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IN THE COURT OF APPEAL

CIVIL APPEAL NO. 12 OF 1991

BETWEEN                      NORTHROCK LIMITED                      -     Appellant

and

(1) DESMOND JARDINE  
(2) SHEILA JARDINE                      -     Respondents

Before: The Rt. Hon. Sir Vincent Floissac - Chief Justice  
The Honourable Miss Justice Joseph J.A (Ag.)  
The Honourable Mr. Justice Singh J.A (Ag.)

Appearances: Mr. P. I. Foster for the appellant.  
Mr. C. A Mc Namara for the respondents.

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1992 May 25th  
October 26th  
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## JUDGMENT

FLOISSAC, C.J.

This is an appeal against a judgment delivered by Matthew J on the 24th April 1991. By that judgment, the learned judge found that damage had been done to the respondents' dwelling house at Bisee, Summersdale in the vicinity of Castries in Saint Lucia and that the damage had been caused by detonations from the appellant's quarry operated in that vicinity. As a result of that finding, the learned judge ordered the appellant to pay to the respondents so-called special damages in the sum of \$35,420.00 and granted a final injunction prohibiting the appellant from executing "any further blasting at their Stone Quarry at Bisee, Summersdale with explosives or otherwise".

The appellant is dissatisfied with the judgment and has filed 18 grounds of appeal against it. Notwithstanding the multiplicity of the grounds of appeal, there are in effect only six substantial questions required to be decided by this Court. These questions are (1) whether the Court should entertain those grounds which are in fact grounds of appeal against the learned judge's interlocutory

orders (2) whether the onus was on the respondents to prove that the damage to the respondents' dwelling house was caused by the "fault" of the appellant (3) whether the respondents discharged that onus (4) whether the defence of "volenti non fit injuria" was available to the appellant, (5) whether the award of so-called special damages is valid and (6) whether the injunction should have been granted.

**(1) The interlocutory orders**

Included in the appellant's grounds of appeal are objections to the learned judge's refusal of the appellant's application for an adjournment of the trial and the learned judge's rejection of a submission by counsel for the appellant that the respondents' Statement of Claim failed to disclose a cause of action.

These rulings by the learned judge were not final judgments or orders which finally and conclusively determined the litigated rights of the appellant and the respondents. The objections thereto were therefore in effect appeals against interlocutory judgments or orders which Section 26(2) of the West Indies Associated States Supreme Court (Saint Lucia) Act No. 17 of 1969 renders unappealable without the leave of the Judge or of this Court. Since no application was made for such leave or for an extension of the time prescribed for applying for such leave, the grounds of appeal based on objections to these interlocutory judgments, orders or rulings cannot now be entertained.

**(2) The onus of proof of "fault" and causation**

The Saint Lucian law of delict or tort is governed by articles 985, 986, 917A and 1137 (our articles) of the Civil Code of Saint Lucia.

Our article 985 provides that:

"Every person capable of discerning right from wrong is responsible for damage caused either by his act, imprudence, neglect or want of skill, and he is not

relievable from obligations thus arising."

Our article 986 provides that:

"He is responsible for damage caused not only by himself, but by persons under his control and by things under his care....."

The responsibility attaches in the above cases only when the person subject to it fails to establish that he was unable to prevent the act which has caused the damage....."

Our article 917A provides that:

"(1) Subject to the provisions of this article, from and after the coming into operation of this article the law of England for the time being relating to contracts, quasi-contracts and torts shall *mutatis mutandis* extend to this Colony, and the provisions of articles 918 to 989 and 991 to 1132 of this Code shall as far as practicable be construed accordingly; and the said articles shall cease to be construed in accordance with the law of Lower Canada or the "Coutume de Paris":...

(2) .....

(3) Where a conflict exists between the law of England and the express provisions of this Code or of any other statute, the provisions of the Code or of such statute shall prevail."

Our article 1137 provides that:

"Any question relating to evidence, which is not covered by any provision of this Code or of any other statute, must be decided by the rules of evidence as established by the law of England."

