**ARIMA AND OTHERS V HIRAL**

**Division:** High Court of Uganda at Kampala; Court of Appeal at Kampala

**Date of judgment:** 19 July 1974

**Case Number:** 653/1973 (33/75); 59/1974 (42/75)

**Before:** Lubogo J, Spry Ag P, Law Ag V-P and Musoke JA

**Sourced by:** LawAfrica

*[1] Negligence – Petrol tanker – Driven on to soft verge in residential area – Negligence established –*

*High duty of care on transporters of dangerous substances.*

*[2] Negligence – Volenti non fit injuria – Whether passersby accepted risk of fire by approaching spilling petrol from tanker.*

*[3] Damages – Causation – Novus actus interveniens – Deliberate fire-raising – Not foreseeable –*

*Chain of causation broken.*

*[4] Nuisance – Constituents of – Act causing injury, danger or annoyance to public or obstruction of common rights – Negligence not required.*

**JUDGMENT**

**Lubogo J:** On 12 January 1973, the driver of a seven-ton Isuzu Petrol Tanker was instructed by his master, Hiral Mohamed, the defendant, to go to Shell B.P. depot in the industrial area of Kampala the following day to fill the tanker with super petrol, hereinafter referred to as petrol. The petrol was destined for Ruanda.

On 13 January 1973, at about 8 a.m., the driver Lajabu Sebale arrived at the B.P. depot and petrol was filled in the tanker in his presence. It was filled to its full capacity of 7,800 litres through three openings at the top. The three top openings were then closed and sealed and so were the lower outlets. The driver then drove his petrol tanker, after receiving necessary documents, towards the city centre. He passed through Nakivubo into Namirembe Road. When he reached Nakovubo Stadium, he branched off into Kisenyi Road. At about 100 yards along the Kisenyi Road off Namirembe Road, he stopped and parked his tanker on the offside of the road off the tarmac in order to get his provisions from the maize mill, namely rice flour, for the journey to Ruanda. He found rice flour already packed, collected it and went back to the petrol tanker. It was estimated that it took him only three minutes. He started the engine and moved forward, but he had hardly moved more than a foot when he realised that the left rear near side wheel had fallen into a ditch. He got out of the tanker and noticed that the left rear wheel was sinking gradually into the ditch and the tanker was tilting on the left hand side. He then tried to get help from the driver of another lorry nearby to pull him out of the ditch. The driver of the other lorry refused. Despite entreaties from the driver of the tanker lasting about ten minutes, the other driver was unable to accede to his request. He went back to the tanker and found that petrol had started to pass through the third rear opening on the top of the tanker and people were helping themselves to it by filling up their containers.

He hired a taxi to take him to the nearest post office to telephone the fire brigade. The time was about 11.30 a.m. He went back to the scene to wait for the firemen. The fire brigade arrived at about 11.35 a.m. The driver introduced himself to the chief fire officer. There was a short discussion in which it was suggested that a breakdown truck should be brought in order to pull the tanker out of the ditch and stop further leakage. At this stage the crowd was swelling and the chief fire officer and his men were trying to control the crowd by driving them away from the tanker. As the driver was coming back to the scene with a breakdown truck, he noticed at a distance away that the place was in flames. It was about 12.15 p.m. when the fire started. The chief fire officer and one fireman remained to brave the inferno while others ran away. Later the chief fire officer received reinforcement from the fire station. The fire was eventually brought under control at about 5.30 p.m. By the time this was done, the fire had taken a heavy toll of the crowd, which was estimated between one thousand and two thousand. Ten people were burnt to death on the spot and seventeen people died later in the hospital, and many received injuries varying in degree of severity. It is due to these deaths and injuries that the plaintiffs have brought actions against the owner of the petrol tanker for damages for negligence and nuisance in the alternative. Three different suits were filed and consolidated and have been heard as one.

What was referred to as a “ditch” was, in fact, a hole of three feet in diameter which had been dug off Kisenyi Road in order to get to an underground water pipe – a sort of hydrant – this hole was later filled with loose earth to the top. That was the condition in which it was immediately before the petrol tanker was parked over it.

