RALPH D. NODDIN (*Defendant*) .....APPELLANT;

AND

WILLIAM W. LASKEY (*Plaintiff*) .....RESPONDENT.

1956

*Mar. 2, 5
*May 24

ON APPEAL FROM THE SUPREME COURT OF NEW BRUNSWICK, APPEAL DIVISION

Negligence—Propane gas heater explosion in rented cabin—Absence of pilot light—Duty of cabin operator—Safety of premises.

The respondent brought this action for damages for personal injuries resulting from an explosion which occurred while he was attempting to light a propane gas heater in a cabin rented from the appellant. The cabin was rented at about 8.00 p.m., and the respondent remained in it only a few minutes after being assigned to it. He left and did not return until about 11.00 p.m., whereupon he locked the door and retired for the night. The following morning, he awoke at 6.00 a.m., closed the windows and went back to sleep. When he awoke again at 8.00 a.m., he went to the heater, struck a match to light it and there was an immediate explosion. There was no pilot installed on the heater. The trial judge gave judgment in favour of the respondent and a majority in the Appeal Division found contributory negligence.

Held (Locke and Abbott JJ. dissenting): That the appeal should be dismissed and the cross-appeal allowed.

Per Rand J.: In the circumstances, it is impossible to draw the inference, as was done by the Appeal Division, that the respondent opened the valve without lighting the gas when he first got up at 6.00 a.m. The omission in duty on the part of the appellant to furnish a reasonably safe heating apparatus by failing to provide a pilot light was a failure in reasonable precaution which drew down liability. That was the initial negligence, and it has not been superseded by any proven act on the part of the respondent or other third person.

Per Kellock J.: The Appeal Division was not justified in drawing the inference that the respondent probably opened the valve at 6.00 a.m. and did not light the heater. Consequently, since explosive gas was present in the premises, they were not reasonably fit for occupancy, and this was caused by the negligence of the appellant, as the preponderance of probability on all the evidence is to the effect that after demonstrating the heater to the respondent the previous evening he did not leave the valve completely shut off.

Although a person in the position of the appellant is not bound to install the most modern equipment, nevertheless when experience had taught what was demanded for the protection of the public using his cabins, he was bound to adopt those means in order to make his accommodations reasonably safe. There was evidence upon which the finding of both courts below that the appellant failed in the duty incumbent upon him to install pilots, could be founded.

*PRESENT: Rand, Kellock, Locke, Cartwright and Abbott JJ.

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Per Cartwright J.: The evidence supported the finding of the Appeal Division that the failure to install a pilot light, which was a cause of the explosion, was a breach of the appellant's duty to make the premises as safe as reasonable care and skill could make them.

The other cause was the unexplained escape of gas, a cause for which neither party has been proved to be responsible. The onus of proving contributory negligence rested upon the appellant, and the evidence does not warrant any interference with the finding of the trial judge that this onus was not discharged. Liability, therefore, for the damage caused rested upon the appellant.

Per Locke J. (dissenting): It was not the absence of the pilot light that was the proximate cause of the respondent's injuries but his own act in turning on the gas and failing to light it when he got up at 6.00 a.m.

Per Abbott J. (dissenting): The escape of gas was due to the respondent himself turning on the valve between the time it was closed at 8.00 p.m. the previous night and 6.00 a.m. the following morning when he got up for the first time. The courts below were not right in holding that the appellant failed in his duty to respondent in not having the heater equipped with a pilot light as a safety measure. An occupier is not bound to adopt the most recent inventions and devices provided he has done what is ordinarily and reasonably done to ensure safety. The appellant carried out his contractual obligation to take due care that the premises would be reasonably safe for persons using them in the customary manner and with reasonable care.

APPEAL from the judgment of the Supreme Court of New Brunswick, Appeal Division (1), reversing, Hughes J.A. dissenting, the judgment at trial.

N. Carter for the appellant.

C. J. A. Hughes, Q.C. for the respondent.

RAND J.:—This is an action for damages suffered by the respondent Laskey through an explosion which occurred while he was attempting to light a propane gas stove.

With five other persons he had reached the summer cabin property or motel of the appellant Noddin, some five or six miles to the west of Moncton, at about 8.30 on the evening of September 25, 1953. To him was assigned the westerly unit of a duplex cabin, the other unit to a Mr. and Mrs. Fraser and their daughter, and a third cabin to the remaining two ladies of the party. Some minutes after arrival Laskey and the Frasers repaired to the ladies' cabin where they had a lunch and spent the evening until about 10.30 when the four returned to their own quarters and shortly thereafter retired for the night.

(1) (1956) 38 M.P.R. 138.

The Laskey cabin was entered by a door close to the partition wall between the two units. The door swung to the left and just beyond it was a small propane stove approximately 15″ in height; this was fed by a pipe running along the bottom of the division wall from the rear. About in line with the side of the stove the pipe divided by means of a T-joint, one short branch going to the stove and the other passing through the partition wall to be connected with a similar stove in the adjoining unit. The distance from the T-joint to the burner was in the vicinity of 10″. At the end was a valve or cock; at right angles to the pipe horizontally and connected with the valve was what is called an orifice leading into the entrance of the burner a few inches outside the stove. The function of the orifice was not clearly explained, but as Mitton the service manager of the company supplying the stove conceded that if a match was placed at the orifice, some degree of explosion would follow, necessarily at that point there is access from the air to the flow of gas; and it may be that at that point air is drawn in to produce, in part at least, the mixture with gas required for combustion. In lighting the gas the lighted match should be placed inside the stove through an opening just above the end of the burner and before the valve is opened.

The propane, in liquid form under pressure in metal cylinders, reaches the valve as gas. It is of the same family as gasoline with the vapour of which, in its combustion characteristics, it is very similar if not identical. It is, in the words of Dr. Toole, professor of chemistry at the University of New Brunswick, a "dangerous agency".

Laskey says that before going to bed he opened the window in the front wall of the cabin and that of the opposite or rear wall in the bathroom which is slightly to the right of being opposite the entrance door. At 6.00 o'clock next morning he awoke, used the toilet in the bathroom, shut both windows, returned to bed and slept until about 8.00 o'clock. Arising, he drew on his dressing gown, walked around the foot of the bed to a small table beyond the stove, picked up a match and, stooping down toward the valve, lighted it and opened the valve. Exactly where or on what the match was struck is not clear as appears from the following answers:

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Where did you put that match when you lit it?
Right down where you are supposed to light one of those stoves.
Where are you supposed to light it?
I assumed down where the pet cock is—where the gas comes in.
You didn't know where to light it?
No I never lit one before; but that's where you usually do in a gas jet, do you not—apply to the nozzle of the gas jet.

* * *

Mr. Laskey, if you were wide awake at that time and you lit that stove, you must recall where you put the match?
I'm telling you I put the match right down that spot where the valve was.
Did you put it inside the stove or outside?
I stuck it inside of course.

But the "spot where the valve was" was not exactly the opening in the side of the stove through which the match should have gone, and there is no nozzle, and it may be that he placed the lighted match at the orifice and not through the small aperture above the burner. Considering what at that moment happened the blurring of this detail in recollection is not to be wondered at.

The striking of the match was followed by an explosion which, in a moment, enveloped him in flames. The combustion evidently found its way to different parts of the room in streams, scorching the tops of the curtains on the two windows in the front and side wall respectively and the shower curtain in the bathroom; but, from pictures of the room taken between 11.00 and 12.00 o'clock that morning, the bed clothes and furniture do not appear to have been damaged. The bottom of the wall opposite that of the partition, made of gyprock or like material and of light construction, was blown out some eight or ten inches. The noise was heard by the Frasers who were already up and around and the husband hurriedly breaking open the door of Laskey's cabin found him a mass of burning clothes. These were extinguished and within minutes the injured man was taken to hospital.

