IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

AT COMMON LAW

SUIT NO. C.L. B345 OF 1976

BETWEEN	BATA SHOE COMPANY JAMAICA LIMITED	PLAINTIFF
A N D	GEORGE REID AND CINDERELLA REID T/A REID'S COZY CORNER BAR & RESTAURANT	FIRST & SECOND DEFENDANTS
A N D	V. L. CHEN SUE	THIRD DEFENDANT
A N D	TEXACO CARIBBEAN INC.	THIRD PARTY

CONSOLIDATED WITH -

SUIT C.L. R086/1978

BETWEEN	GEORGE REID	PLAINTIFF
A N D	V. L. CHEN SUE	DEFENDANT
A N D	TEXACO CARIBBEAN INC.	THIRD PARTY

R. Williams Q.C. and J. Leo-Rhynie, instructed by Messrs. Clinton Hart and Company for Plaintiff in Suit C.L. B345/1976.

H. Munroe Q.C., A. G. Gilman and H. Harris, instructed by H. Harris for First and Second Defendants in Suit C.L. B345/1976 and for Plaintiff in Suit C.L. R086/1978.

A. Scholefield and G. Robinson, instructed by J. D. L. N. S. & Co., for Third Defendant in Suit C.L. B345/1976 and Defendant in Suit C.L. R086/1978.

R. N. A. Henriques and A. Rattray for Third Party in both Suits.

Heard on: 21st, 22nd, 23rd, 24th and 25th April, 21st, 22nd, 23rd October, and 19th December, 1980.

JUDGMENT

CAMPBELL J.

At about 10.50 p.m. in the night of October 11, 1973, an explosion occurred on the premises occupied by George and Cinderella Reid which adjoins premises occupied by Bata Shoe Company. The explosion was traced to a 100 lb cylinder of Butane gas supplied and installed on the premises by the servants and/or agents of V.L. Chen Sue for domestic use by the Reids. The 100 lb cylinder of Butane gas was supplied and installed by Chen Sue in the course of his trade or business as a distributor of Butane gas which he obtained in sealed

cylinder complete with cylinder valves from Texaco Caribbean Inc. Simultaneously with the explosion, there was a fire on the premises of the Reids. It spread to the adjoining premises occupied by Bata Shoe Company causing damage to their premises, also to their goods, furniture and fixture which have been quantified and agreed in the sum of $21,527.08.

Bata Shoe Company as plaintiff in Suit C.L. B345/76 claims damages in the sum agreed against the Reids as first and second defendants based on negligence as well as under the principle of liability popularly described as the rule in Rylands v. Fletcher. The particulars of negligence averred against these defendants are paraphrased hereunder namely:-

(1) Using equipment (Butane gas cylnder and stove) which was defective and likely to cause an explosion and fire and keeping the said cylinder in a place and condition which was unsafe;

(2) Causing and/or permitting the escape and accumulation of Butane gas on the premises which was dangerous and failing to detect the escape and accumulation of the said gas;

(3) Causing the said accumulation of Butane gas to ignite and explode and/or failing to ensure the absence of anything capable of igniting the said accumulation of Butane gas;

(4) Failing to extinguish the said fire in time or at all or to prevent the same from spreading to the premises occupied by the plaintiff.

The rule in Rylands v. Fletcher is raised on the pleading by the plaintiff who pleaded as follows:

> "Further or alternatively the use of the said Butane gas cylinder on the said premises occupied by the defendants was a non-natural user caused or permitted by the defendants".

The first and second defendants by their defence admitted the explosion. They also admitted that a fire was thereby caused on their premises which spread to the premises of the plaintiff. They however denied that the explosion and fire were due to negligence on their part as pleaded or at all. They went on further to plead specifically that the matters complained of by the plaintiff were caused wholly by the negligence of Chen Sue who being a well known

supplier and installer of cylinders of Butane gas, did on October 11, 1973, instal the cylinder of gas acting as independent contractor.

The only particulars of negligence averred by these defendants against Chen Sue which remained after amendment sought and granted on 22nd April, 1980, is paraphrased hereunder:-

> "Failure to install the said cylinder efficiently and safely and free from leaks".

This amendment of the defendants' pleadings will be considered later. Mr. Chen Sue having thus been impleaded by the first two defendants in their defence, the plaintiff, pursuant to an order of the Master dated 18th January, 1978, joined the said Chen Sue as a third defendant and as against him, the plaintiff claimed alternatively in negligence based on the undermentioned paraphrased particulars namely:-

> (a) Supplying and installing a cylinder of Butane gas which was defective and unsafe, or which was without proper fittings and connection;
>
> (b) Failure to instal the said cylinder efficiently and safely;
>
> (c) Supplying and installing the said cylinder without first ascertaining and/or ensuring whether by way of examination, test, inspection or otherwise that the said cylinder was and would remain safe and sound while in use".

The third defendant by his defence, in so far as is relevant, pleaded that if there was an explosion on 11th October, 1973, the same was caused by the negligence of the first two defendants. The particulars of negligence were in substance similar to those pleaded against the said defendants by the plaintiff. With leave of the Court granted on 22nd April, 1980, he specifically pleaded that at all material times there were on the first two defendants' premises, two 100 lb cylinders delivered and installed by him on September 25, 1973, and October 11, 1973, respectively, and that if the cylinders were defective and unsafe and that this caused the explosion, he was not liable as he was not the manufacturer. The cylinders he pleaded were supplied to him complete with Butane gas and all fittings and were sealed by Texaco Caribbean Inc., of 92 Windward Road, Kingston.

The third defendant, by order of the Master made in Third Party proceedings had Texaco Caribbean Inc., joined in the action as a Third Party. He claimed from the company indemnity and or damages and costs for negligence in sums equal to any such sums which may be awarded the plaintiff against him.

The Third Party by the order of the Master on October 9, 1979, was given liberty to appear at the trial of the action and to take such part therein as the judge may direct, and be bound by the result of the trial. I gave the Third Party through its attorney-at-Law Mr. R. N. A. Henriques full and ample opportunity to participate in the proceedings on the footing that it was in relation to Chen Sue a defendant in the action. The input of Mr. Henriques particularly in relation to evidence elicited from the expert witness called on behalf of the first and second defendants has been of inestimable value to the Court and the Court records its appreciation and indebtedness to Mr. Henriques for the depth and incisiveness of his cross-examination of this witness.

