

Privy Council Appeal No 27 of 1935.

Northwestern Utilities, Limited - - - - - *Appellants*

v.

London Guarantee and Accident Company, Limited, and
others - - - - - *Respondents*

FROM

THE APPELLATE DIVISION OF THE SUPREME COURT OF
ALBERTA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF
THE PRIVY COUNCIL, DELIVERED THE 24TH OCTOBER 1935.

Present at the Hearing:

THE LORD CHANCELLOR (VISCOUNT HAILSHAM).

LORD BLANESBURGH.

LORD WRIGHT.

[Delivered by LORD WRIGHT.]

The action out of which this appeal arises, was brought by the respondents as respectively owners of property in the City of Edmonton in Alberta and their insurers; they claimed that the property had been destroyed or damaged by a fire due to an escape of gas from the gas main of the appellants for which the appellants are liable. The damages claimed amounted to \$320,278.64 but all questions of amount were reserved. On the question of liability before Ford J. the appellants succeeded, but his decision was reversed by a judgment of the Supreme Court of Alberta (Appellate Division) by a majority (Lunney and Mitchell JJ.A. dissenting) who ordered judgment to be entered for damages to be assessed. From that judgment, the present appeal is brought.

The appellants are a Public Utility Company incorporated under the Dominion Companies Act: they distribute natural gas under a franchise granted to their predecessors in title the Northern Alberta Natural Gas Development Company Limited (hereinafter called the company) by the City of Edmonton (hereinafter called the City) in November, 1915, and confirmed by statute (Alberta Statutes, 1916, c. 29). The franchise was assigned to the appellants by deed dated the 29th May, 1923.

Under this franchise, the City granted to the company the full power to pull down take up repair maintain or operate its gas pipe lines along through or under the streets and other public places within the City for the purpose of

supplying natural gas to consumers, with power to break up the surface and make necessary excavations for that purpose. By clause 11 it was provided that the company should indemnify the City against any damages arising out of the construction and operation of its works, owing to the negligence of the company, its servants and employees, and that the City should be liable for all damage to the plant of the company caused by the negligence of the City, its workmen and employees. The company was bound to supply natural gas as required to consumers within the City limits at the property line when their land or premises were situated along the company's main line. The franchise was subject to the provisions of the Water Gas Electric and Telephone Companies Act of Alberta which by amendment made in 1924 was applied to companies incorporated or licensed under any statute of the Dominion or of Alberta. It is convenient to recite here sections 11 and 13 of that Act. Section 11 was in these terms :—

“The Company shall make satisfaction to the owners or proprietors of any building or other property or to the Municipality or Minister of Public Works as the case may be for all damages caused in or by the execution of all or any of the said powers.”

By section 13 it was provided as follows :—

“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.”

The appellants in August, 1923, laid a 12-inch intermediate pressure gas main along a lane in Edmonton south of Jasper Avenue, and running at right angles into 107th Street; the lane was unpaved, but where the main went across and under the street an open trench could not be cut; the width of the street was 77 feet, and three excavations were made, one at each end about 7 feet from the side pavement and one in the middle, spaces of about 11 feet being left in the street for the traffic, the two intervening spaces being tunnelled. Each excavation was about 15 feet wide. The main was laid at a depth of 3 feet 6 inches: in the pipe were three welded joints, the one in the centre being in the space of the middle excavation: the pipe was pushed or pulled through the length of the tunnelled and excavated spaces, the earth being back-filled. Not far from this main and about the same level below the ground the appellants also laid a low pressure 10-inch main. There was also a wooden conduit laid by the City to contain the cables for the street railway. In 1907, the City built as part of its sewerage system in 107th Street a manhole called manhole A; the manhole was 16 feet deep and was close to the appellants' two mains. Later, between February and April, 1931, the City proceeded to construct a storm sewer system in the same region. For this purpose they excavated

a manhole called manhole B to the north-east of manhole A, and about 20 feet away, and they dug a trench further to the north or north-east and there they laid a 15-inch storm sewer : in addition they drove a tunnel underground for the 20 feet from manhole B to manhole A, and laid a storm sewer in the tunnel; in order to join that sewer with manhole A they built a weir chamber roughly about 4 ft. cube, at the bottom of manhole A the wall of which at the bottom they had broken so as to build the chamber and join up the storm sewer. These underground building operations were immediately beneath the appellants' main and in the way of the centre welded joint. They were carried out from manhole A.