The combustion of the gas depends upon a minimum degree of temperature and a mixture with air within the limits of approximately 2·4 and 8% of gas. This may be affected by extremes of air pressure or temperature. The gas is heavier than air and slow in diffusion, the direction and extent of which depend largely upon air currents.

Along with evidence tending to show that the stove and the piping connection were in proper condition, the case for

the defence was that the gas had been turned on unlighted by the respondent when he was up at 6.00 o'clock and that the quantity of gas needed to produce such an explosion could have entered the room between two and three hours with the valve fully open.

In describing what had happened at 8.00 o'clock Laskey said:

I stooped down and I reached in, struck the match and reached in and this explosion took place.

As you struck the match?

Yes.

* * *

I reached in to touch the pet cock, stuck the match in. That is the nearest recollection I have of it. I can't describe the stove definitely.

* * *

Was there any space of time between the lighting of the match and the explosion?

No.

* * *

Now what did you see take place as the explosion occurred?

There was this rush and roar and explosion and flash of flame and I was trying to beat the flames out.

* * *

Yes, hair was burning, my shoulders burning, my hands burning.

* * *

Had you ever had any experience with a propane gas heater before that occasion?

No.

* * *

I went over and picked up a match, put it in this hand, reached down like that and turned the pet cock, and lit the match at the same time. That is all.

* * *

Did you have to turn that little valve all the way around to get the gas?

I gave it a turn.

How much of a turn did you give it?

I can't tell you.

Did you smell any gas?

No.

And all you recall was a sudden flash?

And a noise.

On that contention Michaud C.J. at the trial said:

Of course, I find that there is no evidence that Laskey did tamper with or try to light the stove, except at 8.00 o'clock in the morning when he got up, and I find that the explosion was caused by an accumulation of gas in the room before Laskey attempted to light the stove. Whatever caused the accumulation is not determined, and I cannot speculate as to how it came about. However, I am certain that had the defendant equipped his stoves with the proper safety gadgets, there would not have been an accumulation of gas in that room nor the explosion.

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In the Appeal Division Bridges J., with whom Richards C.J. concurred, although holding that Noddin was negligent in not warning Laskey of the danger of the gas and in not explaining the odor given it to enable detection, found that there was evidence from which the inference could be drawn that Laskey "probably opened the valve without lighting the gas" and that in his opinion he had done so. Hughes J. does not mention this issue but his reasons are inconsistent with that finding. In these circumstances, that question of fact must be faced by this Court.

That Laskey, when fully awake, knew the stove was heated by gas that had to be lighted is indisputable; his action at 8.00 o'clock puts this beyond question. The conclusion of Bridges J. necessarily implies that at 6.00 o'clock either he was so drowsy that, although in the somewhat chilly room he was able to go to the bathroom and to close the two windows by different means, both of which he correctly recalled at the trial over one year later, he was not alive to the fact that the stove burned gas that had to be lighted with a match and acted on a hazy notion of turning on heat as on an electric stove, or that having turned on the gas he forgot to light it or that he did not realize the gas for some reason had not caught fire. It means also that two hours later he had no recollection of having been or done anything at or to the stove.

His evidence shows that for many years he had worked as a certified drug clerk in the course of which he had used Swedish burners which are primed by spirits and burn paraffin oil; he had, in earlier years, been an active athlete; that, as the window opening indicates, he was accustomed to sleep in fresh air; and that at 72 years of age he was a fairly vigorous and mentally alert person, his answers being short and directly to the point of the questions. In these circumstances, and with Michaud C.J., I cannot draw such a violent inference as we are asked to draw. He categorically denies that he had then touched the stove and to have been sufficiently awakened and alive in the cool air to have done what he did, excludes for me what is conjectured. His evidence that he opened the valve at 8.00 o'clock, if true, is conclusive against it, and I am unable to infer that, clear enough in mind to apprehend the operation of the valve, he was not clear enough to appreciate the requirement of

the match. That he would at 6.00 a.m. turn on the heat in the small room, 10′ x 10′ x 8′, with windows closed, when he had still two hours for sleeping, is in the highest degree unlikely.

The further question remains whether there was a negligent omission in duty to furnish a reasonably safe heating apparatus by failing to provide a pilot light, a device that would have cost between $10 and $15. By its small continuing flame, it would have made such an explosion impossible. The use of the device in these stoves has become general; they had been installed by Noddin in 1952 in another set of cabins east of Moncton owned by him. Fourteen months after the mishap he said "Well, they are now installing these pilots in practically all stoves, I guess, that are being sold" and by then he had added pilots to the cabins in question. These facts put their desirability and practicability beyond controversy. They furnish both convenience and protection to guests. Protection is particularly needed and effective in rooms used by the travelling public, many, if not the majority, of whom have never before used a gas stove. Mrs. Fraser was so much afraid of it that the stove in her cabin remained untouched. Noddin testified that he had lighted the stoves and explained the mode of lighting to both the respondent and the Frasers and had called their attention to the pungent and distinctive odor of the gas and the necessity of not turning it on before applying the match. The gas is naturally odorless and odorization is for the purpose of arousing notice of its presence. Laskey denied that he saw Noddin light the stove or do anything at it; he says he remained in the cabin only a minute or two, long enough to get his things off and his baggage set down. The instructions and warnings also he denied. The Frasers denied that the stove was lighted and that any instruction or warnings were given; and it is significant that neither of them was cross-examined on either point. I entertain no doubt that the stove in neither cabin was lighted by the occupant during the evening and the remark of Noddin that "they all, I think, had their stove on that particular night" indicates irresponsibility in statement. He added that as a rule he told guests that there was no pilot light for the burner, advice which indicates recognition of the practical need of

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that safeguard. Mitton admitted that in all cases he would warn purchasers of lurking danger, of the distinctive odor by which the gas could be detected, and would show them how to light the burner. The gas has been used in the Moncton area for about six years and when the stoves were to be used in public places he recommended pilot lights. He stressed the danger of lighting the gas at the orifice but it is not claimed by Noddin that warning against this was given Laskey or that he was specifically shown just where the lighted match should be placed.

The acknowledgment by both Noddin and Mitton of the inherent and invisible dangers associated with this gas, as with gasoline vapour, is confirmation, if any is required, of the necessity to surround such a heater with every practicable security. That need is particularly indicated here. Excluding Laskey's opening the valve at 6.00 o'clock, the cause is a mystery. Assuming, as Noddin claims, that he lighted the stove or went near it with that in mind in Laskey's presence in the evening, did he then close the valve tight when shutting the stove off? or was it inadvertently left slightly open or was the closing made in such a manner as to put out the flame but still allow a small stream to run all night? Or if he had turned on but not lighted the burner and in the hurry had not fully closed it? If the machine test was absolute, why the soap and water test? He was in the cabins only briefly as all the occupants were going out immediately, and these questions point to situations of possible and puzzling accumulations of gas from which the necessity for pilot lights in large part arises. The trial judge expressed himself as finding that the plaintiff "had failed to satisfy him" that the propane gas heater was defective or not reasonably safe "to the knowledge of the defendant" or that Noddin was "negligent in assigning" the premises to the plaintiff. He added:

> If the heater and pipe connections were in good order immediately after the incident, it is a fair inference that they were before the explosion in good condition, in the absence of evidence to the contrary.

But this, apart from the limitation to "the knowledge of the defendant", does not touch the possibilities suggested, as to the realities of any of which Noddin might have been quite unaware and quite honest in his testimony.

The rule governing acts of omission of this sort was laid down by Lord Dunedin in *Morton* v. *William Dixon, Ltd.* (1) thus:

> "Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either—to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or—to show that it was a thing which was so obviously wanted that it would be folly in anyone to neglect to provide it".

which was paraphrased by Lord Normand in *Paris* v. *Stepney Borough Council* (2) in these words:

> If there is proof that a precaution is usually observed by other persons, a reasonable and prudent man will follow the usual practice in the like circumstances. Failing such proof the test is whether the precaution is one which the reasonable and prudent man would think so obvious that it was folly to omit it.