In Suit C.L. R086/1978 George Reid claims damages against Chen Sue on the ground that the explosion which occurred on 11th October, 1973, was due to the negligence of the aforesaid Chen Sue.

The plaintiff George Reid in this Suit pleaded in substance that he ordered a 100 lb cylinder of Butane gas from Chen Sue which was delivered and installed by the latter's servants and agents on October 11, 1973. This cylinder exploded and caused a fire on the premises resulting in loss and damage to him. By amendment to his claim pursuant to leave granted by me on 22nd April, 1980, he specifically pleaded that at all material times there was only one gas cylinder on the premises.

The particulars of negligence pleaded against Chen Sue are as hereunder:-

(i) "Failure to instal the said cylinder efficiently and safely and free from leaks;

(ii) Failure to ensure that the valves and other fittings and the said cylinder were in proper working order and safe condition before leaving it for use by the plaintiff;

(iii) The plaintiff will rely on the occurrence of the explosion as evidence of negligence".

Mr. Chen Sue in his defence to this Suit having made admissions where appropriate, specifically denied that there was at the material time only one cylinder of gas on the premises. This specific denial came as a consequential amendment of the defence sought and granted following the amendment of the Statement of Claim previously adverted to by me. The defence repeated the particulars of negligence of this plaintiff as pleaded in Suit C.L. B345/76. The defendant brought in Texaco Caribbean Inc., as a Third Party pursuant to an order of the Master dated 23rd October, 1978. For completeness it is well to highlight the salient features in the pleadings between Mr. Chen Sue and Texaco Caribbean Inc., the Third Party in both Suits.

In each of the Suits, Mr. Chen Sue made it clear that he disputed the averment of acts of negligence made against him by the respective plaintiffs in the respective Suits. He however pleaded that in the event of his being found liable to them or either of them he was entitled to be indemnified by the Third Party or alternatively to recover from them damages for breach of warranty or for negligence.

The claim of Mr. Chen Sue rests primarily on his contention that since he was not the manufacturer of the cylinders and/or fittings but rather was supplied the sealed cylinders complete with fittings which he merely installed and since he was not negligent in installing the cylinders, any leakage of gas and resultant fire if not caused by the conscious act of the Reids would be the result of a defect in the cylinder or its fittings. The Third Party owed him a duty to sufficiently and properly test the cylinder before supplying the same to him. They were negligent if they in fact supplied to him a defective cylinder which, or the fittings of which were defective. Alternatively they are liable to him for breach of warranty in relation to the cylinder supplied.

The efence of the Third Party was a denial that the cylinders when supplied by them were defective. They further aver that if any fire was caused by or emanated from the cylinder installed, such was

either due to the act of the Reids or Chen Sue. They further pleaded complete exemption from liability by virtue of a clause in a contract between them and Chen Sue.

The issues thus raised on the pleadings which call for determination, concisely put, are these:-

(i) Were the circumstances of the explosion which admittedly occurred on the Reids premises resulting in fire which spread to Bata Shoe Company's premises such as to render both the Reids and Chen Sue or either of them liable to the plaintiff in damage under the principle of Rylands v. Fletcher?

(ii) If they are neither of them liable by virtue of this principle, is Chen Sue liable to both the Reids and Bata Shoe Company in negligence?

(iii) If Chen Sue is not liable to these persons are the Reids liable in negligence to Bata Shoe Company?

(iv) If Chen Sue is held liable either under the principle of Rylands v. Fletcher or in negligence, is he entitled to indemnity and/or damages from Texaco Caribbean Inc?.

Dealing with the first issue, namely liability under the rule in Rylands v. Fletcher, Mr. Leo-Rhynie in opening for the plaintiff Bata Shoe Company submitted that since the Reids had caused to be brought on their premises the cylinder of Butane gas for their own use, and since the said cylinder of gas fell into the category of dangerous things as contemplated in Rylands v. Fletcher, and since the storage and use of the cylinder of gas on the premises equally constituted a non-natural "user" of the premises within the meaning of the term as used in Rylands v. Fletcher, the Reids were liable for the damage. As regards the defendant Chen Sue he equally was liable under this rule being the supplier and installer of the dangerous thing even if he was in the circumstance an independent contractor.

The rule in Rylands v. Fletcher (1868) L.R. 1 Exch. at pages 279 and 280 was stated thus by Blackburn J.

> "We think that the true rule of the law is that the person who for his own purposes brings on his land and collects and keeps there anything likely to do mischief, if it escapes, must keep it in at his peril, and, if he does not do so, is prima facie answerable for all the damage which is the

> "natural consequence of its escape. He can excuse himself by showing that the escape was owing to the plaintiff's default; or perhaps that the escape was the consequence of vis major or the act of God, but as nothing of this sort exists here, it is unnecessary to enquire what excuse would be sufficient".

On appeal to the House of Lords, Lord Cairns L.C., said thus:

> "The principles on which this case must be determined appear to me to be extremely simple. The defendants, treating them as the owners or occupiers of the close on which the reservoir was constructed might lawfully have used that close for any purpose for which it might in the ordinary course of the enjoyment of land, be used, and if, in what I may term the natural user of that land, there had been any accumulation of water either in the surface or underground, and if by the operation of the laws of nature the accumulation of water passed off into the close occupied by the plaintiff, the plaintiff could not have complained that that result had taken place..... On the other hand if the defendants not stopping at the natural use of their close had desired to use it for any purpose which I may term a "non-natural" use for the purpose of introducing into the close that which in its natural condition was not in or upon it, for the purpose of introducing water, either above or below ground in quantities and in a manner not the result of any work or operation on or under the land, and if in consequence of their doing so, or in consequence of any imperfection in the mode of their doing so, the water came to escape and to pass off into the close of the plaintiff, then it appears to me that which the defendants were doing, they were doing at their own risk".

For purposes of the case in hand, it would be sufficient to say that since there is no evidence that gas from the cylinder as distinct from the fire escaped from the Reids' premises to the premises of Bata Shoe Company and there caused an explosion and damage, the rule in Rylands v. Fletcher would not come into play whatever may be the characterisation of the cylinder of gas or the user of the premises by the Reids'. The necessity for an escape from a defendant's premises to that of a plaintiff was re-emphasied in Read v. Lyons (J) & Co. Ltd. (1947) A.C. 156.

