WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE CO. (DEFENDANT)..... APPELLANT;

1921

*Feb. 3, 4.
*Mar. 11.

AND

S. PARROTT (PLAINTIFF)..... RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR SASKATCHEWAN.

Insurance—Accident and guarantee—Breach of contract—Insurer's knowledge—Continuation of defence in action against insured—Waiver of condition—Estoppel.

The respondent held a policy of insurance in the appellant company to indemnify him against accidents to his employees. An employee was injured and brought action against the respondent. The appellant, in pursuance of a condition of the policy, assumed the defence. During the trial, the appellant learned, by the respondent's own admission, that the machine which caused the accident had been unguarded in breach of a condition of the application and of the policy. But the appellant continued the defence down to judgment awarding damages to the employee. The respondent brought this action to recover the amount paid by him. The appellant pleaded that owing to the respondent's breach of the condition of the policy, it was relieved from liability.

Held, that the appellant company, having assumed and continued the defence with knowledge of the fact that the machine was unguarded, waived any right to dispute liability under the policy for such breach of condition.

Judgment of the Court of Appeal (13 Sask. L.R. 405) affirmed.

APPEAL from the judgment of the Court of Appeal for Saskatchewan (1), reversing the judgment of Haultain C.J. at the trial and maintaining the respondent's action.

PRESENT:—Idington, Duff, Anglin, Brodeur and Mignault JJ

(1) [1920] 13 Sask. L.R. 405; [1920] 3 W.W.R. 113.

1921

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE COMPANY. v. PARROTT.

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

P. E. Mackenzie K.C. for the appellant.

G. H. Yule for the respondent.

IDINGTON J.—The appellant insured respondent against loss from the liability imposed by law upon the assured for damages on account of bodily injuries accidentally suffered, while the policy was in force, by an employee while within the factory and in and during the operation of the trade or business described in a specified schedule.

There appear as usual numerous conditions limiting appellant's liability.

And indorsed on the policy was the following:

> Indorsement to be attached to and forming part of Manufacturers' Liability Policy No. M. 165, Modern Laundry.
>
> Notwithstanding anything herein contained to the contrary, it is hereby understood and agreed that all mangling machines owned and operated by the assured shall be provided with fixed guards or safety feed tables, adjusted at the point of contact of the rolls so as to prevent the fingers or hands of the employees from being drawn into the rolls, and that such guards shall be maintained during the term of this policy. Any failure on the part of the assured to provide and maintain such guards shall relieve this company from liability on account of personal injuries due to such neglect, and this policy is accepted by the assured accordingly.
>
> Dated at Winnipeg, Man., this 6th day of February, 1914.
>
> The Western Canada Accident and Guarantee Insurance Company.
>
> (Sgd.) A. F. W. Severin, Manager and Secretary.

The main questions raised herein are whether or not the said provision can be waived or the appellant

estopped from setting it up against respondent in answer to this suit upon said policy, and whether or not, in either such case, the facts relied upon establish in law either waiver or estoppel.

A young woman working at a mangle in respondent's laundry was injured by her fingers being drawn into the rolls.

The contention set up by appellant was and is that the mangle in question was not guarded in the manner specified and hence no action can lie.

The factum for the respondent claims that there is no evidence from which it can be inferred that the absence of a guard was the immediate cause of the accident.

I confess I am unable to find in the evidence any necessary connection between absence of the guard and the accident. But the parties concerned seem to have assumed there was. The case seems to have been argued out on that assumption.

I may be permitted to point out the difference between the language of the above quoted condition and the terms of the local statutes which provide for the protection of employees thus:—

17. No person shall keep a factory so that the safety of any person employed therein is endangered or so that the health of any person employed therein is likely to be permanently injured.

19. In every factory:—(a) All dangerous parts of mill gearing machinery * * * shall be, so far as practicable, securely guarded.

The words of this section 19 only require that the machinery shall be, so far as practicable, securely guarded.

The condition indorsed on the policy and herein relied upon is in form absolutely imperative by requiring guards, * * * so adjusted at the point of contact of the rolls so as to prevent the fingers or hands of the employees from being drawn into the rolls.

1921

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE COMPANY v. PARROTT.

Idington J.

This feature of the condition must be borne in mind when we are asked to consider that the appellant had no notice of the actual fact of a want of guard.