In February, 1932, it was discovered that gas from the appellants' system was escaping into the Corona Hotel, which belonged to one of the respondents; the gas ignited and the hotel was burned down and adjoining property was damaged. It was ascertained on examination that the centre welded joint of the pipe line of the appellants' 12-inch main had given way; the pipe in that vicinity had sagged $6\frac{1}{2}$ inches. Hence the escape of gas which had percolated through the soil and penetrated into the hotel basement. The claim was in respect of the loss and damage through the fire. The claim against the appellants was based in the pleadings on various causes of action : (i) for permitting gas, a dangerous substance, to escape; (ii) for breach of section 13 of the Water Gas etc. Act; (iii) for nuisance public or private; (iv) for negligence in construction and maintenance of the system, or in failing to have an inspection system, or in failing to odorise their gas, or in failing to locate their pipes below the frost line or to repair and maintain their pipes. The main defence of the appellants was that the breaking of the joint in the pipe was solely due to the action of the City in letting down the soil under the pipe by the negligent and improper way in which they excavated the weir chamber and tunnel under the appellants' main, without providing adequate support. The respondents' case originally was that the City's work had been properly designed and carried out, so that there could be no reason at any time either while it was being carried on or at any subsequent period to anticipate that it could cause any mischief, but in the course of the trial they alleged as a new and alternative ground of negligence or breach of absolute duty against the appellants that the appellants either knew or ought to have known what work the City was doing and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. No amendment has ever been made of the pleadings nor have any precise particulars been given of this head of claim. Their Lordships must observe that it is *pessimi exempli* to admit a new head of

claim without a proper amendment of the pleadings. But this ground of claim has been considered by the Trial Judge and by the Appellate Division and must now be regarded as a relevant issue in the case. The Trial Judge decided against the contentions of the respondents but the Appellate Division allowed the appeal solely on the new ground of claim.

Before discussing the facts in the case, it is desirable to explain the principles of law which in their Lordships' judgment are applicable.

That gas is a dangerous thing within the rules applicable to things dangerous in themselves is beyond question. Thus the appellants who are carrying in their mains the inflammable and explosive gas are prima facie within the principle of *Fletcher v. Rylands* L.R. 3 H.L. 330, affirming L.R. 1 Ex.265: that is to say, that though they are doing nothing wrongful in carrying the dangerous thing so long as they keep it in their pipes, they come prima facie within the rule of strict liability if the gas escapes: the gas constitutes an extraordinary danger created by the appellants for their own purposes, and the rule established by *Fletcher v. Rylands* (*supra*) requires that they act at their peril and must pay for damage caused by the gas if it escapes, even without any negligence on their part. The rule is not limited to cases where the defendant has been carrying or accumulating the dangerous thing on his own land: it applies equally in a case like the present where the appellants were carrying the gas in mains laid in the property of the City (that is in the sub-soil) in exercise of a franchise to do so. (*Charing Cross Electricity Supply Company v. Hydraulic Power Company* [1914] 3 K.B. 772.)

