

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
ANTIGUA AND BARBUDA
(CIVIL)

CLAIM NO. ANUHCV 372/1999

BETWEEN:

BLANDINA FRANCIS NEGGA

Claimant

and

THE REGISTERED PROPRIETOR(S) OF LANDS CONTAINED
IN REGISTRATION SECTION HODGES BAY & THIBOU'S
BLOCK 43 2197 B PARCEL 157

JEFF HADEED

Defendant

Appearances:

Mr. Ralph Francis for the Claimant

Mr. John Fuller for the Defendant

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2006: December 07 2007: June 28
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JUDGMENT

[1] **Thomas J:** This action was commenced on 6th December 1999 by writ of summons under the Rules of the Supreme Court 1970 and completed under CPR 2000.

[2] The Claimant's claim is against the Defendant for the following:

1. Damages for damage done to the Claimant's property comprising land and dwelling house at No. 8 Sandy Lane, Hodges Bay in the Parish of Saint John in the island of Antigua and Barbuda, by the escape of water from the Defendant's premises at Hodges Bay, Antigua caused by the nuisance of the Defendant, his servants or agents.

2. Damages for damage to the Claimant's property comprising land and dwelling house at No. 8 Sandy Lane, Hodges Bay, Antigua by the escape of water from the Defendant's premises at Hodges Bay, Antigua caused by the negligence of the Defendant by his servants or agents.
3. Such further and/or other relief.
4. Costs.

STATEMENT OF CLAIM

- [3] In the Statement of Claim the Claimant says that at all material times she was the owner and occupier of property known as No. 8 Sandy Lane, Hodges Bay, St. John's Antigua and described in the Land Register as Registration Section: Hodges Bay & Thibous; Block: 42 2197 B Parcel 58 ("Parcel 58"). On the other hand, the Defendant was at all material times the owner and occupier of the adjacent property described on the Land Register as Registration Section: Hodges Bay & Thibous; Block: 43 2197 B; Parcel 57 ("Parcel 57").
- [4] In terms of location the Claimant says that her property, consisting of approximately 0.5 acres lies at the foot of a slope on which slope the Defendant's property of similar size is situated.
- [5] It is the Claimant's contention that the Defendant by himself, his agent, servants or otherwise caused his property to be stripped of all trees shrubs and other vegetation. It is contended further that the Defendant at all times maintained an open septic pit upon his property which measured approximately sixty square feet and which if it overflowed the water collected in it could escape and cause damage.
- [6] At paragraph 5 of the Statement of Claim it is pleaded that despite many complaints and requests to the Defendant and the relevant authorities no steps were taken to avert the nuisance and the consequential damage to the Claimant's property prior to 20th November 1999. It is further pleaded that on or about 20th November 1999 the septic pit on the Defendant's property overflowed and as a consequence water escaped therefrom on to

the Claimant's property resulting in the erosion of the base of the retaining walls of the Claimant's property thus causing them to give way and slam into the Claimant's house.

[7] It is the Claimant's contention that the stripping of the Defendant's land and the presence of an open septic pit thereon constitute a non-natural user by the Defendant of his land and further the Defendant failed to prevent the escape of water unto her property. Accordingly, it is pleaded that further and or alternatively the water constituted a nuisance caused or permitted by the Defendant and further and or alternatively the said matters explained of were caused by the negligence of the Defendant his servants or agents.

[8] The particulars of negligence pleaded are as follows:

1. Completely clearing their land of trees, shrubs and other vegetation on Parcel 57 which allowed for erosion of the land and improper drainage of the hillside.
2. Construction of 2 stone walls on the Defendant's land and the digging of a septic tank which materially altered the topography of the hillside of Parcel 57 and interfered with the natural flow of the water directing more above ground instead of naturally below the ground.

[9] It is the Claimant's pleading that by reason the particulars of negligence her property was damaged and she suffered loss and damage.

[10] The following particulars of special damage are pleaded:

- | | |
|---|-------------|
| 1. Farhan Consultants Architects and Engineers to prepare report on damage to property | \$ 2,500.00 |
| 2. Caribbean Testing and Engineering Laboratory report on failure analysis for retaining wall | \$ 1,266.00 |
| 3. Cost of repairing retaining wall | \$48,000.00 |
| 4. Cost of repairing masonry wall of house | \$14,000.00 |

[11] The Claimant's claim is for damages, interest, such further and other relief as the Court thinks fit and costs.

DEFENCE

- [12] In his defence, the matter of septic pit/tank is denied. In this regard it is the Defendant's contention that the said tank was never connected to his building and that in any event when finished it could not overflow in that the excess effluent would be adequately discharged in a drainage field on the Defendant's land.
- [13] The Claimant's contention that requests were made of the Defendant to avert the nuisance is denied by the Defendant. Also denied is the further contention that the septic tank overflowed on or after 20th November 1999. In this regard the Defendant pleads that over 24 inches of rain fell causing the unsupported decorative wall on the Claimant's land to collapse.
- [14] At paragraph 6 of his defence the Defendant denies non-natural user of the land and nuisance as alleged by the Claimant. Instead the Defendant contends that the water which came onto the Claimant's land was as a result of an Act of God.
- [15] The Defendant further denies the negligence damage and loss as alleged by the Claimant. In this regard the following is pleaded: The damage suffered by the Claimant was as a result of the said excessive rain which in fact caused similar damage throughout the Eastern Caribbean. And further that the damage suffered by the Claimant was caused by the said excessive rain and by virtue of the fact that the Claimant's wall was structurally unsound and unreinforced by any steel and an unsound foundation.
- [16] The issues for determination are:
1. Whether the Defendant was negligent in relation to the Claimant on her property.
 2. Whether the Defendant caused a nuisance on his property which affected the Claimant on her property.
 3. Whether there was non-natural user of the land by the Defendant.

