

63, 1935

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In the Privy Council.

No. 27 of 1935.

ON APPEAL FROM THE SUPREME COURT
OF ALBERTA (APPELLATE DIVISION).

BETWEEN

NORTHWESTERN UTILITIES LIMITED - (*Defendant*) *Appellant*

AND

LONDON GUARANTEE AND ACCIDENT
COMPANY LIMITED AND OTHERS - (*Plaintiffs*) *Respondents.*

CASE FOR THE APPELLANT.

35103

1. This is an Appeal by Leave from the Judgment of the Supreme Court of Alberta (Appellate Division) dated December 6th 1934, reversing by a majority (Lunney and Mitchell, J.J.A. dissenting) the Judgment dated February 27th 1934, of Ford, J., who dismissed the Respondents' claim with costs and ordering that Judgment be entered for the Respondents for damages to be assessed with costs.

RECORD.
p. 795.
p. 778.

2. The action was brought by the Respondents against the Appellant by Amended Statement of Claim dated August 19th 1932. The Respondents claim amounts totalling \$320,278.64 as damages which they allege that they have suffered as the result of a fire which occurred on the night of February 21st 1932, and destroyed the Corona Hotel situate on the south side of Jasper Avenue between 106th Street and 107th Street in the City of Edmonton, Alberta and also caused damage to property adjacent to the said Hotel.

pp. 3-29.

3. The Appellant is a Public Utility Company incorporated under the Dominion Companies Act and distributes natural gas to the City of Edmonton under and by virtue of franchise rights granted to The Northern Alberta Natural Gas Development Company Limited (a Company incorporated under the laws of the Province of Alberta) by the City of Edmonton in November 1915, and confirmed by Statute (Alberta Statutes 1916, cap. 29). The franchise was assigned to the Appellant by Deed dated the

pp. 825-828.

CASE FOR THE APPELLANT.

RECORD. 29th May 1923. The Appellant is also subject to the control of the Board of Public Utility Commissioners of Alberta pursuant to the Public Utilities Act (Alberta Statutes 1923 cap. 53).

4. The Respondents claim that the Appellant is also subject to the provisions of Section 13 of the Water Gas Electric and Telephone Companies Act (hereinafter referred to as the Water Gas Act) R.S.A. 1922 cap. 168 which read as follows :—

“13. The Company shall locate and construct its gas or water works or electric or telephone system and all apparatus and appurtenances thereto belonging or appertaining or therewith connected and wheresoever situated so as not to endanger the public health or safety.” 10

This statute also provides :—

“8. When any Company has laid down or erected mains pipes wires or conductors for the supply of gas, water, electricity or a telephone system through any of the Streets Squares or public places of any municipality no other person persons or bodies politic or corporate shall without the consent of the Company first had and obtained nor otherwise than on payment to the Company of such compensation as may be agreed upon lay down or erect any main pipe wire or conductor for the supply of gas water electricity or a telephone system within six feet of the Company's mains pipes wires or conductors. 20

Provided that if it be impracticable to cut trenches for such other mains or pipes at a greater distance then they shall be cut at as nearly six feet from the Company's mains pipes wires or conductors as the circumstances of the case will admit.”

* * * * *

“18. When a Company has constructed works for supplying any municipality or municipalities with gas water electricity or telephones and the Company is able so to do it shall supply all buildings situate upon land lying along the line of any supply pipe or wire upon the same being requested by the owner occupant or other person in charge of any such building.” 30

5. Part of the Appellant's undertaking in the City of Edmonton consisted of a 12 inch intermediate pressure main and a 10 inch low pressure main running East and West below the surface of a lane which runs immediately South of the Corona Hotel premises and parallel with Jasper Avenue. These mains were both laid in August 1923. The bottom of the intermediate pressure main was originally situated 4 feet 5 inches below the pavement. The mains run a little to the North of the middle of the Lane. 40

6. 107th Street runs North and South at right angles to the Lane and in the middle of the Lane where it is joined by 107th Street there was a

manhole "A" forming part of the original sewer system of the City of Edmonton constructed in 1907. RECORD.