However, even if there had been an escape of gas from the Reids' premises to the plaintiff's which there exploded with resultant damage, the circumstance disclosed by the evidence would not

bring into play the rule in Rylands v. Fletcher. This is so because even though gas is a dangerous thing being inflamable and explosive, its supply and installation in quantities as in 100 lb cylinders or 25 lb cylinders on premises for domestic purposes do not constitute a non-natural user of such premises but rather a natural, normal and reasonable modern day use of the premises. Cases such as Dominion Natural Gas Co. v. Collins (1909) A.C. 640 and Northwestern Utilities v. London Guarantee and Accident Co. (1936) A.C. 108 doubtlessly reaffirm the principle that persons who extract natural gas from gas bearing strata or otherwise accumulate gas in their works and mains for distribution through their mains to consumers as a commercial product are prima facie within the principle of Rylands v. Fletcher. The gas accumulated in such large quantities constitutes an extra-ordinary danger and apart from being dangerous per se represents a non-natural user of land. However in Rickards v. Lothian (1913) A.C. 263 at page 280 Lord Moulton re-echoed in substance certain words of Lord Cairns in Rylands v. Fletcher in the House of Lords when he said:

> "It is not every use to which land is put that bring into play (the principle of Fletcher v. Rylands). It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of land or such a use as is proper for the general benefit of the community."

This case clearly affirms the fact that the principle of Rylands v. Fletcher comes into play only when there is some special use of land bringing with it increased dangers to others and that the said principle cannot be invoked where the use to which the land is put consists merely in the ordinary use or is a use which is proper for the general benefit of the community. In that case it was held that damage caused to the plaintiff Lothian, a tenant on the second floor, by water overflowing from a lavatory basin installed by the defendant Rickards on the fourth floor of a multi-storied building let to different tenants, did not render Rickards liable under the rule in Rylands v. Fletcher since the installation of a proper

supply of water to various parts of a house, together with such conveniences like wash hand basins was a reasonable use of the premises in modern times. Such a use of premises carries with it some danger of leakage and overflow, but the fact of such danger does not make those who instal and/or keep such convenience, do so at their peril. They will only be liable on the basis of negligence even though the duty of care may be very high relative to the danger created.

In Collingwood v. Home and Colonial Stores 1936 3 A.E.R. 200 a fire originated in premises adjoining those of the plaintiff due to some unknown defect in the electric wiring. The plaintiff's premises were damaged by the water used in extinguishing the fire. It was held that the doctrine of Rylands v. Fletcher does not apply to the use of water, gas or electricity for ordinary domestic purposes which must be distinguished from handling of them in bulk in mains or reservoirs.

Lord Wright, M.R. after quoting extensively the words of Lord Moulton in Rickards v. Lothian said:

> "It is perfectly true that electricity like gas and water, may be regarded from one point of view as a dangerous thing and the principle of Rylands v. Fletcher has been applied to persons who carry, in their property or in their mains gas, water or electricity. It would be easy to give instances. I refer to one case of electricity - Midwood and Co. Ltd. v. Manchester Corporation and the case of water illustrated by the Charing Cross Electricity Supply Company v. Hydraulic Power Company and gas is illustrated by the Northwestern Utilities case. But in all these cases there was nothing comparable to the ordinary domestic installation of electric wiring for the ordinary comfort and convenience of life. In all these cases these dangerous things were being handled in bulk and in large quantities, they were being carried in mains. There was a carriage or an accumulation of the dangerous thing. These cases undoubtedly come within the principle of Rylands v. Fletcher but they seem to me to be very different in principle and in result from the case of the ordinary domestic pipes for gas or water or for wiring electricity".

Liability of the Reids and Chen Sue based on the principle of Rylands v. Fletcher is for the reasons stated, reinforced by the

authorities herein mentioned clearly not established, this ground of liability accordingly fails.

Alternative to this principle of liability, Mr. Williams for Bata Shoe Company had in his final address initially submitted that the mere escape of the fire from the Reids' premises rendered them liable at Common Law without the necessity of proving negligence. Mr. Williams however abandoned this submission in the light of the decision of our Court of Appeal in Manboard v. Salabie (1969) 15 WIR page 132 which established in modern times the principle that liability for damage from fire escaping from one premises to another must at least be grounded on negligence.

The next issue which will be considered consequent on the finding of no liability under the principle of Rylands v. Fletcher, or for the mere escape of fire at Common Law, is that of negligence on the part of Chen Sue in relation to the Reids and Bata Shoe Company.

At the threshold of the three cornered contest between the Reids, Bata Shoe Company and Chen Sue is the issue whether there was one or two cylinders of Butane gas on the Reids' premises on the night of the explosion. The Reids in their defence in Suit C.L. B345 of 1976 which was settled and filed about 7th December, 1976, did, in the particulars of negligence against Chen Sue reasonably infer that two cylinders were ordinarily on the premises by pleading as hereunder namely:-

> "Failure to supply a second cylinder with proper fittings and connections".

A similar pleading of George Reid appears in Suit C.L. R086 of 1978 which was filed sometime in or about May 1978.

However, after Mr. Scholefield for Chen Sue sought and was granted leave to amend his statement of claim against the Third Party consistently with the reference to "cylinders" and "a second cylinder" in the pleadings of the Reids, the latter sought and obtained leave to amend their pleadings to correspond to the evidence which was led

on behalf of the plaintiff Bata Shoe Company to the effect that there was only one cylinder on the premises.

The evidence led on behalf of Bata Shoe Company and the Reids relative to the number of cylinders on the premises came primarily from one Dennis Brown and George Reid. Edmund Lionel Lothian now a retired Assistant Superintendent of the St. James Fire Service heard an explosion about 10.52 p.m. while he was at the station. At about 10.55 p.m. he received a report as a result of which the fire brigade was mobilised and despatched to the premises occupied by the Reids and Bata Shoe Company, the premises of the Reids was engulfed in fire which had spread to the premises of the Bata Shoe Company. When the fire on both premises was extinguished, Mr. Lothian returned to the Reids' premises to ascertain, if he could, the cause of the fire. He saw a gas cylinder with the valve section thereof shattered and the top or cap blown off, he saw the blown off top of the valve on the premises. The cylinder apart from the blown off cap was intact. He said he did not notice any zinc shed over the cylinder. He said he did not remember seeing two cylinders but there might have been an undamaged cylinder with the one damaged. Mr. Lothian's evidence which I accept as credible does not however assist in resolving the issue whether there were two cylinders .