This, in substance, was approved in *Morris* v. *West Hartlepool Steam Navigation Company* (3).

Both the trial court and the Appeal Division have held that the omission was a failure in reasonable precaution which drew down liability and with that I agree. The case is thus similar to *Dominion Natural Gas Company Limited* v. *Collins et al.* (4). Here there was negligence on the part of the gas company in installing a safety valve with an emission direct into the shop instead of into the open air. The company had contended that the cause of the accident had been a tampering with the machine by other workmen; but on the evidence the Judicial Committee held the true cause of the escape of the gas to be left in doubt. All that could be said was that the escape had taken place at the safety valve which, in turn, could have been caused through at least two possible conditions. In the language of Lord Dunedin the Committee held that

> The gas company have failed to show that the proximate cause of the accident was the act of a subsequent conscious volition and that, there being initial negligence found against them, the plaintiffs are entitled to recover.

In this case it is assumed that the gas escaped through the pipe leading to the burner and that the explosion would have been prevented by a pilot light; and the purpose of the latter is to meet generally the danger of escape. That

(1) [1909] S.C. 807.
(2) [1951] 1 All E.R. 42.
(3) [1956] 1 All E.R. 385.
(4) [1909] A.C. 640.

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being the initial negligence, it has not been superseded by any proven act on the part of the respondent or other third person.

It was on the assumption that Laskey had carelessly opened the valve that he was charged in Appeal with 30% of responsibility; but, rejecting that, the consequences to which the omission led must be charged against Noddin alone.

I would, therefore, dismiss the appeal, allow the cross-appeal and restore the judgment at trial with costs both in the Appeal Division and in this Court.

KELLOCK J.:—As the learned trial judge found that the escape of gas into the room occupied by the respondent was not due to any defect in the stove or its connections (a situation which was at least tacitly accepted at the trial by the respondent), and as it is not suggested by either party that the stove was interfered with by any third person, the issue was accurately stated by the learned judge as follows:

> Who did open the gas jet and leave it open without producing a flame?

After stating that the respondent had "failed to satisfy" him that the appellant had negligently left the valve open or been guilty of any positive act of negligence causing the escape of the gas, he went on to find that

> *Of course,* I find that there is no evidence that Laskey did tamper with or try to light the stove, *except at 8.00 o'clock in the morning* when he got up, and I find that the explosion was caused by an accumulation of gas in the room before Laskey attempted to light the stove.

The learned judge then said:

> Whatever caused the explosion is not determined, and I cannot speculate as to how it came about.

The learned judge considered that there was a duty on the part of the appellant toward persons such as the respondent to have the premises "absolutely safe" and that he had failed in that duty by reason of the fact that the stove was not equipped with a pilot light. In the result, judgment was given against the appellant for the full amount of the respondent's damages.

As a pilot light would have furnished no protection except in the case of gas escaping through the burner itself (it would merely have brought about an explosion if gas were elsewhere escaping into the room once an explosive mixture

came in contact with its flame), the judgment pronounced involves a finding that the escape of gas was due to the valve having been left open but that this was not imputable to either party. The judgment is therefore contradictory.

The majority in the Court of Appeal concurred in the view that the appellant had been guilty of negligence in failing to have the stove equipped with a pilot light. Upon the footing that there was no defect in the stove or its fittings and that the appellant had not left the valve open the previous evening, they, however, drew the inference that the respondent "probably" had opened the valve when he got up at 6.00 a.m. but did not light the stove. They were also of opinion that the appellant had failed to explain to the respondent the operation of the heater as well as the danger of propane gas and its odour. In this court, however, it was admitted by counsel for the respondent that the appellant had, as he testified, instructed the respondent the previous evening both how to operate and to light the stove. It was also admitted that the respondent knew how to do this although he had never actually lit such a stove before. This, however, leaves the finding that the appellant failed to warn the respondent with respect to the odour of the gas and the significance of the presence of such odour. The Court of Appeal considered that the learned trial judge had been of the same opinion.

The vital question in the appeal is, therefore, as to whether or not the court below was justified in drawing any inference against the respondent. In determining this issue, the appellant takes the position that this court is in as good a position as was the trial judge.

With respect to the inference drawn below against the respondent, I confess to having been attracted by it but further consideration has caused me to change my mind for the reasons which follow. It is first to be observed that no such allegation was put forward in the statement of defence. While the statement of claim specifically pleads that "the defendant negligently left open the valve in the propane gas heater and allowed the gas to escape into the cabin", the appellant merely denies that the respondent's injury was occasioned "by any act or negligence" on the part of the appellant. The sole allegation of negligence made against the respondent is that he did not exercise

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sufficient care "in turning on" the valve on the propane gas heater. This allegation, in its context, can relate only to the allegation in the statement of claim that the explosion had occurred when the respondent had "turned on a valve in a propane gas heater kept for the purpose of heating the cabin assigned to the Plaintiff, and forthwith struck a match." This, of course, was at 8.00 a.m. Had it been intended to allege that the respondent had turned on the valve at an earlier hour but failed to light the burner, there is no question but that such conduct would, as it should, have been expressly alleged.

Not until the appellant was in the witness-box was this theory put forward, and then only in answer to a question in cross-examination. At that stage the respondent was deprived of all opportunity of dealing with such an allegation by adducing evidence with regard to it. As will appear, such an allegation could only be effectively dealt with by evidence, including expert evidence. It is noteworthy that at this stage of the trial the only remaining witness was the appellant's expert. He, however, was not examined with regard to this matter, as I shall point out.

As to his conduct on getting up at 6.00 a.m., the respondent testified in chief:

Q. Now were you up in the night?
A. Not until I got—I imagine somewhere around 6.00 o'clock.
Q. You got up at that time?
A. Yes.
Q. And what did you do?
A. I went to the toilet and I closed the windows.
Q. Both windows?
A. Both windows.
Q. Yes. Touch the stove at that time?
A. No, didn't look at it. Went back to bed.

In cross-examination:

Q. You told us this morning you got up around 6.00 o'clock in the morning?
A. Yes.
Q. Did you smell anything in the cabin at that time?
A. No.
Q. And did you have any cigarettes?
A. Some in my pocket, or some on the table.
Q. Did you smoke any?
A. No.
Q. Are you sure?
A. Positive, because I had no occasion to. I simply went to the toilet and went back to bed, closed the windows—went right back to bed.
Q. Why did you get up, was it you had to go to the bathroom?
A. Yes.

Q. Is that what caused you to get up?
A. Yes.
Q. And it was then you discovered that you might be chilly, and you closed the windows; is that it?
A. I closed the windows, yes.
Q. But it wasn't the cold—
A. It wasn't so cold I had to close them, no.
Q. But you did get up and close the windows. Did you go near the stove?
A. Not then, no.
Q. When you got up at 6.00 o'clock in the morning?
A. No.

The learned trial judge appears, from the way in which he expressed himself on the point as already quoted, to have had no doubt whatever with respect to the acceptance of this evidence.

In the inquiry as to whether upon all the evidence an inference sufficiently strong arises to displace the denial of the respondent thus accepted by the tribunal of fact, it is to be observed in the first place that the appellant did not produce evidence as to whether, after the explosion, the valve was wholly or partly open, nor did he give any explanation of the absence of such evidence although he testified that he had arrived at the cabin about 8.30 a.m., which would be within a half hour of the explosion. At that time he found a Mr. Sullivan outside the cabin. The two entered and, according to the appellant, found the stove turned off. Sullivan was not called nor did the appellant give any evidence as to any attempt made to ascertain if anyone had previously entered the cabin or interfered with the valve. The respondent was unable to say what was the position of the valve at the time he attempted to light the stove at 8.00 a.m., nor how much of a turn he had given it. In view of his experience of that morning, this is not surprising.