ISSUE NO. 1

WHETHER THE DEFENDANT WAS NEGLIGENT IN RELATION TO THE CLAIMANT ON HER PROPERTY

SUBMISSIONS

[17] The following submissions were filed on behalf of the Claimant:

- “1. The Claimants seeks damages for loss and damages suffered as a result of work undertaken by the Defendant on his property. The Claimant contends that the Defendant:
 1. Cleared the hill of its vegetation.
 2. Terraced the hill and in the process changed the contours of the land.
 3. Blocked a hole which provided a natural escape route for water which flowed down the hillside over the Defendants property and in the direction of the Claimants property.
2. The Defendant began the above described work prior to the 19th November, 1999. The date of the passage of hurricane Lenny. The evidence led is that this Hurricane deposited twenty-five inches (25”) of rain on Antigua during the period 19th and 20th November, 1999. As a result, water cascaded down the hill and over unto the Claimant’s Parcel. In the process, it penetrated the space between a cliff and a wall constructed on the Claimant’s Parcel. The wall fell, crashed into the Claimant’s house causing significant damage.
3. The Claimant asserts that the damage to the wall and consequential damage was caused by the Defendants work on his parcel which altered the contours of the land. The Defendant on the other hand contends that it was the unusual heavy amount that coupled with the prior construction of the wall caused its collapse. The Defendant denies any liability for damage suffered.
4. There is no doubt that the Claimant cleared the hillside of vegetation. Photograph’s #73 attests to this clearly. The witness for the Defendant, J. Mario Bento, in cross examination reacted to photo 73 by stating that the area did not look like that seen in the photograph when he visited the site and further stated that the water coming down the hill would have caused the soil to be dislodged; that the soil would have settled against the low wall and flow over the wall unto the Claimant’s Property.
5. The Defendant Jeff Hadeed testified that planning permission for the work undertaken had been received. Pages 15-19 of the trial bundle shows the application, permit and approval for the project. Page 19 shows that the application was submitted, processed and approved all on the 7th day of February, 2000. The work undertaken in 1999 by the Defendant was not done subject to the approval of the Development Control Authority. Therefore, it is not open to the Defendant to suggest that planning permission was an endorsement of the work undertaken.
6. The Defendant further suggests that the wall was poorly constructed. The evidence as led for the Defendant would suggest that the wall was not constructed to bear load; that its purpose was more decorative in that the face of the hillside in front of which it was constructed was stable and did not exert pressure on the wall; that the wall was not built

with steel reinforcement; that water flowed between the cliff (face of the hillside) and the wall and caused it to collapse.

7. All of this evidence it is suggested, supports the Claimants contention that it was the work of the Defendant on his parcel which resulted in the flow of water being directed to the wall.
8. While the Defendant pleads the unusually heavy downfall of rain, the evidence as led particularly that Mr. Hart the structural engineer is that it would not have taken much water seeping between the face of the hill and the wall to have caused the wall to have collapsed.
9. The evidence is that the wall had been subjected to other periods of heavy rainfall and was still standing thereafter. Using the evidence of Mr. Hart more than sufficient would have fallen to have caused the wall to collapse prior to the 1999 work undertaken by the Defendant. It did not collapse.
10. The Claimant's evidence is that prior to the work undertaken by the Defendant the water coming down the hill was directed to a sinkhole situate towards the northern boundary of the Defendant's Parcel. In the process of the work on the land, a wall had been constructed on the eastern boundary of the Defendant's Parcel. Clearly photograph 88 shows the wall almost to the height of the fence. Further the area behind the wall was filled in and in the sink hole parts of trees that had been cut down were deposited. The sink hole, the natural escape route for the flow of water was blocked. Again we refer to photograph #88.
11. In general the photographs show the extensive work that was undertaken on the land. There is no suggestion that there was any pre-work study to show that consideration was given to the effect of the work regarding the further rainfall. No person of scientific background or experience in this field was presented as having planned the terracing exercise. The defendant appears to have wanted the hillside terraced and caused it to be done.
12. It is submitted that the end result was the cause of the water flowing in a direction other than that to which it was accustomed. The result was damage and loss to the Defendant.
13. Photographs #83 to #87 captures the condition of the north eastern section of the Defendant's property and shows the extent of work done there. This is the area in which the sink hole was located. The wall behind the chain link fence was constructed by the Defendant from ground level i.e. the bottom of the fence upwards to almost the top of the fence. In addition, the area of the wall behind the fence was backfill.
14. There is no doubt of the damage done. The wall was destroyed; the wall crashed into the house and in the process damaged the wall and deposited stone debris both inside and outside the house."

[18] No submissions were filed by or on behalf of the Defendant.

