

Eminent Domain—Evidence of the Rupture of a Gas Pipeline Occurring After the Taking of Land Is Admissible to Prove “Fear” as an Element of Damages if the Condemnor Places the Issue of Fear into the Proceedings. *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886 (Tex. 1975).

On December 8, 1970, Delhi Gas Pipeline Company instituted condemnation proceedings against E.C. Heddin and his wife for the purpose of laying a gas transmission pipeline under the Heddins' land. The pipeline was to carry a gas containing about 3.2 percent hydrogen sulfide, a deadly poison. The gas company was granted an easement totaling approximately 1.5 acres of the 80-acre tract of land involved.¹ At trial the Heddins offered proof that their property's value was substantially decreased because of fear in the minds of the public of a possible gas leak from the pipeline. Evidence of a rupture in another gas transmission pipeline located near the Heddins' land was introduced, even though this rupture had occurred almost 8 months after their land had been taken.² The jury awarded damages of \$10,287.50 to the Heddins;³ Delhi Gas appealed, and the Texas Court of Civil Appeals in Tyler reversed the judgment and remanded the case for a new trial.⁴ On further appeal by the Heddins, the Supreme Court of Texas affirmed the judgment of the court of civil appeals. The supreme court held that evidence of a rupture of a gas pipeline which occurred after the date of taking of the condemned property was not admissible if the condemnor had not raised the issue of fear of the pipeline in the proceedings.⁵

In reaching this decision in *Heddin v. Delhi Gas Pipeline Co.*,⁶ the Texas Supreme Court first examined general rules concerning the admissibility of evidence of fear in the minds of the buying public on the date of taking for the purpose of proving damages in a condemnation proceeding. The court stated that evidence of fear was admissible when three elements were present: a reasonable basis for the fear, proof that the fear enters into the calculations of

1. *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 887 (Tex. 1975).

2. *Id.* Color photographs of the carcasses of the cattle and pets belonging to the owner of the land on which the prior rupture occurred were also offered in evidence by the Heddins to illustrate the damage caused by the rupture. *Id.* at 889-90.

3. *Id.* at 888.

4. *Delhi Gas Pipeline Co. v. Heddin*, 509 S.W.2d 954 (Tex. Civ. App.—Tyler 1974), *aff'd*, 522 S.W.2d 886 (Tex. 1975).

5. 522 S.W.2d 886, 889 (Tex. 1975). The court also found error in the trial court's admission into evidence of the color photographs. *Id.* at 890.

6. *Id.* at 886.

persons who buy and sell similar property, and diminished market value of the property because the fear exists.⁷ The court then noted that a landowner must show an actual danger forming the basis of the fear or that the fear is reasonable even though not based on actual experience. The court thus concluded that fear could be considered by the jury in awarding damages as a general rule. The only exception to this rule was stated to be situations where the danger underlying the fear was based on "fancy, delusion or imagination."⁸

Based on these general rules, the Texas court concluded that evidence of pipeline ruptures occurring before the date of taking would be admissible to show fear and, hence, a decline in market value.⁹ The court acknowledged that as a general rule compensation in an eminent domain proceeding is measured on the date of the taking and conceded that this rule would seem to preclude the introduction of any evidence concerning pipeline ruptures occurring after the date of taking. The court stated, however, that such evidence was admissible in two situations. If the condemnor asserted that the pipeline was free of danger or if he otherwise took the position that fear of danger from the pipeline was not a factor affecting market value, the court concluded that evidence of a subsequent rupture could be admitted to rebut the condemnor's position.¹⁰ In *Heddin*, because the evidence of the subsequent rupture was admitted before the issue of fear had been raised by the condemnor, the court held that the admission of the evidence was improper.¹¹

Justice Reavley, in a concurring opinion,¹² maintained that fear of a high pressure gas pipeline could never be considered to be "a reaction to an imaginary danger."¹³ According to his interpretation of the majority opinion, if a condemnor produced evidence to show no depreciation in the market value of the land not taken for the easement, he would be taking the position that fear of the danger was not a factor affecting market value, and the landowner could introduce evidence of a subsequent rupture as rebuttal evidence. Believing that this result would needlessly complicate a trial and prejudice the condemnor, Justice Reavley concluded that any evi-

7. *Id.* at 888.