There has never been any doubt that our articles 985 and 986 place on the plaintiff the onus of proving as a precondition of the defendant's delictual liability that the damage suffered by the plaintiff was caused by the defendant or by persons under his control or things under his care. Nor has there ever been any doubt that where the plaintiff alleges that the damage was caused by the defendant (as distinct from a thing under the defendant's care) or where the plaintiff relies on our article 985 (as distinct from our article 986), the onus is on the plaintiff to prove as a precondition of the defendant's delictual liability that the damage was caused by the defendant's fault. I use the word "fault" in its technical sense to signify the concept which is expressed in the words "act, imprudence, neglect, or want of skill" appearing in our article 985 and which is defined in our article 989 D (1) as "negligence, breach of statutory duty or other duty or other act or omission which gives rise to a liability in tort or would apart from this article give rise to the defence of contributory negligence".

Two questions however were left in doubt by our articles 985 and 986. The first question was whether in the case of damage caught by our article 986 (i.e damage proved to have been caused by a thing under the defendant's care), it is necessary for the plaintiff to prove fault on the part of the defendant. The second question was the test for determining whether damage was caused by the defendant's fault and was therefore caught by our article 985

or whether the damage was caused by a thing under the defendant's care and was therefore caught by our article 986.

The first question was resolved by the Privy council in **Quebec Railway, Light, Heat and Power Company v Vandry** (1920) A C 662. There, the Privy Council was required to consider and interpret article 1054 of the Civil Code of Quebec of which our article 986 is a facsimile. Delivering the opinion of the Board, Lord Summer said (at pp 676,677):

"There seems to be no doubt that art. 1054 introduces a new liability, illustrated by a variety of cases and arising out of a variety of circumstances, all of which are independent of that personal element of *faute* which is the foundation of the defendant's liability under art. 1053. Furthermore, proof that damage has been caused by things under the defendant's care does not raise a mere presumption of *faute*, which the defendant may rebut by proving affirmatively that he was guilty of no *faute*. It establishes a liability, unless, in cases where the exculpatory paragraph applies, the defendant brings himself within its terms. There is a difference, slight in fact but clear in law, between a rebuttable presumption of *faute* and a liability defeasible by proof of inability to prevent the damage."

With regard to the rule in **Rylands v Fletcher** (1868) L.R 3 H. L 330 (which both counsel canvassed at the trial and sought to argue in this appeal), Lord Summer said (at pp 677, 678):

"In enacting the Code the Legislature may have foreseen cases of the kind now in question many years before any of them arose. In construing it *Rylands v Fletcher* and *Nichols v Marsland* had

better be left out of account. There is no reason why the Code should be made to conform to them."

In *City of Montreal v Watt & Scott Ltd* (1922) 2 AC 555, the Privy Council reviewed its decision in **Vandry's Case**. There, Lord Dunedin (delivering the opinion of the Board on the exculpatory paragraph of article 1054 of the Quebec Code) said (at pp 562, 563):

"Their Lordships, therefore, think it better to repeat emphatically that the exculpatory paragraph applies to the first paragraph as well as to the second, third, fourth and fifth, and that that is a necessary part of the interpretation given to the article in *Vandry's Case*. It is indeed obvious that if this was not so then the first paragraph would, as regards the damage done by things, impose a most onerous liability on those who had those things under their control. The only addition to the views expressed in *Vandry's Case*, which was not necessary there but is necessary here, is that in their Lordships' view "unable to prevent the damage complained of" means unable by reasonable means. It does not denote an absolute inability."

As a result of the decisions of the Privy Council in **Vandry's Case** and in *City of Montreal v Watt & Scott Ltd*, there is now no doubt that where the plaintiff has proved that the damage which he suffered was caused by a thing under the defendant's care, there is no need for the plaintiff to prove fault on the part of the defendant as a prerequisite to the defendant's delictual liability for such damage. Proof by the plaintiff that the damage which he suffered was caused by a thing under the defendant's control engenders a presumptive or defeasible liability on the part of the defendant for that damage. The onus is then on the defendant to rebut the presumption of liability or to defeat the defeasible

liability by proving that he was unable to prevent the damage by reasonable means.

To the extent to which our article 986 is a rule of law, it conflicts with the law of England and prevails over the latter by virtue of article 917A(4). To the extent to which our article 986 is a rule of evidence, it excludes contradictory English rules of evidence the importation of which would otherwise have been authorised by our article 1137.

