

**IN THE COURT OF APPEAL BELIZE
A.D. 2000**

CIVIL APPEAL NO. 20 OF 2000

BETWEEN:

WESTERN GAS COMPANY LIMITED	APPELLANT
AND	
MOUNTAIN EQUESTRIAN TRAILS LIMITED	RESPONDENT

BEFORE:

The Honourable Mr. Justice Nicholas Liverpool	-	Justice of Appeal
The Honourable Mr. Justice Elliott Mottley	-	Justice of Appeal
The Honourable Mr. Justice Manuel Sosa	-	Justice of Appeal

APPEARANCES:

**Mr. Denys Barrow, S.C. for the Appellant.
Mr. Derek Courtenay, S.C. for the Respondent**

2000: October 17 and 2001: March 8.

JUDGMENT

MOTTLEY, J.A.

The respondent, Mountain Equestrian Trails Limited was the owner and operator of a tourist lodge on Mountain Pine Ridge Road in the Cayo District. The tourist lodge has four rooms in which guests are accommodated. The building is made of palmetto walls and sapodilla posts and has a thatch roof. There are no concrete walls.

It has a main dining area called a cantina. It also has a kitchen. The stove, refrigerators, beer cooler and freezer operate by butane gas. These items, which all carry pilot flames are connected by copper tubing to the butane gas cylinder. This cylinder, which is situated about 10 feet from the building on the outside on a cement platform, holds about 200-300 pounds.

Western Gas Company Limited, the appellant, started business in Cayo in 1991, having operated in Orange Walk since 1983. It appears that the appellant was delivering gas to the respondent from around 1989.

On 20 February 1993 the respondent ordered a quantity of butane gas from the appellant.

Mr. James Bevis, the principal shareholder of the respondent, gave evidence of the standard procedure to be followed by his staff when the gas was being delivered. He had given instructions to his staff that the gas should be turned off. Sometimes his staff turned off the gas and sometimes the workers of the gas company would turn it off. They usually turned off the gas. On that particular day he was on break and he had not instructed anyone to turn off the gas. He was on his way down to the cantina to turn off the gas. By the time he got there, the delivery persons were already filling up the tank. He indicated that his employee, who is known as Liberata, did not know that she should turn off the gas when the cylinder was being filled. It was not her job.

While driving his car towards the cantina he saw flames coming from the side of the cantina where the gas cylinder is situated. The flames were coming from the gas cylinder, which was off its cement platform, and lying

on its side. At this stage the delivery truck was going down the road with its hose fully extended with butane gas still coming out of it. No flames were coming from the hose, only the gas.

The roof of the cantina was on fire. He tried to put out the fire with a fire extinguisher and five gallon buckets of water. This attempt to extinguish the fire was unsuccessful and the cantina burnt down.

He lost everything it took to run that “particular hotel aspect of the operation” and all the contents such as appliances.

After the fire he found an implement which he describes as “partially a part from the equipment of the truck and partially piece of the tank in a hibiscus plant.”

The witness known as Liberata said that she was working at the Mountain Equestrain as a kitchen helper and also as a cleaner of the cabins. She had started working there 2 to 3 weeks before the fire. On the afternoon of the fire she was off duty but was sitting down in the cantina reading a book. She saw the truck which was parked near the gas tank. She did not see what was going on - what was being done by the delivery personnel. She saw two men, one in the cab of the truck, the other standing on the outside. She said that while reading her book she looked up and suddenly saw fire coming out of the building by the truck.

When the fire started she saw the truck being driven away. At that stage she ran off and did not see what happened. She however saw something burning by the truck but was not sure what it was. The hose leading from

the truck was still connected to the butane cylinder. When asked if she was able to see the exact point at which the fire started, she said she did not know exactly where it started, she only saw the fire by the gas tank.

A number of witnesses were called on behalf of the appellant.

The procedure for the filling of the stationary gas tanks was explained by Mr. Roque Reyes the manager of the appellant company.

