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Tort & Voisinage: A Squirrel's Tale

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Abstract

This article considers the recent judgment in Gale & Clarke v Rockhampton Apartments Ltd & Antler Properties CI Ltd. [2006] JRC 189A which was handed down by the Royal Court of Jersey in the Channel Islands on 13th December, 2006. In this recent case, the Plaintiffs brought proceedings in respect of damage allegedly caused to their properties by the Defendants on the basis of (i) the tort of negligence and (ii) voisinage*, a principle of civil law. The tort claim had prescribed and the defendants argued that* voisinage *was in fact not part of Jersey law. The Court considers that the duty of a landowner not to use his land in such a manner as to cause harm or injury to his neighbour is not founded in tort at all but in* voisinage *or quasi-contract. This decision represents an effort to resist the tide of English tort law that looks set to dominate Jersey legal thinking within its remit.*

Summary

1. Introduction

This article considers the recent judgment in *Gale & Clarke v Rockhampton Apartments Ltd & Antler Properties CI Ltd.* [2006] JRC 189A which was handed down by the Royal Court of Jersey in the Channel Islands on 13th December, 2006. The case seems likely to now reach the Court of Appeal of Jersey and its outcome is likely to have a significant impact on the future direction of Jersey Law and, in particular, whether the Island remains true to its French roots or moves ever closer to English legal thinking.

In this recent case, the Plaintiffs brought proceedings in respect of damage allegedly caused to their properties by the Defendants on the basis of (i) the tort of negligence and (ii) *voisinage*; in short, the latter being a principle of civil law that imposes on the owners of adjoining properties certain reciprocal rights and duties[1].

Proceedings were not validly brought within three years of the accrual of the cause of action (see the unreported judgment at 2005 JRC 105) and consequently the tort claim was prescribed by virtue of the *Law Reform (Miscellaneous Provisions) (Jersey) Law* 1960. (The 1960 Law imposes a three year period of prescription in respect of actions founded on tort). Pursuant to *Royal Court Rules (2004)* 7/8, the matter then came before the Bailiff for determination as to the prescription period applicable to the remaining claim of *voisinage*. The Plaintiffs argued that as a claim in *voisinage* arises out of a quasi-contract between neighbours, the action could only be prescribed by a period of 10 years and was therefore brought well within time. The Defendants argued that *voisinage* was in fact not part of Jersey law; that the previous decision to the contrary effect in *Searley v Dawson* 1971 JJ 1687 was wrongly decided and that the Plaintiff's remaining claim was governed by the tort of nuisance as applied in previous Jersey authority such as *Curry v Horman* 1889 213 Ex 511 and *Keough v Farley* 1937 12 CR 373. The Defendants further argued that, in any event, an action in *voisinage* should be prescribed by the period of 3 years being analogous to a tort action.

2. The Judgment of the Royal Court

The Royal Court held that there was insufficient evidence from previous authority that Jersey law had assimilated the English tort of nuisance whereas quasi-contract was known to the customary law of Normandy and the Royal Court was further entitled to have regard to guidance as to the meaning and extent of the term *voisinage* by reference to the neighbouring legal system of *Orléans* and, in particular, to Pothier's *Traité du Contrat de Societé*. Such authority had been relied upon in *Searley v Dawson* which was a decision of 40 years standing and the Court was therefore obliged to follow this decision unless convinced that it was plainly contrary to earlier authority or wrong. In fact, the decision in *Searley v Dawson* was found to be plainly right.

[1] See MATTHEWS & NICOLLE (1991).

The Court further stated, as an *obiter dictum*, that the duty of a landowner not to use his land in such a manner as to cause harm or injury to his neighbour is not founded in tort at all but in *voisinage* or quasi-contract and claimants should plead their cases accordingly. Contrary to the judgment of Tomes, Deputy Bailiff in *Mitchell v Dido Investments Ltd* 1987-88 JLR 293 and to the apparent vindication of "an action in trespass" in *Parish of St. Helier v Manning* 1982 JJ 183, the torts of nuisance and trespass were stated to be English terms that were not part of Jersey law.

As to the applicable prescription period for a claim brought in *voisinage*, the action was held to be properly classified as an *action personelle mobilière* and therefore a prescription period of 10 years applied (*Albright v Harrison (née Wailes*) (1952) JJ 31 applied) and, further, such a period was observed to represent a sensible default period (*In re Esteem* 2002 JLR 53 applied.)

3. Competing legal principles & Differences in approach

This case will reinforce the view of those that see Jersey law as something of a battlefield between competing legal principles of different origins and where there appear to be wider issues at stake[2].

The judgment in this particular case follows a similar path to that taken by the same Court in *JFSC v Black* 2002 JLR 294 (but overturned on appeal at 2002 JLR 443) in eschewing conventional English tort classification (as laid down in cases such as *Arya Holdings v Minories Finance Ltd* 1997 JLR 176) in preference for maintaining alternative Jersey legal concepts regarded as having a better pedigree. So far, the Court of Appeal of Jersey (Southwell, JA delivering the judgment of the Court of Appeal in both the two latter cases) has adopted a different approach to the Royal Court and it will be interesting to see in the event of an appeal in this matter, whether or not a similar pattern will emerge.

