DEFECTIVE EQUIPMENT*

The Facts

C was the operator in respect of the drilling and completion of a well. The well was spudded and drilled to a certain depth and completed as a dual producer of oil. General supervision of the drilling, testing and completion of the well was the responsibility of C.

An order was placed to supplier X for a tubing head for the well. The order contained a general description giving the manufacturer's tradename, the size of the tubing strings and casing in the well, and indicating the working and test pressures of 2000 and 4000 pounds respectively, the same to be used for dual completion using 2 and 3/8 outside diameter tubing strings in a 7 inch casing. No catalogue or other material from the manufacturer or supplier was available and none was used in placing the order.

A tubing head, answering the description, was delivered to the well site, and following a visual inspection of it by C, it was determined that the tubing head was apparently complete and undamaged. The tubing head was installed on the well's spool assembly by an employee of the servicing company.

Oil was produced from the well, the highest working pressure observed being 950 pounds per square inch. A few days after commencement of production, the pumper employed by C made an inspection of the well, at which time he discovered oil flowing from the tubing head which was ruptured.

Qualified personnel arrived at the scene as soon as possible and various techniques were attempted to bring the well under control, but without success. Experts were brought in and various methods were tried, but without success until some eight days later when the flow of oil was brought under control. The well had to be plugged and abandoned as a result of the failure of the tubing head. The following items of damage resulted:

(a) payments made to adjoining surface landowners for damages to their land, crops and buildings;
(b) costs and expenses of labour, services and materials used in bringing the well under control:
(c) loss of material and equipment in the well;
(d) the cost of drilling, testing, completing and abandoning the well.

The Problems

Consider the liability of (1) the manufacturer, and, (2) the supplier to C with respect to these heads of damage if: (a) the tubing head was bought and sold as second hand equipment and the failure was owing to previous wear and tear; (b) the tubing head failed owing to defective manufacture; (c) the tubing head of this trade name and description was not rated for this job.

Also consider the above questions where (1) the contract is entirely by parol; and, (2) the contract has been made by a purchase order, con-

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firmation and invoice in the usual way in which the purchase of equipment is documented.

For convenience, these problems will be dealt with under separate headings.

Liability of the Manufacturer if the tubing head was bought and sold as secondhand equipment and the failure was the result of previous wear and tear

Under this heading the failure of the tubing head is taken to have resulted solely from previous wear and tear on secondhand equipment. It is important to bear in mind that no defect in the design or manufacture of the tubing head is involved. No catalogue or other material from the manufacturer was used, and indeed the manufacturer was in no way involved in the sale. Under all of these circumstances, there is no way the manufacturer could be found liable in tort or in contract, and there appears to be nothing in the statutes which would affect this result.

Liability of the Manufacturer where the tubing head failed as a result of defective manufacture

The fact of defective manufacture invites the test laid down in *Donoghue* v. *Stevenson*.[1] The general rule in *Donoghue* v. *Stevenson* is summed up in the following quotation from the judgment of Lord Atkin:

> A manufacturer of products which he sells in such form as to show that he intends them to reach the ultimate consumer in the form in which they left him with no reasonable possibility of intermediate examination and with the knowledge that the absence of reasonable care in the preparation or putting up of the products will result in an injury to the consumers' life or property, owes a duty to the consumer to take reasonable care.[2]

The rule in *Donoghue* v. *Stevenson* is considered in *Salmond on Torts*,[3] citing cases where the words "a manufacturer" have been extended to include repairers, assemblers and erecters, and other cases holding that "products" are not limited to articles of food and drink, but include, for example, underwear, tombstones, motor cars, elevator lifts, hair dye and ships' telegraphs. It is also indicated that "ultimate consumer" has been extended to include the "ultimate user" of the articles as in *Grant* v. *Australian Knitting Mills*.[4]