This form of liability is in many ways analogous to a liability for nuisance, though nuisance is not only different in its historical origin but in its legal character and many of its incidents and applications. But the two causes of action often overlap, and in respect of each of these causes of action the rule of strict liability has been modified by admitting as a defence that what was being done was properly done in pursuance of statutory powers, and the mischief that has happened has not been brought about by any negligence on the part of the undertakers. As an illustration of this well known doctrine, reference may be made to *Green v. Chelsea Waterworks Co.*, 70 L.T. 547, where Lindley L.J. said of *Fletcher v. Rylands* "That case is not to be extended beyond the legitimate principle on which the House of Lords decided it. If it were extended as far as strict logic might require, it would be a very oppressive decision". By the same reasoning the rule has been held inapplicable where the casualty is due to the act of God; or to the independent or conscious volition of a third party as in *Box v. Jubb*, L.R. 4 Ex.D. 76, which was approved by the Judicial Committee in *Rickards v. Lothian* [1913] A.C. 263; and not to any negligence of the defendants. In *Box v. Jubb* the act

which caused the escape of the water from the reservoir was a malicious (which their Lordships think means no more than conscious or deliberate) act of a third person. It was said by Kelly C.B. :—

“ I think the defendants could not possibly have been expected to anticipate that which happened here, and the law does not require them to construct their reservoir and the sluices and gates leading to it to meet any amount of pressure which the wrongful act of a third party may impose.”

Lord Moulton in *Rickards'* case states the matter in these words :—

“ A defendant cannot in their Lordships' opinion be properly said to have caused or allowed the water to escape if the malicious act of a third person was the real cause of its escaping without any fault on the part of the defendant.”

And in *Dominion Natural Gas Co. Ltd. v. Collins and Perkins* [1909] A.C. 640, at p. 647, in a case for this purpose not dissimilar the question was put, “ Have the defendants been able to show alternatively that the true cause of the accident was the conscious act of another volition, i.e., the tampering with the machines by the railway company's workmen? ” It is not here intended to enumerate all the defences which might be available to a defendant in this class of action : but the two defences mentioned are both material in this case. Reference was made to a further possible defence based on the contention that the appellants and the owners of the properties destroyed had a common interest in maintaining the potentially dangerous installation, or that these owners had consented to the danger. It is true that in proper cases such may be good defences, but they do not seem to have any application to a case like the present where the appellants are a commercial undertaking though no doubt they are acting under statutory powers, while those whose property has been destroyed are merely individual consumers who avail themselves of the supply of gas which is offered. These facts do not constitute a common interest or consent in any relevant sense.

Where undertakers are acting under statutory powers it is a question of construction depending on the language of the statute whether they are only liable for negligence or whether they remain subject to the strict and unqualified rule of *Fletcher v. Rylands*. Thus in the *Charing Cross Electricity Supply* case cited above it was held (following the previous decision in *Midwood v. Manchester Corporation* [1905] 2 K.B. 597) that the defence of statutory authority was limited by a clause in the statutory Order providing that nothing therein should exonerate the Corporation from liability for nuisance. In *Hammond v. St. Pancras Vestry*, L.R. 9, C.P. 316, where the Act imposed on the Vestry the duty of properly cleansing their sewers, it was held that as these words were susceptible of meaning either that an absolute duty was imposed or that the duty was only to exercise due and reasonable care, the

latter meaning was to be preferred, since the absolute duty could not be held to be imposed save by clear words. That case was followed in *Stretton Derby Vinegar Co. v. Derby Corporation* [1894] 1 Ch. 431.