8. *Id.*

9. *Id.* at 888-89.

10. *Id.* at 889.

11. *Id.* at 890.

12. *Id.*

13. *Id.*

dence of a subsequent rupture should be excluded.¹⁴

In eminent domain proceedings, Texas courts have generally held admissible any evidence that might reasonably contribute to a determination of the value of the condemned property.¹⁵ The admissibility of evidence of fear in the minds of the buying public as an element of damages in Texas first emerged in the case of *Tennessee Gas Transmission Co. v. Adamsen*,¹⁶ the opinion of which was written by Justice Pope while he was sitting on the San Antonio Court of Civil Appeals. Although he did not use the word "fear" in the opinion, Justice Pope wrote that proof of an indisposition by purchasers to build near a high pressure gas pipeline was properly admitted to show a decline in value of the remaining land.¹⁷ *Adamsen* aligned Texas with the majority of jurisdictions in the United States which regard fear as an element of damages in eminent domain proceedings.¹⁸

American courts have long recognized that fear should be considered in arriving at the market value of land taken by the sovereign or its delegate.¹⁹ Two primary difficulties have been encountered, however, in their consideration of fear. The first difficulty relates to what the acceptable basis of the fear may be. By the general rule, the fear may not be premised on dangers that may result from the use to which the condemned property will be put;²⁰ rather, it must be based on an actual danger.²¹ Texas cases are in accord with the majority view that factors which are too contingent, speculative, and remote to affect present market value should not be considered in arriving at the condemnation award.²²

14. *Id.*

15. *Sample v. Tennessee Gas Transmission Co.*, 251 S.W.2d 221, 223-24 (Tex. 1952); *Thompson v. State*, 319 S.W.2d 368 (Tex. Civ. App.—Waco 1958, no writ).

16. 262 S.W.2d 445 (Tex. Civ. App.—San Antonio 1953, no writ).

17. *Id.*

18. 4A J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 14.241(1) (rev. 3d ed. 1975); Annot., 38 A.L.R.2d 788, 801 (1954).

19. *See, e.g.*, an 1898 Indiana case, *Manufacturers Natural Gas v. Leslie*, 49 N.E. 946 (Ind. 1898), which recognized that the future location of buildings, trees, etc., must be governed to some extent by the dangerous proximity of the pipeline, and held that fears of people regarding the line that have the effect of depreciating the value of a portion of the premises should be considered in arriving at a condemnation award.

20. Annot., 38 A.L.R.2d 788, 801 (1954), and cases cited therein.

21. *Id.*

22. *Reeves v. City of Dallas*, 195 S.W.2d 575 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.); *Texas Midland R.R. v. Southwestern Tel. & Tel. Co.*, 57 S.W. 312 (Tex. Civ. App. 1900, no writ); *Crary v. Port Arthur Channel & Dock Co.*, 49 S.W. 703 (Tex. Civ. App. 1899, no writ).

Of course, the question of what is too contingent or speculative to be admissible in evidence on the issue of damages is a matter of some controversy. One line of cases in the United States takes the view that depreciation in the value of adjoining property is not caused by the condemnor's taking and is not compensable if the depreciation is the result of an existing fear that is not founded on experience.²³ The more liberal line of cases, represented primarily by Kentucky decisions, states that if fear in the minds of the public depreciates property value, the depreciation is compensable whether or not that fear is based on experience.²⁴ These cases allow compensation for the decline in value caused by the fear so long as the fear is not based entirely on fancy, delusion, or imagination.²⁵