One Dennis Brown called by the plaintiff in effect gave evidence in support of the Reids.

I have not been impressed by his evidence, either he was not there at all, or he is telling deliberate untruth. He fixes the explosion nearly an hour earlier than the time given by Mr. Lothian. For no rationally explicable reason he, who had merely gone to the cozy corner bar for an infrequent drink, without invitation, followed Mr. Reid through the latter's kitchen to a shed at the back of the premises merely because he heard a hissing sound like a leaking car tube coming from the direction of the kitchen of the Reids. He is not a friend of the Reids, he has never previously been to the back of the premises. There was no discussion in the bar as to what could

be causing the allegedly hissing sound. When Reid got up to go outside, he Dennis Brown instinctively knew that Reid was going to investigate the hissing sound. Unsolicitedly he waltzed through Reid's kitchen to see what Mr. Reid was up to, without any hint as to what valuable service he could have rendered. His narration of the events in the shed behind the kitchen, and as to the things which he saw in that relatively short period of time bears the stamp of a rehearsal and not conceivably the result of perception. He said the shed was dark, yet not only did he see the cylinder in the shed and that the shed had a zinc roofing, he could also see the cap on the valve of the cylinder. He could also see that Reid in putting his hand above the cylinder, did not touch it, even though the hand was a mere 6 inches above the cylinder. He discerned that the cylinder was about 16 ft. from the kitchen, he discerned that the gas was coming out from where the cylinder cap was even though he was at a distance of three feet away from the cylinder. In the relative darkness of the shed, he said he actually saw the cap of the cylinder fly off and hit the zinc roofing. In fact he excelled himself in re-examination when for the first time he said street light reflected in the shed and he could therefore see everything in the shed. He says he saw portion of the cylinder cap and spindle fly off, it flew through the zinc boring it and that it was after it bore through the zinc that the fire started.

I unreservedly reject the evidence of this witness as I find him totally unreliable, I do not therefore accept the evidence given by him that there was only one cylinder on the premises.

The defendant George Reid in his evidence on this issue said on the morning of 11th October, 1973, at about 9.30 a.m. he placed an order for gas with Chen Sue. He had only an empty cylinder when he placed the order. The cylinder was delivered and installed about 10.30 a.m. It was in use until about 9 p.m. when he locked off the kitchen. It was this cylinder which exploded later that night. Under cross-examination he admitted that when he started business

in 1967, he operated with two cylinders, that when he used two cylinders he would order replacement as soon as one ran out. He admits that he could have ordered a cylinder of gas on 25th September, 1973. He said he dropped to the use of one cylinder from about 1969, as business was not bright. He admits however that even in 1973 he was having a net weekly earning of about $200. from the restaurant catering for breakfast and lunch for the locals and the police. The price of gas then on his admission was $11.00 for a 100 lb. cylinder. He says however that he accustomed himself to the use of one cylinder as he could not afford the price of two at a time and that he does not remember ever buying two cylinders from Chen Sue at the same time.

Mr. Chen Sue the third defendant in Suit C.L. B345/1976 gave evidence. He was supported by Mr. Selvin Ulett his employee who for the past three years prior to 1973 was actually responsible for delivering and installing cylinders of gas at customers' premises. Both these persons testified that from the time when gas was supplied to the Reids there have always been two cylinders.

Mr. Chen Sue said he knew George Reid some nine years before the date of his giving evidence in 1980, he knows he runs a restaurant; Mr. Chen Sue says he has actually been to the premises before the time of the fire, he knows that George Reid keeps the cylinders of gas in a shed behind the kitchen. When Reid first asked to be supplied gas he had installation for two cylinders and this installation has never changed. He was emphatic that Reid was supplied a cylinder on 25th September, 1973, also one on 11th October, 1973.

Mr. Ulett who actually did the installation said Mr. Reid always had two cylinders. He said on 25th September, 1973, he installed a full cylinder and removed an empty one. There were then two cylinders on the premises, one in use and the full cylinder which he delivered and installed. On 11th October, 1973, he again removed an empty cylinder and installed a full cylinder. He said when he went on 11th October, there was a pot on the stove and fire was under the pot.

There were two cylinders when he left, namely one which was in use and the full one which he had installed. Both Mr. Chen Sue and Mr. Ulett say that on the morning of the 12th October when they went to the Reids' premises there were two cylinders, one with the cap and valve nut missing and the other still sealed and intact as it was when it was installed the previous day.

Having weighed the divergent evidence given on this aspect of the matter I consider as more reasonably probable that there were in fact two cylinders which were on the Reids' premises on the night of the fire and that Mr. Reid had, at least since being supplied by Chen Sue, always had two cylinders, one being replaced when empty, while the other was currently in use. The explanation given by Mr. Reid for operating on the basis of one cylinder only, is too naive to be accepted as rational much less as reasonable. Once he had started operating on the basis of two cylinders, it would cost no more to have the alternatingly empty cylinder replaced by a full one than to have the sole cylinder replaced by a full one when empty. If anything it would be most unbusiness-like to operate with only one cylinder with the attendant risk of being caught with food uncooked on the stove and irate customers waiting. I cannot conceive Mr. Reid being unblessed with the foresight to have at anyone time a full cylinder in reserve. With earnings of $200.00 net per week it is equally difficult to see how two cylinders of gas costing $22.00 could impose any crippling financial strain since once the initial outlay is made, thereafter it is only one cylinder at a time which will be purchased by way of replacement of the empty one.

I accept the evidence of Chen Sue and his witness that there were two cylinders on the premises after the one was installed on 11th October, 1973. I reject the evidence of Mr. Reid on this aspect of the matter. It is an after thought and the true position was impliedly stated by him in his pleadings before the belated amendment on 22nd April, 1980.

I further find as a fact that a cylinder was delivered and

installed on 25th September, 1973, and 11th October, 1973, respectively and on the morning after the fire the cylinder which was installed on 11th October, was still sealed and intact. Once it is admitted by the Reids that the explosion and fire originated from a gas cylinder, the irresistible inference to be drawn in the light of my finding that there were two cylinder, and that the one installed on 11th October was still intact, is that the explosion came from the one installed on 25th September, 1973, which was on the evidence of Ulett, which I accept, in use on the morning of 11th October, 1973.

