



No.23 of 1968

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL  
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

IN THE MATTER of CIVIL SUIT NO.67 OF 1964  
IN THE HIGH COURT AT  
JOHORE BAHRU

B E T W E E N :

10 LEONG BEE & CO. Appellant  
(SUNG AS A FIRM) (Plaintiff)

- and -

LING NAM RUBBER WORKS Respondent  
(SUED AS A FIRM) (Defendant)

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CASE FOR THE RESPONDENT

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		<u>Record</u>
20	1. This is an appeal from a judgment of the Federal Court of Malaysia (Ong Hock Thye F.J., Raja Azlan Shah J., and Pawan Ahmad J.) dated the 26th day of January, 1968 which allowed the Respondent's appeal from a judgment of Azmi C.J. given in the High Court of Malaya at Johore Bahru and dated the 1st day of October, 1966. In his judgment Azmi C.J. found that the Respondent was liable in negligence for allowing a fire which broke out on its premises to spread to the Appellant's premises next door and cause damage. He awarded the sum of \$87,135.82 in respect of the damage caused to the Appellant by the fire. The Respondent appealed to the Federal Court on the issue of liability and on the quantum of damages and the Federal Court allowed the appeal on the issue of liability and quashed the finding of negligence against the Respondent on the ground	94 72
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82 that the fire was wholly unforeseeable by  
the Respondent or its servant. The Appellant  
cross-appealed in respect of the trial judge's  
dismissal of its claim that the Respondent was  
guilty of negligence and nuisance in  
relation to the condition of the Respondent's  
premises and also on the quantum of damages.  
100 The Federal Court dismissed the cross-appeal.

2. The Pleadings

3 The Appellant alleged in paragraph 4 of 10  
their pleadings that the Respondent, its  
servants or agents had negligently caused the  
said fire or alternatively negligently failed  
to extinguish the said fire or to prevent the  
same from spreading to and damaging the  
Appellant's premises. Further in their  
particulars of negligence the Appellant alleged  
that the Respondent acted negligently by :-

(i) Permitting the Defendant's said 20  
premises to fall into a state of  
disrepair thus rendering it a fire  
hazard;

(i) (a) Permitting the Defendant's said  
premises to be used as a factory  
for the manufacture of rubber  
goods and storage of rubber  
sheets and other combustible  
substances, a purpose for which  
it was not intended or suited.

(ii) Permitting large quantities of debris 30  
and oil stocks to be accumulated on  
the Defendant's said premises so as  
to render the spread of a fire to be  
immediate and unavoidable;

(iii) Failing to take any or any proper  
precautions to deal with a fire if  
such should arise;

(iv) Failing to raise an alarm upon the 40  
fire being started so as to enable  
the spread of it to be efficiently  
checked;

(v) Failing to take any or any proper steps to prevent the spread of the said fire.

3. The claim on nuisance was not specifically pleaded but it was agreed by Counsel for both parties at the trial that it was open to the Plaintiff to claim under that head.

4. Facts in Brief

10 The following extract is taken from the Judgment of Ong F.J. -

20 " The Respondents were dealers in motor spare parts occupying a shophouse, 85A Jalan Scudai Tampoi, Johore. The Appellants owned the adjacent premises Nos. 73, 75, 77 and 79 used by them as a factory for the manufacture of rubber slippers. These premises, including the Respondents' shophouse, were situate within the industrial area of Tampoi. At about 5 a.m. on February 2nd, 1964, long after the Appellants' workmen had departed at the end of the previous day's work, a fire broke out in the factory which spread rapidly on to the Respondent's premises, causing considerable damage to both properties. The cause of the fire was never established. "

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30 5. The Appellant claimed damages for loss and expenses caused by the fire and special damages of \$2,000/- for fees for a survey report on the assessment of loss suffered.

6. The Respondent denied that the fire started on its premises or that the fire was caused or spread by its negligence or the negligence of its servant. It also denied all the particulars of negligence as set out by the Respondent. In the appeal the Respondent put the damages claimed and awarded into issue.

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74 7. Azmi C.J. found that the state of the Respondent's premises did not amount to a nuisance or a fire hazard. He also said that the allegations of negligence in particulars (i), (i)(a) and (ii) were unfounded and he dismissed them. He was correct in so doing in view of the evidence given by both sides.