The second question which was left in doubt by our articles 985 and 986 has been resolved by the Quebec Courts. There, a distinction has been drawn between damage caused by the defendant through the instrumentality of a thing and damage caused by an autonomous act of a thing without intervening human action. The former is caught by the Quebec article 1053 (our article 985) which requires the plaintiff to prove fault on the part of the defendant. The latter is caught by the Quebec article 1054 (our article 986) which creates a presumptive or defeasible liability on the part of the defendant and exempts the plaintiff from proving fault.

It is my judgment that we should gratefully adopt the Quebec test for determining whether damage was caused by a person or a thing. Applying that test, I conclude that the damage to the respondent's dwelling house was not caused by a thing (i.e a quarry). The alleged detonations at the quarry and the resultant vibrations were not autonomous acts of the quarry. They were human acts of the operators of the quarry and were therefore caught by our article 985. The onus was accordingly placed on the respondents to prove that the damage to the respondents' dwelling house was caused by the fault of the appellant.

### **(3) Proof of fault and causation**

We are required by our articles 917A(1) and 1137 to interpret our article 985 by reference to the English Law of tort and to

prove liability under article 985 by reference to the English rules of evidence. This means that where the cause of action is negligence, the plaintiff must prove by reference to the English Law of negligence and English rules of evidence (1) that the defendant owed to the plaintiff a duty to take care (2) that the defendant was negligent or in breach of that duty and (3) that the damage suffered by the plaintiff was caused by that negligence or breach of duty.

With regard to the duty to take care in this case, the evidence is that the appellant's quarry is situated about 100 yards away from the respondents' dwelling house. The result is that there is a relationship of geographical proximity or neighbourhood between the appellant and the respondents and the appellant ought reasonably to have foreseen a substantial or sufficient probability (as distinct from a bare or remote possibility) that severe detonations at the quarry would result in physical damage to the dwelling house. The appellant therefore owed to the respondents a duty to take reasonable care or precautions to prevent such damage.

At the trial, the second respondent testified and the learned judge believed that in the years 1987 to 1991 there were more than 45 detonations during which there were vibrations in the house. As a result of those vibrations, cracks appeared in the walls of the house and grew larger after every detonation. A civil engineer (Mr. Thomas Walcott) also testified as an expert witness. His opinion was that the cracks were caused by ground vibrations which were the result of blastings at the quarry but which could have been the result of seismic activity. The question therefore arises as to whether the evidence of the second respondent and Mr. Walcott was sufficient to establish that the damage to the house was caused by the appellant's negligence.

With regard to proof of causation, it is well established that damage suffered by the plaintiff will be held to have been caused



by the defendant's negligence if the plaintiff proves on a balance of probabilities or by reasonable inference that the negligence substantially contributed to the damage or to the risk or danger thereof. Such negligence may either operate alone or concurrently or successively with other factors and in such a manner as to form a component of one compound or cumulative cause. This theory of causation was explained by the House of Lords in **Mc Ghee v National Coal Board** (1972) 3 AER 1008. There Lord Simon said (at p 1014):

"But *Bonnington Castings Ltd v Wardlaw and Nicholson v Atlas Steel Foundry & Engineering Co Ltd* establish, in my view, that where an injury is caused by two (or more) factors operating cumulatively, one (or more) of which factors is a breach of duty and one (or more) is not so, in such a way that it is impossible to ascertain the proportion in which the factors were effective in producing the injury or which factor was decisive, the law does not require a pursuer or plaintiff to prove the impossible, but holds that he is entitled to damages for the injury if he proves on a balance of probabilities that the breach or breaches of duty contributed substantially to causing the injury. If such factors so operate cumulatively, it is, in my judgment, immaterial whether they do so concurrently or successively."

In the present case, the respondents proved (by the uncontradicted direct evidence of the second respondent and by the uncontradicted expert evidence of Mr. Walcott and on balance of probabilities or by reasonable inference) that the detonations at the quarry and the resultant ground vibrations caused or substantially contributed to the damage to the respondents' dwelling house. The fact that seismic activity may have been a concurrent or successive contributory cause in no way detracts from

the causative attribute of the detonations.

