[2020] JMSC Civ 221

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN CIVIL DIVISION

CLAIM NO. 2011 HCV 05914

BETWEEN	**ALVERINE WITTER**	**CLAIMANT**
AND	**GORE DEVELOPMENT LIMITED**	**1ST DEFENDANT**
AND	**NATIONAL WATER COMMISSION**	**2ND DEFENDANT**

IN OPEN COURT

Mr Canute Brown and Miss Zaieta Skyers instructed by Messrs. Brown, Godfrey & Morgan for the Claimant

Mr Jonathan Morgan instructed by Messrs. DunnCox for the 1st Defendant

Mr Joseph Jarrett instructed by Messrs. Joseph Jarret & Company for the 2nd Defendant

Heard: July 20, 21, 23 and November 13, 2020

Negligence – Damage to property – The duty of care owed by utility company to homeowner – Breach of the duty of care – Doctrine of res ipsa loquitur – Causation – Foreseeability of damage – Remoteness of damage – Basis on which damages are to be assessed – Whether special damages have been specifically pleaded and specifically proven – Quantum of damages – Whether the court should deviate from the breach date rule in the assessment of damages in the interest of justice

A. NEMBHARD J

INTRODUCTION

[1] This matter involves a claim for damage to property brought by the Claimant, Miss Alverine Witter, against the 1st Defendant, Gore Development Limited ("Gore Development") and/or the 2nd Defendant, National Water Commission ("NWC"), to recover damages in negligence.

[2] The subject matter of the claim is the property situated at Lot 766 Rhyne Park Housing Scheme, in the parish of Saint James, being the land comprised in Certificate of Title registered at Volume 1430 Folio 762 of the Register Book of Titles ("the subject property").

[3] By way of an Amended Claim Form, filed on 25 June 2020, Miss Witter alleges that, on 14 November 2009, as a result of the negligent workmanship of the servants and/or agents of Gore Development and/or NWC, a water main, which is located at the front of the subject property, ruptured. As a consequence, a large volume of water escaped onto the subject property, resulting in substantial damage to a portion of a concrete perimeter wall located at the rear of it.

THE ISSUES

Factual Issues

[4] The following factual issues arise for the Court's determination: -

(i) Whether the water main had been pressure tested, sterilized and/or approved by Gore Development and/or NWC, after it had been built;

(ii) Whether Gore Development had exclusive management and/or control of the water main, at the time of the incident, or, whether care and control had been passed to NWC in or around June of 2009;

(iii) Whether the construction project(s) being carried out on the subject property by Miss Witter and/or her contractors and/or her servants and/or her agents, resulted in the removal of the soil around and beneath the

water main, thereby exposing it and leaving it without the necessary support, which, in turn, caused the water main to break under pressure;

(iv) Whether the water which had escaped onto the subject property caused a section of the concrete perimeter wall, located at the rear of the subject property, to collapse, resulting in damage and/or loss; and

(v) Whether the loss and expense claimed by Miss Witter were, as a matter of law and fact, the direct result of the alleged negligence of Gore Development and/or NWC.

Legal Issues

[5] The following legal issues are determinative of the claim: -

(i) Whether Gore Development and/or NWC owed a duty of care to Miss Witter;

(ii) Whether the doctrine of res ipsa loquitur, raised by Miss Witter, is applicable; and

(iii) Whether Miss Witter is entitled to recover Damages for the losses incurred as a consequence of the collapse of the perimeter wall to the rear of the subject property, as well as, for the damage done to the neighbouring property, and, if so: -

(a) What is the basis on which the Court is to assess the quantum of Damages to be awarded to her? and

(b) What is the appropriate measure of Damages to be awarded to her?

BACKGROUND

[6] Miss Witter is a co-owner of the subject property.

[7] Gore Development is the real estate development company responsible for the development of the Rhyne Park Housing Scheme.

[8] NWC is a statutory body responsible for the provision, operation and maintenance of water supply services throughout Jamaica, including the Rhyne Park Housing Scheme.

[9] On 14 November 2009, Miss Witter was alerted by her caretaker that the subject property had been inundated. She subsequently discovered that the water main located along the roadway in front of the subject property, had ruptured, releasing gallons of water onto the subject property. A substantial portion of a partially completed eighteen (18) feet concrete perimeter wall, located at the rear of the subject property, was damaged. Damage was also done to the roof of an adjoining property.

[10] Miss Witter's neighbour, an employee of Gore Development, assisted in arresting the continuing escape of water onto the subject property.

The Claimant's case

[11] Miss Witter alleges that, as a consequence of the negligent workmanship of the servants and/or agents of Gore Development and/or NWC, the water main, located along the roadway in front of the subject property, ruptured. This resulted in the escape of a large volume of water onto the subject property. As a consequence, a portion of her partially completed eighteen (18) feet concrete perimeter wall, located at the rear of the subject property, was substantially damaged.

[12] Miss Witter alleges further that a portion of the perimeter wall collapsed onto the property of her adjoining neighbour, causing damage to it.

[13] Due to the extensive damage caused by the rupture of the water main and in an effort to mitigate further damage to the subject property, Miss Witter contends that she was forced to abandon the reconstruction of the collapsed wall and to construct another perimeter wall, fifteen (15) feet from the house that is located on the subject property.

[14] Consequently, Miss Witter claims the sum of Three Million One Hundred and Fifty Thousand Nine Hundred Dollars ($3,150,900.00), representing the material

and labour costs of constructing the said perimeter wall, as well as, the cost of repairing the damage done to her neighbour's property.