In the report of the respondent to appellant of the nature of the accident and probable cause which was made on the form supplied by appellant, we find the following question and answer:—

> 35. Narrate below how accident happened, its cause, etc., and illustrate by any marked rough sketch which you think will enable the cause of the accident to be easily understood:
>
> Girl was ironing handkerchiefs and odds and ends. It is figured out that the ring on her finger caught in the fabric and the rolls took her hand in on to the heated ironing surface before hand was released, was burned.

How could appellant relying, if its present pretensions are well founded, upon such a clause as quoted above by way of limitation of its obligation, fail to discern instantly on reading such an answer that there was no guard such as called for?

It seems to me inconceivable that any one knowing and relying upon such a condition could read said statement of the nature of the accident and not have his attention aroused thereby. I can conceive of his feeling that no known guard could have prevented it.

Its next or concurrent step was to send its agent, Sinclair, who was such a trusted agent as to be the same man who had countersigned the policy in question and given it vitality a few months previously, to make inquiries on its behalf into all that was involved.

He was shewn the place and how the accident happened, and returned and had further discussion, according to respondent's evidence. And, according to the foreman's evidence, he was told the machine was running in the same condition at the time of the accident. It was unguarded.

Trotter, the manager of appellant's local agency, came later, as I infer, and was told by the mother of the injured employee that the machine was unguarded. Trotter pretends he does not recollect, but admits it was possible she had done so.

Severin, the general manager of the appellant, was examined for discovery, and part of his said examination was put in evidence.

He was asked and answered thus:—

Q. Who were your authorized agents at Saskatoon. A. Willoughby-Sumner & Company.

Q. Was there a Mr. Sinclair connected with that company? A. There was in 1914.

That examination disclosed a mass of correspondence which passed between him and appellant's head office and the local agency, which leads me to the conclusion that the appellant abandoned, if it ever had any intention of relying upon, such a defence as now set up, and instead to take its chance in preference thereto of defending the action the employee might bring against the respondent.

And when that action was brought the appellant was notified by respondent and the former asserted its right under the policy to defend same.

It entrusted the defence to a firm of solicitors of whom one was called and produced the appellant's letter of instructions to defend.

That letter clearly indicates that, instead of raising any question such as involved in the condition in question, the appellant could by defending the action try to defeat the employee in that action by relying on her having worn a heavy ring and thus being drawn in, and the law which shewed she had assumed the risk, despite the law for her protection.

1921

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE COMPANY v. PARROTT.

Idington J.

I cannot understand and I am not at all inclined to believe the assertion or contention that the writer of such a letter did not well know and understand all the foregoing facts, tending to prove that it was by that time well understood by the appellant that there were no such guards in use as required at the time of the accident, or for a long time before the policy issued, as required either by the local statute or the more rigid terms of the condition indorsed on the policy.

The solicitor says, after producing said letter:

> I assumed machinery was unguarded from letter from defendant instructing me. I discussed question of guard having been removed with Severin before trial.

I agree with him that the clear inference from the letter of instructions indicates as much and in face of his disclosure as to discussing the question of absence of guards with Mr. Severin before the trial, I am unable to understand why the trial was gone on with unless upon the assumption that Severin had for the appellant elected his chance of defeating the employee to his then chance of defeating respondent in such an action as this.

There is abundant evidence I think that the respondent was induced by the action of the appellant to change his position, by reason of the course of conduct of appellant, to his detriment. And I am of the opinion that it is thereby estopped from setting up the condition relied upon.

I might have mentioned the contribution by appellant to redress the wrong the employee had suffered, which never should have been made if it had any thought of turning round on respondent and setting up the condition in question.

Hence I am of opinion that the Court of Appeal was right in allowing the appeal on the main issue and in regard to the cross-appeal which arose out of such contributions.

They, in any other light than as flowing from appellant's election to abandon its condition, might be treated as voluntary payments and hence not recoverable.

The allowance of the costs of defence in pursuing such a course of conduct is, if possible, still more indefensible.

The cases cited in *The Atlas Assurance Co.* v. *Brownell* (1), proceed on the want of authority in those concerned and are clearly distinguishable from this where the general manager is ultimately the authority who made the election to abandon the condition.

The appeal should be dismissed with costs throughout.

DUFF J.—After carefully considering the evidence I have come to the conclusion that the appeal should be dismissed. I think the weight of evidence supports the view contended for on behalf of the respondent that the appellant company assumed the defence of Miss Oxenham's action with the knowledge that the basis of the claim was, in part at all events, the fact that the machine she was tending was unguarded and that there was no misrepresentation of fact by the respondent as to the state of the machine.

