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**** HIGHLIGHTS ****

- * The Alberta Court of Appeal has upheld a trial decision which awarded damages against Imperial Oil for cattle deaths and illness allegedly sustained by a rancher as a result of the exposure on her land to toxic chemicals in water and soil which resulted from a sour gas pipeline leak. The trial judge's finding that Imperial Oil had breached its duty of care to adequately protect livestock from hydrocarbon contamination, and that allowing the escape of a noxious substance constituted a nuisance, was not contested on appeal. The primary issue was whether the exposure to contaminants caused the loss in the absence of direct scientific evidence that the cattle had actually ingested contaminants and in the face of conflicting evidence as to whether detected levels of toxic substances could have caused the loss. The Court held that scientific or conclusive proof was not necessary and that the evidence of the rancher and her veterinarian was sufficient to establish causation on a balance of probabilities. The natural curiosity of cattle and their propensity to lick or drink salty and contaminated materials was referred to. The Court also referred to the fact that Imperial Oil's conduct in entering the site without notice and in cleaning up the site made it virtually impossible to provide conclusive scientific proof. (*Ball v. Imperial Oil Resources Ltd.*, [CALN/2010-011](#), [\[2010\] A.J. No. 379](#), Alberta Court of Appeal)

**** NEW CASE LAW ****

Ball v. Imperial Oil Resources Ltd.; [CALN/2010-011](#), Full text: [\[2010\] A.J. No. 379](#); [2010 ABCA 111](#), Alberta Court of Appeal, C.M. Conrad, C.D. O'Brien and F.F. Slatter JJ.A., April 13, 2010.

Environmental Law -- Pipeline Spills -- Liability for Loss and Illness of Livestock -- Causation.

Imperial Oil Resources Limited ("Imperial Oil") appealed to the Alberta Court of Appeal from a judgment granted against Imperial Oil in favour of a rancher, Agnes Ball ("Mrs. Ball") in the sum of \$65,660.00 as a result of losses sustained to Mrs. Ball's cattle herd [[2008 A.B.Q.B. 765](#)].

Mrs. Ball had a herd of approximately 200 head of cattle which were pastured on a provincial government grazing lease in 2002.

Imperial Oil ran two pipelines 6 feet below ground through the grazing lease. One of these was a sour gas production pipeline.

In the fall of 2001, Imperial Oil detected a brown spot on one of the grazing leases during the course of an aerial survey.

In June of 2002 (when Mrs. Ball's cattle were on the grazing lease), Imperial Oil conducted a ground inspection and erected a snow fence around the brown spot.

Imperial Oil was not able to contact Mrs. Ball, who was away on vacation. Imperial Oil entered the land without her permission and excavated a large area around the pipelines. The soil from the excavation was placed outside of the snow fence. A leak was detected in the sour gas production pipeline which was repaired.

Water from the excavated area was removed and poured on the ground outside of the excavated area.

When Mrs. Ball returned from vacation in July, 2002, she visited the site with an Imperial Oil employee. A portion of the fence was down, and her cattle had unrestricted access to both the excavated area, and the area outside of the fence where the excavated soil and water had been deposited. Soil samples from the excavated area disclosed the presence of hydrocarbons -- benzene, toluene, ethylbenzene and xylenes, but at levels which were below Alberta Environment guidelines for soil ingestion by livestock.

Mrs. Ball moved the cattle to a separate pasture 4 days after she observed them at the site.

In September of 2002, Mrs. Ball noticed that one of the calves were acting erratically. It was euthanized and autopsy results indicated the presence of toluene in trace amounts in the fat around the kidney.

In the 2003 calving season, health difficulties arose with the cattle that had been grazing in the pasture where the pipeline leak occurred. A number of calves died or were weak from being born premature and many of the animals suffered from scours and pneumonia. The death rate with respect to the cattle which had been exposed to the leak was significantly greater than the balance of the herd which was pastured in a different area.