It accordingly now becomes necessary to consider the meaning of sections 11 and 13 of the Alberta Water Gas Electric and Telephone Companies Act, cited above. Section 13 of the Act (which was then numbered section 11) was considered by the Supreme Court of Canada in *Raffan v. Canadian Western Natural Gas Light Heat and Power Co.* (8 Western Weekly Reports 676), affirming a decision of the Appellate Division in Alberta (7 Alberta L.R. 459) where it was held that the section imposed an absolute duty on the company not only during the location and construction of the works but also during their operation. Their Lordships cannot agree with that decision in so far as it is sought to read into section 13 some such word as "maintain" in addition to the words actually expressed which are "locate and construct". Nor does it seem legitimate to read "locate and construct" as including something entirely different, that is "maintain": "locate and construct" are words apt only to refer to the initial location or construction or to some new works: once the works are located and constructed, the process of maintaining or keeping and repairing seems to involve a new and different idea and to involve different considerations. Their Lordships accordingly think that so far as section 13 goes, the appellants are in regard to maintenance not within the section and are entitled to the benefit of the statutory authority and are subject only to the obligation to use reasonable care in the same way as in *Manchester Corporation v. Farnworth*, [1930] A.C. 171. It is accordingly not necessary for their Lordships to decide whether section 13 imposes in matters to which it applies an absolute duty. But in any case, the question is not eventually material in this case. For, even if the section applies to maintenance, and is absolute in its terms, the duty it imposes is still no more than the duty under the rule in *Fletcher v. Rylands* according to which the appellants would not be liable for damage caused, without default on their part, by the independent act of a third party. Then whether or not section 13 applies to maintenance and whether or not it imposes, where it does apply, a liability unqualified in terms, the position is the same for purposes of this case: the appellants' real defence was that the damage was caused by the act of the City, for which they were not responsible and could not control, and that they were guilty of no negligence in the matter. That defence could be equally good on any view of the effect of section 13: and the same reasoning applies to section 11, if indeed that section is open at all to the respondents in this case.

It accordingly becomes necessary to consider the issues of fact which have occupied the greater part of the hearing

of this appeal, as they seem to have done in the Courts below. The respondents have contended that the original construction of the pipe line was improper and that the damage was solely caused thereby: the appellants have contended that not only was their original construction proper, but the breaking of the pipe was solely due to the ground beneath it being let down by the new sewerage works constructed by the City in 1931. The further issue which was raised if that were established, viz., whether the appellants were still in default because they ought to have foreseen and provided against the risk of damage through the City's underground work will be dealt with later.

Mr. Greene for the appellants and Mr. Tilley for the respondents have most exhaustively and ably laid before their Lordships the arguments on the one side and the other as to what caused the breaking of the 12-inch pipe from which the gas escaped. In the result their Lordships are in agreement with the finding of the Trial Judge that "the cause of the break in the welded joint through which the gas leaked were the operations of the City of Edmonton in constructing the 12-inch (it should be 15-inch) tile overflow sewer between manhole A and manhole B and the weir chamber at manhole A in the year 1931". It is only necessary here very briefly to summarise why their Lordships so decide.

On the side of 107th Street in close proximity were three mains, all about 3 feet below the pavement: they were the 12-inch pipe and the 10-inch pipe belonging to the appellants, and a wooden conduit which the City had laid for their electric cables serving the street railway. Close to that position was manhole A, the bottom of which was about 16 feet below the surface: through manhole A and under the three mains went a 12-inch sewer, constructed in 1907, and similarly there ran into manhole A a 6-inch tile sewer constructed in 1913 and leading to a catch basin. In February and March, 1931, the City built manhole B in a position about 20 feet north of manhole A. It was excavated from the ground and an open trench was made to the north from manhole B in which a sewer was laid. But also from manhole B, a new 15-inch overflow sewer was laid to manhole A, into which it was opened by way of a weir chamber, which was built for that purpose by opening up the side of manhole A. All this work was underground: the tunnel for the new overflow sewer was dug from manhole B, but the new weir chamber which was built of brick, with a concrete filling on top was constructed from manhole A. In building the weir chamber, earth was excavated apart from the excavation to make the tunnel to a width of about 52 inches, a height of about 5 feet 6 inches and a depth of about 3 feet. This excavation for the weir chamber was almost directly beneath the three mains. The work was finished early in April, 1931: it was in February, 1932, that the 12-inch pipe broke and leaked. When the place was opened up it was