The second difficulty faced by the courts in considering fear as an element of damages has centered around the type of evidence that is admissible to prove a decline in market value because of the fear. A recent line of Texas cases has pondered the problem as it pertains to condemnation for the purposes of pipeline easements.²⁶ *Delhi Gas Pipeline Co. v. Reid*²⁷ was the first case in Texas to allow admission of evidence of a rupture in another gas pipeline to prove a decline in the market value of the condemned and remaining land due to fear. The trial court in *Reid* admitted evidence of a rupture occurring prior to the date of the taking of the land, and the Waco Court of Civil Appeals found that the rupture could very well have had a bearing on the market value of the land on the date of taking.²⁸

In contrast to *Reid*, which considered only evidence of a rupture occurring prior to the date of taking, the Amarillo Court of Civil Appeals, in the case of *Buzzard v. Mapco. Inc.*,²⁹ considered the admissibility of evidence of a rupture taking place after the date of condemnation. The *Buzzard* court held that evidence of the subsequent rupture was admissible to prove fear of the danger of a rup-

23. *In re City of Meriden*, 88 Conn. 427, 91 A. 439 (1914); *Illinois Power & Light Corp. v. Cooper*, 322 Ill. 11, 152 N.E. 491 (1926); *Yagel v. Kansas Gas & Elec.*, 291 P. 768 (Kan. 1930).

24. *Gulledge v. Texas Gas Transmission Co.*, 256 S.W.2d 349 (Ky. 1952); *Tennessee Gas Transmission Co. v. Jackman*, 311 Ky. 507, 224 S.W.2d 660 (1949); *Texas Pipeline Co. v. National Gasoline Co.*, 203 La. 787, 14 So.2d 636 (1943).

25. *Id.*

26. See Wills, *What Me Worry? - Proof of Fear as an Element of Damages in Condemnation Cases*, 38 Tex. B.J. 923 (Nov. 1975) [hereinafter cited as Wills], for an excellent explication of this point and other matters pertaining to the *Heddin* decision.

27. 488 S.W.2d 612 (Tex. Civ. App.—Waco 1973, writ ref'd n.r.e.).

28. *Id.* at 614.

29. 499 S.W.2d 352 (Tex. Civ. App.—Amarillo 1973, writ ref'd n.r.e.).

ture in the line to be constructed under the condemned land.³⁰ The Amarillo court's conclusion was disputed by the Court of Civil Appeals in Tyler, however, in the intermediate appeal of *Heddin v. Delhi Gas Pipeline Co.*³¹ The Tyler court held that the trial court committed error by admitting evidence of the rupture of another pipeline when the rupture occurred after the date of taking of the condemned property.³²

Apart from the conflict over the admissibility of evidence of subsequent ruptures, some controversy existed in Texas concerning the degree of similarity that must exist between the ruptured pipeline and the pipeline that is to be laid under the condemned property. The *Reid*³³ court required only that some similarity exist between the two pipelines before evidence of the rupture could be admitted into the record.³⁴ But in *Delhi Gas Pipeline Co. v. Mangum*³⁵ the Tyler Court of Civil Appeals held that only some similarity was not enough. Instead, a general similarity in the essential characteristics of the two pipelines was deemed necessary to allow admission of evidence of a prior rupture in a pipeline.³⁶

In its decision in *Heddin v. Delhi Gas Pipeline Co.*³⁷ the Supreme Court of Texas resolved the controversies that have existed among Texas courts of civil appeals over the admissibility of other pipeline ruptures in eminent domain proceedings. The supreme court also articulated Texas' position on the two areas of difficulty that traditionally have arisen concerning the element of fear as an element of damages in condemnation cases.

With regard to the acceptable basis for a recovery of damages on the element of fear, the *Heddin* court appeared to adopt the

30. *Id.* at 357.

31. 509 S.W.2d 954, 957 (Tex. Civ. App.—Tyler 1974), *aff'd*, 522 S.W.2d 886 (Tex. 1975).

32. *Id.*

33. 488 S.W.2d 612 (Tex. Civ. App.—Waco 1972, writ *ref'd n.r.e.*).

34. *Id.* at 614.

35. 507 S.W.2d 631 (Tex. Civ. App.—Tyler 1974, no writ).