The 1st Defendant's case

[15] Conversely, Gore Development contends that it owed a duty of care to Miss Witter only in respect of the period of time for which it had exclusive care and control of the water main. Gore Development contends further that NWC assumed control of that water main in or around June of 2009, along with the responsibility for any liability arising after that date. Gore Development asserts that it discharged its duty by ensuring that the water main was pressure tested and sterilized before it was handed over to NWC.

[16] Gore Development maintains that the rupture of the water main was caused by the negligent management and execution of the construction project(s) being carried out on the subject property, by Miss Witter's contractors and/or servants and/or agents. Gore Development maintains specifically, that, it is Miss Witter's contractors and/or servants and/or agents who failed to replace the soil that had been removed from around and beneath the water main, while they were relocating the entrance of the subject property. This, it is averred, left the water main exposed, causing it to bend, thereby placing pressure on the lateral connection of the water main.

[17] Furthermore, Gore Development avers that the damage done to the subject property, as alleged, by Miss Witter, is implausible, as, the rupture to the water main located at the front of the subject property was unlikely to result in the collapse of a perimeter wall which is located at the rear of the subject property.

[18] Finally, Gore Development maintains that Miss Witter has failed to prove the losses claimed.

The 2nd Defendant's case

[19] For its part, NWC contends that it was not responsible for the installation of water pipes in the Rhyne Park Housing Scheme and that, at the time of the incident, Gore Development had exclusive control of and responsibility for the water main

that ruptured. Consequently, NWC maintains that it cannot be held liable for any damage allegedly caused by the rupture of the water main as, at the time of the incident, it did not owe a duty of care to Miss Witter.

[20] NWC agrees with Gore Development that the rupture of the water main was caused by the negligent management and execution of the construction project(s) being carried out on the subject property by Miss Witter's contractors and/or servants and/or agents. It is by virtue of Miss Witter's contractors and/or servants and/or agents removing the soil from around and beneath the water main that left it exposed and without support. NWC contends further that the absence of support caused the water main to bend, placing pressure on the lateral connections which service the subject property. This resulted in the rupture of the water main.

THE LAW

The claim in negligence

[21] The law is well settled that, in a claim grounded in the tort of negligence, there must be evidence to show that a duty of care is owed to a claimant by a defendant, that the defendant acted in breach of that duty and that the damage sustained by the claimant was caused by the breach of that duty.

The burden and standard of proof

[22] It is also well settled that, where a claimant alleges that he or she has suffered damage resulting from an object or thing under the defendant's care or control, a burden of proof is cast on him or her to prove his or her case on a balance of probabilities.

[23] The general state of the law as to the proof of negligence was eminently enunciated by Lord Griffiths in **Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another**[1], when he stated at pages 3 and 4: -

[1] Privy Council Appeal No. 1/1988, judgment delivered on 24 May 1988

> *"The burden of proving negligence rests throughout the case on the plaintiff. Where the plaintiff has suffered injuries as a result of an accident which ought not to have happened if the defendant had taken due care, it will often be possible for the plaintiff to discharge the burden of proof by inviting the court to draw the inference that on the balance of probabilities the defendant must have failed to exercise due care, even though the plaintiff does not know in what particular respects the failure occurred…*
>
> *…it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established."*

[24] In **Miller v Minister of Pensions**[2], Denning J, speaking of the degree of cogency which evidence must reach in order that it may discharge the legal burden in a civil case, said: -

> *"That degree is well settled. It must carry a reasonable degree of probability but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not', the burden is discharged but if the probabilities are equal it is not."*

The doctrine of res ipsa loquitur

[25] While the burden of proving negligence rests on the claimant throughout the case, a claimant may rely on the doctrine of res ipsa loquitur which, when applicable, raises an inference of negligence, requiring a defendant to provide evidence capable of rebutting that inference.

[26] Halsbury's Laws of England, Volume 78 (2018), paragraph 64, provides a detailed summary of the application of the doctrine of res ipsa loquitur. It reads as follows: -

> *"Under the doctrine of res ipsa loquitur a claimant establishes a prima facie case of negligence where:*

[2] [1947] 2 All ER 372 at pages 373-374

(1) it is not possible for him to prove precisely what was the relevant act or omission which set in train the events leading to the accident; and

(2) on the evidence as it stands at the relevant time it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the claimant's safety.

There must be reasonable evidence of negligence. However, where the thing which causes the accident is shown to be under the management of the defendant or his employees, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

[27] Paragraph 68 outlines the effect of the application of the doctrine of res ipsa loquitur. It states as follows: -

"Where the claimant successfully alleges res ipsa loquitur its effect is to furnish evidence of negligence on which a court is free to find for the claimant. If the defendant shows how the accident happened, and that is consistent with absence of negligence on his part, he will displace the effect of the maxim and not be liable. Proof that there was no negligence by him or those for whom he is responsible will also absolve him from liability. However, it seems that the maxim does not reverse the burden of proof, so that where the defendant provides a plausible explanation without proving either of those matters, the court must still decide, in the light of the strength of the inference of negligence raised by the maxim in the particular case, whether the defendant has sufficiently rebutted that inference."[3]

[3] See also - **Ng Chun Pui and Ng Wang King v Lee Chuen Tat and Another** (supra), at page 3, per Lord Griffiths**: -** "…in an appropriate case the plaintiff establishes a prima facie case by relying upon the fact of the accident. If the defendant adduces no evidence, there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is still reasonable to draw the inference of negligence from the mere fact of the accident."

