CENTURY INDEMNITY COMPANY (DEFENDANT) ..... APPELLANT;

AND

NORTHWESTERN UTILITIES LIMITED (PLAINTIFF) ..... RESPONDENT.

1935
* Feb. 12, 13.
* Apr. 15.

ON APPEAL FROM THE APPELLATE DIVISION OF THE SUPREME COURT OF ALBERTA

Insurance (casualty)—Policy indemnifying gas company against liability for damages to property—Interpretation of policy—Break resulting from negligent installation of pipes—Damage by fire following explosion.

The appellant, an insurance and indemnity company, issued to the respondent, a gas company, a policy by which it agreed to indemnify the respondent "for any and all sums which the assured (respondent) "shall by law be liable to pay for (*inter alia*) damages to property "* * * as a result of any one accident caused by or arising out "of the operation of natural gas * * * by or for the assured"; the policy further provided that it was "understood and agreed that "the policy (was) issued to indemnify the assured (respondent) as "the result of accidents caused by, or arising out of, all the assured's "operations in drilling, handling and distribution of natural gas." While the policy was in force, gas accidentally escaped through a break in the service pipe located under the premises of a customer and caused a conflagration which did extensive damage to the customer's premises, the break resulting from the negligent installation of the pipe by the respondent's servants some years before. For this damage the respondent was adjudged liable, and after satisfying the judgment brought an action against the appellant on the policy for indemnity. The service pipe belonged to the owner of the building, but, like all other such pipes in the city, was installed by the respondent for the owner, who paid for it. The respondent's action was maintained by the trial judge, which judgment was affirmed by the appellate court.

Held, affirming the judgment of the Appellate Division, ([1934] 3 W.W.R. 638), that the liability of the respondent for the damages so arising was one covered by the express terms of the policy.

APPEAL from the judgment of the Appellate Division of the Supreme Court of Alberta (1), affirming the judgment of the trial judge, Ewing J. (2), in favour of the respondent for $47,749.96 on a policy of indemnity or casualty insurance.

* PRESENT:—Duff C.J. and Lamont, Cannon and Davis JJ. and Dysart J. *ad hoc.*

(1) [1934] 3 W.W.R. 638.

(2) [1934] 3 W.W.R. 507.

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The material facts of the case and the questions at issue are stated in the above head-note and in the judgment now reported.

Thomas N. Phelan K.C. for the appellant.

G. H. Steer K.C. for the respondent.

The judgment of the Court was delivered by

DYSART J. *ad hoc*—This is an appeal from the dismissal by the Appellate Division of the Supreme Court of Alberta of an appeal from a judgment in favour of the respondent for $47,749.96 and costs under a policy of indemnity insurance.

The appellant and the respondent both carry on business in the city of Edmonton, Alberta—the appellant as an insurance company, and the respondent as a gas company. On January 1, 1932, the appellant issued to the respondent a policy whereby it contracted to indemnify the respondent throughout the calendar year 1932 against any loss resulting from accidents caused by or arising out of the respondent's operations in drilling, handling and distributing natural gas. The relevant provisions of the policy read as follows:

> The company hereby agrees to indemnify the assured for any and all sums which the assured shall by law be liable to pay and shall pay or by final judgment be adjudged liable to pay (subject to the limitations hereinafter mentioned) as damages for injuries to or death of any person or persons (other than employees of the insured while acting as such) and for damages to property (other than property owned, leased and/or operated by the assured) as a result of any one accident caused by or arising out of the operation of natural gas and electric power plants by and/or for the assured covered hereunder.
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> It is hereby understood and agreed that the policy to which this endorsement is attached, is issued to indemnify the assured as the result of accidents caused by, or arising out of, all the assured's operations in drilling, handling and distribution of natural gas.

On February 14, 1932, while the policy was in force, gas accidentally escaped from the service pipe located on the premises of a customer and caused a conflagration which did extensive damage to the customer's premises. For this damage the respondent was adjudged liable, and after satisfying the judgment brought an action against the appel-

lant on the policy for indemnity, and in its turn secured a judgment from which the present appeal is taken.

The gas plant referred to in the policy consists of gas wells located some distance from the city, large mains for bringing the gas to the city, apparatus for reducing the natural pressure of the gas, mains for distributing the gas throughout the city streets and lanes, and finally service pipes for conducting the gas from the street mains to the gas meters placed by the company upon the premises of customers. The "operations" of every part of this plant are covered by the policy. The ownership is in the respondent of every part of the gas plant except those portions of the service pipes which lie in and upon the premises of customers connecting the street portion of the service pipes with the gas meters. And even these portions have all been supplied and installed by the respondent. In every instance, including that of the customer on whose premises the disastrous fire occurred in this case, the respondent insisted on installing the service pipe for the reason, presumably, that safe and satisfactory installation was more likely to be had from the respondent's own skilled and experienced workmen. After the installation, in this case as in all others, the customer paid the respondent the cost of the installation and became the owner of the pipe. The customer was the owner of the pipe at the time of the "accident." There is no suggestion of interference with the pipe by the customer or by the "conscious act of any other volition."