8. Evidence justifying conclusion of no negligence and no nuisance in respect of Premises

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11 (a) P.W.1 The Chemist

(1) He was trying to find out if the fire was caused by chemicals 15 E

(2) He stated that he could not find the cause of the fire, the task for which he was employed. 15 D

(3) He said that the fire originated on the Respondent's premises 16 D

(4) He said that none of the things mentioned in paragraph 2 of his report could burn by themselves 16 G 20

Paragraph 2 of his report says :-

" The burnt-down building contained various electrical machinery, processed rubber slabs, manufactured rubber goods e.g. slippers, white and coloured chemical powders, black oil and debris consisting of burnt rubber, zinc sheets, a fuse box, electrical writing, etc. "

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(5) In paragraph 6 of his report (Exhibit P.1) he said that he examined the debris that he recovered from the floor of the building, but did not find volatile hydro-carbons.

(6) The rubber "cement" was intact when

he found it and it would explode if placed near intense heat 17 A.B.

Conclusion

None of the materials found were self-igniting and they did not cause the fire.

(b) Electrical Expert

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(1) Electrical wiring was in order 18 E

(2) Fire not caused by electrical fault 18 E

10 (3) Exhibit P.4 (Report) supports above. Done by an Electrical expert.

Conclusion

No nuisance or negligence in electrical maintenance.

(c) As to the general condition of the premises:-

(1) Health Inspector (D.W.2) inspected premises on 7-1-64 49 E 49

He found -

20 (a) Floor not broken, no oil on it and condition satisfactory 49 F

(b) Saw to ventilation 49 G

(c) Drains free from dirt and water flowing freely 49 F

(d) Walls clean 49 F

(e) Yard all right 49 G

(f) Fire extinguishers there and in good working condition 50 A

(2) Inspector of Machinery (D.W.1) inspected premises at end of 1963 and 45

gave it a certificate of fitness

Exhibit D.15 - 45 F

He said

- (a) No generator on premises 46 C
- (b) Electric motors adequately enclosed 46 C
- (c) Floor free from oil and dirt 46 F
- (d) Enclosure to prevent sparks escaping when machine in motion and if motor not running no danger from sparks at all 46 D 10
- (e) Machines in good order 46 G
- (f) cursory glance at wiring indicated it was sound 47 A
- (g) Oil or grease for lubricating machines in box inside the machine 47 B
- (h) Fire would melt grease and make it flow out 47 B. The fact that grease was found on the floor after 20 the fire is therefore not of significance.
- (i) Building adequate: floor concrete 47 C
- (j) His duty to see to safety - freedom from danger of fire 46 F
- (k) No risk of fire from machine 46 F
- (l) Nothing he saw could lead to spontaneous combustion from operation of the machine. 46 G 30

Conclusion:

Nothing in this evidence could support

negligence or nuisance re the premises.  
Condition satisfactory.

- (3) D.W. 6 one of the partners in the rubber factory adverts to good conditions:
- (a) Premises have to be kept clean or else his slippers which have to be white will be discoloured  
55 D - E
  - 10 (b) Preserved rubber sheets stacked safely away from walls 55 G.  
No metal shelves 62 F
  - (c) No rubber compound manufactured at factory for some time 60 A
  - (d) No solvent used after September 1963 55 B
  - (e) The external walls are made of corrugated iron sheets 58 G
  - 20 (f) Some other wooden walls removed and zinc sheets put in 58 F
  - (g) Roofs of zinc
  - (h) Fire precautions taken by 5 fire extinguishers and notices prohibiting smoking, walls of zinc 54 D. Watchman (jaga) instructed in use of extinguishers 53 A
  - (i) No natural rubber stored in factory - only in its cured state.
- 30 He also obtained several Certificates to enable him to run factory :-
- (1) Certificate of fitness for machinery Ex D.15
  - (2) Permission to convert factory from shophouses Ex. D.17

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- (3) Licence from Collector of Land Revenue: see Ex. D.18 - letter
- (4) Satisfied requirement of D.18A and had certificate renewed annually 54 C & D
- (5) Licence to store rubber given 54 B

Conclusion:

General state of premises more than satisfactory.