In setting the standard of care imposed on manufacturers, the Canadian courts have followed the English cases, and in some instances the general rule of liability has been enlarged. For example, in *Shandloff* v. *City Dairy*,[5] a decision of the Ontario Court of Appeal, Middleton, J. A. stated:

> The lack of care essential to the establishment of such a claim increases according to the danger to the ultimate consumer, and where the thing is in itself dangerous, the care necessary approximates to and almost becomes an absolute liability.[6]

Similarly, the inference of negligence even where there is no direct evidence of defect has been held sufficient to impose liability; *Martin* v. *T.W. Hand Fireworks Company*.[7] In the *Martin* case a spectator at a fireworks display was injured by the erratic functioning of a roman

1 [1932] A.C. 562.
2 *Id.*, at 599.
3 1961, 13th ed., at 566.
4 [1935] A.C. 85.
5 [1936] 4 D.L.R. 712.
6 *Id.*, at 719.
7 (1963), 37 D.L.R. (2d) 455.

candle. The manufacturer was held liable on the basis of an inference of negligence which arose and which was not rebutted by the manufacturer.

The question is whether C can produce evidence of negligence of the manufacturer in either the design or the manufacture of the tubing head thus inviting the test laid down in *Donoghue* v. *Stevenson* and *Grant* v. *Australian Knitting Mills*. The onus of proving negligence on the part of the manufacturer rests on the plaintiff, and there has been some dispute as to whether a plaintiff can plead in aid the maxim *res ipsa loquitur*. In *Donoghue* v. *Stevenson*, Lord McMillan denies that he can, but in *Grant* v. *Australian Knitting Mills* the Judicial Committee of the Privy Council took the view that if excess sulphites were left in the garments in question, that could only be because someone was at fault. In result the appellant was not required to lay his finger on the exact person in all of the chain who was responsible or to specify what that person did wrong. Negligence can be taken as a matter of inference from the existence of defects taken in conjunction with all the known circumstances.[8]

In the stated facts under consideration, while it is clear that the tubing head failed as a result of defective manufacture, nothing is stated about negligence. It would seem, however, that on the view taken by the Judicial Committee in the *Australian Knitting Mills* case negligence can be held as a matter of inference from the established existence of defects in the manufacture taken against all of the known circumstances. On this basis, the manufacturer would be held liable.

To what extent does the liability of the manufacturer reach into the four stated areas of loss sustained by C

It is submitted that on this question the ruling principle is now found in the decision of the Judicial Committee of the Privy Council in *Overseas Tankship (U.K.) Ltd.* v. *Morts Dock and Engineering Co. Ltd.* (The Wagon Mound).[9] This was an appeal from an Australian court, and the facts involved a large quantity of furnace oil which was discharged negligently from the "Wagon Mound" an oil burning ship chartered by the defendants. The oil spread to a wharf belonging to the plaintiff ship builders who, believing furnace oil in the open to be not inflamable, continued their regular operations. The next day molten metal from the plaintiff's wharf caused the oil under or near the wharf to ignite resulting in extensive damage to the plaintiff's wharf and equipment. The trial judge, Kinsella, J. found that

> the defendant did not know and could not reasonably have been expected to have known that the furnace oil was capable of being set afire when spread on water.

Kinsella, J. held the defendant liable for the damage caused by the fire and this was affirmed on appeal applying the decision in *Re Polemis*.[10] The Judicial Committee of the Privy Council expressly overruled the decision in the *Polemis* case.

There has been no decision of the Supreme Court of Canada on this point since the *Wagon Mound* case. It is submitted, however, that the rule in the *Wagon Mound* case would likely be followed by the Supreme

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8 In this regard see *Western Processing & Cold Storage Ltd.* v. *Hamilton Construction Co. Ltd.* (1965), 51 W.W.R. 354.

9 [1961] A.C. 388.

10 [1921] 3 K.B. 560.

Court of Canada and that reasonable foreseeability is now the test in dealing with remoteness of damages.