The trial judge found that Imperial Oil had a duty to give adequate notice prior to its intended repair of the work and to "adequately protect" Mrs. Ball's livestock from "exposure to hydrocarbons and hydrocarbon contaminated soil and water". The trial

judge found Imperial Oil had breached this duty in pouring contaminated water on the ground and leaving contaminated soil unfenced. He also found Imperial Oil allowed the escape of a noxious substance and thereby created a nuisance [at para. 20].

The trial judge found that the onus was on Mrs. Ball to establish, on a balance of probabilities, that the injuries sustained to her cattle herd was caused by the conduct of Imperial Oil. He found that the evidence was not conclusive, but that scientific conclusiveness was not the test [at para. 21]. He found that the only reasonable conclusion was that the herd's exposure to hydrocarbons was a significant factor in the comprised health of the herd [at para. 24].

With respect to causation, the trial judge concluded [appeal judgment, para. 25]:

The Plaintiff does not have to prove conclusively that exposure to the hydrocarbons or ingestion of them led to the problems subsequently suffered by a portion of herd -- the test is the balance of probabilities. There must be more than conjecture for an inference to be drawn in the absence of exact proof. Such inference must be reasonable. However, the inability of the experts to give a firm diagnosis or to agree on a diagnosis is not fatal to such an inference: *Jones v. Mobil Oil Canada Ltd.* [\[\[1999\] A.J. No. 797, 248 A.R. 1 \(Q.B.\)\]](#)

Imperial Oil did not contest liability on appeal. It advanced the following grounds of appeal:

- The total absence of any evidence that the cattle consumed contaminated water or soil.
- Misapprehending the evidence with respect to whether toxic levels of hydrocarbons were present.
- Misapprehending the evidence as to whether hydrocarbon exposure could produce the effects alleged Mrs. Ball's cattle herd.
- An error of law in applying the incorrect test with respect to causation.

Decision: Conrad, J.A. and O'Brien, J.A. (the "Majority") dismissed the appeal [at para. 70].

Slatter, J.A. dissenting, would have allowed the appeal and would have directed a new trial [at para. 133].

The Majority considered the following issues:

- (a) Whether the trial judge erred in making his decision in the absence of a finding that the cattle had ingested contaminated soil or water.

There was no evidence that anyone saw the cattle drinking water or licking or eating contaminated soil. Imperial Oil workers gave evidence in this regard [at para. 32].

The Majority held that although the trial judge did not give reasons for his inference that the cattle had ingested contaminated water or soil, there was evidence from which a factual inference would reasonably be drawn including the following:

- The evidence that the cattle were clearly exposed to hydrocarbon contamination at the excavation site. Both Mrs. Ball and her veterinarian gave evidence with respect to the curiosity of cattle and their propensity to lick or drink products containing salts or chemicals.
- The evidence that contaminated ground water, in which contaminated material had been detected, was poured on the ground. Although the tested results were low, the expert evidence was that at the time the water had been poured on the ground, the level of contaminants would have been significantly higher.
- The test results from the euthanized calf.

[at para. 32 to 44].

- (b) Whether the trial judge in making his decision having regard to the evidence with respect to whether there were toxic levels of hydrocarbon present.

The Majority concluded that there were grounds for the trial judge to reject the evidence of Imperial Oil's experts and to accept the evidence of Mrs. Ball's experts.

Imperial Oil's experts acknowledged that hydrocarbon levels could have dissipated prior to the low test results being taken [at para. 46 to 49] and that Mrs. Ball's veterinarian had testified that the herd's health problems were likely caused by the ingestion of hydrocarbons [at para. 50 to 53].

- (c) Whether the trial judge erred in finding that hydrocarbon exposure could produce the effects alleged by Mrs. Ball.

Imperial Oil's expert witness had testified that diseases, including lack of reproduction, could not have been caused by exposure to the hydrocarbons.

