ST VINCENT AND THE GRENADINES

IN THE HIGH COURT OF JUSTICE

CIVIL SUIT NO.88 OF 1999

BETWEEN:

FITZROY MC KREE

Plaintiff

and

JOHN LEWIS

Defendant

Appearances:

Paula David for the Plaintiff
John Bayliss Frederick for the Defendant

2000: September 20, 22, 27

JUDGMENT

[1] MITCHELL, J: This was a case of nuisance by water. The facts were not significantly in dispute. The resolution of the dispute turned on a contested point of law rather than on the facts.

[2] The facts can be simply stated. The Plaintiff and the Defendant own and occupy their properties at Hamilton in Bequia. Their properties are separated from each other by a third property owned or occupied by Pearl Marks. The 3 properties lie on a slope running from the north down to the public road in the south. The Plaintiff and the Defendant have their houses on their properties. By contrast, Pearl Marks' land, which lies between and separating them, is bare land, without any house. The Plaintiff and the Defendant have built walls for the privacy and protection of their properties. The property of Pearl Marks is not walled in. Because of the slope of the land on which all 3 properties lie, during heavy rain the

water falling on the hillside collects and runs naturally down a gutter from the top of the lands towards the public road where government has constructed a drain to catch the runoff and take it away. This gutter is normally dry and only flows during heavy rainfall. This natural gutter which brings the runoff on the lands on the hillside above to the drain in the public road below runs principally through the land of Pearl Marks. The gutter does not lie in or towards the middle of the land of Pearl Marks; it lies closer to the boundary of the land of the Defendant. In places, it appears that it forms the natural boundary of the two parcels; in other places, it runs entirely through the land of Pearl Marks; and in yet other places, it crosses the boundary with the Defendant and runs entirely through the land of the Defendant. There was no direct evidence on the point, but my understanding is that this gutter which takes away the natural runoff does not originate on the land of Pearl Marks but instead enters her land from property of other persons higher up the hillside.

[3] Pearl Marks, according to the evidence of the Defendant, did not appreciate this natural gutter running through her land alongside the boundary with the Defendant. Sometime around the year 1992, she built a length of wall some 12 feet long on her land. She built the wall partially running down alongside the natural gutter, but also cutting across the gutter and pointing the water towards the land of the Defendant. The only purpose of this part of the wall, apparently, was to divert the water from out of the gutter and onto the land of the Defendant. The Defendant was not happy with this development. He commenced legal proceedings against Pearl Marks, and obtained an injunction of some sort against her. After having obtained the injunction, he did not pursue those legal proceedings, and nothing appears to have come of them. Pearl Marks did not remove her wall as a result of the injunction obtained against her by the Defendant, and it remained in place and continued to divert the runoff water from off her land onto the land of the Defendant when it rained. Sometime thereafter, the Defendant took further steps that he considered more appropriate or effective than the injunction to abate the nuisance being caused to him by this wall of Pearl

Marks. What he did to achieve this is the ultimate cause of these legal proceedings. A little lower down from the offending wall of Pearl Marks, on his own land, the Defendant constructed a wall so that most of it caught the water that had been diverted onto his land and a small part of it, some 2 ½ feet he says, extended into and obstructed the natural gutter where it ran over his land. The wall that he constructed caught the water where Pearl Marks had diverted it onto his land and took it back towards the gutter. But, he had carefully constructed this wall so that the water could not run again in the gutter down towards the public road and the drain; because of the 2 ½ feet of wall now obstructing the gutter, the water was forced instead to flow out of the gutter and onto the land of Pearl Marks. Pearl Marks has not apparently brought any proceedings against the Defendant for this retaliatory action of the Defendant. She has been content to allow the diverted water to flow over her land. There is no direct evidence on the point, but it must be apparent that if Pearl Marks took the Defendant to court for the nuisance caused to her by the water diverted by the Defendant, he will complain in his turn of the diversion she had caused to him higher up the slope. The diverted water that now flowed out from the land of the Defendant onto the land of Pearl Marks did not find its way back into the natural gutter. Because of the contours of the land of Pearl Marks, the water flowed instead over the land of Pearl Marks and out to the other side of the land of Pearl Marks where it met the land of the Plaintiff.

[4] Bequia is normally a very dry island. The year 1998 was a notoriously wet year. From general knowledge the court is aware that during the year 1998 rain fell continuously in Bequia for many days at a time. Areas of the island were flooded and much damage was caused to property on Bequia from this heavy rainfall and flooding. The water that was diverted by the wall that the Defendant had constructed across the gutter on his land flowed across the land of Pearl Marks and collided with the base of the boundary wall of the Plaintiff. This wall of the Plaintiff had not been engineered to divert a flow of water, particularly the heavier than normal flow that occurred in the year 1998. The water that came into contact

with the base of the wall undermined it and caused it to crack. That crack is what has resulted in this suit being brought against the Defendant by the Plaintiff. The Plaintiff seeks an injunction stopping the Defendant from continuing to divert the water from the gutter and general damages.

