

IN THE COURT OF APPEAL OF BELIZE, A.D. 2007

CIVIL APPEAL NO. 4 OF 2006

BETWEEN:

BELIZE ELECTRICITY LIMITED

Appellant

AND

**DAVID MADRID
ALMA MADRID**

Respondents

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BEFORE:

The Hon. Mr. Justice Mottley - President
The Hon. Mr. Justice Sosa - Justice of Appeal
The Hon. Mr. Justice Morrison - Justice of Appeal

Mr. Dean Barrow S.C. for the appellant.
Mrs. Samira Musa Pott for the respondent.

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25 October 2006, 8 March 2007.

MOTTLEY P

1. On 25 October 2006 I agreed that this appeal should be dismissed with costs to the appellant, to be taxed, if not agreed. I concur in the reasons for judgment given by Morrison JA in his judgment, which I have read in draft.

MOTTLEY P

SOSA JA

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SOSA JA

MORRISON JA

Introduction

3. This appeal was heard on 25 October 2006, when it was allowed with costs to the appellant to be taxed, if not agreed. These are my reasons for concurring in that decision.
4. The appellant is the sole commercial provider of electricity in Belize and the respondents are householders and customers of the appellant living in the town of Orange Walk. On 24 December 2002 there was a disruption in the electricity supply to the respondents' premises which caused damage and destruction to electrical equipment and appliances belonging to the respondents. The respondents alleged that this damage was caused by the negligence of the appellant and claimed damages in the sum of \$29,050.00 as a result. The appellant denied negligence and the matter was in due course tried by Awich J, who on 26 May 2006

gave judgment for the respondents in the sum claimed, with interest and costs. From this judgment, the appellant appealed to this court and the sole issue on appeal was whether Awich J. was correct in his conclusion that the appellant was liable in negligence to the respondents on the basis of the failure of its servants or agents to respond in a timely manner to the reports of an emergency fault along the appellant's power lines in the vicinity of the respondents' home.

The pleadings

5. The respondents' pleaded case was that the appellant was the owner of a transformer which enabled the flow of electricity to their premises (which was admitted), that on 24 December 2002 the appellant was informed that the transformer "was sparking", but "failed to respond to the notification" (which was denied) and that at around noon on that day "the transformer exploded" (which was also denied). In support of this case, the respondents particularized the negligence alleged as follows:
 - (a) failed to provide the Plaintiff's premises adequate efficient and reasonable service in the form of electricity;
 - (b) failed to maintain the transformer in a state of good repair;
 - (c) failed to respond to the notification that the transformer was sparking and to take steps to avoid the transformer from exploding and failing in its function;

- (d) failed to prevent damage to the Plaintiff's property which was a reasonable foreseeable consequence of the transformer's defect/failure in function;
 - (e) neglected to have a proper system for dealing promptly or any at all with defective and/or sparking transformer.
- 6. Further, the respondents averred that the appellant was in breach of its statutory duty (under the Public Utilities Commission Act) and provided particulars which to some extent overlapped with the particulars of negligence above.
- 7. The appellant in its Defence denied that the damage claimed was caused by negligence on its part, raised a plea of contributory negligence against the respondents and averred that it maintained the transformer in good working condition and free from defects, was never notified that the transformer was sparking, maintained at all times a reasonable system for dealing with transformer problems of which it became aware, and that any sparking and explosion of its transformer happened as a result of an accident over which it had no control. The accident alleged was the collision of a private motor truck into the pole on which the transformer and attached wires were erected, resulting in the dislodgement or loosening of the neutral wire attached to the three-phase transformer bank, thereby causing in turn voltage surges to consumers served by the transformer.

The evidence

8. The respondents relied on the evidence of Mrs. Arcenia Gonzalez, Ms. Ada Lisa Cuello and the first respondent, Mr. David Madrid, all three of whom tendered sworn witness statements upon which they were also cross examined. Awich J. was particularly impressed by the evidence of Mrs. Gonzalez, a resident of Orange Walk, which he accepted as truthful. It was summarized, in terms which I am happy to adopt, by the learned trial judge as follows:

“The fuller account was that by Mrs. Gonzalez. She started her account from the moment she saw sparks at the transformer and ended at the moment when the fault was rectified and electricity was restored. Her account was a straight-forward one by an eyewitness. She told her story and answered questions in cross-examination without bias and without any fear of being exposed as a liar. She suffered damage to her microwave cooker and television set, but she never made claim for compensation for the damage. She testified as follows. She owned a restaurant. She had finished cooking according to her usual schedule, and was washing the sidewalk in front of her business. It was the usual time she expected her grandchildren back from school. She gave the time as about 11:15 a.m. She saw sparks at the transformer, people gathered to watch. She made telephone calls to BEL and reported the sparks. Despite intense cross-examination, the witness’ whole account of the events remained reliable. I accept it as truthful in the determination that I make.