This finding in favour of Mr. Chen Sue substantially erodes the allegations of negligence averred against him by both Bata Shoe Company and the Reids. The battle as to whether there was only one cylinder can thus be seen as not being a mere incidental skirmish. It was the fundamental prop on which the Reids at least hoped to establish negligence on the part of Chen Sue. On the other hand Mr. Chen Sue having established that there were two cylinders and that the one most recently installed was still sealed and intact, naturally and properly invites me to draw the inference that if a cylinder installed on 25th September, 1973, remained unmischievous until 11th October, 1973, before exploding, then the cause of the explosion must be sought elsewhere than in negligent installation or in defective cylinder or improper fittings and connections because any of these would most likely have shown up before the lapse of 17 days.

The inference which Mr. Chen Sue invites me to draw is a reasonable one, I will consider it within the context of the evidence given as to the installation and test of the cylinders and in the light of submission made by the Attorneys for the parties.

Mr. Ulett in his evidence said that on 25th September, 1973, he delivered a full cylinder. It had on the seal from Texaco, he did not break the seal as he does not break customers' seals. He connected the cylinder to the pipe and secured the same using a wrench to tighten the screw nut. He tested this coupling to the cylinder also under the cap of the cylinder for leaks. He tested

these parts with paint brush and soap water or sud and found no leak.

On 11th October, 1973, when next he installed a cylinder he tested it in manner similar to the test which he carried out on the cylinder installed on 25th September. He said on this occasion he also routinely tested the one which was in use, since he was testing the one newly installed. He admits that to effectively test if the coupling is properly screwed on to the cylinder he would have had to break the cylinder seal and turn on the gas from the cylinder and that he had not done so as he does not break the seals on customers' cylinders. He said that the purpose of applying the soap water test to the top part of the cylinder is to discover if the cylinder is leaking in the valve area. If the valve or lock nut is defective the soap water test would cause bubbling so indicating a leak. He found no indication of leaks from his test. He said that from his test neither of the valves in the two cylinders was defective. Equally it must be remembered that the cylinder installed on 25th September was open and in use on 11th October, the soap test on 11th October carried out routinely on this cylinder would reveal leaks at the coupling if the installation was improperly done.

He says he has had complaints from the Reids of the gas finishing quickly, he would go to inspect if there was a leak, his inspection always revealed that the burner of the stove was not working properly thus causing the gas to burn out quickly. He said that after the fire the regulator and the coupling to each cylinder was intact and in place.

Mr. Huntley Munroe Q.C. for the Reids in his final address in relation to the liability of Chen Sue referred to the particulars of negligence alleged against him in Suit C.L. 1978/R086 already referred to which for ease of reference is again repeated hereunder namely:-

> " (i) Failure to instal the said cylinder efficiently and safely and free from leaks;
>
> (ii) Failure to ensure that the valves and other fittings and the said cylinder were in proper working order and safe condition before leaving it for use by the plaintiff;

" (iii) The plaintiff will rely on the occurrence of the explosion as evidence of negligence".

He submits that "Res ipsa Loquitur" applies as is pleaded. Mr. R. Williams Q.C. in his final address submitted that Chen Sue as the supplier and installer of the gas cylinder failed to discharge the high duty of care imposed on him having regard to the inherently dangerous nature of gas. Chen Sue, says Mr. Williams, had failed to carry out any sufficient test to determine the reliability of the jointing since on the admission of Mr. Ulett the gas was not turned on when the test was carried on.

Was Mr. Chen Sue on the evidence negligent? The evidence is that in installing gas cylinders Mr. Ulett connects the cylinder to the supply line and uses a wrench to tighten the screw over this coupling. He then applies a soap sud test to the coupling and under the cylinder cap in the area of the valve. The purpose of applying the soap sud test to the valve area of the cylinder is to determine whether there was any leak in this area. This is possible even though the gas is not turned on. Dr. Ellington an expert called by the Reids confirms in his evidence that when the spindle is locked off there can still be an escape of gas, however when it is opened the gas then escapes through the supply line hence any leak in the spindle area should stop when the cylinder is installed and the gas turned on. He said that the valve is normally subjected to a hydrostatic test every five years. As regards the coupling of the cylinder with the supply line, he says a simple soap test is usually carried out to determine leakage in the supply line and for a proper test to determine the escape of gas through this coupling the gas has to be turned on before the soap test is carried out. It seems therefore that for a proper and complete test to be done, the soap test would first have to be applied to the valve area before the spindle is turned open so to detect any leak in this area. Then if no leak is detected, the coupling area is tested by turning the spindle to the open position and applying the soap test.

Gas from the cylinder would now be passing through the supply line and if the coupling was inefficiently done gas would escape therefrom.

Admittedly Mr. Ulett did not open the spindle before testing the coupling of the cylinder installed on 11th October. However even assuming contrary to my finding, that the explosion came from the cylinder installed on 11th October, there was no escaping gas from the coupling of that cylinder. Reid's evidence is that he discovered where the gas was leaking from. He said when he discovered that the hissing sound was caused by gas leaking, he intended if the leak was in the supply line to close the valve. However he discerned that from the part of the cylinder where the gas was coming, he could do nothing. He said when he put his hand above the valve a heavy pressure was coming from around the valve. Under cross-examination by Mr. Scholefield for Chen Sue he said the gas was escaping from the cylinder top. The evidence of Ulett is that he applied the soap test to the opened cylinder which was in use on 11th October. In this state of the evidence I find as a fact in the absence of evidence of any leakage at the coupling of either cylinder that both cylinders were efficiently and safely installed and none was leaking at the joint or coupling on 11th October or at any time. In relation to the test of the other areas of the cylinders Mr. George Reid under cross-examination by Mr. Scholefield said he saw Ulett use paint brush with soap sud to paint the top where the valve was to see that there was no leak, he further admitted that this is done each time when a cylinder is installed and that it was done on 11th October, 1973.

