

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. HCV 00637/2004

BETWEEN RAPHAEL LEWIS CLAIMANT
AND ATTORNEY GENERAL FOR JAMAICA DEFENDANT

Nelton Forsythe and Latoya Green instructed by Forsythe & Forsythe for Claimant.

Nicole Lambert and Kevin Powell instructed by Director of State Proceedings for Defendant.

Heard 27th, 28th September 2006 and 7th September 2007

Campbell J.

(1) Historians claim that Christopher Columbus to better illustrate his description of the topography of Jamaica to his royal patrons, Ferdinand and Isabella of Spain, crumpled a sheet of paper in his hand and presented it to them. It was an apt description. Jamaica is a mountainous country, although the majority of its people live on the narrow coastal strip that skirts the island, a substantial number resides, as the Claimant does, on its hilly hinterland.

(2) The majestic Blue Mountains rise to 7,402 feet in the north-eastern section of the island, and plunges within twenty miles to the southern shoreline. On that shoreline is situated the district of Bull Bay, which is connected by roadway that runs northerly to the university district of Papine. This road straddles the lower ridges of the Blue Mountain. It is along this roadway that the Claimant Mr. Raphael Lewis' house is situated.

(3) Travelling northerly along this road to the left there is a hillside embankment, which rises steeply from the roadway, and runs for most of its length from Bull Bay to beyond the Claimant's house. On the right side of the roadway, the land descends to a river, which runs

“generally alongside the road” with houses between the river and the road at points. Mr. Lewis’ lives in one such house.

(4) On the 24th March 2005, Mr. Lewis filed a claim, seeking damages for that “in or around the years 2000 to 2002, the Defendant through its servant and/or agent, the National Works Agency, whilst in the course of carrying out road works negligently, caused and or permitted damages to be done to his house and property.”

(5) The Particulars of Claim alleged, inter alia;

(a) That during the course of road works, the Defendants caused works to be done adjacent to the Claimant’s property, caused debris to be dumped onto adjoining property thereby blocking the drainage and caused water to ingress onto the Claimant’s property and to flood it when it rained.

(b) The Defendants used the Claimant’s fence as a retaining wall and raised the road level rendering the Claimant’s property below road level which caused a steep downward slope into the Claimant’s driveway and made it easier for the water to enter and flood the Claimant’s property and into his house.

(6) The Defendants admitted that road works were conducted in years 2001 to 2002, that minor patching works were done, which involved merely filling potholes along the existing roadway. They denied dumping debris onto property adjoining the Claimant’s property. They contended that Lewis’ property is situated 6 to 10 meters below the roadway and water ingressing and flooding the said property is a natural and likely consequence of the location of Lewis’ property. The Defendants denied raising the level of the roadway and said they were only involved in a patching exercise.

(7) The parties agreed as an item of fact that, the National Works Agency carried out road works adjacent to Lewis’ property on or around 2000 to 2002.

(8) They agreed that the relevant issues were;

(a) Whether the said road works involved the raising of the road level and /or reconstruction of the road surface.

- (b) Whether the said road works rendered the Claimant's property below road level.
- (c) Whether the Defendant's servant and/or agent dumped debris adjacent to the Claimant's property as alleged or at all.
- (d) Whether the ingress of water unto the Claimant's property when it rains is as a result of the road works undertaken by the Defendant's servant and/or agent and/or as a result of a natural likely consequence due to the location of the Claimant's property.

Was the road level raised?

(9) Mr. Lewis stated in his witness statement that he had owned the lands from the 1960s and built his house around that time. The house consists of five bedrooms and three bathrooms, with a driveway made of concrete that goes to the car park. He said that the National Works Agency (NWA) did work during the period 2000 to 2002 and work was done on lands adjacent to his land. He alleged that the road was raised using his fence as a retaining wall which resulted in his property being below the road surface.

(10) He said further that the said raising of the road level resulted in a steep downward slope leading into his driveway making it easy for water and debris to access and enter his property. He also complained that the debris from the adjoining property has affected the drainage system in that the water does not flow properly.

(11) In cross-examination, he admitted that his entire house was below the surface of the road. He described the driveway as raising six feet over a distance of 10 feet, then descending at a fall (gradient) of one in ten, until a distance of about 20 feet from the house. He testified that the water on the road surface would have to reach 12 inches before it gets over the driveway.