OUTLINE OF THE LAW OF NEGLIGENCE

[19] In CHARLESWORTH ON NEGLIGENCE (6th ed.) at paragraph 4 the following learning is to be found:

"Negligence is often used in the sense of careless conduct without reference to any duty to take care. The use of the term in this sense has introduced some confusion into the subject, and has tended to obscure the true meaning of negligence. When there is a duty to take care,

the standard of care frequently is that of the reasonable man, although this is not always so, and consequently, failure to take reasonable care and negligence are sometimes used as synonymous terms regardless of whether or not there is any duty. This is the sense in which negligence was used in the well-known definition of Alderson B.: 'Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.' This definition does not recognize the necessity for any duty to take care, and therefore naturally does not recognize the necessity for any duty to take care, and therefore naturally does not go on to consider what degree of care is imposed by the duty in any given case. In so far as the definition assumes a duty of care, it also assumes that the degree of care is exactly the same in each case, namely, a degree measured by the standard of a reasonable man, and this, as appears from the following pages, is by means a complete or an accurate statement. It is clear, however, that the definition was not given with reference to any duty but was defining negligence in the abstract as meaning careless conduct."

[20] The learning continues at paragraphs 19 and 20 as follows:

"The following definition may therefore be suggested: Negligence is a tort, which is the breach of a duty to take care imposed by common or statute law, resulting in damage to the complainant".

Accordingly, the essential ingredients of actionable negligence are:

- (1) the existence of a duty to take care owing to the complainant by the defendant;
- (2) failure to attain that standard of care prescribed by the law; thus committing a breach of the duty of care; and
- (3) damage suffered by the complainant, which is usually connected with the breach of duty to take care."

DUTY OF CARE

[21] It is generally¹ recognized a duty of care may arise in a wide variety of circumstances. However, in this instance the question arises in relation to adjacent property owners and as such based on the decision in *HEAVEN v PENDER* [1883] 11 QBD 503 the following principle is applicable: "A duty of care did arise when the person or property of one was in such proximity to the person or property of another that, if due care was not taken, damage might be done by one to the other."

[22] Given the circumstances as outlined in this case, the Court accepts and determines that a duty of care does exist as between the Claimant and the Defendant.

¹ See generally: Winfield & Jolowicz On Torts (16th ed) @ paragraphs 5.6 to 5.7; Gilbert Kodilinye, TORT: Text Cases and Materials pages 74-80

BREACH OF DUTY OF CARE

[23] Another constituent of negligence is breach of the duty of care owed. The generally accepted test for deciding whether there has been a breach is contained in the dictum of Baron Alderson in *BLYTH v BIRMINGHAM WATER WORKS CO.* [1856] 11 Ex 781, 784. It is in these terms: "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do."

[24] According to *WINFIELD & JOLOWICZ ON TORT* (6th ed.) at paragraph 5.53:

"There can be no doubt that the general standard is objective and the question is not 'did the defendant do his best?' but 'did he come up to the standard of the reasonable man?' Nevertheless, the law cannot be understood unless we bear in mind it judges conduct by the particular circumstances in which the defendant find himself and in some circumstances actually modifies the objective standard."

[25] The learned authors go on to say that there are three factors which are usually considered in assessing the objective standard: magnitude of the risk, the importance of the object to be attained and the practicability of precautions.

EVIDENCE: BLANDINA FRANCIS NEGGA

[26] It was noted above that the parties to this action are adjacent owners of property situate at Hodges Bay and being parcels 57 and 58, respectively.

[27] In her witness statement the Claimant described the general situation of the properties prior to June 1999 thus:

7. Between 1974 and 1999 the topography of Parcel No. 57 was never disturbed. The natural contour of the land directed any excess water down the slope towards the north east section of Parcel 57. In that area was to be found a "Sink Hole" through which the water entered and travelled below my Parcel i.e. No. 58 and exited on the public road to the east of Parcel No. 58.

8. On my Parcel there is located a three bedroom Split level house; a drive way and a cottage with garage constructed below.

9. In 1993 a chain linked fence was constructed for me between Parcels 57 and 58. Between the years 1993 and 1994 I caused to be constructed a wall to act as a fascia for a cliff area which existed as a result of the excavation for the construction of the house on my Parcel.

10. The wall withstood the ravages of Hurricane Lenny in 1995 and Hurricanes George and Marilyn in 1998. The natural contour of the land ensured that any water which ran down Parcel 57 was diverted to the "sink hole" and the underground passage.

11. In addition, there was another "sink hole" on parcel 57 situate near to the southern boundary of Parcel 58 through which any water that may have entered over the southern boundary between Parcels 57 and 58 would flow.

12. The work undertaken by the Second Defendant beginning in June 1999 involved:

The cleaning of Parcel 57 including the cutting of trees and the uprooting of the existing vegetation. The installation of walled terraces with open drainage pipes inserted at intervals therein.

The building of a septic tank to the south eastern end of parcel 57 and thus closer to Parcel 58.

Alongside the chain-linked fence between the two parcels a stone wall was erected and the area along the fence was back filled with soil. In the process the "sink hole" through which excess water escaped from Parcel 57 below Parcel 58 was blocked.

13. The result was that rain or other water which did not percolate into the soil, cascaded down the hill and directly unto my parcel."

[28] According to the Claimant, on 20th November 1999 heavy rains fell on the island and in Hodges Bay area in particular. As a consequence of these heavy rains the Claimant contends that there was damage to her property.

[29] In cross-examination the Claimant said that her complaint was that a rush of water caused damage but she added that it was more than that.

[30] With respect to the slope she said it existed before she purchased the house. She added that while the cliff existed, she did construct the retaining wall which contained reinforcement.

