

ANDREW ROBERT McNICHOL } APPELLANT; 1907
 (DEFENDANT) } *May 23-28.
 *June 24.

AND

ADDIE MALCOLM (PLAINTIFF) AND }
 THE STANDARD PLUMBING } RESPONDENTS.
 COMPANY (DEFENDANTS) }

ON APPEAL FROM THE COURT OF APPEAL FOR MANITOBA.

Landlord and tenant—Negligence—Master and servant—Acts in course of employment—Alterations to plumbing—Damage by steam, etc. — Responsibility of contractors — Control of premises—Cross-appeal between respondents—Practice.

In the lease of a shop, the landlord agreed to supply steam heating and, in order to improve the system, engaged a firm of plumbers to make alterations. Before this work was completed and during the absence of the tenant, the plumbers' men, who were at work in another part of the same building, with steam cut off for that purpose, at the request of the caretaker employed by the landlord, turned the steam on again which, passing through unfinished pipes connected with the shop, escaped through an open valve in a radiator and injured the tenant's goods.

Held, that the landlord was liable in damages for the negligent act of his caretaker in allowing steam to be turned on without ascertaining that the radiator was in proper condition to receive the pressure, and that the plumbing firm were also responsible for the negligence of their employees in turning on the steam, under such circumstances, as they were acting in the course of their employment in what they did although requested to do so by the caretaker.

The judgment appealed from (16 Man. R. 411) was affirmed with a variation declaring the plumbers jointly liable with the landlord.

The action was against the two defendants, jointly, and the plaintiff obtained a verdict, at the trial, against both. The Court of Appeal confirmed the verdict as to McN. and dismissed the action as to the other defendants. McN. appealed to the Supreme Court of Canada, making the other defendants respondents on his appeal.

Held, that the plaintiff, respondent, was entitled to cross-appeal against the said defendants, respondents, to have the verdict against them at the trial restored.

*PRESENT:—Girouard, Davies, Idington, MacLennan and Duff JJ.

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APPEAL from the judgment of the Court of Appeal for Manitoba(1), by which the judgment of Dubuc C.J. at the trial, maintaining the action against both defendants, was affirmed in respect to the verdict against the present appellant and the action was dismissed with costs in respect to the Standard Plumbing Company, respondents.

The circumstances of the case are stated in the head-note and the judgment now reported.

Upon the filing of this appeal by the defendant, McNichol, the plaintiff notified the company that, upon the hearing of the appeal by McNichol, she would contend that the decision of the Court of Appeal should be varied and the judgment of His Lordship Chief Justice Dubuc, entered at the trial of the action, should be restored, except as to some damages caused by the escape of water. The company had filed a factum and also appeared by counsel who was heard on the cross-appeal, subject to objection as to its competency.

The Supreme Court of Canada considered that, under the circumstances, it was competent for the plaintiff to cross-appeal in this manner, permitted supplementary factums to be filed by all the parties and heard counsel on their behalf upon the cross-appeal.

Nesbitt K.C. and *Aikins K.C.* (*Coyne* with them) for the appellant.

Chrysler K.C. and *Ormond* for the respondent, Malcolm, appellant on the cross-appeal.

(1) 16 Man. R. 411.

C. P. Wilson for the respondents, *The Standard Plumbing Company*.

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The judgment of the court was delivered by

DUFF J.—The appellant McNichol was, in 1904, the owner of a building in Winnipeg, and, in July of that year, the respondent, Miss Malcolm (the plaintiff in the action) leased from him part of the building for use as a millinery shop. The appellant agreed to furnish heat sufficient, at a temperature of 40 degrees below zero in the open, to maintain a temperature of 70 degrees above zero in the shop. Shortly before the respondent became his tenant, the appellant adopted a system of heating his building by means of steam to be distributed to radiators in various parts of it through pipes connected with a steam generating plant in the basement.

In consideration of the appellant's agreement to supply heat, the plaintiff agreed to pay in each month, from October to April inclusive, a sum of \$15 in addition to the rent reserved. In December the respondent found that her shop was insufficiently heated and that in consequence she was seriously hampered in the prosecution of her business.