[28] In **Jamaica Omnibus Services, Ltd v Hamilton**[4] Fox JA stated the two conditions that a claimant must satisfy in order to obtain the assistance of the doctrine of res ipsa loquitur. He opined as follows: -

> *'In Scott v London and St Catherine Dock Co. (1865), 3 H & C 596, ERLE, C.J., described the conditions for the application of the doctrine of res ipsa loquitur in a statement which has long been famous:*
>
> > *"There must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."*
>
> *To obtain the assistance of the doctrine, a plaintiff must therefore prove two facts:*
>
> *(1) that the "thing" causing the damage was under the management of the defendant or his servants, and*
>
> *(2) that in the ordinary course of things the accident would not have happened without negligence.'*

The duty of care

[29] In establishing a duty of care there must be foreseeable damage consequent upon the defendant's negligent act. There must also be in existence, sufficient proximate relationship between the parties, making it fair and reasonable to assign liability to the defendant.

[30] Lord Bridge, in **Caparo Industries plc v Dickham and Others**[5], spoke to the test in the duty of care, sufficient to ascribe negligence, in this way: -

> *"In determining the existence and scope of the duty of care which one person may owe to another in the infinitely varied circumstances of human relationships there has for long been a tension between two different approaches. Traditionally*

[4] (1970) 16 WIR 316, at page 318, paragraphs F, G and H

[5] [1990] 1 All ER 568 at page 572 g-h

the law finds the existence of the duty in different specific situations each exhibiting its own particular characteristics. In this way the law has identified a wide variety of duty situations, all falling within the ambit of the tort of negligence…"

[31] At pages 573 and 574 Lord Bridge went on to say: -

"What emerges is that, in addition to the foreseeability of damage, [the] necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the law as one of 'proximity' or 'neighbourhood' and that the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope on the one party for the benefit of the other."

Breach of the duty of care

[32] A defendant is in breach of the duty of care owed to a claimant if his conduct falls below the standard of care expected of a reasonable and prudent man.

[33] In the seminal case of **Blyth v The Birmingham Waterworks Company**[6], Alderson B stated the following: -

"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."

[34] Halsbury's Laws of England Volume 78 (2018), paragraph 20, provides an important starting point in determining the standard of care required of a reasonable man. It reads as follows: -

"It is a question of fact whether the defendant has failed to show reasonable care in the particular circumstances. The law lays down the general rules which determine the standard of care which has to be attained, and it is for the court to apply that legal standard of care to its findings of fact so as to decide whether the defendant has attained that standard. The legal standard is objective; it is not

[6] [1856] 11 EX. 781, at page 1049

that of the defendant himself, but that which might be expected from a person of ordinary prudence, or person of ordinary care and skill, engaged in the type of activity in which the defendant was engaged."

Causation

[35] The third and final element of the tort of negligence requires a claimant to prove that the damage or loss sustained by him was caused by the defendant's breach of duty.

[36] This principle was applied by Panton, P in **The Attorney General v Phillip Granston**[7]. At paragraph [33] he opined as follows: -

"It is trite law that the burden of proof of negligence is on a claimant and also, as a matter of law, the onus of proof of causation is on the claimant. That is, the claimant must establish on the balance of probabilities, a causal connection between his injury and the defendant's negligence. For him to succeed he must show that the [tortious] act materially contributed to his injury…"

[37] The test often employed by the court to determine whether there is a causal connection between the damage sustained by a claimant and a defendant's conduct is the 'but for' test. That is to say, the damage would not have occurred but for the defendant's negligent conduct.

[38] In **Joan Clements, by her litigation guardian, Donna Jardine v Joseph Clements**[8], McLachlin C.J. provided a comprehensive analysis of the nature and application of the 'but for' test. He stated as follows: -

"The test for showing causation is the "but for" test. The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury — in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a

[7] [2011] JMCA Civ 1

[8] [2012] 2 R.C.S., 181, at page 187, paragraphs 8-10

balance of probabilities, having regard to all the evidence, her action against the defendant fails.

The "but for" causation test must be applied in a robust common sense fashion. There is no need for scientific evidence of the precise contribution the defendant's negligence made to the injury. See Wilsher v. Essex Area Health Authority, [1988] A.C. 1074 (H.L.), at p. 1090, per Lord Bridge; Snell v. Farrell, [1990] 2 S.C.R. 311.

A common sense inference of "but for" causation from proof of negligence usually flows without difficulty. Evidence connecting the breach of duty to the injury suffered may permit the judge, depending on the circumstances, to infer that the defendant's negligence probably caused the loss.

Where "but for" causation is established by inference only, it is open to the defendant to argue or call evidence that the accident would have happened without the defendant's negligence, i.e. that the negligence was not a necessary cause of the injury, which was, in any event, inevitable."

Reasonable foreseeability

[39] Additionally, a defendant is only liable for the consequences of his negligent conduct which are foreseeable. Therefore, he will not be liable for consequences which are too remote. Damage will be regarded as too remote if a reasonable man would not have foreseen them.[9] This principle was affirmed by the Jamaican Court of Appeal in **Garfield Segree v Jamaica Wells and Services Limited and National Irrigation Commission Limited**.[10]

ANALYSIS

Whether Gore Development and/or NWC owed a duty of care to Miss Witter

[40] The question now arising for the Court's determination is whether, based on the evidence, negligence can be ascribed to Gore Development and/or NWC.

