[1991–92 Gib LR 97]

RAMAGGE and COSTA v. TAYLOR WOODROW INTERNATIONAL and LINCOLN DEVELOPMENT SERVICES LIMITED

SUPREME COURT (Alcantara, A.J.): June 10th, 1991

Construction Industry—defective construction—water damage—contractor's duty in rainy season to anticipate effect of heavy rain on excavations and ensure formation of land not altered so as to cause flooding—Act of God no defence

Tort—negligence—damages—financial gains arising from damage—gains prima facie discounted from damages, unless result from insurance or benevolent donation prompted by sympathy

The plaintiffs sought damages for negligence against the defendant construction company and its sub-contractor.

The plaintiffs were the Chairman and Secretary of a tennis club which was bounded on two sides by steeply sloping waste-land. Following a landslide on to the premises, the club built a new concrete retaining wall behind a smaller existing stone wall.

At about the same time, the first defendant had been engaged by the Government to perform building works on the system of underground tunnels within Gibraltar, including ancillary works on a ventilating shaft on the club's premises. The first defendant sub-contracted the work to the second defendant, which in turn sub-contracted some of it to others.

The work to the ventilating shaft required new foundations to the shaft to be excavated and a protective housing built around it. Large stones then began to fall on to the tennis courts from the vicinity of the ventilation shaft and, some weeks later, heavy rains caused a build-up of water which breached both retaining walls and the fencing around the tennis courts, and flooded the courts with debris.

The plaintiffs claimed damages from the defendants for defective work. They submitted that (a) the trench dug around the ventilating shaft acted as a dam, causing a build-up of water which breached the walls; (b) a visible channel in the earth leading from the shaft indicated that the flood came from that area; (c) alternatively, the defendants had broken a storm-drain in carrying out the works; (d) the defendants had acted negligently in failing to anticipate the effect of their works in the rainy season of November to January; (e) the defendants could not rely in their defence on an Act of God, since the damage would not have occurred in

such a way had they not altered the formation of the land; (f) the new wall was a parapet rather than a retaining wall, and as such was not intended to protect the club's premises from flood; and (g) a Government grant to the club, which paid for immediate repairs in the absence of insurance should not be deducted from damages awarded.

The first defendant submitted in reply that (a) it was not liable for the damage caused, which would have happened in any event; (b) the heavy rains which caused the flood were an unforeseen Act of God for which it could not be held responsible; (c) the plaintiffs were contributorily negligent since they had installed a retaining wall without provision for drainage and it was therefore not properly designed to protect the club's premises from flood; and (d) the Government grant had paid for almost half the cost of repairs and therefore should be deducted from the plaintiffs' losses when calculating damages.

Held, awarding damages to the plaintiffs:

(1) The court was satisfied that the works around the ventilation shaft had altered the slope of the land so as to cause a build-up of water when the seasonal heavy rains occurred. Heavy rain was, statistically speaking, to be expected in November. The earth around the shaft had been disturbed by the building works (as demonstrated by the falls of stones in the preceding weeks), and when the water overflowed, its force breached the retaining walls. The new wall, which had no weep-holes, was unable to withstand the hydrostatic pressure behind it and eventually burst, the water washing away the old wall and flooding the courts (paras. 14–17; para. 19; para. 21).

(2) The defendants owed the plaintiffs a duty of care when carrying out the excavation works around the shaft—in particular, they had a duty to ensure that the excavations did not adversely affect the natural drainage of the land. They were in the same position as anyone who, in carrying out works, diverted the path of a stream and had a duty to ensure that the channel substituted for the original was adequate to contain the water that the original would have carried (para. 20; paras. 23–24).

(3) The court accepted the figure for damages put forward by the plaintiffs. The Government grant given to the club would not be deducted from that figure. Although damages were ordinarily calculated on the basis of net loss, disregarding financial gains occasioned by the event causing the damage, the grant fell under the exception for benevolent donations prompted by sympathy. Furthermore, it had been given on the understanding that the club would refrain for a few years from applying for its annual grant for the promotion of sport. If the plaintiffs had been insured, the payment from their insurers would similarly not have been deducted (paras. 25–28).