... Mrs. Gonzalez said the employees of the defendant took too long, 30 to 40 minutes, to come to attend to the fault she had reported on telephone to the defendant's office. She testified that she made the first report, then followed by a second about ten minutes later, and a third another five or ten minutes later, then because there was still delay, she called the police."

9. The appellant relied on the evidence of two of its employees, Mr. Victor Shaw, a Line Man IV Lead Hand, and Mr. Hector Ruiz, a Distribution Technician, both stationed at the material time in Orange Walk. Mr. Shaw was dispatched by Mr. Ruiz (the appellant denied that there was any undue delay in this regard) to verify a report received by the appellant of an interruption in the power supply and to do whatever was necessary to restore power to the area. Mr. Shaw in his witness statement described the scene as he found it as follows:

"At the scene I found that the 15 KVA transformer of the three-phase bank in front of L & R Liquors was leaking oil and had a burnt fuse. I also found that the 2/0 Triplex service conductor facing north of the BEL pole was hanging loose and touching the 1/0 LV Live 210 volt bare conductor... The end of the broken neutral contacted the line 210 volt 1/0 conductor resulting in high voltage to consumers."

10. Both Mr. Shaw and Mr. Ruiz spoke of seeing an electricity pole "leaning" (as though it had been hit) when they arrived at the scene, but neither was in a position to give evidence as to the cause of this. Mr. Ruiz's evidence was that:

“because the pole was hit, it caused low voltage wire to come together causing short circuit. The live line crossing with the vertical line caused a short circuit. It caused fluctuation of voltage after that nothing will happen that means the circuit has been opened.”

Mr. Ruiz testified further that the short circuit would have occurred immediately after the wires came into contact and that this would have caused high voltage surges and damage to appliances. Mr. Shaw’s evidence was that the wires coming into contact could produce surges, which would “definitely” cause damage or destruction to appliances. According to him, once the wires came into contact there was nothing that could have been done to prevent the power surge and the ultimate damage.

11. On this evidence, Awich J’s conclusion as to the cause of the damage was as follows:

“Did the failure by the defendant to respond in reasonable time cause the damage to the appliances and other items? I concluded, from the testimonies of the two knowledgeable witnesses for the defendants that the direct scientific cause of the damage, was the tear in the insulation of the live wires which then came into contact with the neutral wires thereby causing high voltage, that is, surges in power, transmitted to consumers. It also caused the sparks that Mrs. Gonzalez and others saw on the wires at the transformers.”

12. The learned trial judge therefore accepted the appellant’s witnesses’ account of the direct cause of the damage that occurred on the morning in question, though he rejected their contention

“that a strong force by someone else must have caused the tension and tear in the insulation.” (As the learned judge observed, there was certainly “no admissible evidence of the independent force.”) Notwithstanding his clear finding on causation, however, Awich J. went on to find the appellant liable in negligence on the following basis:

“The final conclusions I make are as follows. There was unreasonable delay to respond to the reports made by Mrs. Gonzalez about an emergency fault along the defendant’s power-line. The delay was a failure by the defendant to take reasonable care to ensure that consumers did not suffer loss due to power surges or even undue interruption of power supply. The damage to the claimants’ household appliances and other electrical items was foreseeable loss arising from failure to respond in good time, the failure was the cause of the damage.”

13. The learned judge therefore based himself squarely on his finding of unreasonable delay, in the light of which he declined “to decide whether the defendant is liable in negligence regarding maintenance of its lines and equipment”, or to make any determination on the claim for breach of statutory duty. In the result, he awarded damages to the respondents in the sum of \$29,050.00, which was the amount claimed and which had not been the subject of any strenuous challenge by the appellant at the trial.

The appeal

14. When the appeal came on for hearing, counsel for the appellant sought – and was given – permission to rely on the following Amended Grounds of Appeal:

1(a) The Learned Trial Judge erred in law in finding that the damage to the Respondents' household appliances was caused by the Appellant's failure to respond in good time to reports of an "emergency fault" along the Appellant's power line, when the only evidence as to the cause of damage clearly established that it was the "emergency fault" itself – and not the failure to respond – that caused the damage.

1(b) The Learned Trial Judge erred in law by failing to appreciate or even consider, the Appellant's evidence (which was the only evidence on the issue) that power surges occurred immediately the "emergency fault" developed along the Appellant's power line; that those power surges were what caused damage to the Respondents' appliances; and that it therefore would not have mattered whether the Appellant had responded within five minutes or five hours of the fault report. The Learned Judge thus erred fundamentally on the question of causation when he held that the damage to the Respondents' appliances was the fault of the Appellant.

