ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.607 OF 1997

BETWEEN:

EMELIUS BARNWELL

Plaintiff

and

THOMAS JOHN

Defendant

Appearances:

Samuel E Commissiong Esq for the Plaintiff
Ronald Jack Esq for the Defendant

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2000: March 13, June 27, July 6, 13
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JUDGMENT

[1] MITCHELL, J: This was a claim in nuisance. The generally endorsed writ issued at the request of the Plaintiff on 24 December 1997 sought damages for nuisance and an injunction to restrain the Defendant from blocking the free flow of vehicular traffic on the Higher Lowman's Village road by the building of a protruding block and stone wall. The statement of claim filed on 15 May 1998, after various interlocutory applications, reveals that the claim was that the Defendant had built a stone wall so as to constitute a public nuisance by interfering with the safe passage of motor vehicles on the road. The claim was that this road was the only means of access to about 20 homes in the village. The Plaintiff claimed that damage to his vehicle was caused by "the negligence and/or the nuisance" of the Defendant. He sought special damages of $1,959.00 and general damages.

[2] By his defence filed on 15 July 1998, the Defendant claimed that the road in question formed the northern boundary of his land. In his deed of 1959, the road was described as "the Lowmans Byway Road." He claimed that at the time of his purchase, the road was but a footpath or track. It was not wide enough for vehicular traffic and was never intended for such usage. He constructed his wall in 1972 as a means of supporting his land. Over the years, the village had been developed, and the byway road had now been concreted and widened. A vehicle carefully driven might now use the road up to a point at some risk of being damaged. In August 1997, the Plaintiff who had just returned to the State from Canada where he had resided for many years, asked the Defendant to sell him the strip of land upon which the wall stood. The Defendant agreed to sell the strip of land to the Plaintiff who subsequently refused to pay. The Defendant denied that his stone wall constituted a public nuisance. He denied that he was guilty of any negligence. He claimed that the damage was caused to the Plaintiff by his own negligence in driving his car on the bye road when the road was not intended for vehicular traffic.

[3] By a reply filed on 11 August 1998, the Plaintiff claimed that the road in dispute was a road within the meaning of the Roads Act, Cap 357 of the Laws of St Vincent and the Grenadines. He claimed that the Defendant had committed an illegal act under the Act in constructing a wall that protruded into the public highway. The Plaintiff had agreed to purchase the strip of land, as he had believed that the land was genuinely the land of the Defendant, but he had resiled on the promise after he had taken legal advice. Even if the wall was built on the land of the Defendant, the Defendant would still be committing a criminal offence by building so close to the public road, and secondly, the wall would constitute a public nuisance. The Plaintiff claimed he was entitled to bring this action if he had suffered loss and damage. The request for hearing was subsequently filed on 19 October 1998, and the case has been ready for hearing since.

[4] At the trial, the court heard the following witnesses. For the Plaintiff there was, in addition to the Plaintiff himself, his brother Samuel Barnwell, and a neighbour of the Defendant, Laurence Lampkin. The chief surveyor was called by the Plaintiff, but did not show up. Giving evidence for the Defendant was the Defendant himself and his wife Prudence John. An exhibit put in evidence was a Lands and Survey Department plan, numbered "St Vincent 9060." It shows the Lowmans Windward Village and adjoining areas, including the area that is not named on the plan but that the parties agree is called Higher Lowmans Village. Also in evidence was the deed of the Defendant, and some receipts for the special damages claimed to have been suffered by the Plaintiff.