[The judge set out the evidence in detail and continued.]

This now brings me to the issues to be decided they are as follows:

(1) Whether or not the defendant’s driver committed an act or omission amounting to negligence and if so which act or acts.

(2) If the answer in first issue is in the affirmative, whether the plaintiffs, Matia Mulondo deceased, suffered any damages and if so were such damages foreseeable.

(3) If the answer to first and second issues is in the affirmative, whether or not a third party act intervening leading to the injuries of Matia Mulondo deceased or whether or not any of the plaintiffs assumed the risk of injuries. If a third party intervened, did it break the chain of causation?

(4) Whether or not any of the plaintiffs, Matia Mulondo deceased, contributed to the damage sustained.

(5) Whether or not there was a nuisance and if so was it caused by the defendant’s driver.

(6) If the answer to issue 5 is in the affirmative were the injuries foreseeable?

(7) What damages if any have the plaintiffs and Matia Mulondo suffered?

The plaint avers in respect of all plaintiffs that: “The driver of the defendant, acting in course of his employment, so carelessly and negligently, drove and controlled the said vehicle on which were tanks containing petrol fuel the property of the defendant along Kisenyi Road that an accident occurred.

By reason of the carelessness or negligence as aforesaid of the defendant’s servant/driver, the said petrol tanks on the said vehicle got tilted and a large quantity of petrol fuel oozed and overflowed from the said tanks on to the ground. Thereafter much of the petrol spread on the ground, caught fire and the fire rapidly spread and caused damage to the plaintiffs.” The plaints then went on to give the particulars of negligence. The defence denied liability and relied on the maxim of novus actus interveniens and the doctrine of volenti non fit injuria.

In their submissions, several cases were cited by both counsel in an attempt to prove their cases.

These authorities are very difficult to reconcile given a particular set of facts. At one time the principle laid down in *Re Polemis and Furness, Withy*, [1921] 3 K.B. 560 that unforeseeability was no defence is no longer good law and it is not my intention to consider it. The expression negligence brings immediately to mind a sense of duty for which the negligent acts or omissions may cause to another person. This means that one should not act negligently in order to avoid harming another person who is likely to be affected by his acts or omissions. The law on this point is very clear and it is to be found in *Donoghue v. Stevenson*, [1932] A.C. 562. Lord Atkin, when answering a question, in the above case, “who is my neighbour?” said that you must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour?

Lord Atkin went on to say that those persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.