In the second place there is a consideration which, in my view, renders the theory upon which the court below proceeded extremely unlikely. The appellant's witness, Mitton, whose qualification to give opinion evidence was based solely on his being the "service manager" of the company which had supplied the appellant with cylinders of the propane gas in question, testified as follows:

Q. And isn't it true that persons have been suffocated in bedrooms in the presence of propane gas?
A. For the lack of oxygen, yes.

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Q. If the air in the room were displaced to a sufficient extent by propane gas, suffocation might result?

A. Mmmm.

Q. And I take from what you say that the odor of propane gas would not be sufficiently pungent to bring about the awakening of a sleeping person in a room such as that?

A. Go over that one again please.

(Reporter read the question aloud)

WITNESS: No. The odor in the gas is definitely not an alarm clock —wouldn't wake him up.

No other evidence was adduced on this aspect. In my opinion, before any such inference as has been drawn by the court below could properly be drawn, there should have been further evidence. As already pointed out, the respondent had no opportunity of adducing it and in the present state of the record I find it difficult to believe that the respondent would not, sleeping in the room for two hours with the windows closed and the jet open, have felt some effects of the gas, if he were not asphyxiated. It was for the appellant to adduce evidence to remove this difficulty. Any inference which, in my opinion, is to be drawn as the case was left, supports the evidence of the respondent that he did not touch the stove until 8.00 o'clock.

That being so, there appears to be no answer to the action in the circumstances. Unquestionably, explosive gas was present. The premises were, therefore, not reasonably fit for occupancy, which is the test rather than any absolute duty as was the view of the learned trial judge. Moreover, the last person to handle the valve was the appellant the previous evening when he introduced the respondent into the premises. The question arises, therefore, as to whether there was any negligence on his part.

In reaching the conclusion that the appellant had left the valve completely closed, the learned judge would appear to have proceeded upon the inference which he considered was to be drawn from the evidence and he relied heavily upon his view of certain evidence given by Mitton. His reasoning sufficiently appears from the following:

Mitton testified that in order to fill with gas that cabin occupied by the plaintiff, the jet must have been open 2 to 3 hours. The plaintiff says that his sense of smell is and was good. Mitton says that if the gas jet had been left open at 8.00 o'clock in the evening by the defendant, Laskey would have sensed the odor of gas when he came in at 11.00 o'clock, even if the room was not completely filled with gas. Mitton further states that had gas been escaping from the jet from between the hours of 8.00

and 11.00, when Laskey came back, the spark caused by the turning on the electric switch would likely have lighted the gas if it had been present.

Mitton testified that all gas sold commercially by his company and supplied to the defendant's cabins contained a mixture which developed a strong odor of rotten vegetables and was purposely added to the liquid gas in order to enable people to detect it when present in the air and not burning. On the other hand, had Laskey turned on the gas at 6.00 o'clock in the morning, if the odor of escaped gas had not suffocated him during the two hours that he went back to sleep, he most certainly would have sensed the presence of gas when he got up at 8.00 o'clock.

Laskey, although he claims that his sense of smell was good, says that he never smelled any abnormal odor at any time while he was in the cabin.

According to Mitton, there is no possibility that sufficient gas would have escaped within the few seconds that elapsed between the time that Laskey turned on the gas, lighted the match and put it into the orifice of the stove, to cause an explosion with such force that would cause the damage that was occasioned.

There is no indication that when Laskey and Noddin entered the cabin for the first time at 8.00 o'clock in the evening on September 25 that either smelled or sensed any gas escaping or being in the cabin.

The Plaintiff has failed to satisfy me by evidence that the propane gas heater in the cabin was defective or was not reasonably safe, to the knowledge of the defendant, at the time that he assigned the cabin to the plaintiff, and that the defendant was negligent in assigning such premises to the plaintiff. If the heater and the pipe connections were in good order immediately after the incident, it is a fair inference that they were before the explosion in good condition, in the absence of any evidence to the contrary.

The plaintiff has also failed to satisfy me that the defendant negligently left open the valve in the propane gas heater and thus allowed the gas to escape into the cabin. The defendant is positive that he closed the valve when he turned the heat off. The plaintiff did not sense any gas odor in the cabin at any time after the defendant had left, nor was there any explosion when he turned on the light switch, nor at any time during the night until 8.00 o'clock in the morning.

I fail to find any positive act of negligence on the part of the defendant Noddin which would have caused the gas to escape and the consequent explosion and damage to the plaintiff. Neither can I find that the defendant was negligent in not detecting any defect that there might have been in the gas stove fixtures or the stove itself. There is no evidence that there were any.

There is, in a number of respects, in my opinion, misconception on the part of the learned judge of Mitton's evidence. In the first place, the witness did not at all deal with "that cabin occupied by the plaintiff" under the conditions existing during the night in question. He did not know its size, and knowledge of its *exact* size was, on his own evidence, a prerequisite to the formation of any opinion as to the amount of gas which would gather during any

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given period. Nor did the witness know, nor was any evidence given, as to the conditions prevailing during the night in question, nor as to the tightness of the windows and door, nor as to the materials or method of construction of the cabin. The following evidence given by the witness in chief is illustrative and clearly indicates that he had not taken any measurements:

Q. How much gas would there have to be in the room to create a serious explosion?

A. In a room, let me see, 8 by 10—say a room with 1,200 cubic feet, you would have to have—let's see—if you take a room 1,200 cubic feet—take *somewhere around 3½ hours* to get enough for an explosive mixture.

Q. That is, *any* explosive mixture?

A. Yes. To get an explosive mixture to cause serious damage, yes. How did you word that again?

Q. What quantity of gas would be required to cause a minor explosion? And you might tell us from there the various amounts and the seriousness of the explosion that could occur?

A. Naturally, the more gas let out in a room, the larger your explosion is going to be because your gas-air ratio—that is, the mixture of air required with the gas is 24 to 1. So *it all depends on the size of your room and how much gas is being let in that room* governs the time that it would take to get an explosive mixture.

The appellant gave evidence as to the size of the cabin as follows:

A. Could be 10 by 12.

Q. 8 feet in height?

A. 8 feet in height, yes. I imagine 10 by 10 would be handier probably.

Notwithstanding his lack of knowledge of measurements and other essential facts, Mitton further testified in chief as follows:

Q. Now Mr. Mitton, in a room the size of that cabin with the burner or the valve turned on, how long would it take for sufficient gas to escape which would cause an explosion?

A. That is if the valve was *wide open?*

Q. Wide open first.

A. In a cabin that size, would take anywhere from *2½ to 3 hours. 2½ to 3½ hours.*

Q. To obtain an explosion?

A. Mmmm.

Q. And if the valve was only turned partly opened, then I presume it would take a considerably longer period of time?

A. Right.

Shortly after, he amplified this evidence as follows:

Q. And an explosion of this type, how long would the valve have to be opened?

A. Well until the room *was filled up* with an explosive mixture. That would take anywhere from *2½* to *3½ hours. It all would depend on the ventilation of the cabin, how tight the cabin was, how tight around the windows, how well—how tight it was around the door.*

Q. Now you heard Mr. Laskey state that he had arisen at 6.00 o'clock or approximately 6.00 o'clock in the morning, closed his windows in the cabin. Therefore the cabin was closed. How long would it take in a cabin that size for that explosive mixture to be created?