In the action by the customer, the learned trial judge, Ewing, J. (1), found that the gas which exploded had escaped from the break in the service pipe, that the break was the result of the negligent manner in which the pipe had been installed in 1928 by the respondent; and that these two facts, conjoined with fire, had caused the explosion for which he found the respondent liable.

In the suit on the policy the defence is raised that the negligent installation of 1928 was an act of construction of plant and had nothing to do with the "operation" of the plant within the meaning of the policy; and further, on any view of it, the negligence long antedated the period of time covered by the policy.

(1) [1934] 3 W.W.R. 507.

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The negligence in connection with the installation lay in the method of installing the pipe. Instead of excavating a trench for the reception of the pipe, the respondent's workmen forced the pipe endwise through the ground in the desired direction by means of powerful jack screws. The method is known as "jacking." If the pipe in question had followed a true course in its enforced progress through the ground all would have been well; but it followed a devious course and as a result became sharply bent in places, and was thereby put under severe strain from which it eventually broke in 1932. The bends were not discovered till the pipe was excavated after the accident.

In distributing gas to its customer, the respondent forced the gas under pressure through the whole of its distributing system of street pipes and service pipes, through the gas meters to the point of consumption. Until the gas passed through the meter it remained the property of the respondent unmeasured as to quantity, and therefore undelivered as an article of merchandise: Sale of Goods, R.S. Alta. 1922, c. 146, s. 20, rule III.

Gas is a substance which unless properly confined is liable to escape and which, if it does escape, is liable to do damage to person or property The respondent as distributor was therefore bound to take all reasonable precautions to guard against the escape of such gas. This was a duty imposed upon it in favour of its customers and the public generally. *Dominion Natural Gas Company Ltd.* v. *Collins & Perkins* (1).

In that case, which originated in Ontario, natural gas escaped from a safety valve which had been allowed to get out of efficient working condition and caused an explosion and damage. The plaintiff sued both the gas company which had supplied and installed the equipment, and the railway company on whose premises the gas exploded. The gas company in its defence raised the ground that some one must have intermeddled with the equipment and so relieved it from responsibility. At page 646 Lord Dunedin says:

> It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things *ejusdem generis*, there is a peculiar duty to

(1) [1909] A.C. 640.

take precaution imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless some one pulls the trigger, a poison is innocuous unless some one takes it, gas will not explode unles it is mixed with air and then a light is set to it. Yet the cases of *Dixon* v. *Bell* (1), *Thomas* v. *Winchester* (2), and *Parry* v. *Smith* (3) are all illustrations of liability enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail.

The respondent, having been exclusively responsible for the installation, must be held to have had notice of the defective condition of the pipe. When, therefore, it forced its gas into this defective pipe on February 14, 1932, it committed an act which can be characterized as nothing less than negligence, and when that gas escaped through a rupture in the defective pipe and caused damage to the customer, the respondent company was properly held responsible for the damage that ensued. This negligent use of the defective pipe within the period of time covered by the policy is sufficient, when conjoined with the other assigned causes, to support the judgment rendered against the respondent. It becomes unnecessary, therefore, to invoke the negligence of 1928.

Even disregarding the element of negligence, it would still appear that the conflagration on the customer's premises was

> the result of accidents * * * arising out of * * * the assured's operations in * * * handling and distribution of natural gas,

and was, therefore, covered by the express terms of the policy. The explosion was certainly an accident in the sense that it was unexpected and undesired. It arose out of the distributing of gas through the respondent's distributing system in the ordinary course of the "operations" of the gas plant. On this broad ground, it would seem that the respondent's liability for the explosion may also be clearly rested.

In view of the conclusion already reached, it will be unnecessary to consider the other grounds urged for or

(1) (1816) 5 M. & S. 198. (2) (1852) 6 N.Y.R. 397.
(3) (1879) 4 C.P.D. 325.

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against this appeal. One of these grounds, however, must be briefly referred to. It is that by co-operating with the respondent in defending the original action brought by the respondent's customer, the appellant thereby estopped itself from later repudiating liability under the policy for the customer's loss. Without definitely expressing an opinion on this question of estoppel, we are inclined to think that inasmuch as the right to co-operate in the defence was a contractual one conferred on the appellant by the specific terms of the policy, the exercise of that right could hardly give rise to an estoppel.

The appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Kerr, Dyde & Becker.*

Solicitors for the respondent: *Milner, Steer, Dafoe, Poirier & Martland.*