In the latter part of December in response to numerous complaints by the plaintiff, the appellant's agent employed the respondent, the Standard Plumbing Co., to place in the shop an additional radiator, by means of which it was expected that sufficient additional heat would be supplied.

To provide a channel for the passage of steam into this radiator, it was necessary to connect it by a pipe with the appellant's main distributing pipe; and

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owing to the absence of any means of isolating the branch pipes supplying individual rooms, it was necessary, while making this connection, to shut off the steam from the distributing pipe at or near the boiler.

The plumbing company's workmen had completed and affixed this branch pipe on the evening of the 28th of December, but finding that the radiator supplied by the appellant required alterations to adapt it to the reception of steam, and that, for this reason, they would be unable to connect it with the branch pipe that evening, inserted a valve at the end of this pipe to prevent its escape and turned on the steam. Almost immediately after this, the plaintiff observed water dripping from the ceiling of her shop. The plumbers, on being informed of this, first went to the basement and turned off the steam. The appellant's caretaker finding that he was unable to get access to the room from which the water was apparently coming, left for the purpose of getting a key from the tenant of it, and the plaintiff, being informed by the plumbers that steam would not again be turned on that night and that it would be unnecessary for her to return in order to give access to the shop, locked the door and went away. In the evening, the foreman of the plumbing company, having arranged with the caretaker to return and assist him in endeavouring to ascertain the source of the flow of water, did return and found that the caretaker, having got access to the room above the shop, had discovered that it was due to the breaking of the air valve in one of the radiators there, and had, by closing the valve attached to the pipe leading to the radiator, obviated the danger of any further escape of water. The foreman then, with the assistance of the caretaker, turned on steam in the basement.

In the morning, the plaintiff's sister returning to the shop found that the valve, which the plumber had inserted in the branch pipe the day before, was open and that the shop was filled with steam, which was still escaping in considerable volume.

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The plaintiff's goods were much damaged by steam and water and, to recover compensation for this damage, the present action was brought.

In my opinion, the act of turning steam into the distributing pipe, without either having taken or immediately taking steps to ascertain with certainty whether the branch pipe constructed that day leading into the plaintiff's shop was so closed as to prevent the escape of steam, was a negligent act for the consequences of which the immediate actors and those responsible for their conduct are answerable in an action. Both the plumber and the caretaker were engaged in the act of turning on the steam. That the continued escape of steam into the shop in the existing state of its temperature would lead to serious damage to the plaintiff's goods and to serious interruption of her business must have been known to both. That there was no person there to observe the escape of steam was known to the plumber and must have been known to the caretaker, if he gave the slightest attention to the subject. In these circumstances, those who undertook to expose this unfinished pipe to the access of steam under the pressure maintained on the appellant's system, for a continuous period, assumed, I think, an obligation to ascertain that this was attended with no risk of its escape. In point of fact, the operation, if proper precautions were taken, was not attended with the slightest risk. Ocular inspection alone, the steam having

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been turned on, would enable anybody, long before its escape in sufficient volume to cause any harm, to ascertain the fact with certainty and to prevent that harm by closing the valves at the boiler.

I agree entirely with the view of the Court of Appeal that, in these circumstances, nothing which occurred in the afternoon absolved either the plumber or the caretaker from the duty of ascertaining the condition of the valve with certainty before the escape of steam would have time to cause serious injury.

The majority of the court having come to the opinion that the plaintiff's cross-appeal is competent, the real questions on the appeal are, I think, whether, for this negligent act, the responsibility can be fixed on the appellant and the plumbing company or upon either and which of them.

First of the responsibility of the appellant. It is contended on his behalf that—following in this, not the usual merely, but the only prudent course—he employed the plumbing company as skilled persons to execute the work of placing the radiator in the plaintiff's shop and connecting it with the distributing pipe; and that this employment included shutting off the steam before commencing and the turning it on after completing the work; and that, having committed the work to competent independent contractors, he cannot be held responsible for the negligent conduct of the contractors or their servants in the course of it.