4. Options on an appeal

In this respect, there must at least be a possibility that the Court of Appeal would test the cause of action permitted by *voisinage* against the same factors that led it to conclude in *Arya Holdings v Minories Finance Ltd* that the *D'Allain* action was a tort, albeit one peculiar to Jersey law and not having a similar existence in England. Such an approach is further supported by *Brown v Premier Builders Jersey Ltd* 1980 JJ 95 where *voisinage* was treated as if it were "akin to a duty imposed in tort."

When one looks at Fournel's 19th Century *Traité du Voisinage* 3rd Ed (1812) we see that *voisinage* is stated to be a vague, generic term that regulates the proper relationship (*rapprochement*) between things, places and people. (See *Discours Préliminaire*.) Under the category of *voisinage personnel* it

[2] In this respect, see HANSON (2005a); & the comments of this author on *Grove & Briscoe v Baker*, and *Steelux Holdings Ltd v. Edmonstone* at HANSON (2005b) and (2005c).

deals with matters such as the emission of bad or harmful smells (*de mauvaises odeurs*) or loud noise during the night (*des bruits nocturnes*), whereas *voisinage réel* will deal with such matters as the relationship (including mutual support) between properties (*les rapports respectifs des propriétés foncieres*). The category of *voisinage mixte* will deal with mixed rights, involving a person and a property, such as a right of way or passage (*le droit de passage*.)

It is beyond the scope of this short article to provide a detailed comparison between the principles of *voisinage* with tort generally, or just the tort of nuisance alone, but insofar as both principles seek to protect the same interests and rights between neighbours, there appears to be little, if any, difference between them. Indeed, the Bailiff's recent judgment confirmed such similarity at paragraph 27. Moreover, at paragraph 17 of his judgement, the Bailiff spoke of the touchstone test for *voisinage* as a consideration of "*what is reasonable in the context of neighbourly relations*" which, in broad terms, seems equally applicable to the tort of nuisance. For example, in *Delaware Mansions v Westminster City Council* [2002] 1 AC 321 the House of Lords dealt with the recoverability of damage resulting from the encroachment of tree roots belonging to a neighbour. The leading speech of Lord Cooke of Thorndon referred (at para. 29) to the answer to the issue being found:

> "*by applying the concepts of reasonableness between neighbours (real or figurative) and reasonable foreseeability which underlie much modern tort law and, more particularly, the law of nuisance*."

Later on at para. 31 he went on to state that:

> "*The label nuisance or negligence is treated as of no real significance. In this field, I think, the concern of the common law lies in working out the fair and just content and incidents of a neighbour's duty rather than affixing a label and inferring the extent of the duty from it*."

It is difficult, therefore, to see any difference in substance between the touchstone test referred to by the Bailiff in *voisinage* with that of modern tort law.

However, at paragraph 26 to the instant judgment of the Bailiff, it is of interest that "quasi-contract and land law" are added as "no go areas" for conventional tort law. It is further noteworthy that a similar argument in respect of a "property" exception to tort law appears to have received no support on appeal in *JFSC v Black*. Further, given the collective weight of the authorities referred to in the instant matter that either do apply, or appear to apply principles of tort law - albeit each case is explained away by the Royal Court - some may find a "land law" exception to the general law of tort a little unconvincing[3].

Indeed, given that the Court of Appeal held in *Picot v Crills* 1995 JLR 33 that the tort of negligence was the same in Jersey as it was in England - and incidentally referred to *Mitchell v Dido Investments Ltd* without criticism- it would seem particularly surprising if the tort of negligence

[3] Note also the Statutory Nuisances (Jersey) Law 1999 which is further commented upon in *Editorial Miscellany* 2000 JL Rev 113.

was now not to apply to matters pertaining to land law but this appears to be the effect of the instant judgment. Accordingly, had the Plaintiff's negligence action not already been prescribed, this judgment suggests that it would have been vulnerable to a strike out application in any event. (This point will perhaps provide a modicum of relief to the Plaintiff's former legal advisors given the previous judgment in this matter at 2005 JRC 105.)

However, there perhaps is a middle course between reclassifying *voisinage* as a tort or, as the instant judgment seeks to do, abrogating tort from land law completely: the Court of Appeal could simply recognize that both causes of action co-exist but accept that they have different jurisprudential roots[4]. In such circumstances, a Plaintiff might be entitled to rely upon the cause of action that is most beneficial to him even if this means that he might thereby enjoy a longer prescription period.

In the event of an appeal in the instant matter, Fournel's 19th *Traité du Voisinage* (which has been held to be of persuasive authority in Guernsey: *Russell & Caine v Gillespie & Ford* [2003] GRC 17, summarised at 2004 JL Rev 112) might be worthy of consideration but regretfully was overlooked in the hearing before the Royal Court.