In this authority the principle of foreseeability and proximity is evident. *Donoghue v. Stevenson* was approved in *Overseas Tankship etc. v. Morts Dock* (*The Wagon Mound*), [1961] 1 All E.R. 404 popularly known as Wagon Mound No. 1. In their conclusion in the above case their Lordships had been concerned primarily to displace the proposition that unforeseeability is irrelevant if damage is “direct”. In doing so, they had inevitably insisted that the essential factor in determining liability is whether the damage is of such a kind as the reasonable man should have foreseen. This accords with the general view thus stated by Lord Atkin in *Donoghue v. Stevenson*. Again in a recent case *Home Office v. Dorset Yacht Co*., [1970] 2 All E.R. 294 at p. 297, Lord Reid said that: “*Donoghue v. Stevenson* may be regarded as a milestone, and the well-known passage in Lord Atkin’s speech should I think be regarded as a statement of principle. It is not to be treated as if it were a statutory definition. It will require qualification in new circumstances.” It is upon this principle that I shall consider the facts in this present case. The evidence in this case has been already reviewed; I shall only refer to parts of it. The driver of the petrol tanker parked his vehicle at a place which was normally safe and where many vehicles had been parked. In this regard, I accept the evidence of Moses Lutagasa and Jackson Mugumya that the place was perfectly safe for parking, as the people who came to watch football matches used to park there; and I accept their evidence, and that of Nyonjo, that there was no warning posted on a newly-dug hole. I do not accept the evidence of Odong that there was a T-shaped sign. If this were so, other witnesses like Maswera, Druvu and Nyonjo, would have seen it, let alone Lutagasa and Mugumya who were working in a garage about 25 yards away. The petrol tanker was parked there for only about 3 minutes over a ground which appeared to be safe despite pools of water here and there. The crucial moment came when the driver started off. He had hardly moved when he felt that he could not move any farther. The nearside rear wheel had stuck in what was termed as ditch. An attempt to remove the tanker from the ditch came to no avail. The fire brigade was called in and found that petrol had started to flow in big quantity. This flow went on for about 45 minutes until eventually petrol ignited. The cause of fire could not have possibly originated in Bemba’s garage. According to Lutagasa and Mugumya, they had removed their welding equipment even before the fire brigade arrived. I seem to accept this testimony because I cannot imagine them carrying on welding and at the same time washing their tools in petrol which they had collected. I do not believe the evidence of Odong on this point. Mubiru was uncertain where the fire came from. The fire, then, must have originated from another source. Maswera, the chief fire officer, said that he saw a man striking a match because he was refused permission to collect petrol. This was the man who had been pushed 70 feet away by Druvu on the instructions of Maswera. Druvu in his evidence said that the fire came from behind him as he was going back. It can therefore be said with certainty that the fire did not originate from the garages that had welding equipment. I do not doubt the testimony of Maswera on this point. In his report to the commissioner of Police made on 22 January 1973 he said that “at about 12.15 somebody was seen, lit a match just 70 metres from the wreckage on the spilt petrol”. This being so, the act was a novus actus interveniens. This, however, does not mean that the defendant is absolved from acts of negligence perpetrated by his servant.

Lord Wright in *Lord v. Pacific Steam Navigation Co*., [1943] 1 All E.R. 211 at p. 214 had this to say:

*“There are some propositions that I think are well-established and beyond question in connection with this class of cases. One is that human action does not per se sever the connected sequence of acts. The mere fact that human action intervenes does not prevent the sufferers from saying that damages for injury due to that human action, as one of the elements in the sequence, is recoverable from the original wrongdoer.”* Again in *Haynes v. Harwood*, [1935] 1 K.B. 146 it was said that if what is relied upon as a novus actus interveniens is the very kind of thing which is likely to happen if the want of care which is alleged takes place, the principle embodied in the maxim is no defence. It appears therefore, that the novus actus interveniens does not break the chain of causation if the connecting link is a human action as opposed to inanimate. It must be added that the human connecting link must stem from the want of care of the original wrongdoer and must be the probable consequence of the wrongdoing.

In *Wagon Mound*, referred to above, in that case a vessel known as *The Wagon Mound*, an oil-burning vessel, was moored in Caltex Wharf for the purpose of discharging gasolene products and taking in bunkering oil. During this operation a large quantity of bunkering oil, through the carelessness of the appellant’s servants, was allowed to spill into the bay. The respondent’s engineer asked the appellant’s engineer whether it was safe to continue welding operation on their ship. It was agreed that it was quite safe so to continue. However, safety precautions were taken to prevent inflammable material falling off the wharf into the oil. For a day and half, work was carried on as usual, but later oil near the wharf was ignited and fire broke out. It was speculated that a piece of debris on which lay some smouldering cotton waste or rag which had been set on fire by molten metal falling from the wharf caused the fire. The appellants were not held liable in negligence. This was due to the fact that the occurrence was unforeseeable simply because although it was a human action that intervened, it was not the natural and probable consequence of the oil spreading in the bay by the carelessness of the appellant’s servants.