- 2(a) The Learned Trial Judge erred in law by finding that the Appellant owed a duty of care to the Respondents in circumstances where the fault and surges along the Appellant's power line (servicing the Respondents' premises) were not shown to have been caused by the Appellant.
- 2(b) The Learned Trial Judge erred in law by failing to appreciate the distinction between a negligent omission and a breach of a duty of care, and by failing to appreciate that in the circumstances no liability attached to the former.
- 2(c) The Learned Trial Judge erred in law by finding that there was a duty of care on the Appellant to respond quickly to, and prevent damage from, a fault along its power line even if such fault were caused by the actions of a third party or by inevitable accident.

The submissions

- 15. At the outset of his judgment, Awich J. stated that in order to succeed in this claim the respondents were obliged to prove (a) that the relationship between the claimants and the defendant was such that the defendant owed a duty of care to the claimants – (the neighbour principle), (b) the defendant breached the duty; and (c) that that breach caused reasonably foreseeable damage or injury or damage to the claimants. Counsel for the appellant, Mr. Dean Barrow S.C., accepted that this was the correct approach on the issue of liability.

16. Mr. Barrow S.C. submitted that Awich J's conclusion that the failure to respond in good time to the emergency calls was the cause of the damage to the respondents' property flew in the face of the learned judge's earlier finding with regard to the "direct scientific cause of the damage". It is this latter finding, Mr. Barrow S.C. contended, that was in fact supported by the evidence of the appellant's two witnesses, which the judge accepted. The evidence was that it was the power surges, which occurred immediately the wires came into contact, that caused the damage to the respondents' appliances and it is these surges, therefore, which were "the direct, proximate and only cause of the damage." Given that the judge did not (and could not on the evidence) find that the tearing and dislodgment of the wires, which produced the power surges, were the appellant's fault, learned counsel for the appellant submitted that there was no basis for the judge's finding that the consequential damage was the appellant's fault. Awich J, Mr. Barrow S.C. concluded, had at the end of the day "lost sight of the requirement of proof he had at the start properly placed on the respondents."

17. Mrs. Samira Musa-Pott for the respondents emphasized the duty placed on electricity providers, electricity being a potentially dangerous commodity, to respond promptly. Had the appellant's technicians arrived promptly before the explosion "to abate or rectify the problem", she submitted, "it is very likely on the evidence that damage could have been prevented, or greatly mitigated." The appellant's negligence in failing to respond promptly to the problem was a significant cause of the damage sustained by the respondents. Mrs. Musa-Pott referred to the decision of the Privy Council in **Goldman v Hargrave and others [1966] 2 All ER 988**, to demonstrate that a defendant can be found liable in negligence

even where the initial cause of damage was not caused by his negligence (this was a case of a fire caused initially by a lightning strike), where by his subsequent inaction the original damage is aggravated. Mrs. Musa-Pott also emphasized that the appellant had proffered no proof in support of the contention that the problem had initially been caused by the actions of a third party. She therefore asked this court to conclude that Awich J. had been correct in his findings and that the appeal ought accordingly to be dismissed.

Analysis and disposal

18. **McGhee v National Coal Board [1972] 2 All ER 1008**, a Scottish appeal to the House of Lords to which this court was referred by Mrs. Musa-Pott, is authority for the proposition (if authority is needed) that a claimant (“a pursuer”) is entitled to succeed in an action for negligence if he can establish that fault of the defendant (“defender”) “caused or materially contributed to his injury” (per Lord Reid at page 1010). This was indeed the basis of liability identified by the learned judge as applicable to the instant case (see paragraph 13 above). However, I am of the view that the respondents’ case at trial foundered ultimately on the basic – but crucial – question of causation: for even if there was a basis in the evidence for Awich J’s finding of unreasonable delay on the part of the appellant in response to the emergency calls, there was no basis for the conclusion that such delay either caused or contributed to the damage to the respondents’ property. To the contrary, on the evidence which the learned judge accepted, the actual cause of the damage was not something for which responsibility could, on the pleadings or on the evidence, have been attributed to any default on the part of the appellant. So that at

the end of the day the learned judge's primary conclusion as to "the direct scientific cause of the damage" was fundamentally irreconcilable with his secondary finding that the failure by the appellant to respond in good time to the emergency calls was the cause of the damage.

19. An unsatisfactory feature of this case was that there was no independent expert evidence called on either side. In this regard, the respondents were no doubt at the greater disadvantage, having had the unfortunate experience of leaving their home intact on the morning of 24 December 2002 and returning later in the day to find their property seriously damaged without any fault on their part. While this may be a consideration that attracted the learned judge's attention in their favour – as it no doubt would that of any citizen – it was that same unexplained fact which made clear technical evidence to establish the negligence alleged by the respondents highly desirable. At the end of the case, the evidence of the appellant's witnesses was in fact the only evidence of what actually caused the disruption of the supply of electricity that morning and it can hardly be surprising that that evidence did not support the respondents' case. These are the reasons which led to the decision set out in paragraph 3 of this judgment.

MORRISON JA