7. In 1931 the City constructed a storm sewer system running North from a new manhole "B" then made 2 feet from the Eastern curb of 107th Street, and 11 feet North of the Appellant's 12 inch main. This storm sewer system was connected up with the original sewer system by a tunnel containing a 15 inch sewer and running from manhole "B" to a weir chamber then constructed at Manhole "A." The roof of the weir chamber when completed was 11 feet 5 inches below the pavement level of 107th Street. The only portion of the work of constructing the new storm sewer system which was carried out overground was the portion which runs North from manhole "B" along 107th Street and away from the Appellant's gas mains. The portion which ran towards the Appellant's gas mains viz. :— the connecting tunnel and the weir chamber at manhole "A" were constructed underground.

The tunnel passed immediately under both the Appellant's mains. Part of the weir chamber as constructed lay below both mains, the roof of the chamber when completed being 7 feet below the bottom of the 12 inch main.

8. The method by which the connecting tunnel and the weir chamber were constructed was shortly as follows :—After manhole "B" had been excavated a tunnel was dug from manhole "B" to manhole "A," a distance of 20 feet, its dimensions being 36 inches by 26 to 30 inches. Where it met manhole "A" the tunnel was enlarged to dimensions of 42 inches by 66 inches, to permit the construction of the weir chamber at that point. After the completion of these excavations the wall of manhole "A" was broken open at the bottom. The weir chamber was then constructed consisting of brick with a concrete floor and ceiling, its outside dimensions being 3½ feet by 3 feet by 4½ feet. The connecting sewer was then built from the weir chamber of manhole "A" to manhole "B" in pipe lengths of 2 feet 6 inches. The outside diameter of these pipes was 18 inches with bell ends of an outside diameter of 21 to 22 inches. The space in the tunnel not occupied by the weir chamber and the pipes was filled by packing in soil. All these operations were entirely carried out by underground work from manhole "B." The work was completed in April 1931.

9. About 3 to 4 feet below the pavement and running parallel to the Appellant's 12 inch main and about 3 inches North thereof there was an 8 by 12 inch wooden conduit box constructed in 1926 which housed the City of Edmonton Street railway return cables.

Plans and sections showing the position of the Appellant's mains, the two manholes and the weir chamber will be found in the Book of Plans (Second and Fourth Plans being Exhibits 10 and 28).

10. There was no evidence that any of the work so carried out by the City in connection with the new storm sewer system (other than that part of the system which runs north from manhole "B" as above stated and has

RECORD. no connection with this case) would be visible above ground or that the Appellant was aware of its nature. In particular there was no evidence that the Appellant was aware that any tunnelling or constructional operations would be or were carried out by the City underneath or in dangerous proximity to the Appellant's mains. No notice of the works was given to the Appellant by the City and no evidence was adduced at the trial that the Appellant had actual knowledge of these works.

11. The fire was caused by an escape of gas from a fractured weld in the Appellant's 12 inch main. This fracture took place at a point close to manhole " A " almost immediately above the sewer and weir chamber laid down by the City in 1931 as above stated. The fracture must have taken place a very short time before the fire. It was discovered after the fire that the main at the point of fracture had sagged downwards to a depth of $6\frac{1}{2}$ inches. 10

p. 781,
ll. 35-41.

12. The learned Trial Judge found that the fracture was caused by subsidence of the earth beneath the 12 inch main resulting from the work carried out by the City in 1931 as hereinbefore described and this finding was not disturbed by the Court of Appeal.

13. The Respondents other than the Respondent Insurance Companies claim to have suffered damage caused by the fire. All these Respondents received indemnity from the Respondent Insurance Companies who claim by right of assignment and subrogation against the Appellant for the amounts so paid to their assured. The Respondents the Corona Hotel Company Limited, Coughlin & Carroll, Motor Car Supply Company Limited, J.W.S. Chappelle and Lucy Hawkins claim to have been only partially indemnified by the Respondent Insurance Companies in respect of the damage caused to them and have made separate claims for the balance of such damage. 20

pp. 3-29.

14. The Respondents by their Statement of Claim alleged that the Appellant was liable to reimburse them for the damage which they have suffered on the following grounds :— 30

- (a) For permitting a dangerous substance to escape.
- (b) For breach of Sec. 13 of the Water, Gas Act.
- (c) For nuisance.
- (d) For maintaining a public nuisance.
- (e) For Negligence in the following respects :—
 - (i) Negligent construction and maintenance of its system.
 - (ii) Failure to have a system of inspection which would detect or discover leaks in the pipes or mains.
 - (iii) Failure to odourise its gas.
 - (iv) Failure to locate its pipes below the frost line.
 - (v) Failure to repair and maintain its pipes.