Mrs. Ball's expert, however, testified to the contrary and the trial judge was entitled to give Imperial Oil's expert evidence little weight [at para. 57 to 61].

- (d) Whether the trial judge erred by using the wrong test to prove causation.

The Majority observed that as a fundamental rule, the primary test for determining causation remains the "but for" test, which requires the Plaintiff to show that the injury would not have occurred but for the negligence of the Defendant and that in some circumstances "very little affirmative evidence on the part of the Plaintiff will justify the drawing of an inference of causation in the absence of evidence to the contrary" [at para. 63 to 65].

After referring to the decision of the Supreme Court of Canada in *Athey v. Leonati*, [\[1996\] 3 S.C.R. 458](#), 140 D.L.R. (4th), the Court further observed [at para. 66] that:

"...in applying the "but for" test it is possible, in the absence of evidence to the contrary, which in that case must be weighed to infer causation through the application of common sense, and without the need for strict scientific proof. In addition, it is not necessary for the plaintiff to prove that the defendant's conduct was the sole cause of the injury..."

The Majority concluded that the evidence introduced by the Plaintiff established causation on a balance of probabilities, and that it was open to the trial judge to discount Imperial Oil's evidence because, among other things, Imperial Oil's conduct made it difficult, if not impossible, for Mrs. Ball to gather the evidence necessary to scientifically assess the extent to which the cattle had been exposed to hydrocarbon contamination, stating [at para. 67 to 69]:

[67] In our view, given the statements of law cited above, the conclusion that the School Section herd's exposure to BTEX hydrocarbons was a "significant factor in its subsequent compromised health" constituted a finding of causation, in accordance with the primary test. Firstly, the Plaintiff's evidence established, on a balance of probabilities, that the cattle ingested the chemicals, whether from the water or soil, or both. Secondly, the plaintiff demonstrated that there was a marked difference in the health and reproduction of cattle pastured in the south field from the

remainder of the herd pastured elsewhere. The Plaintiff also proved that for at least a period of time the water in the excavation contained BTEX chemicals significantly in excess of the Guidelines for livestock watering, and that it could be inferred that the pipeline leak had contaminated the groundwater. Further, the veterinarian who looked after the entire herd testified concerning the preventive medicine program that was in effect for all the cattle, and gave the opinion that the increased incidence of disease and the decreased reproductive performance resulted from the hydrocarbon exposure.

[68] Moreover, it was open to the trial judge to discount the evidence tendered by Imperial Oil, which, generally speaking, disputed causation for want of the data to prove it scientifically. In *Snell*, the court commented that the defendant doctor, by continuing the operation which was found to constitute negligence, "...made it impossible for the respondent or anyone else to detect the bleeding which is alleged to have caused the injury" (para. 43). Here, Imperial Oil entered Mrs. Ball's property and undertook the repair work, without prior warning. It then placed contaminated soil and water in the vicinity of her livestock, also without her knowledge. Imperial Oil's actions made it difficult, if not impossible, for Mrs. Ball to gather the evidence necessary to scientifically assess the extent to which the cattle had been exposed to hydrocarbon contamination. All the while, it was within Imperial Oil's power to test the water in the excavation and the contaminated water dumped upon the ground -- something it failed to do in any timely or comprehensive way. In the case of the spring, no testing was done until well after the danger had passed. Thus, as in *Snell*, Imperial Oil's conduct made it impossible for it to overcome the inferences reasonably drawn from the plaintiff's evidence.

[69] Accordingly, we are of the view that the trial judge's acceptance of the plaintiff's evidence established causation employing the primary "but for" test, upon a balance of probabilities. It therefore was not "impossible" to prove that the defendant's negligence caused the damage, using the primary test. It was not necessary to resort to the material contribution test.

Slatter, J.A. dissenting would have directed a new trial based on his conclusion that the trial judge had failed to make findings whether the cattle actually consumed any toxic soil or water and whether the trial judge used the correct test to determine causation.

**** CREDITS ****

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