On this basis, it is submitted that none of the four items of damage referred to in the statement of facts in this case would be excluded. The damage under each of these four headings appears to be a natural consequence of the failure of the tubing head, and all of the damage which occurred must be regarded as reasonably foreseeable.

In conclusion, applying the principles stated in *Donoghue* v. *Stevenson* and in the *Wagon Mound*, the manufacturer would be liable to C with respect to all four heads of damage.

Before leaving the question of the manufacturer's liability under this heading, mention should be made of the possibility of the manufacturer's pleading a fool-proof process of manufacture which was carried out under constant supervision. This defence prevailed in *Daniels* v. *White*[11] where the manufacturer of a bottle of lemon-aid was held not liable for damages for injuries to a purchaser and his wife who purchased a bottle of lemon-aid containing 38 grains of carbolic acid. On the other hand are cases which follow the approach taken in *Grant* v. *Australian Knitting Mills* where over five million garments had been placed on the market and not one other complaint had been made against the manufacturer. The judgment contains the following statement:

> However well designed, the manufacturer's proved system may be (to remove deleterious substances), it may not invariably work according to plan. Some employee may blunder.[12]

It is submitted that the manner in which the tubing head was ordered from the supplier would not be material to the action against the manufacturer because this is a matter of contract between the supplier X and his customer C. Putting it another way, contractual arrangements between X and C cannot affect the manufacturer whose liability, if any, is in tort on the basis of the rule in *Donoghue* v. *Stevenson*.

Liability of the manufacturer if the tubing head of this tradename and description were not rated for this job

Under this heading we take the facts to be that the tubing supplied was exactly as ordered by C but a better grade should have been specified for this job.

Again it is important to bear in mind that no defect in design or manufacture or other fault on the part of the manufacturer is involved. For the reasons indicated above, under these circumstances there is no liability on the manufacturer.

For the reasons stated above, it is also immaterial whether the contract was entirely by parol or by purchase order, confirmation and invoice.

Liability of the supplier to C if: (a) the tubing head was bought and sold as second hand equipment and the failure was a result of previous wear and tear, and (b) the tubing head failed because of defective manufacture

The liability of the supplier to C where failure was owing to previous wear and tear on second hand equipment and where the tubing failed

11 [1938] 4 All E.R. 258.
12 *Ante*, n. 4, at 96.

because of defective manufacture is considered under one heading because, it is submitted, the result is the same in either case.

In considering the liability of the supplier to C, reference must be had to the provisions of the Sale of Goods Act of Saskatchewan[13] and of Alberta.[14]

The relevant section of the Saskatchewan Act reads as follows:

16. Subject to the provisions of this Act and of any Act in that behalf there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale except as follows:

1. Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether he be the manufacturer or not, there is an implied condition that the goods shall be reasonably fit for that purpose;

2. Where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods shall be of merchantable quality:
Provided that if the buyer has examined the goods there shall be no implied condition with regard to defects which such examination ought to have revealed;

3. An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade;

4. An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

The relevant section of the Alberta Act reads as follows:

17. (1) Subject to this Act and any Act in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as provided in this section.

(2) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required so as to show that the buyer relies on the seller's skill or judgment and the goods are of a description that it is in the course of the seller's business to supply, whether he is the manufacturer or not, there is an implied condition that the goods are reasonably fit for such purposes.

(3) Notwithstanding subsection (2), in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose.

(4) Where goods are bought by description from a seller who deals in goods of that description, whether he is the manufacturer or not, there is an implied condition that the goods are of a merchantable quality.

(5) Notwithstanding subsection (4), if the buyer has examined the goods there is no implied condition as regards defects that the examination ought to have revealed.

(6) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

(7) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith.

The first question which arises is whether or not the implied conditions as expressed in the Acts are applicable to the contract between the supplier and C.