found that the pipe had sagged at the spot above the weir chamber about $6\frac{1}{2}$ inches: the 10-inch pipe and the wooden conduit had also sagged very considerably. These coincidences of time and place would point very strongly to the conclusion that the excavation was the cause, the ground beneath having in consequence been disturbed and having then subsided. This inference is strengthened by the observations made when the ground by the weir chamber was opened up after the accident. Examinations were made on two successive days, the 7th and 8th July, 1932: experts on both sides were present. There was much conflict of evidence, but the Trial Judge on a pure question of fact as to what was seen, must have accepted the evidence given on behalf of the appellants, which was that when a hole was broken in the wall of man-hole A above the weir chamber, a cavity in the earth, extending 12 inches long by 12 inches wide and 2 inches deep, was found above the roof of the chamber, which the appellants' experts stated indicated a failure to give proper support and involved some disturbance of the adjacent soil. On the other hand, the evidence given on behalf of the respondents to show that there was original imperfect construction of the appellants' 12-inch main seems quite unsatisfactory. The 12-inch pipe was about 77 feet long and was made into a single length by means of three welded joints, the centre one of which gave way. It was said that the welding was not properly done, but that allegation failed: it was said that the pipe was not properly laid because it must have been laid on loose earth composed of backfilling material: when it was opened up it was $6\frac{1}{2}$ inches out of line, and the settlement was ascribed to backfilling being squeezed out by the effects of freezing in the winter, the pipe having in fact been laid within the frost area. But that was all inference based on the view that the bottom of the tunnel had not been properly levelled off, and it was assumed that the whole 77 feet had been tunnelled. In fact, the part in which the centre welded joint was laid was in an open excavation: only two portions of the width of the street of about 12 feet each had been tunnelled, between the three portions of about 15 feet each which had been excavated from the street level. The settlement of the 12-inch main and of the two adjacent pipes was much more consistent with a general subsidence of the ground than with any defect in the manner the pipe was laid: there was no substantial evidence to justify the conclusion that the laying was defective.

Their Lordships accordingly agree with the finding of the Trial Judge on this point, which is not expressly dissented from though not affirmatively accepted by the majority in the Appellate Division, who did not feel it necessary to give any opinion.

There remains the further point, which is, that assuming that the City in fact let down the ground and caused the pipe to break, still the appellants should have foreseen and guarded against the risk of their pipes being affected. This alternative plea of negligence was as has been said not pleaded, but it was dealt with by the Trial Judge and by the Appellate Division without the pleadings being amended and without any demand by the appellants for leave to adduce further evidence. As it has been dealt with in the Court below, their Lordships do not feel able to exclude it. But it certainly calls for most critical consideration and the respondents are not relieved, by failing to plead properly, from proving their case properly.

The authorities already cited herein show that though the act of a third party may be relied on by way of defence in cases of this type the defendant may still be held liable in negligence if he failed in foreseeing and guarding against the consequences to his works of that third party's act. The Trial Judge on this issue found that "in the absence of notice, the defendant ought to have known even if it did not, that the operations were going on because of the length of time they were carried on, and the conspicuous and public nature thereof": the Trial Judge however went on to hold "that the defendant had the right to rely upon the City Engineer, with whose department it had been in close contact when it constructed its distribution system in 1923, seeing that the work was done in such a way that such a result as has happened would not occur". Harvey C.J.A. came to a different conclusion and on that ground allowed the appeal and gave judgment against the appellants. He said:—

"What we are concerned with here is not the City's obligation to the defendant, but the defendant's obligation to the public who may be affected by its operations. I cannot think that the defendant performed its full duty to them when it failed to inspect city operations which might affect the security of its pipes and to take such steps as might be necessary to protect them. It would have meant extra trouble and expense no doubt but there would have been no difficulty in ascertaining from the city where such operations were taking place and seeing that all proper safeguards were taken as provided."