A. If the valve was *wide opened,* it would take from *2½ to 3 hours* to get an explosive mixture. That would *have to be figured out on the exact size of the cabin and the leakage around the doors and windows to put the exact time on it.*

Q. And if there was leakage around the doors and the windows, then it would take longer?

A. That's right. It would take longer.

Q. And the 2½ hour period approximately that you were referring to would be *under ideal conditions?*

A. Mmmm.

Q. That is no leaks?

A. No air movement at all.

The learned trial judge was therefore completely in error in proceeding upon the footing that "Mitton testified that in order to fill with gas that cabin occupied by the plaintiff, the jet must have been open 2 to 3 hours."

The evidence of Mitton in which he reduced the period to 2 to 3 hours rather than the 2½ to 3 or 3½ already given by him more than once, is contained in a later portion of his evidence in chief as follows:

Q. *And under ideal conditions, with no escape* of gas in the room that size, how long would it take for sufficient gas to escape to create an explosion of that import?

A. Roughly 2½ to 3 hours ½. Yes, you could pin that down in the vicinity of 2 to 3 hours.

As already mentioned, the actual conditions prevailing in the cabin, including the tightness or otherwise of the door and window openings, the type of walls or the weather on the night in question were not gone into. The above evidence, on its face, cannot be relied upon for the purpose for which the learned judge at trial used it.

It is clear, moreover, that the witness's knowledge as to the proportions of air and gas required to give an explosive mixture to which he testified above is not accurate. Dr. Toole, head of the Chemistry Department of the University of New Brunswick, testified that the limits within which propane gas and air will explode are from a low of 2·4% by volume of propane gas in a mixture the balance of which is air, to an upper limit of 7% or 8%. If there be any excess beyond this, the mixture will not explode.

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In an attempt to negative a finding that the appellant had left the valve open the previous evening, counsel for the latter put the following to the witness:

Q. Now Mr. Mitton, if the—this is a hypothetical question. If the gas in that particular cabin had been turned *on full—opened wide* at 8.00 o'clock in the evening and left on until 6.00 o'clock in the morning, what quantity of gas would be in that room?

A. There would be enough gas in that room, and you would have to go back to the doors and windows, *if the room being airtight*—if the gas had been left on that length of time, you would not have had an explosive mixture. You would be on your high limit of explodability.

If, as the witness had previously said, it would have taken from $2\frac{1}{2}$ to $3\frac{1}{2}$ hours or even 2 to 3 hours to produce "any" explosive mixture in the room, that is 2·47% of gas, it is difficult to credit the statement that in a period of 10 hours with the valve "opened wide" the concentration of gas in the room would not have reached a point beyond 7 or 8%. To my mind, this evidence indicates that the witness was purporting to speak about matters in which he was not in fact skilled. Mitton testified further:

Q. Now Mr. Mitton, if the gas had been *turned on full* at 8.00 o'clock in the evening and was left on, that is in an enclosed room—left on until approximately 10.30 or 11.00 in the evening, and then the windows were opened, would that gas escape?

A. A good deal of it would eventually when the room got filled up to your window level—it definitely would go out. There is no doubt about that; but if that gas was left on from 8.00 o'clock until 11.00—

Q. From 8.00 o'clock until approximately 11.00 with the windows closed?

A. If there had been any fire or spark in that room in that length of time, you would have had your explosion then, such as a light switch or cigarette being smoked; you would have your explosion then, because in that length of time you would have an explosive mixture in the room with the windows closed.

Q. Would there be enough in there in that period of time to create an explosion of the same force as created the damage in this instance?

A. Yes, because—yes, there would be. It would cause damage of that —just about the same as that.

Q. And an electric switch turned on in that period of time around 10.30 to 11.00 o'clock would cause the same effect?

A. Unless it was an explosive-proof switch, yes, in the cabins; and as a rule they don't use explosive-proof switches unless it is around gas premises.

Counsel, and no doubt the witness, had in view the fact that the respondent had returned to the room between

10.00 and 11.00 p.m., put on the light, opened the windows and smoked. The above evidence may be usefully compared with evidence given by Dr. Toole:

Q. One other thing, Doctor, in order to cause combustion with a gas such as propane in mixture, is it necessary that the gas come in contact with an open flame or something of that nature?

A. At least part of it must be heated to a sufficiently high temperature to ignite. For each set of conditions, there is a temperature of ignition which is necessary to raise part of the mixture to in order that ignition may take place.

Q. And I take it this is true, that the gas—the mere fact that the propane gas is present in a room under any circumstances other than at the proper temperature could not produce either fire or explosion?

A. No. That is correct.

Again:

Q. . . . Now Doctor, you have stated that in order for there to be an explosion, this gas must be ignited by a flame.

A. No, I didn't say it must be ignited. It must be raised to a certain temperature. In other words, the temperature of ignition. It could be done by a hot wire or by an electric spark.

Q. That is precisely the question I wish to ask you, Doctor. In the event that an explosive mixture was within the confined space that I have already mentioned, and an electric light switch is turned on, it is possible that the spark from that switch could ignite the mixture and cause an explosion?

A. If the switch was defective, you mean?

Q. If the switch was defective.

A. Oh yes.

Q. Because ordinarily there is a slight spark in most switches at the time they're depressed or pushed in. There is a sparak. That spark within that confined area—that simple little spark would be sufficient to cause an explosion?

A. If it were—*if the gas surrounding it had the correct mixture.*

Thus, unless the right mixture happened to be at the point of the spark or flame, there would be no explosion. He also said:

If you were to fill the whole room with a mixture of say 10% propane and 90% air, it would not explode.

Unless, therefore, the proper condition had been present in the right place when the respondent returned to his room on the evening previous to the explosion, his putting on of the light or his smoking would not have produced an explosion. Again, it is to be remembered that the situation put to the witness Mitton as to the quantity of gas present at that time was on the footing that the valve was fully open, as to which there was no evidence.

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Mitton was also asked his opinion as to the situation which would have existed if, with the valve *fully open* from 8.00 to 11.00 p.m., and the windows closed, the windows were then opened and left open until 6.00 a.m. In answer he testified as follows:

Q. Now with the windows opened—or shall we say with the windows closed at 8.00 o'clock in the evening, the gas valve open, and left opened until approximately 11.00 o'clock at night, and then at 11.00 o'clock at night the windows are opened and left open until 6.00 o'clock, what would be the condition of the room at 6.00 o'clock in the morning?

A. That is with the gas valve opened?

Q. With the gas valve opened—the windows opened.

A. You would have had an explosive mixture below your window level, yes, below your window levels, you would have definitely had an explosive mixture. The rest would pretty well clear itself out, but propane —being heavier than air, it has a tendency to hang towards the floor or the ground.

Q. And then at 6.00 o'clock in the morning if the windows are closed and the valve is still left opened?

A. *The rest of your room fills up with gas.*

Q. And would there still be an explosive mixture at 8.00 o'clock in the morning.

A. Definitely explosive mixture at 8.00 o'clock in the morning.

Again, it is incomprehensible to my mind why, if an explosive mixture would, in the opinion of the witness, be produced in the room with the valve open from 2 to 3 hours, the limits of explodability would not have been exceeded in an additional 9 hours.

In cross-examination Mitton was asked to deal with the situation where the valve was only partially open. He testified:

Q. Now if that heater had been turned on at 8.00 or half-past 8.00 in the evening, closed off at half-past 10.00 with the valve only partially open, I take it it is quite possible that an explosive mixture had not been reached?

A. *It would all depend on how far open the valve was.*

And again:

Q. And taking the same conditions with the burner partially opened at say 8.00 or 8.30 o'clock in the evening, the burner not being again touched until a quarter to 8.00 the following morning, and the windows—front and back opened up for a period from half-past 10.00 until 6.00 o'clock in the morning, is it quite possible that there is a certain position at which that valve could be set which would not reach an explosive mixture until it had been—until the windows had been closed up for an hour and one-half?

A. You would have to know the position of that valve before you could make any statement to that effect.

Q. Yes; but of course I take it that that is possible, there is a position in which it could have been left where the explosive mixture would have been created by closing the windows say an hour and one-half to an hour three-quarters before the explosion occurred?

