IN THE SUPREME COURT OF JUDICATURE OF JAMAICA
IN COMMON LAW
SUIT NO. C.L. 240 of 1983

BETWEEN:	SYNAGOGUE TRUST LTD.	-	PLAINTIFF
AND:	HUBERT PERRY	-	DEFENDANT

Dennis Morrison instructed by Milholland, Ashenheim & Stone for Plaintiff
Norman Wright for Defendant

Heard: 24th July, 1986; 26th January, 1987; 29th July, 1988

MORGAN, J.

Sometime after noon on the 10th April, 1982 there was pandemonium at 10 Wellington Drive, St. Andrew. It was an 'Old People's Home' and the roof of a room on the building was on fire. It was rest period so the occupants had to be awakened and care taken to evacuate them from the premises.

The fire brigade was called. They were unable to find the address. They took some 15 to 20 minutes to arrive, did what they could, but it was a windy day, the fire spread quickly, a section of the building was destroyed and there was no time to save any of the contents. Happily and thanks to the efforts of all no one lost their life.

Prior to this at about 1.30 p.m. Mrs Norma Garrick, the cook, who worked at No. 10 for two (2) years, was tidying the kitchen when she was attracted to smoke coming from the back of the premises. Her investigations revealed a huge fire burning a few feet away from the dividing line on the defendant's premises. She saw a man on the defendant's premises, who she knew as a worker there before, and who she saw working there on that day burning dry mango limbs and other debris under a tree. He was drinking water from a short plastic ice cream container. She called to him to put out the fire as it could be dangerous and sparks from the fire were already flying in the area. His response was to throw on the fire the remaining water in the container from which he was drinking. The water was insufficient, the fire had not been put out, it was windy, she was not satisfied, but she returned to her work. Minutes after that, she said, she heard the shout 'fire'.

She went outside and saw the roof of the building, situated over a room used by eight persons ablaze. Along with others an effort was made to put out the fire, but the wind was very high and they met with no success. The fire that was started was large, it went up in flames and had scorched the mango tree. Water from the garden hose was used in an attempt to put it out but the 'breeze was blowing' and what was needed was for the fire 'to beat out'. The worker could have controlled the fire by that method, she said, but he made no attempt to do so.

The burnt home was owned by the Synagogue Trust Co., who have now sued the occupier of the adjoining premises known as 20 Karachi Avenue, St. Andrew to recover damages occasioned by the fire.

I now set out the relevant paragraphs of the Statement of Claim.

> 3. "On or about the 10th April, 1982 the defendant, his servant and/or agent placed on his land a bonfire burning sparks from which escaped from the defendant's land and ignited the shingled roof of the Plaintiff's dwelling house whereupon the said dwelling house was consumed by flames.
>
> 4. The escape of the said sparks and the fire resulting therefrom was caused by the negligence of the Defendant, his servant and/or agent.
>
> 5. As a result of the matters aforesaid the said dwelling house of the Plaintiff and the contents thereof was destroyed by fire and the plaintiff company has suffered loss and damages.
>
> Particulars of Negligence
>
> (a) Burning refuse and other substance in a large bonfire near the boundary of the Plaintiff's and defendant's land.
>
> (b) Persisting in doing so despite being warned by the plaintiff's servant and/or agent to desist.
>
> (c) Burning rubbish is a manner and under circumstances where it was manifestly unsafe so to do.
>
> (d) Failing to control the size of the fire.
>
> (e) Failing to prevent its escape onto the plaintiff's land.
>
> 6. Further and/or in the alternative the defendant its servant and/or agent failed to control the fire that it made on its land that it escaped therefrom and caused a nuisance to the plaintiff thereby occasioning damage to the plaintiff's company."

Although the plaintiff's attorney indicated he would call two witnesses he closed his case at the end of Mrs. Garrick's evidence.

The defendant gave evidence. He was Mr. Hubert Perry, a United States citizen, residing and working as a Production Manager of Jamaica Flour Mills and the tenant and occupier of 20 Karachi Avenue, since July 1979.

He said that on the 10th April, 1982 he left home about 7.30 a.m. and returned at 5.00 p.m. 'after dark' and was told something by his wife who was at home. Next day he observed that the roof of the neighbour's house was burnt out and he saw charred embers of a fire underneath the mango tree, which was about 10 ft. away from a water pipe in his yard. He knew the identity of the person who lit the fire, but he had not requested or instructed him to do so, nor did he make any agreement with him to sweep up or light a fire. This person was not employed to him nor was he his servant or agent and he did not employ the services of a gardener, that day or at all.