5. Prescription in Voisinage and Contract Claims

As to the finding that a cause of action in *voisinage* (not being a tort) has a 10 year prescription period, there are a number of interesting points that arise but it is a shame that the Royal Court did not consider this aspect in greater detail for here too, we find a confusing admixture of competing English, French and Jersey principle. It is noteworthy, however, that the Royal Court did resist the simplistic approach of holding that quasi-contractual claims such as *voisinage* should be prescribed by the same period as contractual claims being "in general, ten years."

In fact, clear and reasoned authority for the alleged general contractual period of 10 years is arguably non-existent and Jersey authority such as *Albright v Harrison (née Wailes*), *Giot v Giot* (1876) (as referred to in *Albright*), *Bichard v Bichard* (1875) 47H. 436 and Le Geyt's *Privilèges, Loix et Coutumes* at 64 (Title X, Article 9) for example, all refer to contractual claims where the prescription period *varies according to the subject matter or aim of the action in question*. Thus contractual claims involving land (an immovable) enjoy a period of a year and a day (*Giot* and *Bichard*), whereas Le Geyt refers to a variety of other contractual relationships where the prescription period varies from 1, 3 and 10 years.

Having ruled out tort, the approach in the instant matter was to ascribe a prescription period upon the basis that *voisinage* was an *action personnelle mobilière* being an action for damages. This approach appears consistent with long standing authority in this jurisdiction. However, if the particular action properly falls within the category of *voisinage réel (involving les rapports respectifs des propriétés foncieres*) there might possibly be an argument that a shorter prescription period

[4] For the origins of nuisance see *Sedleigh-Denfield v. O'Callaghan* [1940] AC 880 at 902.

applies because the action relates to land. The period of a year and a day would arguably then apply. (See also the judgment at paragraph 27 where Le Gros is referred to as ascribing such a period for an *action possessoire* being, according to the Bailiff, the functional equivalent in Jersey of an action in trespass.)

6. Conclusion

The Royal Court's approach in *Gale & Clarke v Rockhampton Apartments Ltd & Antler Properties CI Ltd* represents an effort to resist the tide of English tort law that looks set to dominate Jersey legal thinking within its remit. The precise point at which the English concept of "tort" gained ascendancy over the established French terms "*tort personnel*" and "*tort matériel*" is not entirely clear but the English concept was well understood and applied at least by the 1970s[5].

Unfortunately, whilst Jersey statute law has firmly entrenched the law of tort by providing a three year prescription period to actions founded on tort (a. 2 of the *Law Reform (Miscellaneous Provisions) (Jersey) Law 1960*) and a contribution or indemnity may only be claimed from another "tortfeasor liable in respect of the same damage" (see a.3), it is difficult to see how isolated attempts by part of Jersey's judiciary can succeed in halting the advance of the law of tort in the longer run: once the genie has been let out of the bottle, it may be too late to put it back. Further, given the fact that the Jersey Court of Appeal, itself, contains many English QC's and retired English judges, the struggle to preserve Jersey's indigenous law from the law of tort begins to look somewhat futile.

During the 19h Century the grey squirrel[6] was introduced into England and quickly displaced[7] its red counterpart.[8] Fortunately Jersey has never allowed the grey squirrel into the Island and its red cousin therefore thrives.[9] Some may regret that Jersey was not as cautious before introducing English legal principle into its jurisprudence!

7. Decisions

Reference	*Parties*
[2006] JRC 189A	*Gale & Clarke v. Rockhampton Apartments Ltd & Antler Properties CI Ltd.*
1971 JJ 1687	*Searley v. Dawson*
1889 213 Ex 511	*Curry v. Horman*
1937 12 CR 373	*Keough v. Farley*

[5] See *Speed, Guardian ad litem of Nixon v. Nixon* 1977 J.J. 1.

[6] *Sciurus caroliniensis*

[7] There are estimated to be only 140,000 red squirrels left in Britain, but over 2.5 million greys.

[8] *Sciurus vulgaris leucourus*

[9] In fact, the red squirrel is so cherished that warnings signs of their presence may be found on many Jersey roads.

1987-88 JLR 293	*Mitchell v. Dido Investments Ltd*
1982 JJ 183	*Parish of St. Helier v. Manning*
(1952) JJ 31	*Albright v. Harrison (née Wailes*)
2002 JLR 294 (but overturned on appeal at 2002 JLR 443)	*JFSC v. Black*
1997 JLR 176	*Arya Holdings v. Minories Finance Ltd*
1980 JJ 95	*Brown v. Premier Builders Jersey Ltd*
[2002] 1 AC 321	*Delaware Mansions v. Westminster City Council*
1995 JLR 33	*Picot v. Crills*
[2003] GRC 17	*Russell & Caine v. Gillespie & Ford*
(1875) 47H. 436	*Bichard v. Bichard*
[1940] AC 880 at 902	*Sedleigh-Denfield v. O'Callaghan*
1977 J.J. 1	*Speed, Guardian ad litem of Nixon v. Nixon*

8. References

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