The butane tank has inlet and outlet valves. He was unable to say categorically whether it was unsafe to leave the outlet valve opened at the time when the tank is being filled. It was the policy of the company not to interfere with the equipment of the gas cylinder until someone from the premises is there to see what is being done. They did not deliver gas to any premises that are unsafe. The premises of the respondent were considered safe for the delivery of gas. It was the company's responsibility to fill the tanks and give people what they ordered. He conceded that the company's employees have some responsibility to ensure the safety of the operation. It was not the responsibility of his men to turn off the outlet valve. This should be done by the owner of the premises.

The witness continued:

“Sir, what I am saying is that when my men go to fill up a tank, stationary tanks. You see stationary tanks are so made especially for this type of business, you know that they have. When you go there they have safety devices on the tank you know like they have little valves that they don't have to touch anything really what they all do is

just put the equipment there to full it and the pump gas in there and they have a meter in the tank that tells them how much the tank has of the liquid that is going in there. Whenever they finish and they unscrew that automatically the tank itself has a valve that - a shut off valve that closes the valve that gas come out of the tank. So, the responsibility of our people working there is that always somebody is there. So I was quite amazed that always somebody is there....”

He did not know whether his company had instructed its employees that they should not fill a tank unless the owner of the premises is present. He also did not know whether the employees had been told that they should make sure that there is no cooking going on or other use of flame near to the place where the cylinder was being filled. This was a matter that would have to be referred to his manager.

Mr. Miguel Reyes who was the manager for the Cayo District said that, in 1993, he had one truck on the road. The driver of that truck was Anthony Rudon. He then set out the procedure to be followed by his employees when making delivery of gas to a property like the Mountain Equestrian Trails. The driver always had a side-man with him when making deliveries. One of the two persons on the truck would be in charge of the “pump or the P.T.O., the meter”; the other is in charge of putting the hose to the stationary tank or cylinder. The side-man would pull the hose to the location of the stationary cylinder. The hose is connected to the filter valve on the cylinder. The pump is then turned on by the person in the truck. The other person checks the gauge meter in the stationary truck. At some resorts, his employees would be authorized that, on arrival, they should do

what they are accustomed to doing; at other resorts, they would have to contact a particular person. He pointed out that, at the Mountain Equestrian Trails, there was an understanding that when the delivery truck arrived and there was no one around to tell them to go ahead, “they would just check the tank to be filled.”

He indicated that when the cylinder is filled to between 85% to 90% of its capacity the quick acting relief valve which is at the base of the cylinder shuts off instantly. No gas would then be passing from the truck to the cylinder except a little amount which is left in the hose.

He said that it was his company’s rule that in the interest of safety the tanks should to be 20 feet away from the building. He did not know how far this tank was from the cantina. Also, the company did not know the distance between the equipment with open flame on the inside and the cylinder on the outside. It was not the company’s policy to turn off the outlet valve before filling the cylinder. He however conceded that it would be safe to turn off the outlet valve before filling the tank. He did not think that the policy which he outlined for the delivering of gas was in place at the time of the fire. It may be inferred that at the time of the fire the company did instruct its employees on the procedure to be followed when filling gas cylinders.

Mr. Anthony Rudon, the driver of the delivery truck, gave evidence that he or his side-man usually made sure that there was no open fire. At some places the valve was turned off; at other places the occupiers do not like the employees of the gas company to turn off the gas. As driver, he

pumped the gas. The hose is connected by the side-man who usually stayed and checked the gauge of the tank that was being filled. After filling the tank he would close off the tank, and take off the hose. He had delivered gas to the Mountain Equestrian Trail about seven or eight times.

On 20 February 1993, on arrival at Mountain Equestrian Trails, his side-man Rodrigo Perez went to the front of the building where he spoke to a young lady and confirmed that the respondent had ordered gas. The side-man then connected the hose and made sure that "everything is clear" and told him to start pumping the gas.

The tank is usually filled to 85% and 95%. When this was done the side-man closed off the tank and went to write the receipt. The driver left the truck and went to disconnect the hose in order to roll it up. He pointed out that, in disconnecting the hose, some gas, which is left in between the valves, usually escapes. While disconnecting the hose, he saw a blue flame coming from the palmetto wall. After running away for about 40 to 50 yards he returned and drove away the truck for about 300 yards. By this time he had already suffered burns. The building was on fire. After he stopped the truck the side-man came and rolled up the hose.