In the present case certain particulars of negligence on the part of the driver have been alleged in the plaint, but no evidence was led to substantiate the allegation. There was only one witness who actually saw the petrol tanker being driven and that was Nyonjo. In his evidence Nyonjo did not say that the vehicle was being driven in a careless manner. Nyonjo again saw the vehicle start off, but as it did, its rear wheel got stuck in the ditch. I fail to see any carelessness on the part of the driver. It has been argued on behalf of the plaintiffs that the driver was careless in parking in an area where welding was being carried on and a lot of activities going on. I would say that fire did not come about because of the welding that was being carried on but came from a different source. Had the tanker caught fire from a welding source, then the case should have assumed a different and ugly complexion. For 45 minutes, petrol was flowing till somebody struck a match. The driver did not know and could not have been reasonably expected to know that somebody would strike a match and set the whole place on fire. When the driver parked his vehicle, he did not know that he was parking on ground with latent defect so as to impute negligence for which the defendant should be liable. Nor could he be expected to know that pressure of petrol would be exerted on the outlets to cause a leak; nor that once petrol leaked people would come to collect it; nor would that somebody be annoyed and strike a match because he had been prevented from collecting it. In my opinion the driver could not have been reasonably expected to anticipate all this, and it could not have been the natural and probable consequence of his falling in the ditch which was not negligent, but it was an extraordinary and unforeseeable combination of circumstances. I would therefore venture to say that there is no negligence or carelessness on the part of the defendant enunciated by Lord Atkin in *Donoghue v. Stevenson*. The word “foresight” connotes experience and knowledge. No one can reasonably be expected to foresee or anticipate that which he has no knowledge or experience of. Had the driver known of a ditch that had been dug around the place where he parked his vehicle, then he could be expected to know the consequences of his act and take precautions but there was no evidence led to that effect. Now I turn my attention to the plaintiffs. It is unfortunate that they suffered such severe injuries. They were the authors of their injuries by exposing themselves to a fiery danger for which nobody owed them a duty. Matia Mulondo deceased was burnt to death, so it was alleged. The only evidence is a chit authorising a relative to collect the body from the mortuary. According to evidence, Mulondo had a stall in Shauri Yako market about 500 yards from the scene of the inferno. It is not known why he left his place of work to come to Nakivubo, if he ever came at all. There is no evidence to show that he died in the Nakivubo fire. Then there is Arima Nantongo, a gonja seller. She was nowhere near the fire. According to her, she was walking along Kisenyi road coming towards the petrol tanker, then saw a crowd running towards her. She was knocked down and in the process her dress caught fire. It was at a distance of 250 yards from the tanker. She ran into the stadium where she received help and was later taken to hospital. George Kigundu is another plaintiff. I did not accept his evidence. He was evasive in his answers. He denied having seen a crowd at Nakivubo and said everything was quite normal. This man was seen by Moses Lutagasa collecting petrol together with Badru Mande. I believe that he was among the people who were being chased away by the fire brigade. Fred Senkima was also evasive in his answers and gave me the impression that he was lying and I do not accept his evidence. Badru Mande is the man who answers the description of a person who had been seen by Moses Lutagasa and Jackson Mugumya collecting petrol. He is the man who was pushed away from the tanker by Dravu and he is the man whom Maswera saw striking a match. I believe the evidence of those witnesses.

Godfrey Serunjogi, a youth who was with his mother in Namirembe Road, said he was burnt while crossing Kisenyi Road. From evidence, the fire did not reach the junction of Namirembe Road with Kisenyi Road. Serunjogi denied having seen a crowd in Kisenyi Road. His evidence was most unreliable and could not be believed. Tereza Naiga received her injuries when she went to help her son Serunjogi a distance away from the scene of the fire. She was burnt slightly by fire from her son’s clothes.

Apart from Nantongo who caught fire in a distance of about 250 yards away and Tereza Naija who also caught fire from her son, I believe that the rest were involved in collecting petrol and that’s how they came to their fate. The plaintiff’s counsel submitted that the doctrine of res ipsa loquitur applied to the instant case. For obvious reasons I disagree with this submission. The argument was advanced that because the covers were not properly fixed, negligence should be presumed. Evidence was given as to what happened at the petrol depot. Petrol was filled in the tank to a point to the brim leaving a space for vapour, then the lid was placed on the opening and eventually sealed. There was evidence by Dr. Kironde-Sali and Maswera that the lid gave way because of the pressure of petrol on it. This evidence was not gainsaid. The photographs give a general view of the tanker and how the lids could be fastened. For these reasons I dismiss the argument that the doctrine of res ipsa loquitur applies.