[5] The facts as I find them are as follows. The major factual dispute was whether the road was a mere footpath or a public road for vehicular traffic and, in either event, how wide was it. The Defendant had purchased his land from teacher William Charles on 3 April 1959, and his deed is registered as No 249 of 1959. The land is approximately half an acre in size. It has never been surveyed. It was previously part of the Lowmans Estate owned by the Hadley family. The Lands and Surveys Department plan put in evidence shows the few surveys that have taken place relating to other properties in the area. The vast majority of properties shown on the plan do not have surveyed boundaries. They are shown as buildings with no indication as to even an approximate demarcation of their boundaries. This applies equally to the lands of both the Plaintiff and of the Defendant. The land of the Defendant is described in the Schedule to his deed as being bound "on the north by the Lowmans bye way Road." This road is shown on the plan put in evidence as a single broken line. The legend on the plan explains that a single broken line marked on the plan represents a "footpath." The plan, therefore, shows the road in dispute to be a footpath, and not a road for wheeled or vehicular traffic. All the parties agree that, presently, cars and trucks do use the road down to at least a point a few hundred feet past the Plaintiff's house. At that point, a neighbour, one Monix, lives and owns a car. Beyond the Monix residence the road is a narrower footpath only. I accept the evidence of the

witnesses that from at least the 1930s and 1940s pedestrians, and donkeys carrying cargo in panniers strapped to their sides, principally used the road in dispute. Later, in the 1950s and 1960s, vehicles began to use the road in dispute at least as far as the house of the Plaintiff who owned a vehicle during that period. I accept that the Defendant's neighbour, Laurence Lampkin, has for many years driven his own vehicles past the Defendant's property to his own property a little further down the disputed road and on the other side of the road from the Defendant. Laurence Lampkin was a carpenter who, in the early days of the 1950s and 1960s, before mini-buses became the normal mode of public transport in St Vincent, built up the wooden bodies for trucks to carry passengers, and did other wood work on trucks at his premises. He had no difficulty during the 1950s and 1960s in having these trucks drive on the road in dispute past the Defendant's house to get to his premises further on down the road.

[6] In about 1972 something happened to annoy the Defendant. Some person or persons unknown came in the dark and dug away the earthen bank of his property alongside the disputed road in an effort to widen the road. This was done without his knowledge or permission, in the dead of the night. The Defendant retaliated by constructing a stone wall on what he considered his property alongside the road. He left a space of some 3 feet between his wall and the properties on the other side of the road for people to continue walking along the road, but ensuring that no vehicle could pass. These 3 feet were the width of the public footpath which was all that he acknowledged ran along the northern boundary of his land. The government has now in the intervening years concreted the road on either side of the Defendant's property to a width of some 12 feet and extending up to the property of the Defendant. The concreted road, as it runs along the Defendant's property, narrows to a width of some 2-3 feet. After the Defendant's wall ends, the concreted road widens again to 12 feet. It continues with this width down to the Plaintiff's house and so on for some short distance past the Plaintiff's property. People are only able to drive past the Defendant's wall because Mr Lambkin allows them to drive partly through his yard as described below.

[7] In 1997, the Plaintiff came back to Higher Lowmans Village from an extended stay of many years in Canada. He attempted to drive his motor car to his house past the Defendant's wall which had been put there, as we have seen, since about the year 1972. The space was too narrow for the Plaintiff's car. No matter how carefully the Plaintiff drove, he could not avoid scraping his car on the sharp, protruding stones of which the Defendant's wall was built. The Plaintiff went to see the Defendant about purchasing the strip of land on which the wall was built in order to widen the wall. The Defendant was quite agreeable to this, provided he was paid the sum of $5,000.00 that he asked for the strip of land and the wall. The Plaintiff did not pursue this solution. He spoke instead to the authorities, some of whom visited the Defendant. The Defendant chased them off and they did nothing about the offending wall. The Plaintiff persuaded the Defendant's neighbour, Mr Lampkin, to remove his wall and fence from his property on the other side of the road from the Defendant. Mr Lampkin agreed and took down his fence. This generous act of Mr Lampkin widened the road between Mr Lampkin and the Defendant's wall just sufficiently, by a few feet, to allow vehicles to pass. So, the Plaintiff and other vehicle users are now able to use the disputed road and Mr Lambkin's yard to drive past the Defendant's wall. The vehicles that pass on that road drive alongside the retaining wall of the Defendant on one side and the building of Mr Lampkin on the other. Mr Lampkin testified that he is not happy with that situation, and wants to put his fence back in place and to get his yard back. But, if Mr Lampkin puts back his fence, before the Defendant removes his wall, the road would be only 2 or 3 feet wide where he abuts the Defendant's wall. No one would be able to pass along that road again, except on foot.