To a question from the court as to whether he would fill the tank if he knew that pilot lights were on, he replied that he would not. He insisted that he would not have filled the tank if he knew that the pilot lights were burning. When asked by the judge if pilot lights are always on, he responded that usually the pilot lights are on "because usually the resort they don't turn off their pilot lights because it gives trouble to light back the heaters." When

reminded by the court that he had said that he would never fill a tank, like the one at the Mountain Equestrian Trails, with the pilot lights on, the witness stated that “if I had known that the equipment in the specific kitchen where there was a palmetto wall, I would not fill it like that.”

He was aware that certain of the lodges have cement walls and do not turn off their pilot lights. He appreciated that the lodge at Mountain Equestrian Trails was different; gas can pass through the palmetto walls to the place where the equipment is situated. He again agreed with the suggestion from the court that, if pilot lights were on, he would not have filled the gas tank.

To a suggestion from the court that “the pilot lights were on presumably in the stove, nobody turned them off”, the witness stated that usually they ask “the person in charge if everything is okay.” He went on to say that “if everything is okay they tell us go ahead and fill the tanks.” His side-man told him the young lady, presumably the witness Liberata, had said to go ahead. He however conceded that he did not hear this conversation.

The witness indicated to the court that the valve, “the one that is on top of the tank that leads to the kitchen, had been closed off.” While he did not close it off, he asserted that the side-man had done so but admitted that he did not see him do this. He was not therefore in a position to say whether the side-man had in fact closed off the top valve.

The driver agreed to a further suggestion from the court that, if the valve on top of the gas tank which leads to the kitchen had in fact been closed off, it

would cause the pilot lights on all appliances to go off. However there would still be enough gas in the pipe line, the 10 foot copper tubing, to run the pilot lights. When asked by the court if he should not have waited for the gas in the 10 foot copper tubing to burn out which would have the effect of putting out the pilot lights, the witness never gave any positive reply.

The court pointed out that the lodge would have had refrigerators in the kitchen which would have been operated by gas. This meant that there was a flame somewhere if the refrigerator was working. The driver however said that he did not know if there were any pilot lights burning. From this it may be inferred that neither he or his side-man checked to see whether the pilot light in the cantina had been extinguished.

The plaintiff in its pleading alleged that the defendant its servants or agent were negligent in the following particulars:

- (a) using a hose which was inadequate to transfer pressurised inflammable gas from the tanker truck to the plaintiff's tank without causing gas to escape therefrom;
- (b) filling the plaintiff's gas tank beyond its capacity and so that excess gas was expelled therefrom;
- (c) failing properly or securely to attach the said hose to the plaintiff's gas tank so as to prevent the escape of gas therefrom;
- (d) moving the said tanker truck before the said hose was disconnected from the plaintiff's gas tank and thereby causing the gas tank to overturn and fall to and be dragged along the

ground and the connection between the hose and gas tank to rupture and permit the escape of gas;

- (e) permitting the gas tank to be dragged along the ground thereby causing friction in an atmosphere in which inflammable gas was escaping;
- (f) failing to take all reasonable and effective measures whether by inspection examination or otherwise to ensure that the apparatus used the manner in which it was attached and used and the environment in which the gas was transferred was safe and that no risk of fire would arise therefrom.

The plaintiff also indicated that it would also rely upon the doctrine of **res ipsa loquitur**.

The defendant denied that the fire was caused by any negligence on its part or by their servants or agents. It however alleged that the fire was caused or contributed to by the negligence of the plaintiff. It alleged that the plaintiff was negligent in the following manner:

- (a) in keeping its gas tank against the outside wall of their building;
- (b) not having the wall air tight and air passed through it;
- (c) failing to keep position or maintain its stoves and other cooking facilities at a safe distance away from its gas tanks;
- (d) failing to disconnect, put out or in any way to stop the flames from their stoves inside the building at the time the gas tanks were being filled.