A. The time limit would be lengthened, would be all.

For my part, I am unable to rely on the evidence of this witness as justifying the view that the cabin was free of gas before the morning when the explosion occurred. There is therefore not the same difficulty in drawing the inference that the appellant did not leave the valve completely shut off after demonstrating the stove to the respondent the previous evening as there is in accepting the respondent's evidence that he did not open it in the morning until 8.00 a.m. It is quite true that Mitton testified that the stove would have continued to burn if the valve had not been turned completely off but I cannot place the same confidence in this evidence as I would have otherwise been able to do had not his evidence on other points to which I have referred, been unsatisfactory. Moreover, no evidence was given as to whether the valve turned easily or not and it is quite possible that although the appellant may have shut it off, he had opened it partially in removing his hand. It was possible in the very act of withdrawing his hand to have opened it to some extent if the valve were not firmly seated. Undoubtedly there was gas in explosive quantity present at 8.00 a.m. Any other explanation for its presence having been negatived, the only conclusion to which I can come on the evidence is that in some such way the valve had been left open to some degree by the appellant. The preponderance of probability on all the evidence is to this effect rather than to support the appellant's theory that the valve had been opened wide at 6.00 a.m. and so left until 8.00 a.m., thus furnishing the *minimum* period for "any" explosion to take place even if one were to overlook the absence of the "ideal" conditions which the evidence called by the appellant stipulated.

The fact that the respondent at no time smelled gas is, at first blush, surprising, but that aspect of the case is not left completely without explanation. In the course of his

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evidence as to the situation existing in the room in his view the previous evening with the valve wide open, Mitton had testified:

A. But you would definitely get the smell of propane there.

Q. If you knew the smell of propane.

A. You would definitely get a peculiar smell there then.

Q. But of course that would mean something to one who was familiar with the smell of propane; that would be part of your premise, I assume?

A. Possibly, yes.

Q. But for one who did not, it wouldn't necessarily be a warning, would it?

A. I would think the curiosity of the party smelling something like that would be investigated.

It may very well be that if, with a slow leak, the respondent had been smoking when he returned to his room in the evening and opened the windows as he did, he might not have noticed a smell as to which he had not been put on notice. His failure to smell the odour in the morning may be due to the fact that his olfactory sense had been dulled by reason of having slept in the fouled atmosphere. There is evidence of Mitton which has a bearing on this. He testified:

Q. You told my learned friend that it would be impossible not to smell propane gas under the circumstances which were necessary, I take it, to bring about an explosion. Is that correct?

A. If your sense of smell is acute.

Q. Are you suggesting that Mr. Laskey perceived the smell of gas in that stove and went out and lit a match?

A. It would be impossible to be in that room with a keen sense of smell and that amount of gas—an explosive mixture in the room—and not smell. It would be impossible, if you were awake.

Q. Now what factors do you suggest must have been present in this case which resulted in Mr. Laskey lighting a match in the presence of an explosive mixture of propane gas?

A. Possibility of not being too wide awake, and not investigating peculiar smells.

It is, moreover, the fact that the respondent struck a match at 8.00 a.m. to light the stove which he would hardly have done had he appreciated any danger. As Mitton said:

Q. And for a person who failed to perceive the presence of gas through the odour, he might well make the mistake and strike a match within that explosive mixture.

A. Mmmm. Certainly, anyone would.

As to the absence of a pilot light, it is clear that had the stove been so equipped, the explosion could not have taken place. As to whether or not there was a duty resting upon

the appellant to have had the heater in the cabin so equipped, the appellant's own evidence is relevant. In cross-examination, he testified as follows:

Q. Now you were aware, I assume, that propane gas is an inflammable and explosive substance?

A. Yes.

Q. And I suppose you also knew as a proprietor of overnight accommodation that all persons did not know the characteristics of propane gas?

A. Well I suppose there would be a lot that didn't know.

Q. There wouldn't be any question about that, would there?

A. No. That's right.

Q. And I assume *that you felt there was some duty on your part to warn your customers of what you had in those cabins for heating?*

A. *After dealing with the public, I would say yes.*

* * *

Q. Do you tell them anything about the nature of the protection on the valve?

A. I tell them it must be on—lighted when they turn it on, and each time they turn it on, they must light the stove.

Q. Why do you tell them that?

A. Well some people are awful stupid. You would have to—I don't know why I tell them that. I really don't know. I know the nature of propane gas, of any gas. We have handled natural gas in our home for years and years and years, and naturally we have to light it every time we put it on and so on; and I took it for granted I tell people these stoves must be lighted when they are turned on, and each time they turn them off they must light them again if they turn them on.

Q. Why do you tell them that?

A. I suppose it is for their protection.

Q. Protection from what?

A. In case it had been turned on and not lighted, which would be a simple thing for anyone to do, but they might do it.

* * *

Q. What is the purpose of the pilot?

A. The purpose of the pilot, well it is a convenience to the public. They don't have to bother lighting them any more, and the stove remains lit at all times—turn them on and turn them off.

Q. Does it serve any other purpose?

A. Well it is a—yes, it is a protection.

Although a person in the position of the appellant is not bound to install the most modern equipment, nevertheless when experience had taught what was demanded for the protection of the public using his cabins, the appellant was bound to adopt those means in order to make his accommodations reasonably safe. There was, therefore, in my opinion, evidence upon which the finding of both courts below that the appellant failed in a duty incumbent upon him, namely, to install pilots, could be founded.

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I would therefore dismiss the appeal and allow the cross-appeal, both with costs here and in the Court of Appeal. The judgment pronounced by the learned trial judge should be restored.

LOCKE J. (dissenting): The evidence given at the trial has been reviewed in other reasons to be delivered in this matter.

The appellant swore that when he took the respondent to the cabin he explained to him the operation of the gas stove and, at the latter's request, turned it on and lit it and then, on his direction, turned it off, the respondent saying that he was going out. The respondent, giving evidence in chief, directly contradicted this, saying that nothing was said at the time about the stove and that he had not seen the appellant light it. Cross-examined as to a statement made on his examination for discovery where he had said that the appellant could have lit the stove, he said:—

> He could have lit it and he could not have (sic). I couldn't swear to it. I couldn't say he did light it; I did not see him.

Upon this issue, it would appear that the learned trial judge believed the evidence of the appellant that he had lighted the stove, a passage from his reasons reading:—

> The plaintiff has also failed to satisfy me that the defendant negligently left open the valve in the propane gas heater and thus allowed the gas to escape into the cabin. The defendant is positive that he closed the valve when he turned the heat off. The plaintiff did not sense any gas odour in the cabin at any time after the defendant had left, nor was there any explosion when he turned on the light switch, nor at any time during the night until 8.00 o'clock in the morning.
>
> I fail to find any positive act of negligence on the part of the defendant Noddin which would have caused the gas to escape and the consequent explosion and damage to the plaintiff.

The only time that the parties were together in the cabin was the occasion above referred to.

There was uncontradicted evidence given by the witness Mitton, the representative of the company which supplied the stove and attachments to the appellant, that some two hours after the explosion he tested the stove and the fittings and those in the adjoining room, including the connections leading to the pressure tank outside the building, applying what was described as the pressure test and the soap and

water test, and found there were no leaks of any kind, the witness saying also that, with the valve closed, it would not be possible for any gas to escape.

The learned trial judge appears to have accepted this evidence without question, saying as to this:—

> The plaintiff has failed to satisfy me by evidence that the propane gas heater in the cabin was defective or was not reasonably safe, to the knowledge of the defendant, at the time that he assigned the cabin to the plaintiff, and that the defendant was negligent in assigning such premises to the plaintiff. If the heater and the pipe connections were in good order immediately after the incident, it is a fair inference that they were before the explosion in good condition, in the absence of any evidence to the contrary.

