

Dominion Bridge Company Ltd. And Toronto General Insurance Company, [1963] S.C.R. 326

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Commentary

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H. INSURANCE

Dominion Bridge Company Ltd. & Toronto General Insurance Company, [1963] S.C.R. 326.

A short history of this action will suffice to explain its presence in the Supreme Court. The trial decision holding the present respondent, Toronto General Insurance Co. liable on a contract of insurance was reversed in the British Columbia Court of Appeal¹ and the appellant, Dominion Bridge Co. Ltd., sought to have the original decision restored.

The facts presented no difficulty and may be summarily stated. The appellant entered into a contract with a Toll Bridge Authority to erect the steel superstructure of a bridge and for their own protection took out a "Contractor's Public Liability Policy" with the respondent. The relevant provision of this policy was Endorsement No. 1 by which the respondent undertook:

A. To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon Insured by law for damages because of injury to or destruction of property, caused by accident occurring within the Policy Period . . . and resulting from or while at or about work or operations of the insured

Then followed the Exclusions Clause which read:

This Endorsement shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of any of the following matters:

(1) Liability or obligation assumed by Insured under any contract or agreement.

(2) . . .

A portion of the bridge collapsed causing considerable damage to piers which had been erected by the Authority. It was found as a fact that (1) the appellant had assumed liability in contract for the damage, and (2) that the appellant was also, by reason of its engineer's negligence, liable in tort. Dominion sought indemnity from General but coverage was denied by reason of the exclusionary clause. Dominion argued that the liabilities were distinct and although the exclusion

²⁷ *Supra*, footnote 22 at p. 499.

¹ (1962) 37 W.W.R. 673 reversing (1961) 34 W.W.R. 289.

clause dispensed with any claim for indemnity for the liability on the contract, the tort liability was clearly a liability "imposed by law" and within the insuring Endorsement.

Collins J. at trial accepted this as a logically sound premise in absence of contrary authority. General cited the decision of the Supreme Court in the *The Canadian Indemnity Co. v. Andrews and George Co. Ltd.*² as governing. They argued that this case decided that if there is a liability imposed by law, and the said liability is also assumed under contract, then such an exclusion clause as is here present is sufficient to exclude liability. This was not accepted, Collins J. preferring to restrict that decision to its narrow facts:

In my view those reasons were not intended as authority for the principle that the exclusion of a liability or obligation assumed by insured under any contract or agreement would relieve the insurer from its own contractual liability under the insuring clause in a policy to indemnify the insured in respect of payment by reason of liability imposed upon the insured by law for damages independently of contract.³

In support of this opinion he turned to a decision by LeBel J.A. in the Ontario Court of Appeal in *Featherstone v. Canadian General Insurance Co.*⁴ LeBel J.A. there reasoned that it was only liability assumed by contract that was excluded from the risk by the exclusion clause, and that the *Andrews and George* case was no authority for the proposition that where an insurer insures against liability "imposed by law" it may exclude that very liability in the same policy. General appealed and was successful in the British Columbia Court of Appeal.

DesBrisay C.J.B.C. specifically disagreed with the learned trial judge's interpretation of the *Andrews and George* case.

The reasoning of Sheppard J.A. is particularly relevant. He considered that the facts of the *Andrews and George* decision were sufficiently parallel to the present case that by adopting the Supreme Court's construction in that case the immediate case was determined against Dominion. The test is:

- (1) Is there a liability "imposed by law" within the coverage?
- (2) Is that liability also assumed under contract within the exclusion clause?
- (3) If so, the liability is excluded from the coverage.

He went on to deal with the allegation by Dominion, that the liabilities were distinct, by pointing out that liability under contract and liability in tort were really not distinct in these circumstances because both causes of action arose from the same damage to the piers. This distinction was illustrated by demonstrating that Dominion had satisfied both claims by repairing the damage. To conclude he stated:

The question in every instance is whether the liability imposed by law and the liability assumed under the contract are one and the same loss; if so, that liability, though imposed by law, is excluded from coverage.⁵

² [1953] 1 S.C.R. 19.

³ (1961) 34 W.W.R. at 299.

⁴ [1959] O.R. 274.

⁵ (1962) 37 W.W.R. at 695.

The judgment of the Supreme Court was delivered by Judson J. In dismissing the appeal the reasons of the Court of Appeal were adopted based as they were on the earlier decision of the Supreme Court in *Andrews and George*. The *Featherstone* case was disapproved. Particular attention it would seem was paid to the holding by Sheppard J.A. that "liability assumed under contract" and "liability imposed by law" where for one and the same loss and hence caught by the exclusion clause. For this reason, though no opinion was expressed, it may be possible in a later case to avoid the present result when the "same loss" test cannot be applied. R.L.W.