In examination in chief Mr. George Reid had already said that he discerned no escape of gas when the cylinder was installed. I find as a fact that Chen Sue by his agent or employee on each occasion efficiently installed the cylinder on the Reids' premises and carried out such test as was normal and reasonable to ascertain the existence of any leak in the valve area of the cylinder and that neither on 25th September nor on 11th October, 1973, was any leak shown up.

Further that the coupling of the cylinder installed on 25th September was tested on 11th October, 1973, when the spindle had been turned open and the gas in use and no leak was shown up in the valve or at the coupling.

The plaintiff, Bata Shoe Company in addition to the particulars of negligence pleaded against Chen Sue which were similar to those pleaded by the Reids, also pleaded that Chen Sue was negligent in supplying and installing a cylinder of Butane gas which was defective and unsafe. Also that he failed to supply a Butane cylinder with proper fittings and connections. In regard to these additional particulars of negligence Mr. Scholefield in his final address submitted that Chen Sue in supplying the cylinder was a distributor and not the manufacturer. He would accordingly be liable only for supplying cylinders with patent defects. Mr. Scholefield's submission is well founded, Mr. Chen Sue as a distributor would not be expected to carry out a hydrostatic test of the valve to ascertain defects therein. His normal duty in my view would be to check for such damage to the cylinder and valve connections which are readily visible to the eye and in addition to adopt such conventional and reasonable tests such as the soap test to the valve area prior to opening the spindle, to determine any leak in this area. There is no evidence that the cylinder itself was in any way damaged. Mr. Lothian in his evidence said that the top of the valve section of the cylinder was blown out, there was a hole where the nut was, so that a stick could be pushed down in the cylinder. This would at the most, likely indicate a defect of the valve area of the cylinder though I make no such finding. Apart from this the cylinder was intact. It is not shown on the evidence that a defect in the valve can be picked up other than by a hydrostatic test or the conventional soap test. The former I have said would be unreasonable to expect of a distributor. He does not have even his original consignment of cylinders recycled to him so that he could possibly know which is in need of a five yearly hydrostatic test. Mr. Ulett on the evidence carried out the

soap test and found no defect.

Apart from the specific acts of negligence pleaded by Bata Shoe Company and the Reids the latter as plaintiff in Suit C.L. R086 of 1978 pleaded that the fact of the explosion is evidence of negligence on the part of Chen Sue. The fact of the explosion Mr. Munroe submits characterise a situation calling for the application of the principle of "Res ipsa Loquitur". He cites in support Moore v. Fox and Sons 1956 1All E.R. 182.

Mr. Munroe's submission is palpably unsound and derives no help from the case cited because the "res" which caused the damage to the Reids is in the control and management of the Reids who are the plaintiffs and not as in the case cited in the control and management of the defendant. Chen Sue merely delivers and instals the cylinder and thereafter is not shown to be in control thereof. The principle thus sought to be invoked, in limine, does not come within the recognised and established parameters laid down by Erle C.J. in Scott v. London Dock Co. (1865) 159 E.R. 665 when he said:-

> "But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care".

In conclusion I find as a fact that both Bata Shoe Company and the Reids have failed to establish any negligence on the part of Chen Sue.

In the light of this finding it is unnecessary for me to consider whether the Third Party, Texaco Caribbean Inc., would have been liable to Chen Sue on the basis of an adverse finding against the latter and I expressly decline to adjudicate on this issue.

There remains the issue whether the Reids are liable in negligence to Bata Shoe Company. I have already found that Dennis Brown is a totally unreliable witness and have accordingly rejected his evidence as to what he said took place. I have equally rejected George Reid's evidence that he was operating on only one cylinder.

I have found as a fact that he ordinarily and customarily operated with two cylinders. A cylinder was supplied to him on 25th September, 1973, which was actually in use on 11th October, 1973, when the other cylinder was installed. The explosion occurred from the cylinder which was installed on 25th September, 1973, and the one installed on 11th October, 1973, was removed intact by Chen Sue.

What caused this cylinder to explode? Mr. Edmund Lothian who went on the Reids' premises immediately after the fire was contained, said he formed an opinion as to the cause of the explosion and fire. He has had 44 years in the fire service with fire fighting training and experience. In his fire fighting training he has learnt that a gas cylinder can leak consequent on which it should not be kept in a completely enclosed space. It should ideally be kept in an open space so that gas leakage may be into the rarified atmosphere where it is not likely per se to cause damage. He formed the view that an open light from somewhere ignited the gas which was leaking from a defective valve. This caused the explosion. He saw the top of the valve on the premises, he did not however take possession of it nor did he inspect it. It was his view that it was the explosion which blew out the valve cap.

The defendant George Reid said that when he discovered that the cylinder was leaking from the valve area, he tried to put his hand on the valve cap to close off the gas. In the split second when the pressure of escaping gas was preventing him from actually grasping the valve cap he heard a sound like "woof", a part of the top of the cylinder blew off, he heard it hit something like zinc and immediately after, there was fire.

There was no light in the shed. Under cross-examination by Mr. Scholefield, he denied that any kind of light was taken for use in ascertaining the area of the leak. On his version of the evidence, this single cylinder which he customarily uses was in use for some 12 hours before the explosion. Under cross-examination by Mr. Henriques he said that immediately the explosion occurred the shed

was engulfed in fire. He suffered burns to his face, hands and knees and calf of his left leg.

The defendant from this evidence is unable to say what caused the explosion but what is clear from his evidence is that in so far as the sound "woof" constitutes the explosion, this preceded the hitting of the zinc roof by the escaping part of the cylinder. In his evidence in chief he had said "immediately I heard gushing sound or explosion there was fire". It was this gushing sound or explosion which to my mind he dramatized as "woof" under cross-examination. When so read with his evidence in chief the reasonable inference to be drawn is that the "woof" or explosion and the fire were simultanteous and preceded the flying off of the cylinder cap. This inference is however not the one which the Reids' invite the Court to accept. Rather it is that using Dr. Ellington's words there was an "explosive venting" which was spontaneous. This jettisoned the cap of the cylinder onto the zinc roof of the shed. The impact of the cylinder cap on the zinc most likely generated sufficient heat which in a highly inflamable atmosphere created by the admixture of escaping Butane gas and air in the right proportion, caused the fire which engulfed the premises of the Reids and also the premises of Bata. In these circumstances they were in no way negligent as alleged by Bata or at all.