I therefore make the following findings in as far as the actions are laid in negligence:

(1) The defendant’s driver did not commit any acts or omissions of negligence.

(2) The damages were not foreseeable because:

( *a*) The fact that petrol escaped and flowed on the ground, the ignition of it could not be reasonably expected to be the natural and probable consequence.

( *b*) The striking of the match was an independent act of volition so as to interrupt the chain of causality.

( *c*) The doctrine of volenti non fit injuria applies to the plaintiffs.

( *d*) There was no spark caused by a scratch on the tarmac surface nor was there a short circuit in the electrical system of the vehicle due to the negligence of the driver.

(3) The plaintiffs were the authors of their own injuries.

Now I come to actions as laid in nuisance. It has been submitted by counsel for the plaintiffs that negligence is not an element of nuisance and that once the plaintiff shows that he has suffered special damage as against the public he is entitled to sue, and that nuisance must be of a criminal nature affecting the public generally and that since the defendant’s driver violated the provisions of the penal code and those of the Traffic and Road Safety Act, the defendant must be liable. I must admit that the law regarding nuisance is not clear to me but one thing I agree with counsel for the plaintiffs is that negligence is not an element in proving nuisance. Most authorities before *Wagon Mound No. 2* seemed to agree that foreseeability was an essential element in nuisance, but foreseeability was also regarded as an essential element in negligence in *Wagon Mound No. 1*. In the unreported case of *Morton v. Wheeler*, Lord Denning said: “But how are we to determine whether a state of affairs in or near a highway is in danger? This depends, I think, on whether injury may reasonably be foreseen. If you take all cases in the books you will find that if the state of affairs is such that injury may reasonably be anticipated to persons using the highway it is a public nuisance.” Lord Denning’s dictum was made in 1956 before the *Wagon Mound No. 2*, [1966] 2 All E.R. 709. Since *Wagon Mound No. 2*, things seem to have changed. Fault seems to be an essential element in deciding whether nuisance has been committed. The facts in *Wagon Mound No. 1* and *Wagon Mound No. 2* are essentially the same except that one dealt with nuisance and the other with negligence. The facts that brought about the nuisance have already been reviewed above and I need not review it again. One significant fact was that nuisance flowed from the carelessness of the *Wagon Mound* engineer in not stopping the flow of bunkering oil into the bay when in fact he was in position to do it and knew that there was a possibility of its catching fire. From this one may infer a conscious human act on the part of the wrongdoer. I have already made a finding that the defendant’s driver was not careless in parking his vehicle in a place he did, but it has been argued by the plaintiff’s counsel that the driver contravened the traffic laws in doing so. The Assistant Inspector of Police Joseph Kiza measured the road in question and it was found that it was 15 feet 9 inches. The petrol tanker was parked 5 feet 3? inches from the edge of the road. He admitted in cross-examination that once a person parks off the road he does not contravene traffic laws in spite of “No parking” or “No stopping” signs. I am therefore satisfied that the defendant’s driver did not contravene any penal or traffic laws of the country.

If I may cite again *Wagon Mound No. 2*, their lordships were of the opinion that: “if the risk is one which would occur to the mind of a reasonable man in the position of the defendant’s servant and which he would not brush aside as farfetched, and if the criterion is to be what the reasonable man would have done in the circumstances, then surely he would not neglect such a risk if action to eliminate it presented no difficulty, involved no disadvantage and required no expense.” It is my opinion that no risk was involved when the defendant’s driver parked his vehicle in Kisenyi road for which he would take steps to eliminate it. But when the risk became apparent he took all reasonable steps to eliminate it as we have seen in evidence. I would therefore conclude by saying that there was no nuisance committed by defendant’s driver and consequently no damages suffered by the plaintiffs and Matia Mulondo. The suits are accordingly dismissed with costs.

For the plaintiffs:

*J Kityo*

For the defendant:

*F Gaffa* (instructed by *Kirenga & Gaffa*, Kampala)