[31] In so far as the rain is concerned, Ms. Blandina Francis Negga testified that there was heavy rain between 17th to 20th November. But that while it was heavy it was not unprecedented as there were also heavy rains in 1973 when 25 inches fell. She said that she recalled that the wall of the Hodges Bay Club collapsed.

[32] It is also the Claimant's testimony that there was a sink hole under her property which came out in the road. But when it was put to her that no such sink hole existed as no

expert made such a finding, she said that she was not aware that they were looking for a sink hole.

[33] In re-examination the Claimant said that her whole complaint is that well before the rain when the Defendant had been cutting down trees he had been warned of the consequences of denuding the land when he started to backfill towards the suck hole. According to the witness, the Defendant was again warned that there would be no escape to her property. The witness further testified that the Defendant's reply to was that he was developing his property.

[34] Returning to the matter of the Claimant's evidence is that the sink hole no longer existed after the Defendant cut down the trees and threw them into the said sink hole.

JEFF HADEED

[35] Jeff Hadeed witness statement in its entirety address the question of the state of his property. The following is part of his evidence as contained in his witness statement:

3. The Claimant claims that I denuded my land and terraced it thereby resulting in the heavy rains of hurricane Lenny rushing down the hill caused her wall to collapse and fall unto her home causing damage.
4. First I did not denude my land, second the little terracing that I did made no difference whatsoever to the movement of water down the hill.
5. That the entire land is rock with no possibility in heavy rain or even light rain of the rain seeping into the ground. I know this from my personal experience of the land in question.
6. The Claimant's retaining wall was personally inspected by me in late November 2000 and I observed that the wall which collapsed was 30ft from our mutual boundary and extended at least 50ft in length and 10ft in height and most importantly contained no reinforcement whatsoever either horizontally or laterally and was patently not anchored to any foundation footing or any sort.
7. My workmen were visited by a representative of the Central Board of Health prior to the 19th November 1999 and all recommendations made by him were done.
8. That I obtained permission for all works including septics, soakaways and all construction from the Development Control Authority and I intend to produce a copy of same at the trial.
9. I have damaged none of the Claimant's property, her walls or her fences.
10. The suggestion that the extraordinary rain precipitated in hurricane Lenny would have some how seeped into the hill before it reached the Claimant's land is devoid of any factual basis. Experts will testify as to the true cause of the Claimant's wall collapsing.

11. It is totally untrue that I denude my property of vegetation to the extent described in the Statement of Claim. Photographs taken at the time will plainly show that that is not so.
12. At all material times my property was in the state of reconstruction and no septic tanks were at the time ever used nor did any ever overflow.
13. I have no obligation to prevent natural drainage of the hill within my property from occurring.
14. In fact more water would have run onto the Claimant's land had my unfinished septic tanks not been in existence.
15. My very low garden stone walls did in no way materially alter the topography of the hillside or interfere with the natural flow of the water.
16. No soil whatsoever escaped from my property onto the Claimant's property."

[36] In an expansion on his witness statement Mr. Hadeed testified that he was not aware of any sink hole and further that the land on which his house was built was very steeply sloped.

[37] In cross-examination the Defendant said that between his house, which is at the top (in the photograph at **TB p. 63**) and that of the Claimant at the bottom, there is a wooded area. This area, he said, is as it was prior to the start of his alterations or renovations.

[38] The Defendant testified further that before he started to build he had a slope and then there was terracing and there were seep holes put in to prevent the walls collapsing as shown at **TB pp. 95 to 98**.

[39] As far as the passage of hurricane Hugo is concerned the Defendant said that all over the island there was severe damage including a wall at the Hodges Bay Club.

[40] In re-examination the witness said that his terrace walls did not collapse and agreed that the effect of the terrace walls was to send the water north.

WAYNE MARTIN

- [41] In his witness statement filed on 1st December 2005, Wayne Martin says that he is a civil and structural engineer. He says further that at the request of the Claimant he prepared a report, based on his inspection of the Claimant's property at Hodges Bay on 10th and 15th December 1999. The witness also said that the said report is annexed to his witness statement.
- [42] In an expansion on his witness statement Mr. Wayne Martin said that on 15th December he arrived at the Claimant's property and saw that the retaining wall was broken and hit the building. The witness then expressed the belief that the said wall was inadequately designed as it had no reinforcement being built entirely of stone. He said further that for a wall of that nature a structural design would be done to include reinforcing steel and concrete.
- [43] With respect to the collapsed wall, the witness said he did not observe any weep holes. The witness also expressed the opinion that the Defendant did not do anything to cause the wall to collapse. At the end of his examination in chief the witness added the following: "The most important factor was the lack of reinforcement. The wall was about 30 feet from the common boundary. I did not see any erosion of soil. A retaining wall has a purpose to retain earth. I stand by my report."
- [44] In cross-examination by learned counsel for the Claimant, Mr. Ralph Francis, the witness said that he agreed that the terracing was done for the purpose of gardening and further that this could change the flow of water.
- [45] With respect to the photograph at **TB p. 73**, the witness agreed that there is no soil behind the wall. He also agreed that water would run down on the right side.
- [46] In so far as the flow of water is concerned, the witness testified that he did not know the levels of the walls and that the flow of the water can be changed if it is designed that way. It is also Mr. Martin's testimony that if another person said that reinforcement was seen in

the collapsed wall, that would not be accurate. He also said that he was not aware that the area was stable hard rock.