He admitted, however, that -

(a) The land was nearer one-third of an acre.

(b) There were almond and mango trees which shed leaves on the land.

(c) That he had hired someone to cut down two almond trees the year before the fire.

(d) That he maintained a lawn and also a hedge which ran along the front and sides of the land.

(e) That it was not usual to use fire there to dispose of clippings, though there was evidence that fire had been burnt at that spot before - this he observed when he first came to the premises - that after living there he observed evidence of fire being burnt at that spot but was never aware who did it.

(f) That his wife was at home on the day of the fire and it was she who gave him some information.

(g) That he owned a dog at that time.

(h) That he employed no domestic helper until year 1983.

This was the case for the defence.

The defence on the pleadings did not admit paragraph 3 of the Statement of Claim, so apart from putting the plaintiff to proof, at the end of the day it remained, on the defendant's case, that although he knew the identity of the person who lit the fire he offered no evidence as to the classification of this person as to whether he was a trespasser or a stranger.

Mrs. Garrick did not see the fire being lit but she spoke to the worker standing by the fire. I accept her evidence that she pointed out the dangers to him and that he responded inadequately and that he was someone she had seen on the premises previously working as a gardener. I find that the clear inference that can be drawn from this evidence is that the fire was set by this 'worker'.

Was he then the servant or agent of the defendant?

Counsel for the plaintiff stated quite properly that the defendant could not say that the lighting of the fire was an independent act of a third party, because he had not so pleaded, neither was it the basis on which the cross-examination of the plaintiff's witness was conducted. Indeed, it was a substantive defence open to him, but on which he did not rely. The plaintiff, however, having been put to proof, elicited through Mrs. Garrick that she had seen him there as a worker before and that he was working there on that day. This went unchallenged as no explanation was offered about his presence.

On that account it became some evidence for consideration in finding the fact of whether or not he was an agent. I accept that two factors must be established.

1. that he was acting on the owner's behalf as his agent; and

2. the existency of this agency.

Such evidence as the plaintiff elicited, I find is prima facie evidence of these factors.

The defendant himself gave evidence as I have listed above as - (a) to (h) inclusive, and from such evidence I conclude that a man who occupies a house plot of such size, with trees growing thereon, and which has

a lawn and a hedge, and who has sufficient authority to chop down trees; a man who works 7.30 a.m. to 5.00 p.m. and is on call seven (7) days of the week, leaving him no time to do his own gardening, ought most probably to have at his command a gardener to maintain those surroundings, if not regularly, then at least occasionally. The presence of a person on the premises not authorized at a time when his wife is at home with a dog present presumably to scare away strangers is significant. The fact also that he has seen evidenc of fire at a point where he had previously seen similar evidence of fire coupled with the fact that there was no other authorised party likely to set it - he has no helper - should at least have put him on enquiry, if he had not sanctioned it. He said he knew the identity of the person but all these matters remained unexplained.

I do not accept the evidence of the defendant that the worker was not his servant or agent and there is no cogent evidence to repel this inference, that he was acting as his agent. I have looked at the totality of the evidence and find that this man was acting on the defendant's request expressed or implied in performance of a task delegated to him, a task which was being done for the defendant's benefit and which was of interest to the defendant. A prima facie case has been established which has not been rebutted. I find that on all probabilities the worker who set the fire was the agent of the defendant.

Counsel for the plaintiff based the claim under several heads, namely, the Rule in Rylands & Fletcher, Negligence & Nuisance. Counsel for the defence attacked the pleadings in that Paragraph 3, he said, did not meet the rule in Rylands & Fletcher in that it must be specifically pleaded and he referred to the precedent in Bullen & Leake at page 803 No. 490. Counsel for the plaintiff in his reply said that the Statement of Claim was pleaded with all particularity. Indeed, I hold that Bullen & Leake contains as it says precedents and is not expected to be slavishly followed as long as all the necessary particulars are present. I find that paragraph (3) of the pleadings contains all the particulars required for the claim and can be relied on as such.

It was not denied that there was a fire or that it got out of control. Fire by itself is a dangerous thing. There was no denial that it was brought on to the land to get fire to leaves and trimmings to burn them. The evidence is that it escaped and did damage to the Plaintiff's building. The defendant, however, averred in his defence that "the use of the fire constituted a natural ordinary and reasonable use of the defendant's premises."

The rule of Blackbourn J. in the case whose name the rule bears is well known but I will repeat it here.