(4) However, the damages awarded would be reduced by one-third for contributory negligence in the plaintiffs' faulty design of the retaining

wall. Had it been constructed to include weep-holes for drainage, it might not have collapsed (paras. 29–30).

Cases cited:
(1) *Greenock Corp.* v. *Glasgow & S.W. Ry. Co.*, [1917] A.C. 556; (1917), 86 L.J.P.C. 185, followed.
(2) *Hussain* v. *New Taplow Paper Mills Ltd.*, [1988] A.C. 514; [1988] 1 All E.R. 541, applied.

Legislation construed:
Contract and Tort Ordinance (1984 Edition), s.10(1): The relevant terms of this sub-section are set out at para. 29.

E. Ellul for the plaintiffs;
D.J.V. Dumas for the first defendant.
The second defendant did not appear and was not represented.

1 **ALCANTARA, A.J.:** The plaintiffs are the Chairman and Secretary (as he then was) respectively of the Gibraltar Sandpits Lawn Tennis Club, suing on behalf of the Club. The defendant, an English public liability company, is a construction firm of considerable repute. The third party is a company which was employed by the defendant as a sub-contractor. I have very little information about it.

2 I have been told, and it has not been disputed, that the Club started life in 1920 as a tennis club for services personnel. After the end of World War II, the Club premises (this includes the clubhouse, the tennis courts and the land surrounding it) were handed over by the Ministry of Defence ("MoD") to the Government of Gibraltar. Until 1973, it was something of a closed shop, accepting only members of the privileged class or classes. In 1973 the Club was given a Crown lease by the Government of Gibraltar, and opened its doors to all tennis enthusiasts. The present membership is said to be between 500 and 600—a high figure for membership compared with other clubs in Gibraltar.

3 The Club premises are bounded on the North by Alameda Gardens; on the South by wastelands and Knight's Court (dwellings); on the East by the pathway just below Europa Road, leading to Knight's Court; and on the West by Sandpits Magazine. Both the northern and eastern boundaries form slopes going down to the clubhouse and the tennis courts, in particular the clubhouse, which is situated at the focal point between both slopes. The slopes are wasteland of red sands, stones and vegetation, and are of no value to the Club. Halfway up the eastern slope going up steeply to Europa Road lies a ventilating shaft of the MoD tunnels complex inside the Rock. The ventilating shaft is securely fenced. When the Club obtained the lease from the Crown in 1973 it was on the

condition that the MoD had access to it at all times, and with the right to execute works, *etc.*

4 Because of the location of the Club the weather has not been particularly kind to it. In 1972 there was a land- or mud-slide from the north boundary of the Club—the Alameda Gardens area—and the tennis courts were put out of action. Government came to the rescue of the Club and built retaining walls in that area, the two lower ones being gabions construction. Since that date, that side has been secured. Up to 1987 there was an old retaining wall on the east side, built of random stonework, held together with cement/mud/lime mortar. It had a height of 2.4m. and had been built 100 years ago. It had never given any trouble and had withstood the test of time and weathered the elements.

5 In 1987 the Club decided to build a new retaining wall (which I will call the green wall, because it was so painted) parallel to and behind the old wall, but apart from it and not co-terminous with it. This was done in conjunction with the re-surfacing of the three tennis courts then in existence, and the creation of a fourth new tennis court, together with a new or refurbished clubhouse. The green wall, which was higher than the old retaining wall by 1.5 m., was going to be the retaining wall of the terrace of the clubhouse.

6 The "new" clubhouse was duly inaugurated some time in September/October 1987, and shortly afterward ominous signs started to appear. The members of the Club noticed that stones were falling or coming down on to the tennis courts. They then noticed a structure in the area of the ventilating shaft. This was in October 1987. The Secretary of the Club took action. He got in touch with the surveyor in charge of the Property Services Agency and a site-meeting was arranged. I accept the evidence of Mr. Costa, the Secretary, that the surveyor and a representative of Taylor Woodrow, the defendant, concurred that there were stones emanating from the vicinity of the ventilating shaft, and that they apologized and said that they would remedy the situation. In point of fact, the evidence is that a big stone fell on the tennis courts a few days after the site-meeting.