[47] Mr. Martin in his further cross-examination gave the following evidence regarding the collapse of the wall: "With the extra pressure, this brought down the wall. It came from the water pressure with soil pressure behind the wall. In order to prevent a wall overturning, this depends on the adequacy of the base. There was another collapsed wall. And the impression I got was that water had hit it. The common factor would be the excess rain. I would say that the collapsed wall in issue was not designed to take the quantity of water that came in that period."

[48] In re-examination Mr. Martin said that Mr. Hadeed did nothing to cause or contribute to the damage. He added that depending on the design, the flow can be changed but also depending on the flow and you are not interfering with the catchment and a run-off as it would be the same.

MARIO BENTO

[49] Mr. J. Mario Bento filed a witness statement in this matter on 1st December 2005. In it the witness says that he is an environmental and waste water engineer. He says further that on 28th May 2003 he visited the Defendant's property for the purpose of assessing the suitability of the water disposal system operating there. According to him, a report was prepared which contains certain recommendations.

[50] In an expansion on the witness statement the witness testified that he visited the property at Hodges Bay to see if the recommendations were implemented and then again in November 2005 to see what was done.

[51] In cross-examination with reference to **TB p. 45**, the witness said that he saw the septic tank on the south eastern corner of the Defendant's house.

- [52] With reference to **TB p. 90** the witness said that he seemed to recall that the structure being higher up the hill. He said it could be preparation for a soak-away.
- [53] It is the witness' further testimony that during hurricane Lenny a significant amount of water would have accumulated in the hole and could have overflowed and came down the hill to the wall. He added that even without Lenny water would have overflowed down but the wall would have affected the direction of the flow.
- [54] The witness agreed that there was vegetation on the Defendant's property and also that less vegetation would affect the flow. Further still, the witness agreed that the water will flow to the north east.
- [55] Finally, the witness testified that in a Lenny situation water would flow down and overflow with silt behind the wall and wash down. According to him, if there is vegetation there would be less silt.

DAVID HART

- [56] On 1st December 2005 David R. Hart filed a witness summary the contents of which are somewhat unusual and as such, the said witness summary is quoted in its entirety:

- “1. David R. Hart is a civil engineer of St. John's, Antigua and did on 23rd November 1999 at the request of the Claimant, inspect the collapsed retaining wall on the property of the Claimant.
2. Mr. Hart produced a report which was rejected by the Claimant.
3. He will be asked at the trial to produce his report and explain his conclusions including photographs and amplify on his conclusions.
4. I, John E. Fuller certify that David R. Hart the above intended witness has declined to volunteer a witness statement for the Defendant in this matter on the grounds that he was originally retained by the Claimant and for professional ethical reasons prefers to be subpoenaed.

JOHN E. FULLER

Dated 1st day of December, 2005.”

- [57] In an expansion of his witness summary Mr. Hart said that he carried out a geotechnical analysis of the retaining wall. He also revealed that he was retained by Ms. Francis as a result of which he prepared a report but was not called by her to give evidence.
- [58] With respect to location of the Defendant's property he said he carried out a study of the topography in view of the collapse of the wall in November 1999.
- [59] Concerning the rainfall associated with hurricane Lenny, the witness testified that he did not know of any other rain of this type. He said it was unusual.
- [60] With respect to the retaining wall, Mr. Hart said that the stones had insufficient mortar to hold them and added to this there was one piece of steel in the said wall. He therefore characterized it as a free-standing wall.
- [61] In terms of reinforcement for the said wall, he said that it being 50 feet long, there should have been 48 steel bars with 5 lengths horizontally. Also there should have been a strip foundation. He further characterized the foundation as make-shift when in fact it should have had steel. This according to him, rendered the said wall devoid of integrity. For him, it was inadequately built.
- [62] Mr. Hart further testified that the wall collapsed because of the water that ran off the Defendant's property. He also said that the water runs downhill and goes west. He however added that there is nothing on the Defendants land to cause the wall to collapse.
- [63] In so far as the septic tank is concerned Mr. Hart said that it may have overflowed but added that if it was not there, the water it collected would have ran downhill.
- [64] It is also Mr. Hart's evidence that he did not look for a sink hole that was covered up. He added that he was not asked to investigate the subsoil specifically.

[65] Returning to the question of the structure of the wall, Mr. Hart said that a normal wall can take up to 80lbs per square foot and after that it would collapse. For him, the higher the wall the greater the pressure at the bottom.

[66] In cross-examination Mr. Hart said that there is no way that the wall could have sustained the pressure of the water as it was not built to withstand any water pressure. According to him the wall stood for five to six years and it could not have experienced such pressure before. He added that when he saw the wall there was not much vegetation.

[67] Finally, Mr. Hart explained that the wall was decorative which could have collapsed on its own and that he knows that the water caused it to collapse.