> "A person who for his own purpose brings on his lands and collects and keeps there anything likely to do mischief if it escapes must keep it in at his peril and if he does not do so is prima facie answerable for all the damage which is the natural consequence of its escape."

It was Lord Cairns at the hearing in the House of Lords, who introduced the restriction that the rule must apply only to circumstances where the defendant had made a <u>non-natural use</u> of the land.

The fact of what is a non-natural use elicited much argument from Counsel for the defence. Indeed, there is no authorative determination of what a non-natural user of land may be and so it has become a question of fact for the Judge to determine in each case. This has spurred defence counsel to submit that in making a decision consideration must be given to all the circumstances of the time and place and that ordinary domestic use does not constitute "non-natural use" of land. He argued that the burning of bush in Jamaica in one's backyard is so prevalent that it becomes a natural use, and should be considered as a natural ordinary domestic use of the land exempting the occupier of land from strict liability, should damage occur.

Fire is one of the elements like water which is legally regarded as a dangerous thing and consequently the principle of Rylands and Fletcher applies. <u>(Clerk & Lindsell on Torts 14th Ed. para. 1511.)</u>

The text book speaks of fire in the context of the English situation where because of climatic conditions fires are lit inside houses and, following the rule, fire can in certain circumstances be called

'natural use'. As Lord Goddard, Chief Justice as he then was, said in a case where a fire escaped from an open fireplace and did damage.

> "There was an ordinary natural proper everyday use of a fireplace in a room. The fireplace was there to be used."
>
> Sochacki & Sas & another [1947] All E.R. p.345.

This case, however, did not come under the rule of strict liability because of absence of a guard before the fireplace and it was held that only proof of negligence could make the defendant liable.

Jamaica happily does not enjoy the climatic changes which England enjoys and so the use of fire for any such situation as the case above would rarely if at all arise. But fire is classified as a dangerous thing in England even though an open fire is natural use in a house. It is the statute which modifies its strict liability by making available the defence of accident in certain cases. The English Act being the Fires Prevention Metropolis Act 1774. Jamaica has no equivalnet Statute. This brings me to the very point - if fire which is used ordinarily in England is classified as "a dangerous thing" what classification ought to be used in Jamaica where fire is not in ordinary use as it is there?

"Natural use of land" means use - something according to nature, or provided by nature. So leaves falling on the ground littering the land and put in a heap is indeed a 'natural use', that being 'things occurring according to nature', things happening naturally on the land. If then the breeze blows and scatters the leaves and fills the neighbour's swimming pool thereby causing damage to it that action would undoubtedly in my view be one of 'natural use' and it would escape the strict liability rule. The non-natural use commences only when fire (which is not naturally there) is placed in the heap and the wind blows and the sparks fly and injury results to the roof by setting it a fire.

As was said by Lord Moulton, to make the rule applicable -

> "It must be some special use bringing with it increased danger to others and must not merely be the ordinary use of the land or such a use as is proper for the general benefit of the community."
>
> Rickards vs. Lothian L.R. [1913] A.C. 263 at page 280.

Following that language I would say that lighting a fire in an open backyard is a "special use" which has its dangers in the wind blowing causing sparks to fly or danger by way of the fire getting out of hand and travelling to the neighbour's land. Can it be said that it is not a special use - an open fire lit in an area where dwelling houses are situated?

I concur with Counsel that fire is commonly used to burn leaves and twigs in the city. True enough the authorities who are responsible for removing garbage do not regard leaves and trimmings as garbage. The garbage trucks do not remove them from our dwellings, so alternative methods have to be initiated by householders which will not cause harm to the neighbour. Some persons dig holes and bury them, some heap them in a corner or dry them out and use them as mulch, some persons more affluent use incinerators and there are other alternatives which though not numerous, are available. Prevalence or common use could never be a standard by which natural use is judged and so an open fire, for whatever purpose, however, often it is done, by whatever number of households must be looked at in the same context of what is a non-natural use. The act of setting fire is not something of nature, it is by itself dangerous and it is being used in a manner which exposes someone or something to harm if it escapes.

Indeed, as defence Counsel said, consideration must be given to all the circumstances of time and place. Circumstances differ and the difference and consideration given to the specific cases may well be the cause of an absence of an authorative principle. Jamaica has a tropical climate and the scenic beauty which our visitors enjoy come from the abundance of flora and vegetation with which we are blessed and also as an Island surrounded by the sea. From the sea gusts of winds are forever blowing and are prevalent in every nook and cranny of our Island. To set fire to your land and allow it to escape by the sea wind or land wind or wind from the trees can be nothing less than a non-natural use of the land. It matters not whether it is a fire heap in your backyard or a fire set in an open land. It is my finding that in this case it was a non-natural use and strict liability applies.

