

ANTIGUA AND BARBUDA

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 11 OF 2002

BETWEEN:

ESAU MANSOOR

Appellant

and

[1] **GERALD BENJAMIN**
[2] **SONIA BENJAMIN**

Respondents

Before:

The Hon. Mr. Albert Redhead
The Hon. Mr. Adrian D. Saunders
The Hon. Mr. Ephraim Georges

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal [Ag.]

Appearances:

Mr. G. Watt QC for the Appellant
Mr. C. Roberts for the Respondent

2003: May 26;
September 16.

JUDGMENT

[1] **SAUNDERS, J.A. :** This dispute is between adjoining neighbours. It arose in the wake of Hurricane Luis in 1995. Some time during the passage of the storm, a retaining wall, at the southern boundary of Mr. Mansoor's property, collapsed and did severe damage to the property of the Benjamins. The latter filed this suit against Mr. Mansoor for damages for negligence and/or breach of duty. The suit was tried on the issue of liability. The learned trial Judge held in favour of the Benjamins. Mr. Mansoor has appealed that decision.

[2] The important facts of the case were not particularly contentious. The parties had built their homes on sloping land at Tamarind Heights at Crosbies. The Benjamins

built first, in 1987. They excavated into the hillside and erected a fence around their property. Mr. Mansoor built above them later, in 1989. He had a retaining wall constructed a few feet away from the Benjamin's property. For the purpose of erecting the wall, Mr. Mansoor engaged Mr. Keith Hamilton, an experienced and well-known builder who had built Mr. Mansoor's house. Mr. Mansoor stated in evidence that he relied on Hamilton's expertise in the building of the wall. As Hurricane Luis raged on the night of the 4th September, 1995, the wall fell onto the Benjamin's property.

- [3] Within two weeks of the collapse of the wall, the Benjamins employed the services of a civil engineer, Mr. Trevor Gonsalves, to advise them on the reasons for the collapse of the wall. On the 15th October, 1995, the engineer gave a written account of his findings. His report was a comprehensive one. He concluded thus:

"The main reason why the reinforced concrete retaining wall failed was due to the fact that the width of the foundation base was only half of the minimum size required and the length of the heel in the base should be at least 2 feet 8 inches and not 1 foot as discovered....The other reason for the wall's failure is due to the weep holes not being located in the correct position. That is, they should have been located as close as possible to the lower ground level and spaced closer together."

- [4] The Statement of Claim, filed in the matter, contained the particulars of negligence alleged against Mr. Mansoor. Those particulars were grounded on Mr. Hamilton's report and were premised on the footing that Mr. Mansoor had, by himself or his employees, poorly constructed the wall. So, for example, it was alleged that Mr. Mansoor or his workers caused the wall to be built with the foundation base only half of the required size; that the footings and length of the steel in the base were inadequate; that the weep holes were not properly located; that the wall was not properly secured; and that the design was inadequate.

- [5] The Defence filed by Mr. Mansoor admitted the collapse of the wall but emphasised that Hamilton, an independent contractor, was the one who had constructed the wall. The defence alleged that any proven negligence should be attributable to Hamilton as the defendant had relied on his experience.

Alternatively, the defendant pleaded that the wall had fallen as a result of an act of God.

- [6] In giving judgment for the Benjamins, the learned trial Judge rejected the plea of act of God and Mr. Watt QC has conceded here that the learned trial Judge was right so to do. The learned trial Judge accepted that Hamilton was an independent contractor but stated that Mr. Mansoor owed his neighbours a non-delegable duty of care to have the retaining wall erected with sufficient engineering so that if there were extensive rainfall it would not cause the wall to collapse.
- [7] The learned trial Judge was persuaded to find the way he did on the authority of cases such as **Dalton v Angus** (1881) 6 A.C. 740, **Tarry v Ashton** (1876) 1 Q.B.D. 314 and **Hughes v Percival** (1883) 8 A.C. 443. These are all cases that illustrate an exception to the general rule that an employer is not vicariously liable for the negligence of an independent contractor. In **Dalton** for example, a case between the owners of adjoining dwelling-houses, the exceptional circumstance was that the plaintiff enjoyed a right of support with which the defendant could not interfere so as to cause the plaintiff damage. Employing a contractor could not displace the duty of the defendant to ensure the continued existence of that right of support. In **Tarry** the defendant maintained on his premises a heavy lamp that projected over the highway. It was therefore his duty to keep that lamp in such repair that it would not fall and injure a passer-by. That was not a duty he could delegate. The case of **Hughes** was somewhat similar to the case of **Dalton**. It had to do with a party-wall that was pulled down by the defendant's contractor.
- [8] In **Dalton** and **Hughes** therefore, there was, by reason of the special relationship between the parties, a specific duty on each party to keep the other harmless from any damage resulting from an interference with a status quo that was based upon a mutuality of obligation. In **Tarry's** case the defendant knew that the lamp, once in poor repair, could injure passers-by. To have a lamp like that literally hanging over the heads of pedestrians was an inherent risk that was deliberately created or

maintained by him. It was therefore no defence for him to say that he had contracted someone to keep the lamp in good repair.