Having proved that the causes of the damage to the dwelling house were the detonations and the resultant vibrations, the respondents still had to prove negligence on the part of the appellant or his servants or agents in the execution of the detonations. In discharging that onus of proof, the respondents were assisted by the maxim "*res ipsa loquitur*" and the presumption of negligence enshrined therein. That maxim is explained in Halsbury Laws of England (Fourth Edition) Vol. 34 paragraph 57 which reads as follows:

"Under the doctrine *res ipsa loquitur* a plaintiff establishes a *prima facie* case of negligence where (1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the incident, and (2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the plaintiff's safety. There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

In *Barkway v South Wales Transport* (1950) 1 AER 392, Lord Normand said (at p 399):

"The maxim is no more than a rule of evidence affecting *onus*. It is based on commonsense, and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant."

In the ordinary course of things, a detonation at a quarry should not result in damage to a dwelling house if those who have the management and control of the quarry exercise reasonable care to avoid such damage. Since the vibrations in and damage to the respondents' dwelling house were caused by detonations at the appellant's quarry, the probability that the vibrations and damage were caused by the negligence of the appellant or of persons for whose negligence the appellant is vicariously responsible is greater than the converse probability. The maxim "*res ipsa loquitur*" therefore applied and the onus was on the appellant to rebut the presumption of negligence embodied therein.

The appellant might have rebutted the presumption by explaining the most probable cause of the ground vibrations and by proving that such cause did not connote negligence on the part of the appellant or was consistent with or could have operated irrespective of the absence of such negligence. The appellant might also have rebutted the presumption by simply proving that irrespective of the cause of the ground vibrations and even if the ground vibrations were inexplicable, the appellant in fact took all reasonable care or precautions to avoid the same or to avoid damage to the respondents' dwelling house and for this reason the appellant was not negligent.

Unfortunately, the appellant did no such thing. The appellant led no evidence whatsoever at the trial and thereby allowed the presumption of negligence to survive and prevail. Accordingly, the proper conclusion invited by the evidence adduced at the trial is that the damage to the respondents' dwelling house was caused by the negligence of the appellant or its servants or agents.

(4) *Volenti non fit injuria*

One of the grounds of appeal is that "The Learned Trial Judge failed to consider properly, adequately or at all counsel for the Defendants/Appellants submissions concerning the Plaintiffs/Respondents consent in this matter". This of course is a reference to the defence of "*volenti non fit injuria*". The contention is that when the Respondents came to live in Bisee in the year 1966, the quarry was already operative. The respondents knew that and must have consented to the risk of damage to their dwelling house as a result of the operation of the quarry.

In *Letang v Ottawa Electric Ry. Co.* (1926) A. C. 725 (which incidentally was a Quebec Case), Lord Shaw (delivering the opinion of the Privy council) said (at p 731):

"The law of Canada and England seems to be summed up in the leading proposition to Wills J.'s judgment "If the defendants desire to succeed on the ground that the maxim *volenti non fit injuria* is applicable, they must obtain a finding of fact that the plaintiff freely and voluntarily, with full knowledge of the nature and extent of the risk he ran, impliedly agreed to incur it."

The evidence in this case is that the detonations at the quarry between the years 1966 and 1986 were not as frequent and violent as those executed during the years 1987 to 1991. It could not therefore be said with justification that the respondents had full knowledge or appreciation of the nature and extent of the risk

which they are alleged to have accepted. In the light of that fact, the learned judge correctly rejected the defence of *volenti non fit injuria*".

(5) **The so-called special damages**

The appellant's twelfth ground of appeal (which includes the eleventh ground) is that "The Learned Trial Judge erred in awarding the sum of \$35,420.00 as special damages, the said sum not being properly pleaded in the Plaintiffs/Respondents Statement of Claim and/or not being pleaded with sufficient particularity".

In their Statement of Claim, the respondents alleged physical damage to their home. They particularised the physical damage and claimed special damages in the sum of \$26,565.00 as well as general damages. At the trial, they proved by reference to Mr. Walcott's Report that it would cost \$26,565.00 to repair the damage. In awarding special damages in the sum of \$35,420.00 the learned judge said:

"I accept the original figure of \$26,565.00 as special damages as at May 1988 and would increase this by thirty-three and one-third percent to arrive at the appropriate figure to cover the deterioration and increase of costs of repair to the date of judgment".