It is my view that the "bold approach" which Counsel urged with respect to this aspect of the case, is not appropriate to these circumstances.

The defence pleaded accident but this defence though a scatutory defence in England (supra) is not available at common Law. the rule being one o strict liability. Jamaica has no comparable Statute.

Also pleaded was - Act of God. No submissions were made under this head and so it was deemed to be abandoned. Notwithstanding, I will deal with it briefly. To avail the defendant the act must be something which "no human foresight could provide against and something which human prudence was not bound to recognize as possible". A windy day in our fair Island is something every one is bound to recognize and which every citizen expects and can guard against or take precautions. Mrs. Garrick said she pointed out the fact of the blowing wind and its likely dangers. I accept her as a witness of truth. That windy day clearly did not fall within what can be determined as an Act of God.

This ground also fails.

The plaintiff, therefore, is entitled to succeed under the Rule in Rylands & Fletcher. In the event, however, that I am wrong in finding that the rule applies, I will go on to consider the claim in negligence.

The evidence of Mrs. Garrick I accept in its entirety. The plaintiff has set out in the pleadings five (5) particulars of negligence alleged. These I have set out in my recital of the Statement of Claim. I find that each of these particulars has been proved. It must have been a large fire to have attracted her attention, still after speaking to this man and warning him he made a matter-of-fact and insufficient response. This evidence was not rebutted as the defence called no such witness even though the identity of the person was known to the defendant and neither did he give any account for his absence. The defendant owed a duty of care to the plaintiff and failed to act as a reasonable and prudent person ought to have acted.

I find that the plaintiff is entitled to succeed also in negligence.

DAMAGES

Tendered in evidence by the plaintiff and admitted by consent were:

(a) a Certificate of Title registered at Vol. 372 Fol. 34 registered in the name of Synagogue Trust Ltd.

(b) Two assessor's reports concerning the contents of three dwelling houses and the building situated at 10 Wellington Drive Kingston 6, as pleaded.

Particulars of Damage

Cost of reinstatement of dwelling house	$88,648.72
Assessor's fee re reinstatement of dwelling house	4,284.00
Value of destroyed contents of dwelling house	17,500.00
Assessor's fee re contents destroyed	1,291.00
	$111,373.72

The reports are addressed to "Home Insurance Co." and the name of the insured as listed thereon is "United Congregation of Israelites".

Paragraph 6 of the Amended Defence reads as follows:

> "Further and alternatively the Defendant says that if the plaintiff sustained any loss or damage (which is not admitted) then it has already been fully indemnified against such loss and damage under a policy of insurance and has lost any right to bring this action by reason of the subrogation of this right to its insurers."

Defence Counsel addressed the Court on subrogation rights in contracts of Insurance. This had nothing to do with the matter before me, which was, to settle a claim for damages occasioned by fire between the plaintiff and the defendant in respect of premises on Certificate of Title Vol. 672 Fol. 34 which named the plaintiff as owner. Indeed, the doctrine of subrogation applies to fire insurances but there was nothing in the evidence adduced before me to indicate that either an insurer or insured were parties to the action. Vague references were made by defence Counsel in his address to the name of an Insurance Co. on the valuation report admitted in evidence. These reports were admitted in evidence by consent, as I understood it, only for the purposes of proof of valuation of the damage to the premises.

There is no jurisdiction to settle any matter judicially unless it is properly before the Court and this aspect certainly was not.

Accordingly, there will be no finding.

What is the measure of damages?

Defence Counsel said it was the difference between the money value of the owner's interest in the property before and after the damage was done. Plaintiff said that the cost of putting the article in the same position as before is the accepted and appropriate measure. In my view, the general measure of damages is the cost of replacement or repair. There is no judicial authority to satisfy me that it should be otherwise in this case. The reports exhibited are valuations on the basis of replacement cost.

The plaintiff is entitled to damages as proved.

Judgment will therefore be entered for the plaintiff in the sum of $111,373.72 with costs to be agreed or taxed.

Before parting with this matter I must apologise ~~for the~~ lengthy delay. The matter was completely forgotten and was only brought to mind when I was recently shown a reminder from plaintiff's Counsel.

The delay is regretted.

Stay of execution for six (6) weeks from ~~today~~ granted.