[9] See - **Overseas Tankship (U.K.) Ltd. v Morts Dock & Engineering Co., Ltd.** [1961] 1 All ER 404

[10] [2017] JMCA Civ 25, at paragraph 108, per McDonald-Bishop JA

[41] The evidence advanced on behalf of Gore Development illustrates a procedure whereby the water lines located throughout the different phases of the Rhyne Park Housing Scheme were pressure tested, sterilized and subsequently approved by Gore Development and/or NWC.

[42] Mr Israel Pinchas, the Project Manager employed by Gore Development, who had responsibility for the installation of water lines throughout the Rhyne Park Housing Scheme, averred as follows: -

> *"Prior to [the] construction of the development, the National Water Commission (NWC) issued a Certificate of Approval on June 06, 2006, approving the plans and specifications for the installation of mains in the development. Pursuant to the NWC approval, Gore Development constructed mains that met the type - requirements and specifications for the pressure – levels anticipated. Those mains were also laid within the carriage way in the appropriate manner and as required by the 2nd Defendant.*[11]
>
> *On May 11, 2007, the NWC notified that it would take over control of the water supply and responsibility for individual water supply accounts on a block by block basis in relation to each phase of the development. The 2nd Defendant also conducted tests and issued sterilization certificates confirming that the systems were "of good quality" on July 30, 2007, March 03, 2008 and August 02, 2007, respectively.*[12]
>
> *On February 11, 2008, July 22, 2008 and June 05, 2009, the 1st Defendant invited the 2nd Defendant to perform pressure testing on the lines in the different phases of the development. The 2nd Defendant conducted pressure testing on the lines in the different phases of the development. The 2nd Defendant conducted pressure tests and cleared the mains for operation by issuing its Pressure Test Reports [in] March 2005, February 2008, September 2008 and October 2008, respectively. These tests confirm that the 1st Defendant discharged its burden to construct and install merchantable and satisfactory water mains in the housing development.*[13]

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[11] See - Paragraph 4 of the Witness summary of the evidence of Israel Pinchas dated and filed on 30 June 2020

[12] See - Paragraph 5 of the Witness summary of the evidence of Israel Pinchas dated and filed on 30 June 2020

[13] See - Paragraph 6 of the Witness summary of the evidence of Israel Pinchas dated and filed on 30 June 2020

The 1st Defendant also conducted independent pressure testing of numerous water mains on or around June 19, 2009, before the project was finally closed. At all material times thereafter, the water main belonged to the 2nd Defendant who was wholly responsible for its care and maintenance."[14]

[43] Furthermore, Mr Carlton Green, the Divisional Engineer for the Western Division of NWC, during cross examination, admitted that it is not the modus operandi of NWC to provide water connection to customers unless the relevant waterlines have been pressure tested, sterilized and approved. He also admitted that it was NWC's policy to take over the water distribution system of a development after pressure testing had been conducted and a Sterilization Certificate had been issued.

[44] Gore Development has produced in evidence Sterilization Certificates and Pressure Test Reports which, on their face, establish the pressure testing, sterilizing and approval of several water lines throughout phases one (1) to four (4) of the Rhyne Park Housing Scheme. It has not however submitted a Pressure Test Report or Sterilization Certificate for the water main that ruptured, which is located along road thirteen (13) of phase four (4) of the Rhyne Park Housing Scheme.

[45] That notwithstanding, Gore Development maintains that the water main that ruptured had been pressure tested, sterilized and approved by Gore Development and NWC. It asserts that NWC would not have supplied water to the subject property unless the water lines had been pressure tested, sterilized and approved.

[46] To support that assertion, Gore Development relies on a letter of possession, dated 23 June 2009,[15] which indicates that Miss Witter is one of the registered proprietors of the subject property and advises NWC that it is entitled to enter into a contractual arrangement with her, for the supply of water to the

[14] See - Paragraph 7 of the Witness summary of the evidence of Israel Pinchas dated and filed on 30 June 2020

[15] See - Exhibit 37 at page 65 of the Index to Bundle of Exhibits

subject property. Reliance is also placed on a receipt dated 25 June 2009,[16] from NWC, evidencing payment on Miss Witter's behalf of an installation deposit for the supply of water to the subject property.[17]

[47] The Court accepts the evidence of Messrs. Green and Pinchas in this regard and finds that the evidence establishes a pattern of conduct on the part of Gore Development, whereby, it would, along with NWC, carry out pressure testing and sterilization of the water lines in the Rhyne Park Housing Scheme, in order to obtain NWC's approval.

[48] The Court finds that, despite the absence of documentary evidence to that effect, the water main that ruptured had been pressure tested, sterilized and approved by both Gore Development and NWC, after it had been built.

[49] The Court also finds that the letter of possession and the receipt, which comprise exhibits 37 and 38, respectively, signify that, at the time of the incident, NWC had exclusive management and/or control of the operation and maintenance of the water main that ruptured.

[50] NWC, in seeking to establish that, at the time of the incident, Gore Development had exclusive management and/or control of the operation and maintenance of the water main that ruptured, contends that the incident occurred during the "defects liability period".