In *Manchester Liners Ltd.* v. *Rey Ltd.*[15] the House of Lords held that if goods are ordered for a special purpose and that purpose is disclosed to the vendor so that in accepting the contract the vendor undertakes to supply the goods, the resulting contract is sufficient to establish that the buyer has shown that he relies on the seller's skill and judgment. The House of Lords was considering there the provisions of the Eng-

13 R.S.S. 1965 c. 388.
14 R.S.A. 1955 c. 295.
15 [1922] A.C. 74.

lish Sale of Goods Act which on this point are similar to those of the Saskatchewan and Alberta Acts. The judgment was approved by the Supreme Court of Canada in *Preload* v. *The City of Regina*[16] with the following observation:

> The mere disclosure of the purpose may amount to sufficient evidence of reliance on the skill and judgment of the seller.[17]

In the stated facts of the present case, the indications are that the order given to the supplier for the tubing head was detailed as to the use to which it was to be put with the result, it is submitted, that the supplier would be liable for damages on the basis of an implied condition that the goods be reasonably fit for that purpose.

Sub-section (3) of section 17 of the Alberta Act which refers to sale of a specified article under its patent or other tradename should not be overlooked. The Saskatchewan Act contains no similar provision. In Alberta, it could be argued for the supplier that the goods were sold under the manufacturer's tradename and that there is therefore no implied condition as to fitness. The question then arises whether under sub-section (4) of section 17 of the Alberta Act there is an implied condition that the goods are of a merchantable quality. In conclusion on this point, it seems unreasonable that the mere statement of the manufacturer's tradename in the order is sufficient to negative all of the implications expressed in section 17.

Where, as in this case the goods have been accepted and are not of quality according to the contract the implied conditions must be treated as a warranty only.[18] The measure of damages for breach of warranty is dealt with in section 52 of the Saskatchewan Act and section 53 of the Alberta Act which are identical. The measure of damages for breach of warranty is stated to be the loss "directly and naturally resulting in the ordinary course of events from breach of warranty."

The question is are the damages under consideration directly and naturally resulting in the ordinary course of events from the breach of warranty? In the present case, it is submitted all of the items of damage included under the headings of damage above are directly and naturally resulting damages in the ordinary course of events and that the supplier would therefore be liable under all four heads.

Whether the situation would be different if the contract was made by a purchase order, confirmation and invoice rather than by parol would depend on the writings.

It should be pointed out that under section 54 of the Saskatchewan Act and section 55 of the Alberta Act, which are identical, any right duty or liability which would arise under a contract of sale by implication of law may be negatived or varied by express agreement, by the course of dealing between the parties or by usage binding both parties. It is submitted that in considering the liability of the supplier it is of no consequence whether the contract is by parol or by purchase order, confirmation and invoice except in cases where liability has been negatived by agreement or in the course of dealing or by usage binding the parties as indicated above.

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16 [1959] S.C.R. 801.
17 *Id.*, at 820.
18 *Benjamin on Sale*, 8th ed., at 895.

Liability of the supplier to C if the tubing of this tradename and description was not rated for this job

Again we take the facts to be that the tubing supplied was exactly as ordered by C but a better grade should have been specified for this job. The question is, on the information given him should the supplier have been aware of this? On this point, it seems fair to state as a general principle that in the absence of special circumstances any skill and judgment of the seller relied on by the purchaser must surely be premised on the operating conditions indicated to the seller by his customer.

It is noted that the highest working pressure observed was 950 pounds per square inch which is well below the 2,000 pounds indicated in the order. However this does not of itself lead to the conclusion that the goods were not as ordered, and having regard to all of the facts as stated, it is difficult to find that the supplier should have been led to inquiry beyond the information given him by his customer. On this basis no implied condition or warranty would arise.

For the reasons indicated above, if there is any liability on the seller under this heading, such liability would extend to all four heads of damage stated in the facts.

For the reasons indicated above, writings constituting the agreement of the parties would have no bearing on the question of liability of the seller unless they contain provisions negativing liability.