[5] The principle defence of the Defendant is that he is not liable in nuisance to the Plaintiff, as the water damaging the wall of the Plaintiff has come from the land of Pearl Marks and not from his land. He claims that the Plaintiff has brought the wrong person to court. He protests that he has only been taking steps to protect his land from the action of Pearl Marks, and that he had not acted maliciously. If what he did as described above is not malicious in its legal sense, then this court does not know what malice means. But, do the facts in this case make the Defendant liable in nuisance to the Plaintiff? Accepting that the proximate cause of the damage to the Plaintiff was the water running from the land of Pearl Marks, and not from the land of the Defendant, does the fact that the malicious act of the Defendant was an ultimate cause make him liable to the Plaintiff in nuisance? What about the actions of Pearl Marks? She may be described as also an ultimate cause of the damage to the Plaintiff, but she is not a party to this action. Is her action in stopping the natural flow of the water and diverting it onto the land of the Defendant to have any effect on the outcome of this dispute? She is undoubtedly a neighbour of both the Plaintiff and the Defendant. Is the Defendant for the purpose of the law of nuisance by water also a neighbour of the Plaintiff? The Plaintiff says that he is, while the Defendant denies that he is.

[6] The authoritative legal text of Winfield and Jolowicz on Tort, 10th Edition, does not provide much assistance. The text simply states at page 318 that the law of private nuisance is:

> an attempt to preserve a balance between two conflicting interests, that of one occupier in using his land as he thinks fit, and that of his neighbour in the quiet enjoyment of his land.

At Clerk and Lindsell on Torts, 14th Edition, at para 1393, the following definition appears:

> A private nuisance may be and usually is caused by a person doing on his own land something which he is lawfully entitled to do. His conduct only becomes a nuisance when the consequences of his acts are not confined to his own land but extend to the land of his neighbour by (1) causing an encroachment on his neighbour's land, when it closely resembles trespass, (2) causing physical damage to his neighbour's land or buildings or works or vegetation upon it, or (3) unduly interfering with his neighbour in the comfortable and convenient enjoyment of his land.

And, a little later in the same paragraph, appear the following relevant examples, none of which help with the question that has to be answered in this case:

> Nuisances of the second kind, causing physical damage to land or to something erected or growing upon it, occur when a man allows a drain on his own land to become blocked or makes a concrete paved drive so that the water overflows onto his neighbour's land, maintains a mound of earth or other artificial erection on his own land so as to cause damp to enter his neighbour's land, works the mines under his own land so as to cause the surface of his neighbour's land to subside, allows buildings upon his land to become dilapidated so that they, or parts of them, fall upon his neighbour's land, sets up vibrations on his own land which cause damage to his neighbour's buildings, or emits noxious fumes from his land which damage his neighbour's crops or trees.

Nothing appears in either of these two textbooks to assist us with the question that arises in this case, is the Defendant the neighbour of the Plaintiff for the tort of nuisance? Halsbury's Laws of England, 4th Edition, Vol 34, dealing with Nuisance, at para 318, offers the following equally unhelpful text:

> Acts beyond reasonable user. As a general rule, no act can be justified as an ordinary user of premises which in fact results in substantial interference with the ordinary use and enjoyment of property by other persons. Also a person who injures the property of another or disturbs him in his legitimate enjoyment of it cannot justify that injury or disturbance as being the natural result of the exercise of his own rights of enjoyment, if he exercises his rights in an excessive and extravagant manner, or, it seems, if the inconvenience or injury resulting from the exercise of rights might easily be avoided.

The question is, in the circumstances of this case, accepting that what the Defendant did in blocking the gutter is not an ordinary use of his land, is the Defendant the person who is injuring the property of the Plaintiff, or is it the water running off the land of Pearl Marks that is causing the injury? At para 319 the following appears:

> Extraordinary and unreasonable user. A person is not entitled by applying his property to extraordinary or unreasonable uses or purposes to impose upon his neighbours burdens which, in the ordinary course of things, they are not called upon to bear. Examples of such extraordinary or unreasonable user are interference with the course of natural agencies or conditions . . .

There is still no guidance in this last on the question that vexes us in this case.

[7] A question arises what might be the effect of the malice of the Defendant in constructing his protective wall so that it not only caught the water diverted onto his land by Pearl Marks, but also ensured that the water could not run back into the natural gutter but was forced out onto the land of Pearl marks? The effect of

malice in the tort of nuisance is dealt with in this way at para 311 of the same edition of Halsbury:

> Effect of malice. An act which is otherwise lawful, and which a person has a right to perform in the ordinary enjoyment of his property and rights, does not become unlawful merely because the doer is actuated by motives of malice; but in some cases a malicious motive may make the defendant's act unreasonable and therefore actionable as a nuisance.

[8] Applying the above principles, I am satisfied that, if Pearl Marks had been the Plaintiff in this case, the constructing of a part of his "defensive" wall across the natural gutter on his land so as to divert the flow of rainwater back onto the land of Pearl Marks was not done by the Defendant in the ordinary enjoyment of his property and rights, and would probably amount to a nuisance on Pearl Marks if. But, Pearl Marks is not the Plaintiff here.