The defence having been assumed in such circumstances and persisted in down to the trial with the acquiescence of the respondent, there is, I think, ample evidence to support the inference, and that I think is the right inference, that the company agreed to assume responsibility under the policy.

(1) [1899] 29 Can. S.C.R. 537.

1921

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE COMPANY v. PARROTT.

Duff J.

The agreement of the respondent by which the control of the proceedings and negotiations for settlement, if there should be any, were delivered over to the company is a sufficient consideration.

There is, I think, not the slightest ground for suggesting that the company's officials were not acting with the authority of the company; and I can see no ground whatever for doubting that the company is bound by the agreement.

The case does not raise any of the nice points that sometimes arise when a claim is founded upon election, estoppel or waiver taking effect on equitable principles.

ANGLIN J.—Assuming in the appellant company's favour that, but for its continued conduct of the defence in the action of *Oxenham* v. *Parrott* after becoming aware by Parrott's own admission that the machine on which Oxenham was injured was unguarded, it would have had a good defence to Parrot's claim in this action for indemnity under the policy held by him on the ground that accidents in the use of unguarded machinery were not within the risk, its continuation of that defence down to judgment estops it in my opinion from now setting up that answer to this action. Its right to conduct Parrott's defence to the Oxenham claim existed only if and because the injury to Oxenham was within the risk covered by its policy.

On becoming aware of the fact which it now alleges excluded Parrott's liability to Oxenham from that risk, it had an election to repudiate liability to Parrott and decline further to carry on his defence or to accept such liability and continue that defence. Its action in continuing the defence would seem to be unequivocal and to import an election to undertake

liability upon its policy. But it was at all events conduct from which Parrott was justified in assuming that it had so determined and that he therefore need not concern himself with the Oxenham claim—either to defend that action or to endeavour to settle it.

Judgment was recovered by Oxenham for $1,400.09. Parrott's evidence is that he believed he could have effected a settlement of the action for $700, and circumstances detailed in the evidence indicate a probability that a settlement could have been effected for a sum substantially less than $1,400. The principles enunciated in the judgment of the Court of Exchequer Chamber in the leading case of *Clough* v. *London and North Western Rly. Co.* (1), delivered by Mellor J., but written by Blackburn J. as he tells us in *Scarf* v. *Jardine* (2), and approved in *Morrison* v. *Universal Marine Ins. Co.* (3), govern this case.

Assuming that the fact that Oxenham was injured on an unguarded machine excluded any claim in respect thereof from its policy, the appellant company had a right of election either to repudiate or to accept liability therefor. With full knowledge of that fact, if it did not actually elect to do so—*Scarf* v. *Jardine*—(2), it so acted as to create the impression that it accepted responsibility. The position of the respondent—the other party to the contract—was affected. He took no step to protect himself because lulled into security by the belief, induced by the company's action, that it would indemnify him against whatever judgment Oxenham might recover. Prejudice sufficient to support an estoppel would seem to be implied in these circumstances. *Ogilvie* v. *West Australian*

(1) [1871] L.R. 7 Ex. 26, at p. 35. (2) [1882]7 A.C. 345, at p. 360.
(3) [1873] L.R. 8 Ex. 197, at pp. 203-5.

1921

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE COMPANY v. PARROTT.

Anglin J.

Mortgage and Agency Corporation (1); *Knights* v. *Wiffen* (2). After Oxenham had recovered judgment the respondent had no chance to avoid payment of the damages thereby awarded. The burden lies on the appellant company, whose conduct lulled the respondent to rest, to shew that he could not have escaped any part of that liability after the time when its officers learned the fact that the machine on which Oxenham was injured was unguarded. *Dixon* v. *Kennaway & Co.* (3).

The appeal in my opinion fails and should be dismissed with costs.

BRODEUR J.—I concur in the result.