Dr. Ellington called as an expert by the Reids was given a composite of facts by Mr. Huntley Munroe based primarily on the evidence of Dennis Brown on which his opinion was sought as to the cause of the explosion and fire.

The facts assumed for purposes of his opinion are paraphrased hereunder:-

(i) A 100 lb cylinder of Butane gas is installed between 10 - 11 a.m. in a shed 7 ft. high with a zinc roof and open sides, 16 feet from a kitchen;

(ii) About 11 p.m. on the same day a hissing sound is heard which is investigated and it is discovered that gas is leaking from the valve area of the cylinder;

(iii) A person puts his hand about 6 inches above the top of the cylinder and the hand is blown away by pressure of escaping gas;

(iv) There is almost simultaneously an explosion;

(v) The top of the cylinder is blown off hitting the zinc roof boring a hole in the zinc roof which was about 3ft. above the cylinder;

(vi) There was immediately thereafter a fire;

(vii) The stove in the kitchen was not on and no naked light was brought in or about the shed.

It is to be noted that a very important indisputable fact was omitted namely that on George Reid's evidence the gas had been turned on from the cylinder and was in use in the kitchen from the time it was installed until about 9 p.m. when the kitchen operation ceased.

On the assumed facts, Dr. Ellington having cautioned that his opinion in the absence of inspection by him of the cylinder and the blown off part would be primarily theoretical, essayed as his opinion that:

> "There was a release of Butane gas through a worn spindle gland in the top of the cylinder. This spindle gland might have been weakened by a build up of pressure which could have developed intransit. This build up of pressure resulted in a 'propulsive venting' which would account for the hand being pushed aside from over the top of the cylinder. The propulsive venting could have arisen because of a defective 'safety release valve' which is provided on the cylinder, which valve, when in good order, allows excess pressure to be released from the cylinder into the atmosphere until the pressure returns to equilibrium".

This propulsive venting blew off the spindle and spindle valve which moving at high speed, punctured and ruptured the zinc roofing producing an area of high temperature. The escaping Batune gas which was then in the right proportion with air was ignited when it came into contact with this area of high temperature. Assuming there was a defective valve, the build up of pressure intransit would be determined by the level of temperature to which the cylinder is exposed. It normally takes about ½ hour to 1 hour from the end of

transit for the cylinder pressure to return to equilibrium.

Under cross-examination by Mr. Scholefield Dr. Ellington was given certain additional assumed facts based on Chen Sue's evidence namely that prior to delivery the cylinder was stored in an open-walled compound exposed to the sun and was transported in an open truck for only about ¼ mile when it was installed by mere attachment to a regulator.

In the light of the additional facts Dr. Ellington was of the view that the more efficacious time for expansion, that is to say build up of pressure, would be when the cylinder was under the zinc roof with the sun up. Spontaneous explosive venting would more likely have occurred then. While spontaneous propulsive venting was not to be ruled out at a later time, there was less chance of this occurring with the external temperature reduced. He said that with the reduction in external temperature after sun down, the possibility of human interference with the spindle and spindle valve could not be ruled out. The time for spontaneous explosion was then not as propitious. Dr. Ellington was further of the view that, either on the assumption that explosion was from a cylinder which had been installed some days before and was in use on the date of the explosion, or had been installed on the date of the explosion and was in use during the day, the probability of human interference causing the explosion was greater and more likely than a spontaneous propulsive venting.

Under cross-examination by Mr. Henriques, the following important and significant opinions were expressed by Dr. Ellington namely:-

(i) If a 100 lb cylinder was installed between 10 - 11 a.m. and was being used in the kitchen of a restaurant up to 8 p.m. in the night, any build up of pressure in the cylinder would have been relieved by use;

(ii) Even if the build up of pressure had been occasioned by transportation and installation under a zinc roof shed the use in the kitchen would relieve the build up;

(iii) If the cylinder was installed about 11 a.m. and started hissing about 10 p.m. then on the assumption that venting had only then

(iii) commenced, and having regard to the low pressure of Butane, and the use of the gas during the day, he would not expect the pressure in the cylinder even if only being relieved by a leak through the spindle area to be capable of blowing away the hand of a person trying to put his hand over the top of the cylinder. The likelihood of a spontaneous propulsive venting would then be small. He would not expect the spindle to shoot up and hit the zinc roof when the cylinder had been in use during the day;

(iv) Before spontaneous propulsive venting can occur there must be the simultaneous convergence of four factors namely, a defective safety valve, a worn spindle, abnormal temperature, and pressure not being relieved by use. The absence of any one factor precludes spontaneous propulsive venting;

(v) If a 100 lb cylinder was in use for a whole day and a hissing is heard during the night, and a human agent approaches to ascertain the cause of the hissing, it is more likely that any explosion occurring would be caused by ignition from a naked light since the escape of Butane gas would be minimal and could not cause spontaneous propulsive venting. If the cylinder had been in use for about two weeks the probability of spontaneous propulsive venting would be very small;

(vi) Butane being heavier than air, in the event of a venting would form a layer near the bottom of the cylinder creating an ignition area just above that level. A naked light brought within the area of the leak would create a high temperature resulting in a high pressure leading to propulsive venting. There would be the ingnition followed by the explosion.

(vii) The evidence read to him wherein George Reid said he heard "woof" and "some part of the cylinder blew off" could be explained by the mixture of Butane and air being lit, in which case the fire would have started not in the zinc roof but nearer to the ignition area created by the escaping Butane gas. A naked light could have been applied and this would be a possible explanation of the sound "woof".

What emerges from Dr. Ellington's evidence is that though he cannot give an affirmative answer as to what specifically caused the explosion and fire, the probability of explosion due to human interference with the spindle gland causing the leak, and further of an ignition initiator having been introduced by human agent is

greater than a spontaneous propulsive venting in a cylinder which was installed and in use for some 9 - 10 hours prior to the explosion. A fortiori, the likelihood of a spontaneous propulsive venting is very much less where the cylinder had been installed some 16 days at least prior to the explosion and had been in use for more than 10 hours at the least.