The appellant argued two grounds of appeal:

- (I) The learned trial judge erred in law in failing to find that the accident was caused by the failure of the respondent to take reasonable steps to ensure that there were no naked flames within the respondent's premises to present a risk of ignition of released gas.
- (II) The learned trial judge erred in law in failing to find that the accident was materially contributed to by the failure of the respondent to take reasonable steps to ensure that there were no naked flames within the respondent's premises to present a risk of ignition of released gas.

GROUND 1

In delivering his judgment the learned trial judge made the following finding, of fact as to the cause of the fire:

“It seems to be clear on the balance of probabilities that this accident occurred because there were naked flames in the plaintiff's kitchen (at least the pilot light on the stove) and because the outlet valve on the tank was left open. It was clear from Mr. Rudon's evidence that he was well aware that at this site it was important to check that there were no naked flames and that the valve was shut, and I find that these measures should have been taken but were not. Since the defendant's

employees were carrying out the hazardous operation of delivering gas and took it upon themselves to carry out the job without making contact with anyone in authority at the plaintiff's lodge, I do not see how the Defendants can possibly avoid liability for this accident."

I am of the opinion that there was ample evidence upon which the judge could have come to this conclusion. It is clear that as of the date of the fire the appellant did not have any set policy for filling the gas tank. Any policy was developed after the accident. Neither the driver nor his side-man made any effort to ensure that all naked flames were put out before they attempted to fill the cylinder with butane gas. The driver said he would not fill the cylinder if he knew the pilot lights of the appliances were burning. This is a clear indication that he was aware of the danger involved in filling the cylinder while the pilot lights of the appliances were burning. They ought to have recognized that this operation was fraught with danger and should have taken the appropriate steps to ensure that all naked flames had been extinguished. These naked flames would include the pilot light of all the appliances. They were aware that even though the gas was shut off on the outside, gas would have remained in the 10 foot cooper tubing leading to the appliances and would have caused the pilot light to remain burning. They did nothing to ensure that these flames had in fact burnt out or had been put out before filling the cylinder.

The evidence discloses that some gas is always left between the valve and the point of the nozzle. This gas is released into the air. Counsel for the appellant stated that it would seem to him that this was the only way in

which the gas could have escaped. That some gas is always left between the valve and the point of the nozzle and that it escapes into the air, is a factor which is peculiarly within the knowledge of the appellant. To my mind, this would place a duty on the appellant's employees, when delivering gas, to have taken such steps to ensure that no naked fire existed in near proximity to where the cylinder was being filled, especially where the walls were made of palmetto. Gas is a substance that is dangerous in itself and, as such, the law imposes on those who deal with it, a peculiar duty to take precaution. The delivery-man may not be required to enter the cantina to ascertain that all naked flames have been extinguished. He was, in my view, required to make such inquiries to ensure from the respondent's employees, that no naked flames existed in the cantina which the gas, that they knew or ought to have known would be left behind between the valve and the nozzle, and which would escape into the air, could have come into contact with the naked flames.

From the evidence it appears that the driver did not satisfy himself that the pilot lights were off. Neither did he check with the side-man or the young lady to ensure that the pilot lights were in fact turned off. He was fully aware that in disconnecting the hose some gas would escape. He was clearly under a duty to ensure that there was no naked flames in the building as he appreciated the danger between the pilot lights being on in a building where the walls made of cement and in a building where walls were made, as in the case of the catina, from palmetto.

As Langton J. said in ***The Pass of Ballater [1942] P 112 (at page 117)*** that, in the case of a person who handles or deals with implements or

substances dangerous in themselves such as gas, “he has not merely a duty to take care but a duty to provide that care is taken.”

In **Dominion Natural Gas Company Limited v Collins, Perkins et al** [1909] A.C. 640, Lord Dunedin in delivering the opinion of the Privy Council said (at page 646):

“It has, however, again and again been held that in the case of articles dangerous in themselves such as loaded firearm, poisons, explosives and other things ejusdem generis, there is a peculiar duty to take precautions imposed upon those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity.”