[8] I am grateful to both counsel for producing their skeleton arguments in writing, and to counsel for the Plaintiff in particular for his usual thorough exposition of the law of St Vincent, supported by copies of the authorities on which he relied. His submission was that the evidence indicated that the by way road in question had been created by dedication as a public road by the previous owners. His further

submission was that its user over the years by motor vehicles, and the evidence of its width of 12 feet along its length upto the Defendant's property, and after the Defendant's property, showed that its dedicated width where it ran alongside the Defendant's property was also 12 feet. Counsel for the Defendant submitted that the evidence was that the road was but a mere foot track and had never been intended for vehicular use. It was at most a donkey cart road in width. He further submitted that there was no evidence that the Defendant has committed any criminal offence under the Roads Act which was a prerequisite for the tort of public nuisance.

[9] The common law relating to public roads is not simple and straightforward. It is quite a complex area of law. The Roads Act, Cap 357 of the 1991 Revised Laws of St Vincent and the Grenadines was introduced in 1956 to make provision for roads. It replaced the previous Roads Act of 1949. It provides that

> "road" means any road or thoroughfare over which the public have a right of passage, and includes all bridges, dams, drains, embankments, causeways, fences and ditches belonging or appertaining to a road, provided that such road is maintained and repaired by moneys paid from the Consolidated Fund.

[10] It was accepted that the government is maintaining the road in question, and has concreted it upto and past the Defendant's house. So, it is a road as defined above by the Act. The Act provides by section 4 for four classes of road. Section 4 provides that a first class road shall be 30 feet in width; a second class road shall be twenty-four feet in width; a third class road shall be sixteen feet in width; and a fourth class road shall be twelve feet in width. By section 5 of the Act, the Chief Engineer has the general supervision of roads. He may by order published in the Gazette add any road to the list of public roads in the Schedule to the Act. It may be worth noting at this point that the Act does not contain the provision found in some of the Roads Acts of other territories of this jurisdiction for a statutory

presumption of dedication as a road after 20 years user by the public. By section 9 of the Act, the Chief Engineer is empowered to take possession of any land for the purposes of the Act and to pay compensation to the landowner. By section 24 it is an offence to erect a building within 11 feet from the side of a road. The Chief Engineer may give 14 days notice to any offending landowner who commits an offence subject to a fine of $50.00 per day for every day he continues to offend, and the Chief Engineer may cause any offending house or other structure to be removed at the expense of the owner. By section 27, any person who, *inter alia*, obstructs any public road commits an offence subject to a fine of $1,000.00 and, in addition, to the cost of the removal of the obstruction. It is accepted by both parties that the road in dispute is not on the list of public roads in the Schedule to the Act, nor has it been the subject of any order by the Chief Engineer. There is no suggestion that anyone from the Chief Engineer's office has approached the Defendant over the past 25 years since he built his wall in or about the year 1972 to discuss either prosecuting him or compensating him for the removal of the allegedly offending wall. The road in dispute has for many years been used by vehicles accessing the village and has been concreted at the public expense, but it has not been created a public road under the provisions of the Roads Act. The inference I draw is that the public authorities have been content to save their funds and to allow the Defendant's wall to remain in place, and for Mr Lampkin to continue to allow his yard to be used as a part of the road, and for the Plaintiff as a concerned member of the public to take his chance at enforcing any existing public right by way of an action in the High Court.