9. There is no evidence to support the allegation of dirt and disrepair made by the Appellant. There is a natural use of site in an industrial area and the premises are adequate for its purposes. The facts do not support the allegations in Paragraph 4 (i), (i)(a) or (ii) of the Statement of Claim. 10

74 The Chief Justice pronounced that the building although "perhaps not the best kind for the purpose, had been approved by the local authorities, who had placed certain conditions which appear to them to provide sufficient safety measures." It is evident that the Chief Justice accepted that these conditions had been satisfied. 20

10. However the Chief Justice found that the Respondents were negligent in that the fire spread to the Appellants' premises and that the particulars of negligence (iii) - (v) were proved. In this respect the Learned Judge was wrong: the evidence does not justify this view. He said in his judgment "I will therefore now consider the question of negligence on particulars (iii), (iv) and (v). On this question, I think the following evidence would be relevant. The Defendants employed D.W.3 as a watchman who in my view was incompetent. I accept his evidence that he was there the whole night because on this ground the Plaintiffs did not try to dispute but I feel considerable doubt that he was 30 40



really awake during the part of the night and early next morning. I accept the evidence of both the experts called by the Plaintiffs that the fire must have originated some hours before it was discovered which would have meant that the fire started in a small way until the rubber materials became effected. If the jaga had really been awake I feel sure that he would have become aware of the burning  
10 by the powerful smell the burning rubber must have produced. An ordinary watchman would have noticed this powerful smell. Again, fire extinguishers were provided but I accept the evidence of the fire officers none of them had been used. The jaga also failed to telephone the police or the fire engine when he easily could have done so on the office telephone where he said he was lying all night. If he  
20 had been a younger man or a more suitable person and less excitable I am sure that he could have telephoned either the police or the fire brigade long before the fire had developed and destroyed the defendants' premises. I am also sure that the jaga had no knowledge of how to deal with a case of fire. I would therefore say that the plaintiffs succeed under particulars (iii), (iv) and (v)."

11. Evidence showing that a charge of negligence cannot be supported on the facts before the Court.  
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- (1) The watchman (jaga) did his rounds normally and did not notice any fire  
51 D
- (2) He was far away from the fire and did not smell any burning or feel the heat  
51 F
- (3) He was awake between 4 a.m. - 5 a.m.  
51 E
- (4) By the time the fire was discovered it was in an advanced stage and fire extinguishers were of no use 26 F and  
40 50 D

- (5) D.W.3 (the fire officer) said that he could not have stopped the fire even if he had come 30 minutes earlier  
28 F
- (6) As soon as the watchman was aware that there was a fire he did not leave the matter there but took positive steps to stop the fire.
- (i) He tried to ring his employer and also 10
- (ii) told his neighbour to ring the fire brigade 50 D, 51 B and 52 E
- (7) He helped P.W.6 (one of the partners of the Appellant firm) to move his things and save them from the fire  
53 C
- (8) There was a wind which could have helped to spread the fire 50 G
- (9) The area was only  $\frac{1}{2}$  mile away from the sea and so would be well within the area of sea breezes. 20
- (10) In P.W. 6's report he said he was alerted by jaga. Ex. P.10

Conclusion:

The watchman acted promptly as soon as he became aware of the fire. He was the one who alerted P.W.6 to ring the fire brigade. There was nothing in the evidence which indicates that there was any kind of probability of a fire breaking out and neither he nor the Respondent could be expected to foresee that it would. 30

12. The Law on the matter

So far, it has been argued that the watchman was not negligent. This pre-supposes that he was under a duty of care to the Defendants. "It is essential in English law

that the duty should be established: the mere fact that a man is injured by another's act gives in itself no cause of action: if the act is deliberate, the party injured will have no claim in law even though the injury is intentional so long as the other party is merely exercising a legal right: if the act involves a lack of due care, again no case of actionable negligence will arise unless the duty to be careful exists": Lord Wright in Grant v. Australian Knitting Mills Ltd. 1936 (A.C. 85 at p. 103). In the Wagon Mound No.1 Viscount Simonds said: "It is, no doubt, proper when considering tortious liability for negligence to analyse its elements and to say that the Plaintiff must prove a duty owed to him by the defendant, or breach of that duty by the defendant, and consequent damage". These principles are part of the law of Malaysia regarding negligence. It is submitted that there was no duty of care in the present case.

13. There is no evidence to show that the outbreak of fire was foreseeable. A fortiori, it was not foreseeable that fire would break out in the early morning when the factory was not in operation and was deserted save for the watchman. As the outbreak of the fire was not foreseeable, it was not possible to foresee a further step, namely, the spread of the fire. If this view is accepted then there can be no liability on the part of the Appellants.