15. In addition to general denials the Appellant relied upon the following affirmative defences, namely :— RECORD.

(a) That it has imperative statutory authority for its undertaking.

(b) That it is a public utility operating for the public benefit subject to the control of the Board of Public Utility Commissioners of Alberta pursuant to the Public Utilities Act (Alberta Statutes, 1923, cap. 53).

10 (c) The insured Respondents consented to the distribution in the City of Edmonton by the Appellant of its gas, or alternatively used the said gas.

(d) The escape of gas was caused by subsidence of the earth beneath the 12 inch intermediate pressure main resulting from the City of Edmonton underground construction work in 1931.

(e) The gas which caused the fire reached the Hotel because the City of Edmonton had constructed a wooden conduit box in 1926 and its weir chamber and tunnel in 1931 in dangerous proximity to the 12 inch intermediate pressure main contrary to Section 8 of the Water Gas Act.

20 (f) The Water, Gas Act does not apply to the Appellant.

16. On February 27th 1934 the learned Trial Judge dismissed the action pp. 778-786. with costs finding :—

(a) That the fire was caused by the igniting of a mixture of natural gas and air, the gas being the property of the Appellant and having escaped from the Appellant's 12 inch intermediate pressure main through a break in a welded joint in the main in the middle of the intersection of 107th Street and the lane in the rear of the Hotel and finding a channel through and along the wooden conduit box and a way from the box through the soil and openings in the Basement walls of the Hotel. The Appellant does not dispute the
30 correctness of this finding.

(b) That the break in the weld was caused by subsidence of the ground below the main, such subsidence being the result of the construction work carried out by the City of Edmonton in 1931.

(c) That the provisions of Section 13 of the Water, Gas Act applied to the Appellant.

(d) That the Appellant even in the absence of notice ought to have known that the operations carried out in 1931 by the City of Edmonton were in progress because of the length of time they were
40 carried on and the public nature thereof.

(e) That the Appellant was entitled to rely upon the City Engineer with whose Department it had been in close contact when it constructed its distribution system in 1923 to see that the work carried out by his Department did not interfere with the Appellant's pipes and mains.

(f) That the injurious effect of the City's operations was one which the Appellant could not reasonably be expected to anticipate.

RECORD.

(g) That the damage having been caused by the act of a stranger over whom the Appellant had no control, and the injurious effect of whose act it could not reasonably be expected to anticipate the rule in *Rylands v. Fletcher* (3 H.L. p. 330) did not apply and the Appellant not having been negligent in any respect was entitled to succeed in the action.

p. 795.

17. On December 6th 1934 the Appellate Division of the Supreme Court of Alberta allowed the Appeal of the Respondents from this Judgment. The Judgment of the majority was delivered by Harvey C.J.A. and concurred in by Clarke J.A. and McGillivray J.A. The learned Chief Justice does not reject any of the findings of fact made by the learned Trial Judge as to the cause of the fracture of the pipe and holds that :— 10

pp. 796-801.

(a) On the assumption that the finding of Ford J. as to the cause of the fracture was correct the consequence of the City's storm sewer operations could have been reasonably anticipated by the Appellant, and that the Appellant is, therefore, not relieved from liability under the Rule in *Rylands v. Fletcher* (*supra*).

(b) In any event however the Appellant was negligent in failing to inspect city operations and to protect its pipes from the consequences of these operations. 20

pp. 801-803.

18. Lunney J.A. dissenting holds that :—

(a) The findings of Ford J. that the fracture in the pipe was the result of the City's constructional work and that the Appellant was not negligent are correct.

(b) The evidence does not justify the finding of Ford J. that the Appellant ought to have known of the City's operations because of the length of time that they were carried on and the conspicuous and public nature thereof.

(c) The Appellant was not negligent and is relieved of liability under the Rule in *Rylands v. Fletcher* (*supra*) because the escape of gas resulted from the act of a stranger over whom the Appellant had no control and the injurious effect of whose act it could not reasonably have anticipated. 30

pp. 803-807.

19. Mitchell J.A. dissenting, holds that :—

(a) The findings of Ford J. that the fracture in the pipes was the result of the City's constructional work and that the Appellant was not negligent are correct.