[9] In the instant case, no facts or circumstances were pleaded, and none proved, that could have taken this case outside the general rule, alluded to above, that an employer is not vicariously liable for the negligence of his independent contractor. There is nothing inherently risky or unlawful or wrong in building a retaining wall on one's own property. There was here no special duty cast upon the defendant. In building such a wall the best that Mr. Mansoor could have done was to ensure that he retained an experienced builder to do the job. And the evidence is that he did just that.

[10] The Benjamins' loss is extremely unfortunate. Someone was clearly negligent and that negligence caused great damage. One sympathises with the claimants and instinctively feels that they should be compensated. In awarding them judgment, the learned trial Judge may have been influenced by the view, intimated by him, that it was for Mr. Mansoor and not the Benjamins to join Mr. Hamilton as a defendant.

[11] Part 19 of the Civil Procedure Rules addresses the issue of joinder of parties. Part 19.2 clearly states that a claimant may add a new defendant without permission at any time before the case management conference. Indeed, it would be quite startling if each time a defendant alleged that a tortious act was committed by a third party and not by the defendant, the onus was on the defendant to join that third party. It is for the claimant to sue the appropriate tortfeasor. That onus is on the defendant where the defendant is liable to the claimant but seeks an indemnity from a third party. Where the claimant does not join the appropriate wrongdoer the innocent defendant cannot be thereby made liable.

[12] It is clear that, in this case, it was not unreasonable for Mr. Mansoor to engage Mr. Hamilton to put up the retaining wall. All the evidence points to the conclusion that

Mr. Hamilton negligently erected the wall. The claimant was aware, certainly after the Defence was filed, that it was being alleged that any negligence that led to their loss would have been occasioned by Mr. Hamilton's workmanship. In those circumstances the claimants ought to have joined Mr. Hamilton. The learned trial Judge erred in simultaneously finding that Mr. Hamilton was an independent contractor and that Mr. Mansoor was liable.

[13] During the arguments before us Counsel for the Benjamins endeavoured to fix liability on Mr. Mansoor by suggesting that the latter was negligent in not employing an engineer to design the wall. Again, this was not pleaded. What was pleaded was that the wall's design was inadequate for the site and soil conditions. The evidence at the trial was that the wall failed for two main reasons namely, the poor location of the weep holes and the insufficient width of the foundation base. Neither of those reasons was referable to the site or soil conditions. Moreover, the learned trial Judge found that "the specifications for a retaining wall are quite standard. The engineering required was not particularly complex, sophisticated or difficult...." The clear inference is that a reasonably experienced builder ought to have been able properly to construct such a wall.

[14] In all the circumstances it is my view that no liability can be attached to Mr. Mansoor. This appeal is therefore allowed with costs to the appellant in the sum of \$10,000.00.


Adrian D. Saunders
Justice of Appeal

I concur.

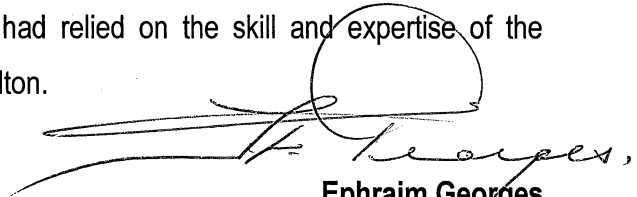
Albert Redhead
Justice of Appeal

[15] **GEORGES, J.A. [AG.]:** I too agree that the appeal should be allowed and that the judgment of the learned trial Judge should be set aside with costs to the appellant as ordered for the reason that from the very inception the respondent's claim was

badly pleaded in that the statement of claim was framed on the basis of the report of their civil engineer, Trevor B. Gonsalves, who attributed the collapse of the retaining wall to its faulty construction by the independent building contractor, Keith Hamilton, who had built it but who as the tortfeasor was not sued as defendant. That proved to be a fatal flaw in the respondent's case.

[16] At the appeal the respondent's counsel ingeniously attempted to blame Mr. Mansoor for his failure to engage the services of an engineer to design the retaining wall but this was not pleaded and formed no part of the respondent's case at the trial.

[17] For those reasons as well as the others set out in the lead judgment of Saunders, J.A., the appeal must be and is accordingly allowed. No negligence had been proved against Mr. Mansoor who had relied on the skill and expertise of the experienced builder, Mr. Keith Hamilton.



Ephraim Georges
Justice of Appeal [Ag.]