Following this, he added that he could not find the defendant negligent in not foreseeing what caused the explosion and the damage.

In view of these findings, it necessarily follows that some one turned on the gas between the time that the appellant left the cabin at about 8 o'clock in the evening and 8 o'clock the following morning when, according to the respondent, he lit a match near the burner of the stove and the explosion occurred. The cabin was locked by the respondent when he left the evening before, and again when after returning he retired about 11 o'clock, and no one suggests that any one else entered the cabin during this twelve hour interval. The respondent got up at 6 o'clock in the morning and closed the two windows in his part of the cabin and says that, at that time, he did not touch the stove. Dealing with this aspect of the matter, the learned trial judge said:—

> Of course, I find that there is no evidence that Laskey did tamper with or try to light the stove, except at 8.00 o'clock in the morning when he got up, and I find that the explosion was caused by an accumulation of gas in the room before Laskey attempted to light the stove. Whatever caused the accumulation is not determined, and I cannot speculate as to how it came about.

With due respect, I think it was the duty of the learned judge to decide what inference was to be drawn from the facts above stated. This would not be to speculate, as suggested in the reasons given. This issue not having been decided, the appellant was none the less held liable on the footing that there was an implied warranty that the cabin would be *absolutely safe* for occupancy and that had there been a pilot light on the stove the accident would not have occurred.

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The only evidence as to the function of the pilot light was that given by the witness Mitton. A stove not equipped with such a device, which is attached to the burner, must be lighted with a match: with the device, when the gas is turned on it is ignited by the pilot light. Apart from the evidence, these devices are in such common use and have been for so long that judicial notice may properly be taken of their function and purpose. Mitton further gave evidence of a fact that appears to be obvious, that if gas were escaping in the vicinity of the light, whether at the burner or close to it, it would be ignited. No doubt also, if there was an explosive accumulation of gas in the room the source of which was elsewhere than in the burner or the connections, it would be ignited by the pilot light, as it would be, of course, by a match. These matters are self evident.

To say, however, that the absence of the pilot light, which would undoubtedly have kindled the gas which, upon the evidence, must have escaped through the burner, was the cause of the accident is, in my opinion, quite unwarranted. It is, indeed, to put the cart before the horse. If, as the majority of the Appellate Division concluded and as appears to me to be the only inference to be drawn from the evidence, the presence of the gas in the room resulted from the action of the respondent in turning it on when he got up at 6 o'clock, it was that act which was the proximate cause of the accident.

Under Order 58, Rule 1 of the Rules of the Supreme Court of New Brunswick, all appeals to the Court of Appeal shall be by way of rehearing and, by Rule 4 of that Order, the Court is given power to draw inferences of fact and to give any judgment and make any order which ought to have been made.

Bridges J., with whom Richards C.J. agreed, after referring to the finding at the trial that the stove and the connections were in good condition immediately before the explosion, and saying that the trial judge was apparently satisfied that the defendant, when in the cabin with the plaintiff, lit the heater and then closed the valve shutting off the gas, apparently concurring in those findings, said in part:—

> the only conclusion one can I think reach is that the valve must have been wholly or partially opened by some person between shortly after 8.00 o'clock in the evening and 6.00 a.m. the following morning.

Continuing, he said that the judge had not dealt with this aspect of the case but that there was evidence from which the inference could be drawn that the plaintiff probably opened the valve without lighting the gas, and that it was his opinion that he did so. These learned judges were, however, of the opinion that, if the appellant had properly instructed the respondent in the operation of the stove, it was "difficult to believe that he would have turned on the gas without lighting it." Bridges J. further considered that the appellant was negligent in not explaining the dangers of propane gas and the facts as to its odour which was designed to give warning of its presence. Upon these findings he held that both parties were to blame and the loss was apportioned.

There is thus a finding of the court appealed from that the presence of the inflammable mixture of gas in the room at 8 o'clock a.m. was caused by the respondent turning on the gas and, upon the respondent's own evidence, the only time that this could have occurred was when he got up to close the windows at 6 o'clock. If the respondent had said that he had turned on the gas, thinking that there was a pilot light on the stove which would have at once ignited it, the absence of the pilot light might have afforded some arguable ground for imposing liability. The respondent, however, says nothing of the kind, his evidence being a flat denial that he did turn on the gas at all. If there is any authority for the proposition that there is a duty imposed upon persons renting accommodation of this kind to others, in this day and age, to explain that gas used for illumination or cooking, if left turned on without lighting it, constitutes a danger either of asphyxiation or explosion, I am unaware of it. There was nothing to differentiate the propane gas from other gas in this respect that, if allowed unchecked to escape into the air in a room, a dangerous inflammable mixture would result.

The duty of the present appellant to the respondent was not that of an insurer and, as pointed out by the judgment of the majority in the Court of Appeal, was not absolute. In *Cox* v. *Coulson* (1), Swinfen Eady L.J., referring to the liability of a theatre owner to a person purchasing a ticket to see a performance, said that the defendant must be taken

(1) [1916] 2 K.B. 177 at 181.

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to have contracted to take due care that the premises should be reasonably safe *for persons using them in the customary manner and with reasonable care,* referring as authority to what had been said in *Francis* v. *Cockrell* (1), and in *Norman* v. *Great West Railway Co.* (2). This statement of the law was approved in *Hall* v. *Brooklands Auto Racing Club* (3), by Scrutton L.J.

Upon the finding made in the Court of Appeal which, with respect, appears to me to be an inevitable conclusion from the evidence, it was not the absence of the pilot light that was the proximate cause of the respondent's injury but his own act in turning on the gas and failing to light it. A pilot light, no doubt, would have at once ignited the gas preventing any damage, but then leaving the window or the door open would have been equally effective for that purpose. But the failure to take any of these precautions that might be suggested was not the proximate cause of the injury and have, in my opinion, no bearing on the question of liability.

It has been pointed out many times in this Court that, as the appeal is from a court of appeal, the judgment should not be reversed unless we are of opinion that it is clearly wrong. Particularly is this so when the decisive finding, as in this case, is upon a question of fact. I am quite unable to say that the judgment of the Court of Appeal in this case is wrong: on the contrary, with respect, I think that upon the issue as to what caused the accumulation of gas in the room it was clearly right.

I would allow this appeal and dismiss this action with costs throughout.

CARTWRIGHT J.:—The facts out of which this appeal arises are sufficiently set out in the reasons of other members of the Court.

For the reasons given by my brother Rand on this branch of the matter, I am of opinion that the finding of the Appeal Division, that the failure of the appellant to install a pilot light was a breach of his duty to make the premises as safe as reasonable care and skill could make them, was supported by the evidence and should not be disturbed. This failure was a cause of the explosion.

(1) (1870) L.R. 5 Q.B. 184. (2) (1869) L.R. 5 Q.B. 385.
(3) [1933] 1 K.B. 205 at 215.

The other cause was the escape of gas. It was conceded that the evidence established that there was no leak in the piping leading from the cylinders containing the gas to the heater and that the escape must have occurred through the valve at the heater having been left wholly or partly open for a considerable period of time prior to the explosion. Three theories as to how this happened were put forward: (i) that after the appellant had lighted the heater he either failed to turn it off completely or, having turned it off, inadvertently turned it on; (ii) that between 8.00 and 11.00 o'clock in the evening preceding the accident someone unknown entered the cabin (which was then empty and, so far the respondent recollected, unlocked) and inadvertently or mischievously opened the valve; (iii) that the respondent opened the valve when he got up at 6.00 a.m.

The learned trial judge found that none of these theories were established. The majority in the Appeal Division were of opinion that there was evidence from which the inference could and should be drawn that the respondent opened the valve at 6.00 a.m. without lighting the gas and that this was negligence on his part contributing to the accident.