DAMAGE

[68] The evidence of damage comes entirely from the witness statement of the Claimant at paragraphs 14 to 26 as follows:

- “14. On the 20th November 1999, heavy rains fell on the island of Antigua and in the Hodges Bay area in particular. Water rushed down the slope of Parcel No. 57 bringing with it debris and soil over into Parcel No. 58 and caused the retaining wall to collapse.
15. The collapsed wall fell upon my house causing extensive damage to it. Windows were shattered; the masonry of the house was damaged; the interior of the house including the floor was extensively damaged.
16. Further soil was washed over onto my Parcel and the “sink hole” on Parcel No. 57 was filled with soil.
17. On the 20th November, 1999, the septic tank had not yet been completed in that the top was not then cast. Consequently water overflowed therefrom with the overflow running over my property.
18. On the 30th day of November 1999 and the 7th day of December 1999 I did commission an inspection and reports of the site to be prepared by Mr. David Hart, B.Sc., CE, CET of Caribbean Testing and Engineering laboratory and Mr. Lucine Harley, Civil and structural engineer of FARHAN Consultants Architects and Engineers respectively.
19. In addition, on the 10th of June 2002 a topographical survey of Parcel No. 58 was prepared on my instructions by Mr. Bertrand B. Burke, Chartered surveyor and land developer.
20. Further, I have photographs of Parcels 57 and 58 and taken both before and after the 1999 clearing of Parcel 57.

21. In an affidavit sworn and filed by the second-named Defendant, Jeff Hadeed on the 20th day of November, 2001 in support of an application for the discharge of an injunction granted to me in this matter, there is exhibited an "application for Development Permission" to the Development Control Authority, St. John's Antigua.
22. The application relates to a development to be conducted on parcel 57. The application is dated the 7th day of February 2000. There is also a "Development Permit" from the Development Control Authority in respect of the aforementioned application which permit is dated the 7th day of February, 2000.
23. As a result of the damage sustained by me I have so far expended the sum of Fifty-nine thousand, two hundred and thirty-two dollars and twenty-six cents (\$59,232.26) to repair my home and to re-erect the wall.
24. I have not yet been able to secure the services of a painter to do the necessary repainting, but I have been provided with an estimate by Damian Murphy of Murphy's painting Services of old Parham Road, St. John's and the estimated cost of material and labour to complete the repainting is twenty-four thousand dollars (\$24,000.00).
25. I have also not yet replaced my beveled glass door which was damaged when the collapsed wall fell upon my house. The estimated cost of obtaining the door from Beveled Glass Works Inc. in California is twenty-eight thousand eight hundred and sixty dollars and fifteen cents (\$28,860.15).
26. Therefore, in addition to the monies I have already expended, I still require a further fifty-two thousand, eight hundred and sixty dollars and fifteen cents to completely repair the damages done to me as a result of the negligence of the defendants."

SUMMARY

[69] The Claimant's contention with respect to the negligence is that the Defendant did a number of things on his land which resulted in damage to her property. These are: 1. denuding the land of trees, shrubs and other vegetation; 2. constructing a septic tank which was opened at the material time, 3. blocked a hole which provided a natural escape route for water and 4. built terrace walls with open drainage pipes inserted at intervals.

[70] The Defendant denies that he denied the land but admitted that he terraced his property by, inter alia, constructing two terrace walls. The matter of the septic pit is denied. It is however contended by the Defendant that the damage to the Claimant's property was as a result of the exceptional heavy rain which fall between 19th and 20th November 1999.

[71] Based on the evidence the Court makes the following findings of fact and inferences drawn therefrom:

1. The Defendant did not entirely denude his property of trees, shrubs and other vegetation. This is implicitly conceded by the Defendant in his witness statement when he said in effect that he did not denude his property to the extent described.
2. There was an open septic pit on the Defendant's property. But according to Mr. David Hart it collected water that would have otherwise ran off to the Claimant's property until it overflowed.
3. The Defendant did terrace his property and in the process did construct two walls which were constructed with weep holes.
4. The collapsed wall on the Claimant's property was not reinforced. Mr. David Hart in his evidence characterized said wall as decorative, lacking in integrity because of a make-shift foundation and which could have collapsed on its own.
5. Exceptionally or unusual heavy rains fell in Antigua at the material time.
6. Apart from the water running down the Defendant's land, rain would have fallen directly on the Claimant's property.
7. There is a wooded area between the Claimants house and that of the Defendant as shown at **TB p. 63**. This would have acted to retard the flow of water to the Claimant's property.
8. The septic pit would have also served to retard the flow of water.
9. The terracing would have altered the flow of the water but not to an extent to increase the risk involved.

LIABILITY

[72] The question now posed is whether the Defendant was negligent in the circumstances.

[73] As noted above, in order that the Defendant may be liable in negligence he must be in breach of the duty of care owed to the Claimant. Such a breach is measured by the standard of the reasonable man. This standard depends on three factors as outlined above: 1. magnitude of the risk; 2. the importance of the object to be attained and 3. practicability of precautions.