[51] Mr Green, in seeking to define the "defects liability period", averred as follows: -

> *"That any pressure testing of the collapsed pipeline would have been conducted by the developer Gore Developments Limited. The National Water Commission is only called on to observe. Testing would have been conducted over a period of time. After the testing there is what we call a "defects liability period" which can*

[16] See - Exhibit 38 at page 66 of the Index to Bundle of Exhibits

[17] See also - Paragraphs 12, 14 and 16 of the Witness Statement of Alverine Witter dated 25 February 2020 and filed on 18 March 2020

last for around a year. During this period the line is observed for defects and the developer remains liable for the line and not the National Water Commission"[18]

[52] Mr Green admitted however, in cross-examination, that the "defects liability period" operates between the developer and its contractor who is hired to construct the water main. The Court accepts the submissions made on behalf of Gore Development that NWC has not presented any evidence to support the assertion that it could rely on the existence of a "defects liability period", in order to avoid responsibility for the water main that ruptured. Any arrangements between Gore Development and NWC in relation to a "defects liability period" would have had to have been agreed between them. There is no evidence of any such agreement between these two (2) parties before the Court.

[53] In the circumstances, the Court finds that, at the time of the incident, NWC had exclusive management and/or control of the operation and maintenance of the water main that ruptured and owed a duty of care to Miss Witter in respect of it.

Whether the doctrine of res ipsa loquitur, raised by Miss Witter, is applicable

[54] It has been submitted on Miss Witter's behalf, that the doctrine of res ipsa loquitur is applicable in the instant case.

[55] By virtue of the doctrine of res ipsa loquitur, a claimant establishes a prima facie case of negligence where, firstly, it is not possible for him to prove precisely, the relevant act or omission which set in train the events which led to the accident. Secondly, where on the evidence as it stands at the relevant time, it is more likely than not that the effective cause of the accident was some act or omission of the defendant or of someone for whom the defendant is responsible, which act or omission constitutes a failure to take proper care for the claimant's safety.

[18] See - Paragraph 1.5 of the Witness Statement of Carlton Green, dated 2 July 2020 and filed on 3 July 2020

[56] A claimant who seeks to rely on the doctrine must adduce some evidence to ground his claim of a breach of duty. In **Lloyde v West Midlands Gas Board**,[19] Megaw LJ stated as follows: -

> *"The plaintiff must prove facts which give rise to what may be called the res ipsa loquitur situation. There is no assumption in his favour of such facts. Thus, in the prototype case of res ipsa loquitur,* Byrne v Boadle*, the plaintiff, in the absence of admissions by the defendant, had to prove, not only that the barrel fell on to his head while he was walking along the street, but also that it fell from the window of a warehouse which was in occupation of and use by the defendant."*

[57] In order to rely on the doctrine of res ipsa loquitur, Miss Witter must successfully establish that: -

(1) the water main that ruptured was under the exclusive management and/or control of Gore Development and/or NWC; and

(2) in the ordinary course of things, the water main would not have ruptured without some act of negligence or omission on the part of Gore Development and/or NWC.

[58] This Court has already determined that, at the time of the incident, NWC had exclusive management and/or control of the operation and maintenance of the water main that ruptured.

[59] It is not disputed by any of the parties that the water main ruptured on 14 November 2009. Miss Witter contends that, in the ordinary course of things, the water main would not have ruptured without some act of negligence or omission on the part of Gore Development and/or NWC. She admits however that, she is unable to adduce any evidence that speaks directly to the quality of the material used to construct the water main that ruptured. She attributes her inability to do so to the fact that the water main was fixed on the very day that it ruptured.

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[19] [1971] 2 All ER 1240, at page 1246 j - 1247 a

Was there some act of negligence or omission on the part of Gore Development?

[60] It is therefore important that the Court conducts an examination of the evidence in this regard. Gore Development has maintained from the outset that it discharged its duty to protect against foreseeable risks to the homeowners in the Rhyne Park Housing Scheme, by taking reasonable steps to safeguard the pipeline. That assertion was supported by the evidence that Gore Development, in constructing the pipeline, used the material required by NWC's Conditions of Approval and that it carried out pressure testing on the pipeline in accordance with the requirements and to the satisfaction of NWC.[20] Mr Green, in his evidence, averred that the purpose of pressure testing the pipeline is to ensure that the line, 'having been constructed, is sound and unlikely to develop leaks under normal circumstances'.

[61] In light of that evidence and the evidence outlined at paragraphs **[42]** to **[46]** and **[51]** and **[52]**, above, the Court finds that the subject pipeline had been pressure tested, sterilized, approved and certified by NWC. The Court also finds that this was done before connections were made to NWC's customers, in phase four (4) of the Rhyne Park Housing Scheme, for the supply of water to their respective properties. The Court finds further, that Gore Development took all reasonable steps to ensure that the subject pipeline was constructed in accordance with the specifications and requirements of NWC and that it [the subject pipeline] did not cause foreseeable injury, whilst under the control of Gore Development.

[20] Mr Carlton Green, in cross-examination by Learned Counsel Mr Jonathan Morgan, on behalf of Gore Development, testified that the developer's work has to be done in accordance with the approvals given by NWC. It is this approval that is called the "Conditions of Approval". He testified that he saw the Conditions of Approval in respect of the Rhyne Park Housing Scheme and that it set out the material that should be used for the construction of the water mains. Mr Green agreed that the Conditions of Approval required that one type of material to be used in the construction of the water mains is socket type cement mortar ductile iron. He also agreed that the Conditions of Approval are conditions (precedent) for NWC to approve the pipeline.