36. *Id.* at 634. In addition, the Tyler court required that a person with personal knowledge of the occurrence of a rupture be produced to testify about it. In a case decided the same day as *Mangum*, *Delhi Gas Pipeline Co. v. Heddin*, 508 S.W.2d 417 (Tex. Civ. App.—Tyler 1974, no writ), the Tyler court listed eleven factors which might tend to show the requisite similarity. (This case involved the same landowners as the subsequent Supreme Court of Texas case, but concerned the condemnation of a different tract of land.) Although the supreme court in *Heddin* did not approve these eleven factors, they are helpful indicia of the necessary elements in proving similarity between the two pipelines.

37. 522 S.W.2d 886 (Tex. 1975).

liberal view espoused by the Kentucky courts. This conclusion is supported by two observations. First, the *Heddin* court's three-pronged test explaining the circumstances under which evidence of fear is admissible was taken directly from a Kentucky decision.³⁸ Second, the *Heddin* majority took a broad view of what might constitute a danger upon which fear could be based and for which damages could be recovered. The Texas Supreme Court held that the danger need not be based on actual experience to be compensable if the danger and resultant fear were reasonable and not imaginary.³⁹ The court even used the same language as the Kentucky courts to describe the only situations in which evidence of fear is not admissible, those being instances in which the fear is the product of "fancy, delusion, or imagination".⁴⁰

In addressing the issue of what evidence may be used to prove fear, the supreme court cleared the confusion occasioned by the conflicting lower court decisions. The court held that evidence of a rupture occurring after the date of taking is admissible on rebuttal after the issue of fear of a possible danger has been raised by the condemnor.⁴¹ Additionally, *Heddin* appeared to accept the *Mangum* court's view that evidence of another pipeline's rupture is admissible only if that pipeline is generally similar to the one about to be laid.⁴² Although this issue was not raised on the *Heddin* appeal, the court's statement that the "landowner, may, in rebuttal, introduce evidence of specific ruptures in the same or a closely similar pipeline"⁴³ and its reference to "specific instances in which similar pipelines have developed ruptures under similar circumstances"⁴⁴ support this conclusion.

The supreme court decision in *Heddin* is both commendable and helpful. It recognizes the dangerous nature of the gas pipelines that in increasing numbers carry their lethal cargo under Texas soil. The deaths of eight persons in a Denver City gas field in February, 1975, serve as a grim reminder of both the killing speed and deadly nature of the gas flowing through those pipelines.⁴⁵ The presence of

38. *Gulledge v. Texas Gas Transmission Corp.*, 256 S.W.2d 349 (Ky. 1952).

39. *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886 (Tex. 1975).

40. *Id.* at 888.

41. *Id.*

42. *Delhi Gas Pipeline Co. v. Mangum*, 507 S.W.2d 631 (Tex. Civ. App.—Tyler 1974, no writ).

43. *Heddin v. Delhi Gas Pipeline Co.*, 522 S.W.2d 886, 889 (Tex. 1975).

44. *Id.* at 888-89.

45. See Swindle, *The Deadly Smell of Success*, TEXAS MONTHLY, June 1975, at 64, for

a pipeline arouses fear and causes a concomitant decline in the utility and value of the property close to the pipeline. It is thus both correct and just to follow liberal rules of evidence to permit a landowner to show the loss he has suffered due to the burden placed on the land by a condemnor.

*Heddin v. Delhi Gas Pipeline Co.*⁴⁶ is helpful in its clarification of the Texas position on fear as an element of damages in eminent domain proceedings and on the admissibility of various factors in evidence to prove fear. Texas lawyers now have a definite standard by which to plot their strategy concerning the element of fear in eminent domain proceedings,⁴⁷ and the admission of evidence to establish fear should proceed in a manner consistent with the *Heddin* opinion.

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a discussion of the Denver City tragedy.

46. 522 S.W.2d 886 (Tex. 1975).

47. See generally note 26 *supra*, for further discussion of the practicalities of proof of fear in eminent domain proceedings.