MAGNITUDE OF THE RISK

- [74] According to Winfield & Jolowicz: "Two elements go to make up the magnitude of the risk, the likelihood that injury will be incurred and the seriousness of the injury that is risked."
- [75] The law in this regard is that the greater the likelihood that the Defendant's conduct will cause harm the greater the amount of caution required of him.
- [76] Gilbert Kodilyne¹ illustrates the principle by reference to two cases:
"In *Bolton v. Stone*, the plaintiff was struck and injured by a cricket ball as he was walking along a public road adjacent to a cricket ground. The plaintiff contended that the defendant, who was in charge of the ground, had been negligent in failing to take precautions to ensure that cricket balls did not escape from the ground and injure passers-by; but the court held that, taking into account such factors as the distance of the pitch from the road, the presence of a seven-foot-high fence, and the infrequency with which balls had escaped previously, the likelihood of harm to passers-by was so slight that the defendant had not been negligent in allowing cricket to be played without having taken further precautions such as raising the height of the fence. In *Hilder v. Associated Portland Cement Manufacturers Ltd.*, on the other hand, where the plaintiff, whilst riding his motor-cycle along a road, crashed and sustained injuries after being struck by a football kicked from the defendant's adjacent land where children were in the habit of playing, the defendant was held negligent in having failed to take precautions to prevent footballs from being kicked onto the road since, in the circumstances, the likelihood of injury to passers-by was considerable."
- [77] Also in *MOWSER v DENOBRIGA* [1969] 15 WIR 147 the Defendant was held liable in negligence when a riderless horse left the track at a point where there were no rails or fence. This constituted a real risk of injury and therefore a breach of the duty of care owed.
- [78] In this instance the Defendant's evidence is that he was developing his property. He did this by terracing his land which include the building of two terracing walls with weep holes and building a septic pit or tank.
- [79] Therefore, in the view of the Court there is no likelihood of harm in the Defendant's action was slight. This is based on the rule that the degree of care which the duty involved must be proportioned to the degree of risk involved if the duty of care is breached².

¹ *Op cit*; at page 81

² Per Lord Wright in *Northwestern Utilities Ltd v London Guaranteed Accident Co. Ltd* [1936] A.C 108, 126.

IMPORTANCE OF THE OBJECT TO BE ATTAINED

- [80] The operative principle in this regard is that the risk must be balanced against the consequences of not taking it. The purpose to be served, if sufficiently important justifies, the assumption of abnormal risk. On that basis, in *WATT v HERTFORDSHIRE CC* [1954] 1 WLR 835 the Plaintiff sued in negligence as a result of injury sustained when, in an attempt to save a life, a heavy jack was carried on a truck not equipped for the purpose. It was held that the fire authorities were not negligent for the risk involved to the Plaintiff was not so great so as to prohibit the attempt to save life.
- [81] In like manner the risk of injury or damage to the Claimant's property is not so great as to prohibit the Defendant developing his property.

PRACTICABILITY OF PRECAUTIONS

- [82] This factor requires a consideration of how costly and practicable it would have been for the Defendant to have taken precautions to eliminate the risk, for in every case of foreseeable risk it is a matter of balancing the risk against the measures to eliminate it.
- [83] In *LATIMER v. A.E.C* [1953] AC 643 a factory floor became slippery after a flood. The occupiers of the factory did everything possible to get rid of the effects of the flood, but nevertheless the Claimant was injured and then sought to say the occupiers should have closed the factory. The House of Lords held that the risk of injury created by the slippery floor was not so great as to justify, much less require, so onerous a precaution.
- [84] In this action the risk lies in water running down sloping land. The question then becomes whether there are any practicable precautions that could have been taken. This stands in contrast to *MOWSER v DENOBRIGA*, *supra* where it was simply more guard rails or fencing.

CONCLUSION

- [85] It is common ground that the rainfall that was experienced on 20th November 1999 was exceptional so that rainfall of this nature was not foreseeable. It is therefore in this context that the issue of the breach of the duty of care must be assessed or determined.

[86] In relation to the factors relating to the reasonable man's standard it was determined that: the likelihood of harm from the Defendant's action on his property was slight; the development of the Defendant's land was not of such a nature to prohibit it; there were no practicable precautions that could have been taken by the Defendant.

[87] Therefore, it is the conclusion of the Court that the Defendant is not liable in negligence.

ISSUE NO. 2

WHETHER THE DEFENDANT CAUSED A NUISANCE ON HIS PROPERTY WHICH AFFECTED THE CLAIMANT ON HER PROPERTY

[88] On the matter of private nuisance the following statement of the law is contained in Winfield & Jolowicz at paragraph 14.4:

"Private nuisance may be described as unlawful interference with a person's use or enjoyment of land, or some right over or in connection with it. It has been said that the tort takes three forms: encroachment on a neighbour's land; direct physical injury to the land or interference with the enjoyment of the land. The varieties of the third form are almost infinite but it is still a tort against rights of property and therefore lies at the suit of a person with a sufficient interest in the land."

[89] In CLERK & LINDSELL ON TORTS (10th ed.) at paragraph 19-01 the statement of the law covers the same field but other considerations are introduced:

"The essence of nuisance is a condition or activity which unduly interferes with the use or enjoyment of land. In common parlance, stenches and smoke and a variety of different things may amount to a nuisance in fact but whether they are actionable as the tort of nuisance will depend upon a variety of considerations and a balancing of conflicting interests. Actionable nuisance is incapable of exact definition and it may overlap with some other heading of liability in tort such as negligence or the rule in *Rylands v Fletcher* Nuisance is an act or omission which is an interference with, disturbance of or annoyance to, a person in the exercise or enjoyment of (a) a right belonging to him as a member of the public, when it is a public nuisance, or (b) his ownership or occupation of land or of some easement, profit, or other right used or enjoyed in connection with land when it is a private nuisance."

[90] In Volume 45 (2) of HALSBURY'S LAWS OF ENGLAND (4th ed. Reissue) the following factor is added: "In most cases nuisance depends on some form of activity, but this is not an essential ingredient of the tort; a private nuisance may also arise from mere existence of a state of affairs on a person's land, where that person allows the state of affairs to continue."