(12) He testified that he had been living there since 1964 and he never had a problem with water on the roadway. He denied the suggestion that he had been having problems before, and that after discussions, NWA raised the embankment to stop water coming into his property. It was

suggested that raising of the embankment did not result in raising the level of the road. "They filled between the fence and the embankment. I find as a matter of fact that there was a filling between the fence and the embankment by the NWA, but this did not raise the road level."

Lewis' testimony is that this was done in his face, there is no evidence that he brought to the attention of NWA the "bump" he had created to prevent the water entering his property, as one would reasonably expect if that "bump" was being altered.

(13) The Claimant called an expert witness, Mr. Rupert Evans, Consulting Engineer, a licensed Civil Engineer, with thirty years of experience. He holds a M. Sc. (with distinction) from the University of Surrey. He said he visited the Claimant's residence on Sunday, November 6, 2005. He testified that he observed that new kerbs were constructed above an existing retaining wall. He concluded that the road elevation was raised in the vicinity of Lewis' entrance. In order to determine the height to which the roadway was raised, he assumed that what he observed and exhibited (see Plate 5) was typical of the height of the parapet wall above the road surface. The new surface he testifies is 290m. He therefore determined that the road was increased at that point by approximately 480mm or 18.9 inches. He opined that as a result Lewis' gateway would now be 190mm below the new road level whereas before it would have been 300mm above.

(14) Mr. Evans exhibits several photographs, which he labels plates, which are titled, for example, Plate 3 is titled, Lewis Entrance. He then adds a short comment, in case of Plate 3, that comment is, "The Lewis entrance indicates that the house is well below road level".

(15) Plate 3 shows, a gateway, with a steeply descending driveway. To the left of this driveway is a thick concrete wall which separates the driveway from an equally steeply ascending roadway. The dwelling-house is not visible in this photograph. The picture presents a typical Jamaican scenery of a roadway snaking its way over mountainous terrain bordered on one hand

by hillsides and on the other by a precipitous fall, gully or ravine. Lewis' house is on the ravine side.

(16) If one accepts the Claimant's experts' evidence in relation to Plate 3, it is abundantly clear that no roadwork, as alleged, could have caused the Lewis' house to be below the road surface, that was achieved by the geography of the land and the selection of a location by its builder.

(17) However, Mr. Evans has opined that the 300mm "bump" created by Lewis at his gateway, to prevent the ingress of water was rendered ineffective by the raising of the roadway. That appears to be the essence of the argument in relation to the raising of the roadway.

(18) Mr. George Knight of National Works Agency, who had responsibility for road works in that area said he had noticed "excess scouring" to the opposite side of the road from Lewis' property. On that side of the road, there is a concrete side drain. The road slopes in the direction of the embankment, that is away from Lewis' property. Knight testified that there was no structural damage to the road, only to its surface. The potholes were patched, he said the shape of the roadway was never changed, there was no re-construction, and the road was never raised.

(19) Mr. Evans concluded that the road had been raised based on observing relatively new kerbs on an old retaining wall. In **Plate 8** exhibited to his witness statement, he shows what he considers the top of the retaining wall. Cross-examined, Evans describes the kerbs as being an earth retaining structure that would have been built before one raises the roadway. However, the evidence is that Lewis states that the road was raised using his fence as a retaining wall. Evan states he has no idea who built the kerbs. I do not accept Lewis' testimony that the roadway slopes from the opposite side of the road in the direction of his house in some areas and in others towards the hillsides. Evans testimony is that the road slopes towards the hillside embankment.

The embankment and the scouring in that area would indicate that there is erosion of the embankment caused by water.

I accept the evidence of Mr. Knight that there was no raising of the road in that area. The house being below the road surface was not caused by any road works effected by the Defendants or their agents.

Was debris dumped by the Defendants on adjacent property?

(20) Lewis testified that the road works could have been done in 2002. He could not say whether it was May to June of 2002 that the rains came, which he described as being exceptional and heavy. However, the statement of Estimate of Cost by Davidson and Hanna indicates that the Quantity Surveyors visited Lewis' property on 11th June 2002 and submitted their reports in respect of "flood rains of May 2002". He said he was flooded out and that the work was going on when the rains came. Although he had earlier said he had no water problems prior to the flooding, when the question followed queries about the May rains, he contradicted his earlier evidence on this point. I find that this contradiction of his earlier testimony was to minimize the effect of the "exceptional rains" as being the primary cause of the flooding and deposit of debris.