It is clear that the onus of proving contributory negligence on the part of the respondent rested upon the appellant, and, in my opinion, the evidence does not warrant any interference with the finding of the learned trial judge that this onus was not discharged. It must be remembered that the learned trial judge, who had the advantage of seeing and hearing the witnesses, has apparently credited the explicit statement of the respondent, made during his examination in chief and repeated during his cross-examination, that he did not touch or go near the heater when he got up at 6.00 a.m. Of the three theories mentioned none may appear to be probable but, in my opinion, on all the evidence the third is at least as improbable as either of the others, and I agree with the view of the learned trial judge that the contributory negligence alleged against the respondent was not proved.

It therefore appears that it has been proved that the explosion by which the respondent was injured resulted from (i) the failure to install a pilot light, a cause for which the appellant is responsible, and (ii) an unexplained escape

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of gas, a cause for which neither party has been proved to be responsible; and it follows that liability for the damage caused rests upon the appellant.

For these reasons I would dismiss the appeal, allow the cross-appeal and restore the judgment of the learned trial judge with costs throughout.

ABBOTT J. (dissenting):—This action arises out of injuries sustained by respondent following an explosion which took place in an over-night cabin, one of a group operated by the appellant, near Moncton, New Brunswick.

The respondent and a group of friends arrived at these overnight cabins at about 8 p.m. on September 25, 1953, and rented three cabins, one of which was occupied by the respondent, being one side of a double cabin, the other side being occupied by a Mr. and Mrs. Fraser, the two sides separated by a partition. Each of these cabins was equipped with a propane gas heater. The evidence established that the appellant personally showed the cabins to the party, and appellant testified that when he took respondent to his cabin at about eight o'clock, he turned on and lit the propane gas heater in the presence of the defendant. His evidence on this point is not contradicted by respondent. Respondent told him he did not need the heat on as he was going to visit a cabin occupied by two of his friends. Appellant testified he then turned off the gas heater.

Respondent did leave the cabin and spent most of the evening at another cabin with other members of his party, returning to his own cabin at about 11 p.m. He stated that after he had undressed, he opened the windows, turned off the light, and went to bed. He said he slept until about 6 a.m., when he got up, went to the bathroom, closed two of the windows of the cabin, one of which was in the bathroom, the other in the front of the cabin near the door, and then went back to bed. He stated that he did not again rise until about 8 a.m. when he turned on the gas heater, lit a match, put it towards the burner, when an explosion took place which severely injured him, blew out one side of the cabin wall and scorched furniture and fittings in the cabin.

The learned trial judge found that the gas heater was not defective, that the defendant did not leave the valve open when he demonstrated the apparatus at 8 p.m. and that the defendant was not negligent in assigning the premises to the plaintiff. There was ample evidence to support these findings. He also found no positive act of negligence on the part of either the appellant or the respondent which would cause the gas to escape.

On these findings of fact the learned trial judge gave judgment for the respondent on the ground that the appellant had not made the premises absolutely safe for occupancy by providing the propane heater with a pilot light.

In the Court of Appeal, Bridges J., with whom Richards C.J. concurred, appears to agree with the findings of the learned trial judge that appellant did light the stove at about 8 p.m. when in the cabin with respondent and then turned off the gas. He then went on to say:—

> There was no direct evidence that the plaintiff turned on the gas during the night or early morning but if the gas was completely turned off by the defendant at 8.00 p.m. in the evening prior to the explosion, with the heater and pipe connections in good working order, the only conclusion one can I think reach is that the valve must have been wholly or partially opened by some person between shortly after 8.00 o'clock in the evening and 6.00 a.m. the following morning. The learned trial judge did not deal with this aspect of the case. There is no evidence or suggestion of any person being in the cabin between those hours except the plaintiff. He stated that he locked the door of the cabin when he went to bed at 11.00 p.m. but did not remember if he locked it when he went to the other cabin shortly after 8.00 p.m. It is highly improbable that a person would enter the cabin for the sole purpose of opening the valve if the cabin were unlocked. There is in my opinion with all deference evidence from which the inference can be drawn that the plaintiff probably opened the valve without lighting the gas and it is my opinion that he did so.

In holding the appellant liable, Bridges J. agreed with the learned trial judge that there was a duty imposed upon the appellant to equip the stove with a pilot light as a safety measure but differed with his view that there was an implied warranty that the cabin must be made absolutely safe for occupancy. He considered moreover that the appellant had failed in his duty in that "he did not explain to the plaintiff the operation of the heater and warn him of the danger from the use of propane gas . . ."

With respect, I am unable to agree with this latter finding. In my opinion the evidence established that the appellant did show the respondent how the heater operated and

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I cannot believe that the plaintiff, an educated man, 72 years of age, who had been a druggist for over thirty years, needed to be warned that any gas stove or heater carelessly handled could be dangerous.

There is uncontradicted evidence that the gas heater was a type of heater in common use, and as it was installed in the cabin operated properly, was in good condition and could not of itself have caused an explosion, and the Courts below appear to have so found.

I am satisfied on the evidence that the escape of gas, which resulted in the explosion, must have been caused by some human intervention. It seems to me that this could only have happened in one of three ways:—

(1) that the appellant after opening the valve and lighting the stove at about 8 p.m. failed to turn it off. He states positively that he did turn it off and this is not contradicted although respondent was present at the time. The appellant did not re-enter the cabin until after the explosion had taken place the following morning;

(2) that some third person entered the cabin between the time appellant and respondent left it about 8 p.m. and the time respondent returned at about 11 p.m., and at that time turned on the valve. There is no evidence to support this alternative, the cabin door appears to have been locked at all relevant times, certainly from 11 p.m. on, and I think it must be rejected and

(3) that the respondent himself turned on the valve between the time it was closed at 8 p.m. the previous night and 6 a.m. when he says he got up for the first time. That this is what happened is the view held by Richards C.J. and Bridges J., as appears from the quotation which I have given from the latter's reasons. I share that view.

There remains for consideration therefore the question as to whether the Courts below were right in holding that appellant failed in his duty to respondent in not having the propane gas heater equipped with a pilot light as a safety measure. With respect, I am of opinion that they were not.

The legal principle upon which appellant's responsibility to respondent rests has been accurately and succinctly stated by my brother Rand in *Brown* v. *B. & F. Theatres Limited* (1), where he says:—

> There was a contractual relation between her and the theatre management that exercising prudence herself she might enjoy those privileges without risk of danger so far as reasonable care could make the premises safe.

An occupier is not bound to adopt the most recent inventions and devices provided he has done what is ordinarily and reasonably done to ensure safety. See Halsbury, 2nd Ed. Vol. 23 at p. 605, and the authorities there cited.

As Du Parc L.J. said in *Gilmore* v. *London County Council* (2), "in considering what is reasonable you must not ask for perfection" and this test was cited with approval by the Court of Appeal in *Bell* v. *Travco Hotels, Ltd.* (3).

No doubt the installation of a pilot light on the gas heater in question would have constituted an additional safeguard against an explosion resulting from careless operation of the heater. As I have said, however, there is uncontradicted evidence in this case that the heater in question was of a type in common use, was in good condition and if operated properly could not have caused an explosion.

In the circumstances I am of opinion that the appellant carried out his contractual obligation "to take due care that the premises would be reasonably safe for persons using them in the customary manner and with reasonable care." See *Cox* v. *Coulson* (4).

I would therefore allow the appeal and dismiss the plaintiff's action with costs throughout.

Appeal dismissed; Cross-appeal allowed; both with costs.

Solicitor for the appellant: *C. F. Inches.*

Solicitor for the respondent: *C. J. A. Hughes.*

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(1) [1947] S.C.R. 486 at 490.
(2) [1938] 4 All E.R. 333.
(3) [1953] 1 All E.R. 638.
(4) [1916] 2 K.B. 177 at 181.