I have already intimated that, in my opinion, the caretaker and the plumber were jointly engaged in the act of turning on the steam which led immediately to the damage complained of. It is not, I think, a fair inference from the facts in evidence that the land-

lord had abandoned the control of the heating system to the plumbing company during the execution of the work they were engaged to do, and that the caretaker was merely the mechanical helper of the plumber; on the contrary, the evidence shews that the steam was turned on at the suggestion of the caretaker.

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Such an intervention on the part of the landlord is sufficient, in my opinion, to fasten upon him responsibility for the act in which they were engaged.

But I cannot agree that, assuming the work in question had been committed to the control of an independent contractor, the landlord could, in the circumstances of this case, for that reason, escape responsibility. The landlord's contract was to supply heat absolutely. This, I think, clearly brought him under an obligation to see that the contract was carried out with reasonable care with a view to the object of the parties in entering into it—that the demised premises should be in a fit state to enable the plaintiff to carry on her business. *North Eastern Railway Co. v. Elliott* (1); *Robinson v. Kilvert* (2); *Aldin v. Latimer, Clark, Muirhead & Co.* (3).

When, then, the landlord, having broken his contract to supply heat, chose, in order to enable him to carry it out—either because the existing system was deficient or because it suited him best so to proceed—to execute the work in progress when the damage occurred, he remained, I think, fully subject to the obligation referred to and consequently was bound to carry out the work in such a way as not to interrupt the tenants in their enjoyment of the premises, in so far at least as such interruption should be preventable by the exercise of reasonable care. But it is said

(1) 1 J. & H. 145.

(2) 41 C.D. 88.

(3) [1894] 2 Ch. 437, at p. 444.

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the plaintiff specifically assented to the execution of the work and that having regard to the character of the work, there was involved in this assent the delegation of the execution of it to skilled persons and therewith an assumption of the risk of their careless or unskilful work. I think that the fact that the plaintiff assented to the work is not fairly open to dispute, but what did that assent imply? Possibly an assent to such an interruption of her use of the premises as the execution of the work in the ordinary course—that is to say, with due care and skill—should entail. It is difficult to see on what ground the implication can be carried further. But it is not necessary to put the plaintiff's case so high.

Assuming that the tenant's assent to the placing of the radiator and connecting it with the heating system implied the assumption of the risk of the failure on the part of a competent plumber to use due care and skill, in so far as the work should require the exercise of an expert plumber's skill and knowledge, I am quite unable to discover any reason for extending this implication in the circumstances of this case so far as to absolve the landlord from the duty of taking such precautions as any unskilled person could take, and the necessity of which must have been apparent to any such person applying his mind to the situation; the duty, that is to say, of seeing when steam was turned into the connecting pipe whether or not it had a way of escape into the tenant's shop. It was not, in any sense, a case in which the landlord was dependent upon expert assistance; not, for example, one of those cases in which the carelessness or the unskilfulness of the expert becomes apparent only when the resulting mischief has been accomplished.

From all these considerations, the duty to see that

such precautions were taken, appears to me to arise inevitably from the landlord's contractual relation with his tenant; and to be involved in the responsibility undertaken by him in assuming to execute the work in question for the purpose of enabling him to carry out his contract. I am unable to distinguish the case in principle from cases where works are executed under a statutory obligation.

There remains the question of the responsibility of the Standard Plumbing Co. I have already said that in my opinion the act of the company's foreman in turning on the steam was, in the circumstances, a negligent act. The Court of Appeal has taken the view that in this he was the servant of the landlord only, and that consequently the plumbing company is not responsible. With great respect, and after some hesitation, I cannot agree with this view. I think he was acting in the course of his employment in what he did, although he did it at the request of the caretaker. Moreover, I am not satisfied that the view of the trial judge upon the evidence to the effect that the valve not being closed was due to the neglect of the foreman plumber or his assistant is erroneous.

The appeal is dismissed with costs and the cross-appeal allowed with costs.

*Appeal dismissed with costs and
cross-appeal allowed with costs.*

Solicitors for the appellant: *Aikins, Robson & Co.*

Solicitors for the respondent,

Malcolm :

Hudson, Howell,

Ormond & Marlatt.

Solicitors for the respondents,

The Standard Plumbing Co.: *Hough, Campbell &
Ferguson.*

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