The question to be decided is whether the award of \$35,520.00 is wrong in principle in view of the measure of damages awardable in such a case. In **Dominion Mosaics Co. Ltd. v Trafalgar Trucking Co.** (1990) 2 A.E.R 246 at 249, Taylor L.J said:

"The basic principle governing the measure of damages where the defendant's tort has caused damage to the plaintiff's land or building is *restitutio in integrum*. The damages should be such as will, so far as money can, put the plaintiff in the same position as he would have held had the tort not occurred. In applying that principle to particular

cases, the problem has been whether restitutio is to be achieved by assessing the diminution in value of the damaged premises or the cost of reinstatement or possibly on some other basis".

In the present case, the appropriate measure of damages is the cost of the repairs. This the learned judge purported to assess on the basis of Mr. Walcott's Report. He called the award special damages when, technically, it was general damages. The misnomer by itself cannot be a valid ground for interfering with the award.

(6) **The injunction**

In the exercise of his judicial discretion, the learned judge granted the injunction claimed. The appellant now asks this Court to review the exercise of the discretion and to discharge the injunction. In this respect, we should be guided by two dicta which were cited with approval by the House of Lords in **G v G** (1985) 2 A.E.R 225.

The first dictum emanates from Viscount Simon L. C in **Charles Osenton & Co. v Johnston** (1941) 2 A.E.R 245 where he said (at p 250):

"The appellate tribunal is not at liberty merely to substitute its own exercise of discretion for the discretion already exercised by the judge. In other words, appellate authorities ought not to reverse the order merely because they would themselves have exercised the original discretion, had it attached to them, in a different way. If, however, the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion, in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be

justified."

The second dictum is that of Asquith L.J in **Bellenden v Satterthwaite** (1948) 1 A.E.R 343 where he said (at p 345):

"We are here concerned with a judicial discretion, and it is of the essence of such a discretion that on the same evidence two different minds might reach widely different decisions without either being appealable. It is only where the decision exceeds the generous ambit within which reasonable disagreement is possible, and is, in fact, plainly wrong, that an appellate body is entitled to interfere."

In the present case, the learned judge gave no reason for his grant of the injunction. Nor did he indicate the factors or circumstances which influenced the exercise of his discretion in favour of the grant.

Realistically, there are at least five factors or circumstances which militate against the grant of the injunction. Firstly, the learned judge might have taken judicial notice of the fact that the operation of a quarry is in the public interest which is always an important factor to be taken into account in the exercise of the judicial discretion to grant or refuse an injunction. Secondly, the award of precisely quantified damages indicates that the damage resulting from the fault complained of is capable of being estimated in monetary terms. Thirdly, in view of the award of substantial damages, it is unlikely that the appellant would repeat the detonations with the intensity, heedlessness and grave consequences which necessitated this action. Fourthly, the grant of the injunction denies the appellant an opportunity to repent the wrongful act which incurred the sanction of the Court by way of an award of damages. Fifthly, the grant of the injunction must already

have inflicted and would continue to inflict on the appellant hardship and oppression disproportionate to the advantage to be derived from the grant of the injunction in the circumstances of this case.

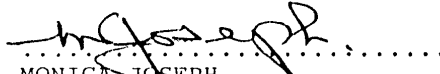
It is evident that the learned judge either failed to take those five factors into account or gave such little weight to them that the injunction resulting from the exercise of his discretion must be held to have exceeded the generous ambit within which reasonable disagreement is possible and to have been plainly wrong.

For these reasons, I would discharge the injunction but would otherwise dismiss the appeal with costs to the respondents.



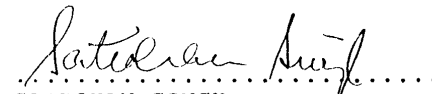
.....  
SIR VINCENT FLOISSAC  
Chief Justice

I concur



.....  
MONICA JOSEPH  
Justice of Appeal (Ag.)

I concur



.....  
SATROHAN SINGH  
Justice of Appeal (Ag.)