[11] The common law on the creation of a public road is found at Halsbury's Laws of England, 4th Edition, Vol 21, paragraph 61. It provides as follows:

> 61. How highways may be created. A claim to a public right of way may be based either on the common law doctrine of dedication and acceptance or on some statutory provision. In theory a claim may also be based on prescription at common law, but a claim so based would be

> defeated by proof that the right originated after 1181. As user by the public may be evidence of dedication, it is never in practice necessary to rely on prescription to establish a public right of way.

Applying the above law to the facts in this case, it is apparent that the road in question was not created by the appropriate statutory provision. Its existence will depend, not on prescription, but on the court's finding as to any evidence of dedication and acceptance by the public.

[12] The doctrine of dedication and acceptance is explained at paragraph 62 of the same volume of Halsbury's Laws of England. It reads:

> 62. Doctrine of dedication and acceptance. A road or other way becomes a highway by reason of the dedication of the right of passage to the public by the owner of the soil and of an acceptance, that is user, of the right by the public. "Dedication" means that the owner of the soil has either said in so many words, or so conducted himself as to lead the public to infer that he meant to say, that he was willing that the public should have this right of passage. From the moment that a dedicated way has been accepted by the public there I a right of passage by the public.

In this case, the evidence was that the previous sugarcane estate owners, the Hadleys, had sold out the estate land to the villagers over the years commencing in about the 1930s. It is significant that on the Defendant's deed the boundaries of the Defendant were described not as a footpath, but as a road. I accept this as some evidence that the previous owners of the estate land had dedicated the passage way as a road, and not as a footpath.

[13] The evidence of dedication in this case is no more than an inference. There is nothing unusual in that. Indeed, the very next paragraph 63 of the volume of

Halsbury's Laws of England earlier referred to deals with the question of the intention to dedicate in this way:

> 63. Intention to dedicate. Dedication necessarily presupposes an intention to dedicate. The intention may be expresses in words or writing, but is more often a matter of inference. . .

[14] The final fundamental requirement for proving dedication and acceptance is that there must have been an acceptance by the public. The same volume of Halsbury's Laws of England deals with this issue at the following paragraph 64 in this way:

> 64. Acceptance by the public. Both dedication by the owner and user by the public must occur to create a highway otherwise than by statute. User by the public is a sufficient acceptance; it is not necessary that the way should be adopted as repairable or maintainable at the public expense.

[15] The law on inference and proof of dedication is dealt with at paragraph 72 of the same volume of Halsbury's Laws of England:

> 72. Inference from user. The fact that a way has been used by the public is evidence from which a dedication may be inferred if the way has been used for so long and in such circumstances that the proper inference is that the owner of the soil had said, or so conducted himself as to imply, that he had granted the right of passage to the public. The inference may be of a dedication at some time before the earliest proved user.
>
> At common law, the question of dedication is one of fact to be determined on all the evidence. User by the public is no more than evidence, and is not conclusive evidence. Thus, if nothing is known about a road except

> that it is used by the public, that user may raise a presumption of dedication in the sense that the evidence points all one way. However, any presumption raised by that user may be rebutted. . . .

[16] In this case, there is no doubt that from the 1930s the road in question was used by members of the public to enter the new and growing village of Higher Lowmans. Initially, user may have been by foot only, later by donkey, then by donkey cart, and after, from the 1950s, by vehicle. I am satisfied that the road in question was dedicated by the Hadleys for use by the villagers as a road and not as a footpath. If the original owners who were selling out the estate land to permit the village to expand wished to maximize their income from the sale of the land, they would have intended to provide for a road for vehicular traffic, and not merely a footpath. With shops and other conveniences coming to the village, access for vehicular traffic would have been essential. The minimum the landowners could have intended was a 12 foot access road, that being the minimum width of road in St Vincent. The public authorities have been surfacing and maintaining the road on either side of the disputed wall from the public purse to a width of 12 feet. I find that the disputed road was a public road and that it measured 12 feet in width.