Was there some act of negligence or omission on the part of NWC?

[62] NWC maintains that the rupture of the water main was caused by the negligent management and execution of the construction project(s) being carried out on the subject property by Miss Witter's contractors and/or servants and/or agents. NWC maintains further that, it is by virtue of Miss Witter's contractors and/or servants and/or agents removing the soil from around and beneath the water main that left it exposed and without support. NWC contends that the absence of support caused the water main to bend, placing pressure on the lateral connections which service the subject property. This resulted in the rupture of the water main.

[63] In his evidence, Mr Green stated as follows: -

> *"That to the best of my knowledge the pipeline in question should not have collapsed to cause the spillage which occurred unless there was one or a combination of the following: -*
>
> *(a) human intervention such as the removal of soil from around the pipeline which was supporting it;*
>
> *(b) a manufacturer's defect in the line, amongst other reasons"*[21]

[64] One of the construction projects that NWC contends was being carried out at the subject property was identified as the relocation of the entrance to the subject property from South View Avenue to Bamboo Hill. Miss Witter's evidence in cross-examination is that the physical entrance to the subject property was always located on Bamboo Hill and that she did not carry out any construction work in order to relocate the entrance from South View Avenue.

[65] It has been submitted that this evidence is diametrically opposed to her evidence-in-chief. In her witness statement Miss Witter stated as follows: -

[21] See - Paragraph 1.6 of the Witness statement of Carlton Green dated 2 July 2020 and filed on 3 July 2020

"The slope at the front of the property at South View Avenue made it extremely difficult for me to gain access to the property and so it was prudent for me to change the location of my entrance gate and access the property from Bamboo Hill where I built the gate.

The way the land slopes, you have the road (South View Avenue), the sidewalk, the verge where the water main is laid then there is the steep drop from where my land starts.

My fence is about two (2) feet from the point where the water main is located and the place where the foundation of my fence is built is way below the level of the pipeline – the height of the fence is four (4) block height from the top of the verge where the water main is laid to the foundation.

***It would have been impossible for there to be any disturbance of the water main at the time that section of my fence was constructed which by the way was not until February 2010**."*[22]
[Emphasis added]

[66] Regrettably, the Court is unable to accept the submission that Miss Witter has been discredited in this regard. It is the Court's understanding of this portion of Miss Witter's evidence that the topography of the land made it difficult for one to access the subject property from the front. It is for that reason that she says that she changed the entrance to the subject property and began to access the subject property from Bamboo Hill. There is no evidence before the Court that there was any construction work involved in this process nor is there any evidence that Miss Witter's contractors and/or servants and/or agents carried out any construction work around the location of the subject pipeline for this purpose. What Miss Witter does indicate is that she subsequently built her gate at the entrance on Bamboo Hill.

[67] The following evidence, elicited from Miss Witter in cross-examination, bears repeating: -

[22] See – Paragraphs 29, 30, 31 and 32 of the Witness Statement of Alverine Witter dated 25 February 2020 and filed on 18 March 2020

"*Sugg: It was your own workmen's work to adjust the entrance to the property that caused damage to the water main in late 2009.*

A: There were no adjustments made to the entrance to the property. The natural terrain on Bamboo Hill is what we used to enter the property."

[68] The Court is also unable to accept the submission that Miss Witter's evidence at paragraph 53 of her witness statement is an admission that construction work had been recently carried out around the subject pipeline. It is imperative that Miss Witter's evidence be read in the context in which it was given. It is clear from a reading of Miss Witter's witness statement in its entirety, that, what she describes at paragraph 53 are her observations of the subject property, on her visit there on 19 November 2009, after the water main had ruptured. At paragraph 54, she goes on to state that the earth was still water soaked along the verge and that water was still visibly settled there.

[69] This Court is of the view that it cannot tenably be argued that Miss Witter's observations are indicative that construction work had been recently carried out by her contractors and/or servants and/or agents on the subject property and around the water main that had ruptured. This is especially so when the uncontradicted evidence before the Court is that, on the morning of the rupture, work was done to the ruptured water main, in order to arrest the continued escape of water onto the subject property.

[70] In any event, the Court accepts the evidence of Mr Carlius Stewart that, in November of 2009, there was no construction work being carried out around the water main that had ruptured by Miss Witter's contractors and/or servants and/or agents, or, any at all.

[71] In the circumstances, the Court finds that NWC has not presented any evidence that is capable of substantiating its account as to the cause of the rupture of the water main. Nor has NWC presented any evidence that is capable of rebutting the inference of negligence, in order to absolve itself of liability.

[72] Having successfully raised an inference of negligence on the part of NWC, Miss Witter is required to prove a causal connection between NWC's negligence and the damage that she sustained. In essence, Miss Witter must demonstrate that, "but for" the rupture of the water main, the damage occasioned to a portion of the partially completed eighteen (18) feet concrete perimeter wall, as well as, to the adjoining neighbour's property, would not have happened.

[73] The "but for" test requires the Court to conduct a factual inquiry to determine, on a balance of probabilities, the cause of the damage. In that regard, the Court observes that there is no conclusive evidence of any fault to the perimeter wall, whether structural or otherwise, prior to the rupture of the water main. Nor is there any evidence of any fault to the building that was damaged on the adjoining property.