7 Before relating what happened on November 7th, 1987, which has given rise to the present cause of action, I think that it is in order to say something about the defendant and the third party. The defendant was awarded by the Property Services Agency a large project of works of a sensitive nature connected with tunnels inside the Rock. A minor part of that project was in connection with the ventilating plant situated inside the Club premises on the eastern slope. A new foundation was going to be laid to the shaft, and a housing was going to be erected to enclose the shaft properly within the fence that already existed there. The defendant was experiencing difficulties with its manpower. This is the evidence given by Mr. Horner, a senior member of the defendant's staff:

> "All people inside the Rock had to be cleared by security. The process took six weeks. Suffered permanent shortage of labour—six weeks to clear. Workers here [the ventilating shaft] did not require security clearance. We decided to sub-contract."

8 The sub-contract was for just under £10,000 and the sub-contractor selected was Lincoln Development Ltd. This was the first time this sub-contractor had been employed by the defendant; it knew nothing about them. It does not even know whether they are still in Gibraltar. All that Mr. Horner has been able to say is that he has tried to phone them, but that their telephone has been disconnected.

9 The third party, Lincoln Development Services Ltd., duly acknowledged service of the third party proceedings, but has taken no part in this action. I can only draw a robot picture of it from the material before me. The Schedule to the sub-contract has been exhibited. It shows that the address of the sub-contractor is a P.O. Box, and that the sub-contract should have been completed by November 1st, 1987. Apparently, contrary to cl. 1 of the sub-contract, the third party appears to have sub-contracted the whole or part of the works to some other person or persons. This is indicated in a letter dated November 24th, 1987 from Lincoln Development Services Construction Ltd. to Taylor Woodrow International.

10 Some time in September 1987, the third party started with its operation. This involved erecting a structure composed of a scaffold surrounding the ventilating shaft and a catwalk from the top of the scaffold on to the pathway below Europa Road. The purpose of the catwalk was to enable workers to carry materials from Europa Road to the site (the ventilating shaft). The site surveyor of the defendant at the time was Mr. Domenic Busiletti, but he was more concerned with the works inside the tunnels. His view was that this was just ancillary work, and in evidence he said: "I was not on site and not responsible for supervising." He added that he considered the structure to be safe, but that he would not have done it like that.

11 The other part of the work was to dig round the foundation of the ventilating shaft. The intention was to lay new foundations, 3m. square by 18 in. deep. A 3m. square shuttering structure was put in place, embracing the circular ventilating shaft. The area dug out was greater or larger than the 3 m. square shuttering. This was necessary in order to maintain the shuttering in place and in a vertical position. Timber was used for this purpose. This can be seen in the photographs that have been exhibited. In fact, what had happened was that a moat or trench of considerable size had been dug out on the steep eastern slope of the Club premises. This was done at the commencement of the rainy season. I think I can take judicial notice of the fact that here in Gibraltar (being a Mediterranean climate) we have long hot summers and short wet winters.

12 The defendant has procured and produced statistics from the Meteorological Office of the Royal Air Force, which shows that the worst months for intense rain in Gibraltar since 1930 are November and January. Those of us who live on the Rock do not need statistics as we know that November is invariably a bad month for rain; in fact, the first rains after the long hot summer.

13 On the night of November 6th, 1987 and the morning of the 7th, there was a very heavy, continuous and intense downpour. Drains just could not cope with the rain water. The records of the Meteorological Office show that from GMT 09.00 on November 6th to GMT 09.00 on November 7th, there was recorded 6.6 in. of rain, with the heaviest downpour between 7.00 and 9.00 a.m. (local time) on November 7th. This accords with the evidence of Mr. Ramagge, who, with literary licence, describes the water coming towards the Club and the retaining walls thus: "What I saw at the time was as if you imagine a hose and water coming down."