(21) Speaking of the period of the rains he said there was extensive damage in that area, although he could not say if houses there were covered with debris and silt. He denies that there was a river near to him. This evidence contradicts that of his witness, Evans and the Plate 1(exhibited to his witness statement) and the evidence of George Knight. He later admitted the presence of the river but said it is dry.

(22) He said the heavy rains demolished his fence. Water rose to three feet in his yard and the place was covered with silt. He denied that all the debris and damage that took place was a result of the excessive rainfall, he said the debris was what NWA had deliberately placed on adjacent

property using tractor and shovel. This last bit of testimony is squarely contradicted by his own witness, Mr. Evans, who exhibits at Plate 5, what he labels as erosion damage and debris downhill from Lewis' gate. He notes on the exhibit that immediately downhill of the entrance to Lewis residence, debris was observed on the hillside of the road, there was a point (breach) on the upstream end of the retaining wall that admits water on the property below. Interestingly, Mr. Evans' photographs support his evidence that the debris deposited on Lewis' property are a result of the severe erosion of the hillside opposite to the Claimant's house, and not debris deliberately deposited by NWA as Lewis alleges.

(23) Plate 6, a photograph of landslide across from Lewis' entrance, confirms that the debris in Plate 6 is similar to that on Lewis' property. I am satisfied that the debris deposited on Lewis' property was brought there naturally by the action of the excessive rainfall following its natural flow paths.

(24) The Claimant has failed to establish any lack of care on the part of the NWA. NWA constructed the roadway to cause it to lead away from the Claimant's property. They had responded to the Claimant's summons for assistance and had filled the space between the embankment and the fence. They had constructed a fence to lead water away from the entrance to the Claimant's property. Efforts had been made to mitigate the erosion on the hillside opposite the Claimant's property. The rainfall that caused the flooding was described by George Knight as rainfall for some 21 days that caused the project on that road to be halted.

(25) Mr. Evans said in cross-examination that water generally flows in the direction of the river, and the river that he observed was in a valley. He also admitted that the proximity of the river to Lewis' house could result in flooding of Lewis' property. Evans testified that the culvert that he observed was not containing all of the water that ran off the road, that the majority by-pass the

culvert and ran onto Lewis' property. The size of the culvert he opined could cause problems. Evans evidence also conflicts with Lewis' when he says that the debris from the hillsides could have blocked drains, channelling water to Lewis' gate. He agrees with the Defendant's suggestions that the land slopes away from Lewis' gate, thereby conflicting Mr. Lewis. I find that the deposit of debris and flooding of the property of the Claimant was as a result of a natural and likely consequence of the location of the Claimant's property.

(26) Although that is sufficient to dispose of this matter, the question, whether Mr. Lewis was owed a duty of care by the Defendant, is pertinent and although not rehearsed before me, the comments of the Court of Appeal **In The Jamaica Public Service Co. Ltd. v Winsome Patricia Crawford Ramsey** SCCA no. 17/2003, unreported decision, delivered on 18th December 2006, are apposite. Mrs. Justice Harris J.A. said at page 62;

“As a general rule, a party is under a duty to take reasonable care to avoid acts and omissions which can be reasonably foreseen as likely to injure his neighbour. What then is the relevant test in the creation of a duty of care? Over the years there has been diversity in the approaches adopted in the determination of the existence and extent of a duty of care which one party owes to another. As long established practice, the law recognizes diverse situations which rise to a duty of care within the scope of negligence.

These situations, however, must be amply perceptible to demand a distinct definition of the requisite ingredients of a duty of care. The modern approach and accepted test in imposing a duty of care are ensconced in three elements. These are a) foreseeability of damage as a consequence of the negligent performance of an operation; (b) the existence of sufficient relationship of proximity between the parties and (c) whether it is fair and just that a duty be imposed.”

The learned judge, after referring to Lord Bridge test that was propounded in **Caparo Industries plc. v Dickman (1990) 1 ALL ER 568** at page 572 continued;

“A court on its enquiry into foreseeability, must consider the nature of the relationship of the parties and must be satisfied that in all the circumstances it is fair and just to assign to a Defendant a duty of care.”

The ingredients of foreseeability, proximity and fairness, are inextricably interwoven in establishing a duty of care.

The Claimant's case is dismissed. Judgment for the Defendant. Costs to the Defendant to be agreed or taxed.