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COLE v. GEORGE

Supreme Court (Macquarrie, Ag. C.J.): July 8th, 1932

[1] **Tort — damages — nuisance — failure to abate nuisance does not disentitle from suing for damages:** An owner of property who fails to exercise his lawful right of abating the nuisance when the property is damaged by branches falling from a tree on adjoining property does not thereby lose the right to sue for damages (page 314, lines 36—38).

[2] **Tort — negligence — duty of care — duty of owner of property to take such care as to prevent damage to adjoining property — owner of old and rotten tree causing damage on neighbouring land liable if fails to do so:** It is the ordinary duty of every person to take such reasonable care of his or her property as to prevent damage to an adjoining property; so that, where an old and rotten tree overhangs an adjoining property and causes repeated damage to it through falling branches, the owner of the tree ought to be aware of its dangerous condition and ought to remedy it, failing which he or she is liable for negligence (page 315, lines 14—25).

[3] **Tort — nuisance — abatement — failure to abate nuisance does not disentitle from suing for damages:** See [1] above.

[4] **Tort — nuisance — knowledge of nuisance — tree overhanging adjoining property — owner ignorant of tree's dangerous condition not liable for nuisance:** No case of nuisance can be established against the owner of an old and rotten tree which overhangs an adjoining property and causes damage there without evidence that its owner knew of the dangerous condition of the tree (page 314, lines 34—36).

The plaintiff (now the respondent) brought an action against the defendant (now the appellant) in the Police Magistrate's Court, Freetown, to recover in respect of damage to his property.

The defendant had an old pear tree growing in her garden only two feet away from a fence separating her property from the plaintiff's. The branches of this tree hung over the plaintiff's property, and in the course of four years four of them fell on to it and caused damage. The plaintiff alleged that on each occasion he protested to the defendant while doing nothing himself to remedy the situation. The magistrate held the defendant liable to pay damages in respect of the damage suffered by the plaintiff's premises but did not record any findings of fact, nor give reasons for his decision.

On appeal to the Supreme Court, the defendant contended that damages should not be awarded, since (a) the rule in *Rylands v. Fletcher* did not apply in the circumstances of this case; (b) in the absence of the defendant's knowledge of the condition of the

branch, she could not be found guilty of committing a nuisance; and (c) the plaintiff should have exercised his right to abate the nuisance and his failure to do so precluded him from recovering damages.

The appeal was dismissed.

Cases referred to:

(1) *Heaven v. Pender* (1883), 11 Q.B.D. 503; 49 L.T. 357, applied.

(2) *Noble v. Harrison*, [1926] 2 K.B. 332; (1926), 135 L.T. 325.

(3) *Rylands v. Fletcher* (1868), L.R. 3 H.L. 330; 19 L.T. 220, distinguished.

(4) *Smith v. Giddy*, [1904] 2 K.B. 448; (1904), 91 L.T. 296.

O.During for the appellant;
Hyde for the respondent.

MACQUARRIE, Ag. C.J.:

This is an appeal from a judgment of the learned police magistrate who held the defendant liable for damages suffered by the plaintiff's premises by the fall upon them of a branch of a tree growing on the defendant's premises and overhanging the plaintiff's premises.

The magistrate has not recorded any findings of facts, nor given reasons for his decision. By s. 21 of the Appeals from Magistrates Ordinance (*cap.* 8), as amended, this court may deal with the appeal on the evidence taken by the magistrate and as neither party has asked that other evidence should be taken, I propose to deal with the case accordingly.

I am of opinion that the defendant can only be liable for negligence, *i.e.*, the failure to perform any duty she may owe to the plaintiff, which failure has led to the damage. I agree with Mr. Otto During for the appellant that the principle of *Rylands v. Fletcher* (3) has no application to this case, for the reasons given in the judgment of Rowlatt and Wright, JJ. in *Noble v. Harrison* (2). Similarly, no case of nuisance has been established in the absence of the defendant's knowledge of the dangerous condition of the tree. Nor does the neglect of the plaintiff to remedy the nuisance of the overhanging tree disentitle him to sue for any damages caused by its fall: see *Smith v. Giddy* (4) ([1904] 2 K.B. at 451; 91 L.T. at 299). It remains, then, to consider whether the defendant is liable for negligence. The only evidence on this point is that of the plaintiff when he says:

"There is a pear tree in the defendant's yard; the trunk at the base is about 3 ft. wide and about 50 ft. high and it is over 30 years old. The tree near the fence is within 2 ft. of my fence and some of the roots extend into my property, the branches coming over my property about 16 ft. I first had trouble with this tree in 1927 — one of the branches fell into my yard. The next trouble occurred in 1928 — a branch fell over by a high wind — I cannot say whether this branch was rotten — I protested about that too. Another occurred in 1928 but not serious — I called the attention of the defendant. In 1932 another branch fell over — it was rotten and the hole was in the middle of the branch. It looked healthy from outside but when it broke I saw the dry rot in the middle."

That is four falls in the four years previous to this one. The defendant must be taken to know, or she ought to have known, of these falls from a tree growing on her land. This, added to the age of the tree, in a country where it is common knowledge that violent winds occur fairly frequently, together with the absence of any evidence that the defendant made any examination or did anything to minimise any risk, in my opinion justifies the conclusion that she has neglected the ordinary duty of every person to take such reasonable care of his or her property when in such proximity to the person or property of another that, if due care is not taken, damage might be done by the one to the other: see *Heaven v. Pender* (1) (11 Q.B.D. at 509; 49 L.T. at 358—359).

For these reasons I am of opinion that the judgment was correct and the appeal is therefore dismissed with costs.

Appeal dismissed.