14 By this time, the two retaining walls had already collapsed. There is no dispute as to how the collapse of the walls happened. Mr. M.E. Belilo, a chartered civil engineer called by the plaintiffs as an expert, describes it thus in his report:

> "Since the back-fill behind the second concrete block-work wall (which I have called the 'green wall') consisted mostly of the finer red silty sand, it is imagined that this material was incapable of draining the amount of water arriving. Consequently, there was a build-up of hydrostatic pressure behind the wall which culminated in overturning the wall. In so doing, the collapsing block-work wall crushed the lower stone-work wall, which in turn brought down the court fencing. Once this occurred, it provided an open outlet to the build up of water which then formed its way onto the courts and drained away."

15 A word about the green wall. It was constructed of reinforced concrete block-work with a surface rendering of concrete. It had no weep-holes. The old retaining wall had weep-holes. The plaintiffs say that the green wall was a parapet, not a retaining wall. The defendant in turn says that it was a defective retaining wall. I find that it was a retaining wall which was unable to withstand the hydrostatic pressure to which it was subjected on that particular day.

16 The next point which I have to consider is what caused the hydrostatic pressure. Much time has been spent on theorizing how the water ran down the slope, and in particular from the works at the ventilating plant. What I am being asked is to draw conclusions from channels that were later seen on the slope and photographed, and in

particular a channel that came down from the ventilating shaft. I think that a more useful exercise is to ask oneself why it happened.

17 I accept the expert opinion of Mr. Belilo in preference to that of Mr. R.M. Fisher, a chartered civil engineer, called as an expert by the defendant. Mr. Belilo stated in evidence:

> "If [the] shaft had not acted as a dam, there might have been no damage. [The] presence of [the] shaft (meaning the works there) contributed to act as a dam. Work on [the] dam was contributory.
>
> I do not think [the] collapse would have occurred if [there had been] no work on [the] shaft."

I accept his evidence, in the same way that I accept his evidence in relation to the green wall: "[It was] not designed to withstand [the] hydrostatic pressure. [The] design seemed insufficient. [The] lack of weep-holes contributed to the collapse."

18 I think I should state why I prefer the evidence of Mr. Belilo to that of Mr. Fisher. Mr. Belilo visited the site soon after the event. His report is dated November 16th, 1987. Mr. Fisher did not visit the site until January 27th, 1988 and his report is dated February 1st, 1988. I am not impressed by his finding that the exact position of the green wall "could not be exactly determined, but it would appear to have been constructed either directly on top of or immediately behind the original wall." The report of Mr. Belilo must have been in the possession of Mr. Fisher when he made his survey, the plaintiffs having provided a copy to the defendant on November 17th, 1987. In any case, Mr. Fisher could have asked Mr. Belilo to help him with the location of the green wall. Amongst experts, many things are allowed, and communications between them is not improper. I also find that the report of Mr. Fisher concentrates too much on the water that accumulated inside the shuttering, and ignores the water that accumulated inside the moat, the shuttering included.

19 My own conclusion is that the eastern slope was disturbed by the works round the ventilating shaft, as is evident by the stones that fell on the tennis courts before the advent of rain. The creation of a moat with the surrounding rubble altered the natural gradient of the slope and was a major factor in the water accumulating inside the moat and shuttering and eventually bursting forth and finding its way to the retaining walls and causing the collapse of the green wall.

20 I find that the defendant owed a duty of care when it set out to carry out the works, which included the creation of a moat at the commencement of the rainy season.

21 The plaintiffs, at the eleventh hour, amended their statement of claim, with leave, to allege that the defendant, in executing its works,

broke a storm-drain just below Europa Road and that water gushed down to the ventilating shaft and then on to the retaining walls. There is no evidence on which I could come to that conclusion. As its very highest, there is just a suspicion that it could have happened, but a suspicion based on possibilities, not on probabilities. The plaintiffs fail on this allegation.

22 The defendant, apart from denying liability, has pleaded, in the alternative, Act of God and contributory negligence on the part of the plaintiffs. In support of the defence of Act of God based on excessive rain-fall, Mr. Dumas, for the defendant, has referred me to *Clerk & Lindsell on Torts,* 16th ed., para. 1–157, at 111 (1989).