(b) The Appellant is relieved from liability under the Rule in *Rylands v. Fletcher* (*supra*) because it is a public utility operating a public service for the common benefit of the community and, therefore, is not to be held liable as an insurer. 40

(c) The Rule in *Rylands v. Fletcher* (*supra*) does not apply because the break resulted from the conscious act of another's volition.

(d) He is not convinced that the Appellant ever had express notice of the City's work or that it should have had knowledge thereof by reason of the surrounding conditions.

RECORD.

20. With regard to (1) the finding of the learned Trial Judge that the Appellant ought to have known that the operations carried out in 1931 by the City of Edmonton were in progress because of the length of time they were carried on and the public nature thereof and (2) the finding of the majority of the Appellate Division that the Appellant was negligent in failing to inspect City operations and to protect its pipes from the consequences of these operations, the Appellant respectfully submits that neither the question whether the Appellant enquired, or should have enquired or could effectively have enquired, from the City about its contemplated work, nor whether it had or had not any knowledge, particularly of the operations in question, and what results might be expected therefrom were not questions included within the particulars of negligence given by the Plaintiffs in paragraphs 7 and 7 (1) of the Statement of Claim and summarised in paragraph 14 (e) above. They were not mentioned by Counsel for the Respondents either in his opening or in his argument at the trial. No evidence was led by either side with regard to them.

p. 4.

21. It is further respectfully submitted that there is nowhere in the evidence any justification for the finding of the learned Trial Judge as to the Appellant's knowledge or duty to know of the City's operations. It is not quite clear in the first place what is meant exactly by knowledge of the City's operations but from the fact that the learned Trial Judge goes on to speak of the "conspicuous and public nature thereof" it must be taken that he means knowledge of what one could see on the ground. As to that all that could be seen at any time, according to the evidence, was manhole "B" and a trench leading north from it, such manhole being 11 feet north of the Appellant's main. The connecting sewer between manholes "A" and "B" was dug entirely underground and after 4 o'clock in the afternoon or after midnight. To hold the Appellant liable in negligence, therefore, on the evidence it must be assumed that a responsible officer of the Appellant saw or should have seen and reported what was visible on the ground, that the management of the Appellant should have considered what he saw and should have concluded that what was being done was sewer work and should have concluded that such sewer work must of necessity connect manhole "B" with manhole "A" and that such connection could only be brought about by tunnelling underneath the Appellant's main.

22. With regard to the finding of the majority of the Appellate Division referred to in paragraph 17 (a) above to the effect that the consequence of the City's operations could have been reasonably anticipated by the Appellant the reasoning of the learned Chief Justice appears from the following extract from his Judgment:—

"In view of his (the Trial Judge's) finding, on the evidence of experts that the ground did settle and let down the main I find it p. 799, l. 16.

RECORD.

difficult to see how it could be said that even the effect of the City's operations could not have been anticipated. Certainly it seems to me that their evidence involves the conclusion that the settlement of the earth would or might be the consequence of the City's operations and therefore that it could have been reasonably anticipated and the Defendant does not therefore come within the exceptions to the Rule of *Rylands vs. Fletcher*."

23. The Appellant respectfully submits that this reasoning is fallacious and amounts to saying that because the thing happened it could reasonably have been anticipated. The issue on this aspect of the case is whether in law or in fact the Appellant, being for the purpose of the argument assumed to know of the construction being lawfully made by a skilled City Engineer, should reasonably have anticipated a subsidence of its main as a consequence thereof. This is a question which was not raised on the pleadings, with respect to which the Respondents led no evidence and which was never tried. 10

24. The difficulty of foreseeing such a consequence is most clearly illustrated by the divergence in views of the experts called by the Respondents and by the Appellant as to the cause of the fracture. According to the Respondents' own experts quite clearly the Appellant could not reasonably have expected the fracture to have resulted from the City's work. The City Sewer Superintendent William Ruff was asked, in rebuttal: 20

p. 764, l. 9.

"Let me put the question in this way: with your experience in the City of Edmonton and your knowledge of the conditions at the corner of 107th Street and the lane south of Jasper would you say that anyone putting in that 15 inch tile sewer into the weir chamber had any reason to expect any sinking of the construction."

His answer was: "No sir."

p. 772, l. 29.