- [91] There can be no doubt that there was interference with the Claimant's enjoyment of her property. But the question is whether, in light of the contour of the land and an extraordinary rainfall, the Defendant is liable. In this regard the rule is that whosoever creates a nuisance may be sued for it whether or not he is in occupation of the land from which emanates.
- [92] While the Court has already accepted that the interference with the Claimant's enjoyment of her property was caused by the heavy rainfall, it cannot be said that the Defendant created such rainfall. In fact the circumstances of the consequences have already been examined and these include the natural slope of the land, the presence of an area of trees between the two properties and the unreinforced wall on the Claimants land.
- [93] In *HERNANDEZ v ALTA GARCIA QUARRY Ltd*¹ the Defendant was held liable in nuisance where as a result of heavy rains and flooding, silt and rubble was brought down from the Defendant's quarry and settled on the Plaintiff's cocoa and avocado trees. The Court determined that the working of a quarry was a hazard and that some damage was foreseeable. This case can be easily distinguished from the present in that the Defendant was merely developing by terracing his land which is far removed from quarrying. Furthermore, quarrying is an on-going process.
- [94] In his defence the Defendant pleads act of God. This is said to be a defence to nuisance².
- [95] Act of God was defined by Lord Westbury in *TENNANT v EARL OF GLASGOW* [1864] 2 M (HL) 22 as circumstances which no human foresight can provide against and of which human prudence is not bound to recognize the possibility and which when they do occur, therefore, are calamities that do not involve the obligation of paying for the consequences that may result from them.

¹ Suit No. 2298 of 1979 High Court of T&T unreported – Des Isles J.

² *Winfield & Jolowicz, op. cit.*, paragraph 14.36

- [96] Some learning suggests that rainfall of extraordinary violence is not an act of God¹. The determination is based on the case of **GREENOCK CORPORATION v CALEDONIAN RY** [1917] AC 556. In this case the Corporation diverted the course of a natural stream and constructed a paddling pond. Owing to extraordinary rainfall, the stream burst from its diverted channel and returned to its natural channel with the result that the accumulated water damaged the railway premises. The corporation was held liable. Lord Finlay concluded that: "It is true that the flood was of extraordinary violence, but floods of extraordinary violence must be anticipated as likely to take place from time to time."
- [97] The case of **NICHOLS v MARSLAND** [1876] 2 Ex. D1 involved the diversion of a stream to form pools. Extraordinary rainfall burst the dam with resulting flooding. The Defendants were held not liable by virtue of *vis major*, the equivalent to an act of God. This case was much criticized in the later case of **GREENOCK CORPORATION**, supra, on the question of act of God with the result that it may be said that an extraordinary rainfall is not an "act of God."
- [98] In **HALSBURY'S LAWS OF ENGLAND** Vol. 45 (2) at paragraph 363 the defence of act of God is alive along classical lines. And one of the cases cited in support is **DIXON v METROPOLITAN BOARD OF WORKS** [1881] 7 QBD 418 at 421-422 where it was held that the rainfall must be such as could not reasonably been anticipated and not merely an unusual rainfall such as the Defendant ought to have prepared for.
- [99] In any event the Court considers that the facts in both of the cases cited in **CHARLESWORTH ON NEGLIGENCE** are distinguishable from the present in that they both involved the storing or accumulation of water. And although water accumulated in the unfinished septic pit, that was not the intended purpose and in any event the water never escaped as in the two cited cases.
- [100] The further evidence is that the rainfall measured for the 20th November 1999 was 25 inches which had not been experienced for about twenty-five years. Further there is no

¹ See: Charlesworth On Negligence (6th ed.) at paragraph 454.

evidence of any forecast of such weather. In the circumstances a reasonable conclusion would be that the rainfall could not be reasonably anticipated.

[101] Therefore, further to the determination that the Defendant was not the creator of a nuisance, it is also the determination that the defence of act of God succeeds.

ISSUE NO. 3

WHETHER THERE WAS NON-NATURAL USER OF THE LAND BY THE DEFENDANT

[102] The generally accepted dictum of non-natural user is that of Lord Moulton in *RICHARDS v. LOTHIAN* [1913] AC 263, 279:

“It must be some special use bringing with it increased danger to others and must not be the ordinary use of the land or such a use as is proper for the benefit of the community.”

[103] The cases therefore show that the Courts apply the principle to those circumstances such as where there is storage of chemicals¹, or bauxite processing². However in *SYNAGOUGE TRUST LTD v PERRY* the burning debris result in fire spreading to the adjoining land was held to be, inter alia, non-natural user³.

[104] The Defendant was engaged in actions on his property which cannot be other than the ordinary use of the land. And not even the construction of the septic pit falls outside of this legal orbit.

[105] Accordingly it is the determination that the actions of the Defendant on his land do not constitute a non-natural user of the land.

CONCLUSION

1. The Defendant is not liable in negligence for the damage to the Claimants property.

¹ *Cambridge Water Co. v Eastern Counties Leather plc* [1994] 1 ALL ER 53

² *Chandat v Reynolds Guyana Mines Ltd* Suit No. 249/1969 High Court of Guyana.

³ C.L. 240/1983 SC: Jamaica (unreported)

2. The Defendant is not liable in nuisance since he did not create the nuisance and the defence of act of God is applicable to the circumstances of the Defendant.
3. The use of the land by the Defendant is not a non-natural use of the land.

[106] **IT IS HEREBY ORDERED** as follows:

1. The Claimants case is dismissed.
2. The Claimant must pay costs to the Defendant in the sum of \$3,500.00.

Errol L. Thomas
Judge