23 In turn, Mr. Ellul, for the plaintiffs, has brought to my attention the case of *Greenock Corp.* v. *Glasgow & S.W. Ry. Co.* (1), the headnote to which reads ([1917] A.C. at 556–557):

> "It is the duty of any one who interferes with the course of a stream to see that the works which he substitutes for the channel provided by nature are adequate to carry off the water brought down even by extraordinary rainfall, and if damage results from the deficiency of the substitute which he has provided for the natural channel he will be liable.
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> A municipal authority, in laying out a park, constructed a concrete paddling pond for children in the bed of a stream and altered the course of the stream and obstructed the natural flow of water therefrom. Owing to a rainfall of extraordinary violence the stream overflowed at the pond, and, as the result of the operations of the authority, a great volume of water, which would have been carried off by the stream in its natural course without mischief, poured down a public street into the town and damaged the property of two railway companies:
>
> *Held,* that the extraordinary rainfall was not a damnum fatale which absolved the authority from responsibility, and that they were liable in damages to the railway companies."

24 I agree that the above case is not on all fours with the present action, but it is an answer to the defence of Act of God.

25 Before dealing with the issue of contributory negligence, I shall deal with the quantum of damages. The plaintiffs are claiming a total of £49,350. A list of the various items making up that claim was supplied to the defendant, long before the actual hearing of the action. Mr. Ramagge, when he gave evidence, gave formal proof of the claim. When he was cross-examined, he was queried on a figure or two, but his evidence as to the damage suffered was not challenged. In his final address, Mr. Dumas submitted that there was no documentation for the various sums claimed,

only estimates, and that therefore there was insufficient evidence to assess the damages suffered. I do not agree. *Prima facie* evidence had been adduced, and on that evidence I am entitled to arrive at the quantum of damage suffered. I find that the damages amount to £49,350.

26 An issue raised by counsel for the defence has to be dealt with at this stage. When the retaining walls collapsed, the Club had no insurance and no money to carry out the necessary works. They approached the Government for a loan. This was not forthcoming, but the Government was eventually prepared to give the Club a grant of £22,000. They, the Club, had in previous years received grants from Government in the nature of £3,000 or £4,000 to foster sport on the Rock. This was an extraordinary grant and it was understood that the Club would, for a few years, abstain from asking for a yearly grant, although nothing was formally agreed or stated.

27 Mr. Dumas submits that the £22,000 should be deducted from the award of £49,350. Counsel argues that the rule is that *prima facie* the only recoverable loss is the net loss. Lord Bridge of Harwich, in the case of *Hussain* v. *New Taplow Paper Mills Ltd.* (2), had this to say ([1988] A.C. at 527):

> "Financial gains accruing to the plaintiff which he would not have received but for the event which constitutes the plaintiff's cause of action are prima facie to be taken into account in mitigation of losses which that event occasions to him.
>
> But to the *prima facie* rule, there are two well-established exceptions. First, where the plaintiff recovers under an insurance policy for which he has paid the premiums, the insurance moneys are not deductible from the damages payable by the tortfeasor. Secondly, when the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary of a disaster fund, the amount is again to be disregarded."

28 The award by the Government of £22,000 falls under the second exception. I rule that it should not be taken into account.

29 Finally, we come to the question of contributory negligence on the part of the plaintiff. Section 10(1) of the Contract and Tort Ordinance, provides:

> "Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damage recoverable in respect thereof shall be reduced to such an extent as the court thinks

just and equitable having regard to the claimant's share in the responsibility for the damage."

30 There is no doubt that the green wall contributed to the damage suffered by the plaintiffs. I have so found by accepting the expert evidence of Mr. Belilo. It was faulty in design in that it did not have weep-holes. None the less, I have also found that the defendant was negligent in the way it carried out the works at the ventilating plant. I do not think that they are equally to blame. I think what is just and equitable is that the award of damages should be reduced by one-third. In arriving at this conclusion, I am saying that the defendants are two-thirds to blame and the plaintiffs only one-third. I give judgment for the plaintiffs in the sum of £32,900.

Judgment for the plaintiffs.