[74] Gore Development and NWC contend that, the construction of the eighteen (18) feet concrete perimeter wall, to the rear of the subject property, was in breach of a restrictive covenant and that Miss Witter did not obtain Parish Council approval for the construction of the said wall.

[75] Miss Witter did not agree that she did not have the approval of the Parish Council to build her perimeter wall. Her evidence was that, whilst she did not personally obtain that approval, she had contracted Mr Carlton Sterling to do so and to design the said wall. She also relied on the evidence of Mr Stewart that the construction of the perimeter wall had been approved and that he had the approved drawings from which to work.[23]

[76] The evidence of both Miss Witter and Mr Stewart is that, at its highest point, the concrete perimeter wall to the rear of the subject property measured

[23] The law is well settled that a court, in its determination of issues relating to the credibility of a witness, is permitted to accept all of a witness' evidence or to reject all of a witness' evidence or to accept a part of a witness' evidence and to reject a part of a witness' evidence. The Court rejects Mr Stewart's evidence that approval was granted by the Trelawny Parish Council and places no reliance on that evidence.

eighteen (18) feet.[24] The highest point of the said wall, on Bamboo Avenue, (that is above ground), was four (4) feet.

[77] On that evidence, the Court finds that the requisite Parish Council approval had been obtained in respect of the construction of the perimeter wall. Nor does the Court find that the perimeter wall was in breach of any of the restrictive covenants that run along with the subject property.

[78] Another aspect of the issue of causation that arises for the consideration of the Court touches and concerns the integrity of the eighteen (18) feet wall that had been built and whether it had been properly constructed. In that regard, Gore Development contends that a wall of that height should never have been built. Mr Pinchas averred that he would try to avoid building eighteen (18) feet walls and that concrete should be used to build a wall of that height rather than concrete blocks. The reason for this, according to Mr Pinchas, is that, the latter do not have the strength to withstand the pressure of the forces that are applied to the wall.

[79] Gore Development also contends that the wall had been built without weep holes to guard against damage as a result of flooding. Mr Stewart's evidence however, in cross-examination, was that weep holes had been built into the wall, although they were not visible in any of the photographs of the wall that were produced in evidence. He testified further that there were no filling or shingle material where the weep holes were because the construction of the wall had not yet been completed.

[80] The Court is, respectfully, unable to accept the submission of Gore Development in this regard. The Court accepts the evidence of Mr Stewart and finds that the wall had been built with the requisite belting and that weep holes had been built into the wall. In fact, there is no evidence before the Court to the contrary. The Court is strengthened in these findings by the fact that the

[24] See - Paragraph 28 of the Witness Statement of Alverine Witter dated 25 February 2020 and filed on 18 March 2020 and paragraph 7 of the Witness Statement of Carlius Stewart dated 25 February 2020 and filed on 18 March 2020

uncontradicted evidence is that there were portions of the eighteen (18) feet perimeter wall that remained intact despite the impact of the water against it.

[81] Accordingly, the Court finds that an inference can be drawn that the damage to the perimeter wall located at the rear of the subject property and that to the adjoining property was as a consequence of NWC's negligence.

[82] Having established the factual requirement of causation, Miss Witter must also prove that the damage described above was not too remote. Indeed, NWC can only be held liable for the foreseeable consequences of its negligent conduct. If NWC could not reasonably have foreseen the damage claimed by Miss Witter, then the damage is too remote.[25]

[83] The Court finds, on a balance of probabilities, that it was reasonably foreseeable that, the rupture of the water main and the resulting inundation of the subject property could have caused damage. It was also reasonably foreseeable that the rupture of the water main could have caused the kind of damage that was occasioned to the perimeter wall located at the rear of the subject property and that occasioned to the adjoining property.

Whether Miss Witter is entitled to recover Damages for the losses incurred as a consequence of the collapse of the perimeter wall to the rear of the subject property, as well as, for the damage done to the neighbouring property

[84] Miss Witter claims the sum of Three Million One Hundred and Fifty Thousand Nine Hundred Dollars ($3,150,900.00), representing the material and labour costs of constructing another perimeter wall, fifteen (15) feet from the dwelling house that is located on the subject property, as well as, the cost of repairing the damage done to her neighbour's property.

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[25] The damage which is reasonably foreseeable must be of the same kind and type as that which actually occurred and, in this regard, each case turns on its own particular set of facts. See – **Overseas Tankship (U.K.) Ltd. v Morts Dock & Engineering Co., Ltd.** (supra) and **Hughes v Lord Advocate** [1963] AC 837

[85] Miss Witter's evidence is that, in an effort to mitigate further damage to the subject property, she constructed a perimeter wall fifteen (15) feet from the house that is located on the subject property.[26]

[86] In an effort to substantiate her claim for damages, she has produced in evidence two (2) estimates. The first is an estimate from ACME Roofing and Construction, dated 22 June 2010. It details the cost, inclusive of labour and material, for the complete construction of a wall, fifteen (15) feet in height and one hundred (100) feet in length, in the sum of Two Million Three Hundred and Seventy-Two Thousand Five Hundred and Eighty-One Dollars ($2,372,581.00). The second is an estimate from Signexx Design and Development Services, dated 27 February 2020. It details the cost of the demolition and reconstruction of the damaged wall, in the sum of Four Million Seventy-Eight Thousand and Eighty-Nine Dollars and Fifty Cents ($4,078,089.50).