In my view the filling of a gas cylinder in the circumstances of this case would be doing a thing “ejusdem generis” and thus places a peculiar duty on the appellant and its employees to take care that the cylinder would be filled without injury to person or damage to property.

In **Read v J. Lyons & Co** [1947] AC 156 Lord Macmillan in upholding a submission of counsel that there was a “category of things and operations dangerous in themselves.” said (at page 172).

“I think that he succeeded in showing that in the case of dangerous things and operations the law recognized that a special responsibility exist to take care. . . . The more dangerous the act the greater is the care that must be taken in performing it . . . One who engages in

obviously dangerous operations must be taken to know that if he does not take special precautions injury to others may very well result.”

The appellant through its management and employees knew they were dealing with gas, a highly dangerous substance and unless managed with the greatest care was likely to cause injury to others. The appellant’s employees had been delivering gas to the respondent’s property for about one year. These employees ought to have been aware that the cantina was constructed of palmetto wall. They would also have been aware or ought to have been aware of the proximity of the gas cylinder to the kitchen and the stove. They were aware that the appliances used butane gas and would have had a pilot light burning. It was incumbent on the appellant’s employees to ensure that all naked flames were extinguished before they started to fill the cylinder. They were, or ought to have been aware that the filling of the butane cylinder was a highly dangerous operation and called for great care on their part.

The learned trial judge found that the fire was caused when naked flames in the kitchen - at least the pilot light on the stove - and the outlet valve on the tank was left opened. The employees were delivering gas to the cantina for over one year. I hold that the Company through its servants or agents knew or ought to have known about the gas remaining between the valve and the point of the nozzle and should have taken steps to ensure no naked flames were burning in the cantina within close proximity to the gas cylinder so that if gas did in fact escape it would not cause damage to any person or property.

GROUND 2

In regard to the issue of contributing negligence the judge said:

“Contributory negligence is pleaded against the plaintiff company. Mr. Lumor relied first on the fact that the gas tank was kept close to the wall of the kitchen which was not air tight and that the stove was not far enough away from the gas tank for safety. I was not referred to any relevant regulations or expert evidence in relation to this allegation but, in any event, the defendant were the experts in gas and their representatives (particularly Mr. Rudon) were well aware of the layout of the plaintiff’s cantina. If there was a danger the defendant ought to have advised that this was the case and taken whatever steps were necessary before agreeing to deliver gas. He also said that it was up to the plaintiff to be present when the defendant came to deliver gas and to make sure that any necessary steps were taken to make the delivery safe. I accept Mr. Bevis’s evidence that he was on his way to meet the defendant’s representatives when he came upon the accident already happening and that he knew the importance of turning off the outlet valve and would have insisted on it being turned off. But I cannot accept that it was necessary for the plaintiff to have someone waiting for the defendant’s representative; rather, if they needed someone in authority, they ought to have sought out someone before beginning the operation, or, if they did not, they must have taken upon themselves responsibility for the

safety of the operation. It was also said that Liberata was not given proper instructions; but she was a new kitchen assistant who happened to be taking her rest break in the cantina; she was not put forward by the plaintiff as having any authority to supervise anything; again, it was the defendant's responsibility to see that the delivery was safe. I therefore reject any defence of contributory negligence."

I agree with the learned trial judge's analysis and also reject the appellant's contention that the respondents were guilty of contributing negligence. The appellant's employees were involved in the delivery of a highly dangerous substance - gas and it was incumbent on them to use great care to ensure that in so doing no harm should be done to anyone or any property having regard to the peculiar circumstance of the gas which is left between the valve and the nozzle is likely to escape into the air. The appellant cannot escape liability by alleging that the respondent was negligent by keeping its gas cylinder against the outside wall of the cantina or not having air tight wall and not keeping, positioning or maintaining its stove and other cooking facilities at a distance away from the gas cylinders.

The appellant was under a duty to take special precautions. As stated above, it is my view that it failed to take such special precaution and this failure was the proximate cause of the fire. Had its employees taken these special precautions the fire would not have occurred.

In the circumstances I would dismiss the appeal and award costs to the respondent to be taxed if not agreed.

MOTTLEY, J.A.