The City Engineer Albert Walter Haddow was asked in rebuttal: 30

"Did you have any reason to consider it necessary at all to support this twelve inch gas main by reason of anticipating that it might sink from either the earth dropping down due to cavities or from shrinkage of the earth due to drainage or from the carrying away of earth due to the cracks in the soil?"

*Sic

The answer was "No. I have no * hesitation at all with eight foot of ground above the excavation to anticipate any settlement of the gas main."

The Respondents' own case, therefore, clearly did not prove negligence on the part of the Appellant in failing to guard against the consequences of the City's work. They adduced no evidence whatever to establish negligence on the part of the Appellant in this respect, but on the contrary tendered evidence which established that the Appellant was not so negligent. 40

25. No evidence was tendered by either side which would indicate that the fracture caused by the subsidence was something which the Appellant could reasonably have anticipated. The only possible evidence upon which the Respondents can rely in this respect is that of Robert Starr Leigh Wilson, an expert witness called by the Appellant who, when asked whether the City should have provided a support for the Company's main, said :— RECORD.

10 “ A support from a purely engineering point of view and only the technical aspects of the problem—as I do not want to question the propriety of decisions made by brother engineers—there is no question in my mind at all but that a substitute support should have been furnished for these gas mains incidental to the construction of the weir chamber and tile sewer.” p. 660, l. 8.

This was a suggestion made by Wilson after reaching his conclusion as to the cause of the fracture in the light of what had actually happened, and represents his view of the strict technical engineering requirements in the light of that knowledge. This is the only evidence in the case which gives any support to the finding of negligence made by the Appellate Division.

26. With regard to the finding of the learned Trial Judge that Section 13 of the Water Gas Act applies to the Appellant it is respectfully submitted—

(a) that the section by its terms is limited to the time of the location and construction of gas works.

(b) at the date of the location and construction of the Appellant's undertaking in 1923 the Water Gas Act did not apply to companies incorporated under the Dominion Companies Act. The Water Gas Act was amended to include such companies by Alberta Statutes 1924 Cap. 3 Sec. 21 assented to on April 12th 1924.

27. On December 18th 1934, the Appellant applied to the Supreme Court of Alberta (Appellate Division) for leave to appeal to His Majesty in Council and such leave was finally granted on the 8th April 1935. p. 808A.

28. The Appellant submits that the Judgment of the Supreme Court of Alberta (Appellate Division) should be reversed and that of Mr. Justice Ford restored for the following among other

R E A S O N S.

1. Because the Appellant is a public utility company operating a public service for the benefit of the community under Statutory Authority and is not liable, therefore, in the absence of negligence for any damage caused by its operations.
2. Because the Appellant was not negligent in any of the respects pleaded or at all.

3. Because there was no evidence upon which the learned Trial Judge could properly have found that the Appellant ought to have known of the operations of the City of Edmonton in 1931.
4. Because in any event the Appellant could not reasonably have anticipated the injurious effect of such operations.
5. Because the fire was caused by the act of a stranger over whom the Appellant had no control and the injurious effect of whose act he could not reasonably be expected to anticipate.
6. Because such of the Respondents as were users of the gas supplied by the Appellant consented to the presence of the gas in the Appellant's mains and its distribution. 10
7. Because Section 13 of the Water Gas Act does not apply to the Appellant.
8. Because even if Section 13 of the Water Gas Act does apply to the Appellant :
 - (a) The section only applies during the period of the location and construction of the Appellant's undertaking.
 - (b) The section does not make the Appellant liable in damages without proof of negligence.
 - (c) The section confers no private right of action. 20
9. Because the Judgment of the majority of the Supreme Court of Alberta (Appellate Division) is wrong and ought to be reversed and the Judgments of the minority of the said Appellate Division and of the learned Trial Judge, except in so far as the latter held (a) that the Appellant should have known of the work carried out by the City of Edmonton and (b) that Section 13 of the Water Gas Act applies to the Appellant, are correct.

WILFRID GREENE.
RONALD MARTLAND.

In the Privy Council.

No. 27 of 1935.

ON APPEAL FROM THE SUPREME COURT OF
ALBERTA (APPELLATE DIVISION).

BETWEEN
NORTHWESTERN UTILITIES LIMITED
(Defendant) Appellant
AND
LONDON GUARANTEE AND ACCIDENT
COMPANY LIMITED AND OTHERS
(Plaintiffs) Respondents.

CASE FOR THE APPELLANT.

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