JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 76/88

COR: THE HON. MR. JUSTICE CAREY - PRESIDENT (AG.)
THE HON. MR. JUSTICE FORTE, J.A.
THE HON. MR. JUSTICE GORDON, J.A. (AG.)

BETWEEN	HUBERT PARRY	DEFENDANT/APPELLANT
AND	SYNAGOGUE TRUST LIMITED	PLAINTIFF/RESPONDENT

Norman Wright & Mrs. Elise Wright-Goffe for Appellant

Dennis Morrison & Mrs. Janet Morgan for Respondent

July 2, 3 & 15, 1991

CAREY, P. (AG.)

On 10th April 1982 a fire set on premises adjoining the Jewish Home on 15 Wellington Drive in St. Andrew destroyed a section of the building and its contents. Happily, none of the residents was injured. Sadly however some lost all their belongings. Mrs. Garrick, the cook employed to the home, witnessed the fire and its spread to the home. She stated that she saw a man working on the premises of the defendant, the present appellant. She had seen him working there before. He was burning dried mango tree limbs and other debris near the fence between both premises. It was a large fire. When she noticed sparks flying about, she warned him of the danger. He threw a small container of water on the fire. Shortly after she had returned to her duties, there was a shout of "fire". The roof had caught fire.

The plaintiff who is the owner of the property claimed damages under the rule in Rylands v. Fletcher, in nuisance and in negligence. By paragraph 3 of the amended statement of claim, the plaintiff averred -

> "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."

In the defence with respect to paragraph 3 it was pleaded as follows:

> "The Defendant denies paragraph 6 of the Amended Statement of Claim and says that the said fire got out of control as the result of a sudden and unexpected gust of wind which sprang up shortly after the fire had been lit such gust of wind constituting an Act of God.
>
> Further and alternatively the Defendant says that the said fire got out of control accidentally during its natural ordinary and reasonable user for domestic purposes."

The defendant gave evidence and called no witnesses. He is the Production Manager at the Jamaica Flour Mills. He leaves early for work and arrives home late. When he returned home on the day in question, he was advised of the fire by his wife. He knew who had lit the fire but that person was not employed by him nor authorised by him to light the fire. He had made no agreement with anyone to light a fire.

He admitted that his land is about a third of an acre, that he has a lawn and a hedge. Trees were on the land, apparently almond trees, which he had felled subsequent to the fire.

The action was heard on 26th and 27th January, 1987. The trial judge Morgan J, reserved judgment but regrettably forgot about the matter until reminded 18 months later. She handed down judgment on 29th July 1988. I mention this fact because Mr. Wright said in argument that this delay affected her evaluation of the evidence. I do not however recall counsel suggesting in what way the delay affected the outcome of the case.

It seems to me that this action did not depend on the demeanour of any witnesses. The result was inevitable in the light of the pleadings. The plaintiff was entitled to judgment on admissions. See Section 307 Civil Procedure Code. Paragraph 3 of the statement of claim pleaded the escape of fire lit on the land occupied by the defendant. The defence admitted the fire was set on land occupied by him. To plead thereafter that the defendant does not admit paragraph 3 appears as sheer futility. To add thereafter that the fire constituted a natural ordinary and reasonable use of the premises does not raise any issue of agency, whatever other issue might otherwise be raised thereby.

Be that as it may, the whole thrust of the appellant's submission was that the finding by the judge that the person who started the fire was the agent or servant of the defendant was against the weight of evidence. I propose to deal with this ground out of deference to counsel for the appellant.

The evidence of Mrs. Garrick was that she had seen the person who set the fire not only on the day of the fire but prior to that, she had seen him there working. This evidence was not challenged in any way by cross-examination. The appellant for his part said he knew the identity of that worker but was content to say that he was neither his servant or agent. Assuming as I am asked to do that the issue of agency arose on the pleadings, then plainly the plaintiff who had been put to proof, had discharged the onus on it. An evidential burden thereupon shifted to the defendant to show, if he could, that the "worker" was not his servant or agent. That burden could not be discharged by a mere traverse on his part.

The judge was perfectly correct when she demonstrated that the weight of the evidence was against a finding that the worker was not his servant or agent. At pages 33-34, she said this -

"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 the person as to whether he was a trespasser or a stranger."

So far as this question of agency goes, it could arise only in respect of the action as framed in negligence. But, in point of pleading that issue was not raised either in regard to negligence for the defence merely traversed the allegation of negligence. It was wholly inapplicable to the actions pleaded under the rule in **Rylands v. Fletcher** and nuisance. In respect of these causes of action, as is well known, the occupier is prima facie liable unless for example he can plead, Act of God, or the act of a trespasser

without his knowledge. A gust of wind does not constitute an Act of God properly so called. The defendant did not deny that he was the occupier and he did not plead any of the defences I have given as illustrations. The ground is really without substance and accordingly fails.

In my opinion that is enough to dispose of this appeal. It is as well not to mention the other grounds filed but not supported by argument.

For these reasons, I was of opinion that the appeal must be dismissed, the judgment of the Court below affirmed. The respondent would be entitled to its costs.

FORTE, J.A.

I agree.

GORDON, J.A. (AG.)

I agree.