[9] None of the above texts deals specifically with the defence raised by the Defendant, as described above. The textbooks we have looked at have provided little assistance. Stroud's Judicial Dictionary, 3rd Edition, does not help us with a definition of neighbour in the tort of nuisance. The closest we get to a legal answer to the issue raised in this case is the definition of private nuisance at paragraph 307 of the same volume of Halsbury. It reads

> Private nuisance. A private nuisance is one which interferes with a person's use or enjoyment of land or of some right connected with land. It is thus a violation of a person's private rights as opposed to a violation of rights which he enjoys in common with all members of the public. The ground of the responsibility is ordinarily the possession and control of land from which the nuisance proceeds.

The last sentence is the only guidance that has been produced for the assistance of the court on the principal issue that arises in this case. The statement of law appears clear: the nuisance must proceed from the land of the defendant; liability in nuisance lies where the defendant possesses and controls the land from which the nuisance proceeds. The normal definition of neighbour in relation to the ownership and occupation of land is the person living next door, or the adjacent occupier. The classic definition of neighbour in the tort of negligence as anyone whom one can reasonably foresee will be affected by one's action, is special to the tort of negligence. Nuisance is an ancient tort at common law predating the law of negligence. Despite considerably research, counsel for the Plaintiff has not been able to find any legal authority or principle to suggest that the normal definition of neighbour in relation to land does not apply in the tort of nuisance and that something akin to the definition of neighbour in the tort of negligence should also apply to the tort of nuisance. The cases involving nuisance by smoke or fumes do not assist. The rule is not that for the Defendant to be a neighbour the lands must lie contiguous to the Plaintiff's land. In the smoke and fume cases, the Plaintiff's land frequently lies some distance away from the land of the Defendant. But, the smoke or fume nuisance proceeds directly from the land of the Defendant to the land of the Plaintiff. It may pass over the intervening lands, but it does not fall onto the land of the immediate neighbour and then get pushed or placed onto the land of the Plaintiff. If that happened, a question would arise as to whether the nuisance was originating from the land of the distant Defendant. The land from which the water complained of by the Plaintiff proceeds is the land of Pearl Marks and not the land of the Defendant. The proximate cause of the damage to the Plaintiff is the water flowing from the land of Pearl Marks, not the water flowing from the land of the Defendant. It is the shape and contours of the land of Pearl Marks that has directed the water flowing on and over the land of Pearl Marks, however that water was ultimately derived, to flow onto the wall of the Plaintiff and damage it. If this were a case of negligence, which it is not, we might be discussing either the concept of novus actus interveniens or the principle of remoteness of damage. The damage caused to the Plaintiff results from the water

flowing over the land of Pearl Marks. This is not to suggest that Pearl Marks may be liable in the tort of nuisance on the evidence to the Plaintiff. Pearl Marks may be immune from an action brought by the Plaintiff, as she has done nothing to cause the water to flow over her land onto the land of the Plaintiff. The rain water run-off appears to be following the natural contours of her land. She appears to have done nothing to adopt any nuisance of the Defendant. So long as she is happy with the water flowing over her land, and brings no action against the Defendant to have him cease his nuisance committed against her, then the Defendant may continue to discharge the runoff water onto the land of Pearl Marks.

[10] The proper step that the Defendant might have taken in law is clear. He should not have diverted the water back onto the land of Pearl Marks in retaliation for the nuisance she has allegedly committed against him; he should have persisted in the legal action that he had earlier brought against Pearl Marks. Pearl Marks should not have started the entire saga of unneighbourlyness by diverting the water onto the land of the Defendant; if she had a problem with the water flowing where it did on her land she should have discussed with him joint steps to regulate and divert to their mutual satisfaction the water flowing over both their lands. If someone further up the hill above her had done something to cause the water to damage her land she should have sought a legal remedy against that person. Further, the Planning Authorities might have jurisdiction in disputes such as this under planning legislation. Additionally, there may be an offence that has been committed by someone here under the watercourses legislation, which exists to regulate conduct such as that complained of here. Alternatively, the Plaintiff may want to discuss with Pearl Marks, if she does not intend to settle her dispute with the Defendant, suitable steps that the Plaintiff and she may take to divert the flow of rain water over her land from damaging the wall of the Plaintiff. In conclusion, I can find no tort of nuisance committed by the Defendant against the Plaintiff which entitles the Plaintiff to an injunction or damages against the Defendant.

[11] I must express my appreciation to counsel for the Plaintiff who has been diligent in researching and producing to the court copies of all the relevant textbook pages and the cases that she considered might have helped. However, for the reasons set out above I consider myself constrained, however reluctantly, to dismiss the suit of the Plaintiff. Given the malice shown by the Defendant in having taken the steps he did that caused this suit to be instituted, in exercise of the discretion vested in me in awarding costs the order will be that each party is to bear his own costs.

I D MITCHELL, QC
High Court Judge