14. The other view is that even if it is clear that the fire was accidental and not foreseeable, once the fire started and it was brought to the attention of the Respondent or its servant, from that moment there should be a duty to stop its spread. If this alternative view is correct the Respondent is still not liable. It is clear from the evidence given before the trial judge that even if the fire brigade had been called earlier (i.e. the moment the watchman became aware of it), the fire still could not have been put out before it spread to the Appellant's premises.

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15. The important point is whether, assuming that the watchman was sleeping on his job, he was aroused while the fire was still within his power to subdue. Unless this was established - which it was not and indeed the evidence was all the other way - he was not at fault: there is no negligence in him sleeping. Indeed the Respondent was not obliged to have a watchman on the premises at all. Moreover the watchman was employed to protect the Respondent's premises, not the Appellant's. Then, again, as regards the watchman's failure to use the fire extinguishers, there is no evidence that it was possible for him to do so or that the use of them would have been of any effect. His evidence, which was uncontroverted, was that the first warning he received was a shout from outside the factory to the effect that fire had broken out. Since the fire was of such proportions that it was already clearly visible from outside when his attention was called to it, it seems unlikely that he could have done anything effective and this view is supported by the evidence of the fire officer.

16. Judgment of the Federal Court

94 (a) Ong Hock Thye F.J. in the leading judgment upheld the finding of fact by the trial judge that there was no nuisance or negligence as far as the state of the premises were concerned. He also said that the spread of the fire to the Appellants' premises was not caused by the negligence of the Respondents or their servant. He said negligence could not be established when the fire was "wholly unforeseeable" by the Respondents or their servant.

82 (b) The Appellants cross-appealed on the finding of nuisance and this was dismissed by the Federal Court on the ground that it did not satisfy the requirements of foreseeability either. Their cross-appeal on quantum of damages was also dismissed.

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(c) The Respondents contend, for the reasons given earlier herein, that the Appeal Judge was correct in upholding the finding of fact by the trial Judge that the evidence given before him did not disclose liability for negligence or nuisance as regards the state of the premises.

10 17. (a) The case of McKenzie v. Chilliwack Corpn. 1912 A.C. 888 is directly in point. There it was held by the Privy Council that a small rural township in British Columbia is not bound to have a watchman constantly on duty to guard against the risk of fire in a wooden cell used for the custody of prisoners, in which there is no fire and matches are not allowed.

20 (b) The facts of the case are as follows. The deceased was imprisoned in a wooden lock-up by the only Police Constable in the township when he was arrested for being drunk and disorderly. Matches were removed from his person as they were not allowed in the lock-up. He was locked up at 6.00 p.m. and a fire broke out after 9.00 p.m. and burnt the lock-up and killed the men in it. During the evening the Police Constable had visited the cell four times and was around about  $\frac{1}{2}$  an hour before the fire. At other times he was busy with his other duties. The fire  
30 originated from the cell but was unexplained apart from that.

(c) Amongst other things, the Privy Council found that firstly the plaintiff could not establish the cause of the fire. Secondly that no one "could reasonably expect that a fire might take place". Thirdly it was not unreasonable for the Defendants to allot the P.C. the other duties to which he attended to on the evening of  
40 the fire. Fourthly it was not the duty of the respondents in the circumstances to keep the P.C. or any other person constantly at the lock-up. Lastly, it was not a breach of duty on their part which caused or contributed to the death of the deceased.

R E A S O N S

- (1) There was no or no sufficient evidence to support the allegations of negligence and nuisance insofar as these were based upon the state of the Respondent's premises;
- (2) There was no duty of care upon the Respondent to prevent the spread of a fire the occurrence of which it could not reasonably be expected to foresee; 10
- (3) In any event, the Respondent was not negligent in failing to prevent the spread of the fire to the Appellant's premises;
- (4) The decisions of the Federal Court on the appeal and cross-appeal were right.

PETER MOONEY

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B E T W E E N :

LEONG BEE & CO. (SUING AS A FIRM)  
APPELLANT  
(PLAINTIFF)

- and -

LING NAM RUBBER WORKS (SUED AS  
A FIRM) RESPONDENT  
(DEFENDANT)

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CASE FOR THE RESPONDENT

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