

1963
*May 6, 7,
8
Oct. 2

DOMINION BRIDGE COMPANY }
LIMITED (*Plaintiff*) }

APPELLANT;

AND

TORONTO GENERAL INSURANCE }
COMPANY (*Defendant*) }

RESPONDENT.

ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA

Insurance—Contractor’s public liability policy—Coverage for “liability imposed by law”—“Liability assumed under contract” excluded—Liability of insured tortious liability independently of contract—Whether claim within exclusion clause.

The plaintiff company contracted with a Toll Bridge Authority to construct the steel superstructure of a bridge, the piers of which had already been erected by the Authority. The defendant insurance company issued to the plaintiff a “Contractors Public Liability Policy”. Endorsement No. 1 of the policy provided for the payment of “all sums which the insured shall become obligated to pay by reason of the liability imposed upon the insured by law for damages because of injury to or destruction of property, caused by accident . . .”. It further provided that “this endorsement shall have no application with respect to and shall not extend to nor cover any claim arising or existing by reason of . . . (1) liability or obligation assumed by the insured under any contract or agreement . . .”. As the result of faulty design and miscalculation, portions of the uncompleted superstructure collapsed upon and seriously damaged two of the piers. Under the contract, the plaintiff assumed all responsibility for loss or damage to any portion of the bridge structure, arising out of faulty work or faulty design on its part. The plaintiff admitted that the accident resulted from its negligence and accepted liability and then claimed against its insurer.

The trial judge held that the above exclusion clause only excluded liability arising from contract and not claims arising out of concurrent liability in tort. The Court of Appeal held that the liability in question had been assumed by the plaintiff under its contract with the Bridge Authority and that it came squarely within the exclusion and that it was immaterial that such liability was tortious liability independently of contract. “Liability imposed by law” and “liability assumed under contract” were for one and the same loss. That being so, liability, even though imposed by law, was excluded from the coverage. From this decision the plaintiff appealed to this Court.

Held: The appeal should be dismissed.

For the reasons given by the Court of Appeal, the Court held that the present claim was within the exclusion clause. *The Canadian Indemnity Co. v. Andrews & George Co. Ltd.*, [1953] 1 S.C.R. 19, followed; *Featherstone v. Canadian General Insurance Co.*, [1959] O.R. 274, disapproved.

*PRESENT: Cartwright, Fauteux, Abbott, Martland and Judson JJ.

APPEAL from a judgment of the Court of Appeal for British Columbia¹, reversing a judgment of Collins J. Appeal dismissed.

J. J. Robinette, Q.C., and *J. A. Ogilvy, Q.C.*, for the plaintiff, appellant.

D. McK. Brown, Q.C., and *A. D. McEachran*, for the defendant, respondent.

The judgment of the Court was delivered by

JUDSON J.:—Dominion Bridge Company Limited sued the Toronto General Insurance Company for a declaration that it was entitled to indemnity in the sum of \$358,102.81, being the agreed cost to Dominion Bridge of repairing damage to piers nos. 13 and 14 of the Second Narrows Bridge in Burrard Inlet caused on June 17, 1958, when span no. 4 and partially constructed span no. 5 of the steel superstructure of the bridge collapsed. The trial judge gave judgment in favour of Dominion Bridge for the agreed sum. The Court of Appeal¹ reversed this judgment on the ground that the liability in question came within the exclusion clause in the insurance policy on which the action was brought. Dominion Bridge now seeks restoration of the judgment given at the trial.

On August 7, 1957, Dominion Bridge contracted with the British Columbia Toll Highways and Bridges Authority to construct the steel superstructure of Second Narrows Bridge to connect the City of Vancouver with the north shore of the Burrard Inlet. The concrete piers upon which the superstructure was to be placed had already been erected by the Authority but it was the duty of Dominion Bridge to erect any temporary supports, called in the evidence "falsework". Under the contract, Dominion Bridge assumed all responsibility for loss or damage to any portion of the bridge structure, which would include the piers, arising out of faulty work or faulty design on its part. Due to faulty design and miscalculation, the falsework buckled and caused portions of the uncompleted superstructure to collapse upon and seriously damage the piers. Dominion Bridge admitted that the accident resulted from its negligence and accepted liability and then claimed against its insurer.

¹ (1962), 37 W.W.R. 673, 32 D.L.R. (2d) 374.

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The insurance company issued what is called a "Contractors Public Liability Policy" for all damages arising out of bodily injury, sickness, disease or death caused by an accident resulting from the work or operations. This was subject to an exclusion of the liability of the insured under the workmen's compensation law and for injuries to employees of the insured arising out of and in the course of the employment. We are not concerned with this aspect of the policy but with endorsement number 1 which is called "Contractors Property Damage Endorsement".

The relevant parts of endorsement 1 read:

In consideration of an additional premium and subject to the Statements, Exclusions and Special Conditions, hereby further agrees with the Named Insured:

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 the Insured by law for damages because of injury to or destruction of property, caused by accident occurring within the Policy Period and while this Endorsement is in force and resulting from or while at or about the work or operations of the Insured designated as an insured risk under a Section or Sections of Statement 4.

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 the Insured under any contract or agreement; (2) injury to or destruction of (a) property used, owned or occupied by, rented or leased to, or in the care, custody or control of, the Insured . . .

The trial judge held that the first exclusion clause only excluded liability arising from contract and not claims arising out of concurrent liability in tort. The Court of Appeal held that the liability in question had been assumed by Dominion Bridge under its contract with the Bridge Authority and that it came squarely within the first exclusion clause and that it was immaterial that such liability was tortious liability independently of contract. "Liability imposed by law" and "liability assumed under contract" were for one and the same loss. That being so, liability, even though imposed by law, was excluded from the coverage.

I agree with and adopt the unanimous opinion of the Court of Appeal on this point based as it is on the applica-

tion of the judgment of this Court in *The Canadian Indemnity Co. v. Andrews & George Co. Ltd.*¹ and their rejection of the interpretation put on this judgment by the learned trial judge, who had founded his judgment on *Featherstone v. Canadian General Insurance Co.*². In my respectful opinion, there is direct conflict between the judgment of the learned trial judge in this case and the judgment of the Ontario Court of Appeal in the *Featherstone* case on the one hand and the judgment of this Court in *Andrews & George*, and for the reasons given in the judgment under appeal, I would hold that the present claim is within the first exclusion.

It is unnecessary to deal with the second exclusion clause which excludes liability if there is injury to or destruction of (a) property used, owned or occupied by, rented or leased to, or in the care, custody or control of, the insured. The learned trial judge held against this exclusion. In this he was supported in the Court of Appeal in the reasons for judgment of the learned Chief Justice. Sheppard J. A., however, held that the use made of the piers by Dominion Bridge in order to erect its superstructure and as part of its method of construction, constituted such piers "property used by the Insured". He therefore held that liability for the damage to these piers was also excluded by the second clause. Davey J.A. expressed no opinion.

I would dismiss the appeal with costs.

Appeal dismissed with costs.

Solicitors for the plaintiff, appellant: Harper, Gilmour, Grey, de Vooght & Levis, Vancouver.

Solicitors for the defendant, respondent: Russell & DuMoulin, Vancouver.

¹ [1953] 1 S.C.R. 19, [1952] 4 D.L.R. 690.

² [1959] O.R. 274, 18 D.L.R. (2d) 227.