The question here is between the respondents and the appellants. It may be that the respondents, treating them all as property owners, have or had a claim against the City on the facts as found by their Lordships: such a claim would prima facie be within the principle of such a case as *Hardaker v. Idle District Council*, [1896] 1 Q.B. 335, where a district council in making, by their contractors, a sewer negligently broke a gas main the gas from which escaped into the plaintiff's house and caused damage: it was held that the defendants were liable in tort to the plaintiff. This is not a matter on which their Lordships can properly express an opinion since it is a question

between parties who are not before them. It may also be that the City are liable to the appellants if they have let down the ground in which the appellants' pipes were laid; prima facie they are not entitled to derogate from the franchise they have granted and in addition they may be liable under the provision quoted above contained in the agreement granting the franchise. Their Lordships here again have no desire to pass on matters not before them. The question in these proceedings is between the respondents as or representing property owners and the appellants as undertakers, who are carrying an element, gas in their mains close to the owners' premises; the gas is carried at high pressure, is very dangerous if it escapes and calculated if it does escape to damage, as it did, the owners' property. The appellants accordingly owe a duty to the respondents, even though the case falls outside the rule of strict or absolute liability, to exercise all care and skill that these owners should not be damaged. The degree of care which that duty involves must be proportioned to the degree of risk involved if the duty should not be fulfilled. It has been found both by the Trial Judge and by the Appellate Division that the appellants were put on enquiry, at least, as to the operations which the City were conducting in the vicinity of their mains, in particular of the 12-inch intermediate pressure main, where the pressure of the gas was 40 lbs. to the inch. Even if the operations at manhole B were, so far as above ground, in a direction opposite to manhole A and even though the tunnel from manhole B to manhole A was underground, still manhole B was only 20 feet from manhole A: but of particular moment was the fact that the building of the weir chamber which involved men working on it and carrying down bricks and cement cannot but have been obvious to the appellants' employees if they were taking any interest in what the City did in the vicinity of the appellants' mains. In ordinary course, the City might at any time be conducting operations in connection with their sewers in the vicinity of the appellants' mains, and it was the appellants' duty to watch such operations. This particular operation was, as both Courts have held, from its public nature and conspicuous character and from the time during which it went on, such that a failure by the appellants to know of it, is plainly not consistent with due care on their part in the interests of members of the public likely to be affected. The appellants have strenuously contended that they are embarrassed because they have had no particulars of what is complained of and no opportunity of calling evidence in answer. But if that were a grievance, it might have been, but was not, availed of in the Courts below.

In truth the gravamen of the charge against the appellants in this matter is that though they had the tremendous responsibility of carrying this highly inflammable gas under

the streets of a City, they did nothing at all in all the facts of this case. If they did not know of the City works, their system of inspection must have been very deficient. If they did know they should have been on their guard: they might have ascertained what work was being done and carefully investigated the position, or they might have examined the pipes likely to be affected so as to satisfy themselves that the bed on which they lay was not being disturbed. Their duty to the respondents was at the lowest to be on the watch and to be vigilant: they do not even pretend to have done as much as that. In fact, so far as appears, they gave no thought to the matter. They left it all to chance. It is, in their Lordships' judgment, impossible now for them to protest that they could have done nothing effective to prevent the accident: and in any case their Lordships cannot accept that as the true view.

In the result their Lordships agree with the decision on this point of the Appellate Division and are of opinion that the appeal should be dismissed. The respondents however have failed on the issue which has bulked so largely, whether the breaking of the pipe was due to the fault of the City or of the appellants, and succeed on an issue not raised in the pleadings, and the costs to be paid by the appellants ought to be reduced accordingly.

The order of the Appellate Division ought therefore to be varied by reducing by one-third the amount of costs payable under that order by the appellants to the respondents, and the appellants ought to pay to the respondents two-thirds only of their costs of this appeal.

Their Lordships will humbly so advise His Majesty.

In the Privy Council.

NORTHWESTERN UTILITIES,
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