[17] The question then arises whether a member of the public has the right to enforce the public's right to use the highway by a private action in the High Court. One of the purposes of the Roads Act was to avoid members of the public having to take on the immense responsibility and cost of enforcing the public's right to use the highway. That burden was placed by the Roads Act on the public authorities, in the case of St Vincent on the Chief Engineer. He is armed by the statute with various powers both civil and criminal to assist him in ensuring that the public right to use the highway is enforced. That duty not having been carried out in this case, the Plaintiff was obliged to bring a private action. What right has the Plaintiff to bring such an action?

[18] The authorities produced by the Plaintiff establish that a private individual who seeks to maintain a private suit in nuisance when a public right has been interfered with has a heavy burden. It was put this way in the judgment of Luxmore J in the case of Vanderpant v Mayfair Hotel Co Ltd [1929] All ER Rep 296, at page 302, letter F:

> The law as I have just stated it is that which is applicable to a suit brought by the Attorney-General on behalf of the public to restrain the obstruction of a public highway by a person occupying premises abutting thereon. Does the same law apply to the case of a suit brought by an individual? Again, speaking generally, I think it does, but the private individual who seeks to restrain the obstruction of a public highway must, in order to maintain his suit, prove that he has sustained particular damage other than and beyond the general inconvenience and injury suffered by the public; and, moreover, he must prove that the particular damage which he has sustained is direct and substantial.

[19] The reason given in the English cases, for the restriction on members of the public who have been inconvenienced by an obstruction of the public highway from bringing a private action in the High Court to enforce the private right, is that there would otherwise be a risk of a multiplicity of actions if several members of the public took it upon themselves to bring an action against the offending obstructer. In the case of Winterbottom v Lord Derby [1867] LR 2 Ex Ch 316, the fact was that the Plaintiff had merely on one or more occasions gone up to the obstruction and returned, and another occasions, went and removed the obstruction. In the Judgment of Kelly CB at page 320, the rule is stated as follows:

> The substantial point for our decision in this case is whether this action is maintainable. The rule of law on the subject, which is well laid down in the case of Ricket v Metropolitan Railway Company 5 B&S 156, is, that in order to entitle a plaintiff to maintain an action, he must shew a particular

> damage suffered by himself over and above that suffered by all the Queen's subjects. I will refer to one or two authorities in support of this proposition. The leading case is that of Iveson v Moore 1 Ld Raym. 486; and it is laid down there by Lord Holt that there must be a particular damage done to a particular person in order to found an action, otherwise there would be a multiplicity of actions.

[20] I consider that it may well be equally arguable that, a public duty having been placed by the House of Assembly on a public official to use a summary procedure to enforce the public right to use the highway, it is contrary to public policy to have private individuals, no doubt at great expense to themselves, have recourse to the higher courts of the land to do what could more effectively and inexpensively have been done by the public official designated by the legislature to carry out that responsibility. However, there can be no doubt that a private individual has a right to seek redress from the High Court by way of damages and injunctive relief against the committer of a public nuisance where he can prove substantial damage particular to himself.

[21] The damage suffered by the Plaintiff from the scratching and scraping of the sides of his car as he forced his car around the wall built into the public highway by the Defendant might not be considered the most significant damage in the world. However, I am satisfied that it is substantial and particular to the Plaintiff. Given the reluctance of the public authorities to take the necessary action, the Plaintiff was forced to bring this action in the High Court. He is entitled to his proved special damages and to an order removing the offending wall. There will be judgment accordingly for the Plaintiff for:

(1) special damages of $1,959.00;
(2) an injunction restraining the Defendant whether by himself, his servants and/or agents or howsoever otherwise from blocking and/or impeding the

free flow of vehicular traffic on the High Lowmans Village Road by the building of protruding block and/or stone walls into the public road;

(3) costs to the Plaintiff to be taxed if not agreed.

I D MITCHELL, QC
High Court Judge