[87] To establish her claim for Damages, Miss Witter relies on the authority of **Alcoa Minerals of Jamaica Limited v Herbert Broderick**.[27] There, the Board held, inter alia, that, the general rule in tort that damages should be assessed at the date of the breach was subject to exceptions and that, if the adoption of the rule would result in injustice, the court has a discretion to use another date.

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[26] See - **Smith v Graham** (1996) 33 JLR 189 (The common law duty to mitigate damages).

[27] [2000] UKPC 11 - The Respondent, Herbert Broderick, brought a case against the Appellant, Alcoa Minerals of Jamaica Limited to recover damages in nuisance. A smelting plant operated by the Appellant since 1972, generated and dispersed pollutants, noxious gas and corrosive dust into the atmosphere. This caused the corrosion of the galvanizing zinc panels of the roof of the Respondent's house and other injury to his property and his health. When the damage first occurred, the Respondent repaired it but by 1989, the damage occurred again and he was not able to afford the costs to carry out the necessary repairs. In 1990, the Respondent commenced proceedings against the Appellant to recover damages he claimed to have incurred as a consequence of the Appellant's nuisance. In 1990, he claimed special damages in the sum of Two Hundred and Eleven Thousand One Hundred and Forty-Nine Dollars ($211,149.00) being One Hundred and Thirty-Five Dollars ($135) for each One Thousand Five Hundred Sixty-Four (1,564) square feet of the building. On March 25, 1994, he was permitted to amend this amount to Nine Hundred Thirty-Eight Thousand Four Hundred Dollars ($938,400.00) being Six Hundred Dollars ($600) per square foot of the same area. The trial Judge found for the Respondent in the sum of Nine Hundred Thirty-Eight Thousand Four Hundred Dollars ($938,400.00) for special damages and granted an injunction to restrain the Appellant from continuing the nuisance. The Court of Appeal set aside the injunction but affirmed the award of special damages. The Appellant appealed.

[88] It is settled law that a claimant has a duty to mitigate his/her losses. In the circumstances of this case, it is not unreasonable for Miss Witter to have built another wall in an effort to guard against the continued land slippage that occurred on the subject property after the rupture of the water main. In order to do so, she constructed another wall, fifteen (15) feet from the house that is located on the subject property.

[89] Having done so, Miss Witter testified that she was unable to afford the cost of rebuilding the eighteen (18) feet perimeter wall and that, for that reason, it was not rebuilt at the time that the damage occurred.

[90] The question for the Court's determination is therefore whether, in the circumstances, Miss Witter ought properly to recover Damages in respect of the eighteen (18) feet perimeter wall and whether Damages ought properly to be assessed at a date other than the date of the breach. This Court is of the view that, in the circumstances, it would be unjust for damages to be assessed as at 14 November 2009, in light of the prevailing economic conditions in Jamaica. The Court accepts the estimate from Signexx Design and Development Services, dated 27 February 2020 and will make an award for Special Damages, in the sum of Four Million Seventy-Eight Thousand and Eighty-Nine Dollars and Fifty Cents ($4,078,089.50), with interest thereon at the rate of three percent (3%) per annum, from 27 February 2020 to the date of Judgment.

[91] Regrettably, the Court finds that Miss Witter has not proven her claim for Damages in respect of the perimeter wall that was built fifteen (15) feet from the house that is located on the subject property. In this regard, the Court accepts the submissions advanced on behalf of Gore Development. The Court notes that the sums of money, inclusive of labour and material, that are reflected in the estimate from ACME Roofing Construction do not correlate with Miss Witter's evidence in that regard.

[92] Additionally, Miss Witter has not produced any documentary evidence to substantiate her claim in respect of the perimeter wall that was constructed

fifteen (15) feet from the house that is located on the subject property. For example, no receipts have been produced in evidence to establish the actual costs incurred by Miss Witter in respect of material purchased for and labour used in the construction of this wall or in relation to the repair of the damage done to the adjoining property.

CONCLUSION

[93] In summary, the Court finds that, at the time of the incident, NWC had exclusive management and/or control of the operation and maintenance of the water main that ruptured.

[94] Secondly, the Court finds that NWC owed a duty of care to Miss Witter in respect of the water main that ruptured and that it acted in breach of that duty. Additionally, the damage sustained by Miss Witter and that occasioned to the adjoining property, was caused by the breach of that duty.

[95] Finally, the Court will make an award of Special Damages, in favour of Miss Witter against NWC, in the sum of Four Million Seventy-Eight Thousand and Eighty-Nine Dollars and Fifty Cents ($4,078,089.50), with interest thereon at the rate of three percent (3%) per annum, from 27 February 2020 to the date of Judgment.

DISPOSITION

[96] It is hereby ordered as follows: -

1. Judgment is entered in favour of the Claimant, Alverine Witter, against the 2nd Defendant, National Water Commission;

2. Special Damages are awarded to the Claimant against the 2nd Defendant in the sum of Four Million Seventy-Eight Thousand and Eighty-Nine Dollars and Fifty Cents ($4,078,089.50), with

interest thereon at the rate of three percent (3%) per annum, from 27 February 2020 to the date of Judgment;

3. Costs are awarded to the Claimant against the 2nd Defendant and are to be taxed if not sooner agreed;

4. Judgment is entered for the 1st Defendant, Gore Development Limited, against the Claimant;

5. Costs are awarded to the 1st Defendant against the Claimant and are to be taxed if not sooner agreed; and

6. The Claimant's Attorneys-at-Law are to prepare, file and serve the Orders made herein.