MIGNAULT J.—I am inclined to think that the fact that the mangling machine by which Miss Oxenham was injured was unguarded, notwithstanding that the respondent had declared that all machinery would be provided with proper guards, was a breach of the conditions of the policy issued to him by the appellant at a lower premium than if the risk insured were against accidents caused by unguarded machinery, and that for this reason the appellant could have been relieved from liability under the policy. But the question here is whether the appellant is now entitled to repudiate liability for this breach of contract, in view of the fact that when the respondent was sued by the mother of Miss Oxenham, the appellant undertook to contest the latter's claim with the result that a judgment was recovered against the respondent for $1,409.09, which the latter has paid and now seeks

(1) [1896] A.C. 257, at p. 270. (2) L.R. 5 Q.B. 660, at pp. 664-7.
(3) [1900] 1 Ch. 833, at pp. 839-40.

to recover from the appellant. The respondent states that if he had been left free to compromise the claim against him, he could have settled it for $700. Mrs. Oxenham, at the trial, swore that she refused an offer of $100 made on behalf of the appellant, but that she offered to the respondent to settle for $700 and would have done so.

The learned Chief Justice of Saskatchewan, who tried the case, stated that the appellant may be held to have first had knowledge of the unguarded condition of the mangling machine at the time the solicitor for the plaintiff in the Oxenham action became aware of the fact on the examination for discovery of Parrott. The learned Chief Justice however considered that the appellant having under the policies the right to defend the action, the fact that it continued to do so after having obtained this knowledge, did not suggest any waiver of the conditions of the policy.

The Court of Appeal being of opinion that this conduct involved waiver of any right to dispute liability under the policy and that the position of Parrott had been prejudiced by the conduct of the appellant in contesting the Oxenham action, when he, Parrott, could have settled for one-half of the amount he was eventually condemned to pay, reversed the judgment the learned trial judge had rendered in favour of the appellant.

The only construction, in my opinion, that can be placed on the conduct of the appellant in defending the Oxenham action on behalf of the respondent is that it assumed liability under the policy, for this was its obligation by virtue of the contract it made with the respondent. So far as this conduct was induced by its ignorance of Parrott's breach of con-

1921

WESTERN CANADA ACCIDENT AND GUARANTEE INSURANCE COMPANY v. PARROTT.

Mignault J.

tract, it could not be set up by the latter against the appellant. But when the appellant discovered this breach, which entitled it to repudiate liability under the policy, it was placed on its election between repudiating liability and treating the policy as existing between Parrott and itself. It was then that it should have made its election and given notice thereof to Parrott. By continuing with full knowledge of the breach to contest the action it elected to treat the policy as existing. From that point of view it would not seem necessary to shew that the respondent was prejudiced by the continuance of the defence set up by the appellant against the Oxenham action, but the existence of this prejudice strengthens the respondent's contention that, notwithstanding his breach of contract, the appellant should be held to have elected to treat the contract as still existing. And the least that can be said is that the appellant so conducted itself as to give Parrott reason to believe that it had elected to continue the policy and thus prevented him from making the best terms possible with Mrs. Oxenham.

I do not think that under the law of contract there can be any doubt that when a breach of contract by one of the contracting parties occurs, the other party can elect to rescind the contract or to continue it notwithstanding the breach, and if it elects to continue the contract, it is held to all the covenants therein contained. I may perhaps on this point be permitted to refer to my judgment in *American National Red Cross* v. *Geddes Bros.* (1), in which, although I wrote a dissenting opinion, there was, as I understand it, no dissent as to this legal proposition

(1) [1920] 61 Can S.C.R. 143.

which rests on very solid authority: *Clough* v. *London & Northwestern Rly. Co.* (1); *Scarf* v. *Jardine* (2); *Frost* v. *Knight* (3); *Johnstone* v. *Milling* (4).

Applying therefore this rule, I must find that the appellant, which could have repudiated liability when it acquired knowledge of the unguarded condition of the mangling machine, elected not to do so by continuing to contest in the respondent's name the Oxenham action. And therefore I think it cannot now set up the breach as a defence to the respondent's action claiming to be reimbursed for what he was forced to pay to Mrs. Oxenham, the more so as the conduct of the appellant in continuing to contest the Oxenham action after knowledge of the breach, caused a prejudice to the respondent by preventing him from effecting an advantageous compromise with Mrs. Oxenham.

My impression is that some forms of guarantee policies expressly state that the defence by the company of any action taken against the insured shall not be deemed an admission of liability under the policy. There is nothing of the kind here, and the conduct of the appellant distinctly shews that it recognized its liability towards the respondent.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *McCraney, Mackenzie & Hutchinson.*

Solicitor for the respondent: *G, H. Yule.*

(1) L.R. 7 Ex. 26, at p. 34.
(2) 7 App. Cas. 345.
(3) [1872] L.R. 7 Ex. 111.
(4) [1886] 16 Q.B.D. 460