Mr. Reid's evidence as to the events culminating in the fire does not, in my view, appear reasonably probable in the light of the opinion expressed by Dr. Ellington except for the part of the evidence where Mr. Reid said "immediately I heard gushing sound or explosion there was fire". This, Dr. Ellington considered as explicable on the basis of combustion resulting from an ignition initiator having been brought into contact with the admixture of Butane and air. A fire would thus have been caused around the valve area causing the propulsion of the spindle. The fire would thus not have originated in the roof area resulting from any impact of the spindle onto the zinc roof. The nature of the injuries suffered by George Reid namely burns to both hands and forearms, face, ears, both knees and calf of the left leg with no burning of the scalp are also in the opinion of Dr. Ellington more consistent with the fire not having started in the shed roof but some where around the valve area.

I accordingly reject Mr. Reid's evidence that he introduced no naked light in the shed when in search of the area of leak in the cylinder. In the absence of a spontaneous propulsive venting which I reject, the evidence on record points to the fact that the only other circumstance in which there can be a propulsive venting is by ignition of Butane gas which has escaped and has formed an ignition area around the valve area of the cylinder. As on the evidence, Mr. Reid did approach the cylinder and was the one who placed his hand some 6 inches above the top of the cylinder, the irresistible inference, from the sudden explosion engulfing the shed in flames when this was done, is that he must have had some naked light in his hand which ignited the escaping Butane gas and caused the explosion and fire.

In the course of his final address Mr. Williams Q.C. in making submissions relative to the liability of Chen Sue submitted that even if Mr. George Reid was found to have used a naked light in his search for the locus of the escaping gas, the person found to have caused the escape of gas would be the person liable in damages and not the person who used the naked light. He cited as authority for this view "Burrows vs. Marsh Gas and Coke Co." (1872) (1861-1873) All E.R. Reprint page 343. The decision in this case does not support Mr. Williams as it turned on its own peculiar facts.

The facts briefly were as follows:-

"The plaintiff engaged a gas fitter as an independent contractor to make alterations to the gas fittings in his shop. On the advice of this gas fitter the plaintiff then requested the defendant gas company to supply and instal new service pipes from the company's main on to the meter in the plaintiff's premises. This was done by the company which supplied its own material and labour. The service piping was defective and had a leak in it. The gas was turned on from the main before the service pipe was tested and gas escaped through the leak. An employee of the gas fitter who was working on the premises heard the escape of gas and went into the shop to investigate the source of the escape. He had a lighted candle in his hand and an explosion took place the moment he entered the shop".

The action was primarily framed in contract alleging breach of contract in not supplying proper service piping and breach in not well and sufficiently laying the same, there was a further allegation that they were negligent in laying a defective pipe. The jury found that the employee of the gas fitter in investigating the source of escape of gas with a lighted candle was guilty of negligence but his negligence did not exonerate the company from liability for breach of contract. Equally they were negligent in not effecting a test to ascertain that the pipes and fittings were alright. The company was held liable for breach of contract.

Cockburn C.J. at page 345 said:

> "There was, therefore, a breach of contract on their part, and although that alone would not, apart from the negligence of a third person, have brought about the accident which occurred, yet inasmuch as an escape of gas is necessarily dangerous and the escape was the necessary consequence of the defective pipe which the defendants supplied, I am of opinion that the action is maintainable".

It will thus be seem that there was a clear finding that the use of a naked light to investigate the source of escape of gas was a negligent act. The employee and the independent contractor were however not sued. The plaintiff rather relied on his claim in contract against the Gas Company.

The case in my view merely highlights the undoubted right of a plaintiff to elect which cause or causes of action he will pursue. He elected to pursue his claim primarily in contract and succeeded. It does not in my view establish that he could not alternatively have successfully recovered in negligence against the employee and the latter's employer.

In Brooke v. Bool (1928) 2KB 578 a tenant of a lock-up shop requested her landlord who lived on adjoining premises communicating internally with the shop, to visit the shop occasionally at night to see that everything was secure. A lodger complained one night to the landlord of a smell of escaping gas which he believed came from the shop. Both went to investigate. A gas pipe terminating in a burner accessible from the floor ran down the wall of the shop. The landlord examined the lower part of the pipe with a naked light and lit the burner but found no leakage there. The lodger got on the counter of the shop and proceeded to examine the upper part of the pipe also with a naked light. An explosion followed and the teneant's goods on the premises were damaged. It was held that the lodger was negligent and the landlord in the circumstances of the case was liable for the lodger's negligence.

Talbot J. at page 159 said:

> "It is obvious that to examine a place in which an escape of gas is suspected is highly dangerous, unless proper care is taken, and that one of the necessary precautions against disaster is to avoid the use of a naked light".

The necessary precaution against disaster, by avoiding the use of a naked light was exactly what Mr. Reid failed to take in his search for the locus of the escaping gas. He was negligent in not heeding this necessary precaution. The result of his negligence was that a fire started which engulfed his premises and escaped to the premises of Bata Shoe Comapny and there caused damage. The Reids are accordingly liable to Bata Shoe Company for the damage caused.

There will accordingly be judgment for the plaintiff Bata Shoe Company against George Reid and Cinderella Reid jointly and severally in the sum of $21,527.08 being the agreed quantum of damage with costs to be agreed or taxed.

There will be judgment for Chen Sue against Bata Shoe Company in Suit C.L. B345 of 1976 and against George Reid in Suit C.L. R086 of 1978 with costs in each case, the same to be agreed or taxed.

There will be judgment for Texaco Caribbean Inc., the Third Party against Chen Sue in each of the above two Suits with costs in each case to be agreed or taxed.

Dealing with the incidence of the costs, I find, in the circumstances of this case, that it was reasonable, prudent and proper for Bata Shoe Company to have joined Chen Sue as a defendant having regard to the defence filed by or on behalf of the Reids. Equally was it reasonable prudent and proper for Chen Sue to have brought in Texaco Caribbean Inc., as a Third Party.

In view of the immediately foregoing, it is hereby ordered that the costs paid or payable by Bata Shoe Company to Chen Sue, and the costs paid or payable by Chen Sue to Texaco Caribbean Inc., in

Suit C.L. B345 of 1976 shall respectively be recoverable from and be reimbursed by George Reid and Cinderella Reid jointly and severally. In addition the costs paid or paybale by Chen Sue to Texaco Caribbean Inc., in Suit C.L. R086 of 1978 shall be recoverable from and be reimbursed by George Reid.

Interest is awarded on the sum of $21,527.08 at the rate of 4 per centum per annum from 11th Octiber, 1973, to the date of judgment.