IN THE SUPREME COURT OF JUDICATURE

OF JAMAICA

COMMON LAW

SUIT NO. C.L. 1976/c 313

BETWEEN	LLOYD CAMPBELL	PLAINTIFF
AND	THE CLARENDON PARISH COUNCIL	DEFENDANTS

Mr. Raphael Codlin & Miss Beryl Ennis for Plaintiff
Mr. D.A. Scharschmidt for defendant.

31st March, 1981, 2nd, 3rd & 4th June, 1981
12th, 13th, 14th & 15th October, 1981
29th January, 1982

PATTERSON J.

Frankfield is a small town nestled in the hills of Clarendon on the banks of the Rio Minho. It has a number of business premises, a Railway station, a Fire Brigade station, amongst other buildings. As the year 1975 drew near to its close, Frankfield lost one of its business places to a fire. On the 27th December, a building which housed a hardware store and classrooms for the JAMAL foundation was gutted by fire of unknown origin and all its contents were destroyed. The town's Fire Brigade was unable to save the building, probably because it was hampered by the lack of water at some stage of its operations. The town is supplied with water from a public supply scheme under and by virtue of the Parishes Water Supply Act, but on this night, the water had been locked off with the result that the flow to fire hydrants in the town was disrupted, although it appears that the domestic supply to some areas at least, was not so disrupted. It was the plaintiff's business place that was gutted and he has brought this action against the defendant to recover damages for his loss. He claims that the destruction of his business place by the fire was caused by the negligence or breach of statutory duty of the defendant, its servants or agents. The particulars of negligence set out in the pleadings are:-

1. "Failing to provide a constant flow of water in the water main and hydrant.

2. Failing to provide any or any sufficient water in the water

main and hydrant.

3. Failing to provide a proper water supply by which water would be available to the Fire Brigade at all times.

4. Locking off the water so that it was unable to flow into the water main and hydrant at the material time.

5. Failing to be available to turn on the water so that it could flow into the water main and hydrant on the occurrence of the fire.

6. Failing to respond promptly to the request by the Fire Brigade to provide water in the water main and hydrant.

7. Failing to provide an efficient system for releasing water into the water main and hydrant.

8. Further or in the alternative the destruction of the plaintiff's business place by fire was caused by a breach of statutory duty by the defendant in that the defendant by its servant or agents failed to provide water in the water main and hydrant contrary to sections 5 and 20 of the Parishes Water Supply Act."

The vicissitudes which befell the plaintiff during the festive season were vividly related by the plaintiff himself in his testimony. At about 10:30 p.m. on the 27th December, 1975, while he was in a club on premises where his hardware store was also situated, it was brought to his attention that smoke was coming from a window in the first floor of the store building. The ground floor of that building housed the hardware store and the first floor was used as classrooms by the JAMAL foundation. A fireman who was also a patron of the club summoned the Fire Brigade, which arrived within a few minutes of the discovery of the fire. The firemen set about their task with alacrity and despatch. Some of them went to the fire hydrants on the street and connected hoses whilst others pumped water from the fire unit into the upstairs of the building where the fire was confined. They almost succeeded in putting it out. However, the water from the fire unit ran out and although the hydrants' valves were activated, there was no water. The fire unit then went to the river which runs at the back of the premises where it was refilled. Misfortune betook it; it stuck in the sand and it was not until some 45 minutes after leaving for the river that it was towed out and

the men were able to resume their activities. By then, the fire had regained its strength and was now out of control. The roof and floor of the first floor of his building had caved in and the hardware store on the ground floor was now on fire. The firemen again connected a hose to a hydrant and this time there was water. One Ivan Brown who was employed by the defendant to lock off the water at 9 p.m. each night and to turn it on again at 5 a.m. had been summoned and he turned on the water at about midnight. However, it was too late; the building was razed to the ground despite the efforts of the firemen. The agreed damage to the building was placed at $20,000, and the damage to the stock amounted to thousands of dollars. The plaintiff contended that but for the lack of water in the fire hydrants, the building would have been saved; his stock would not have been destroyed and the damage to the building would not have exceeded $1,000.00.

He says that he paid water rates to the Clarendon Parish Council, the defendant, in respect of three premises in Frankfield, including the hardware store. He paid on a flat rate basis, and paid when he received a statement by post telling him how much to pay. The rates for 1975/were paid on a quarterly basis; but not in advance. For 1975 he paid $101.00 water rates for the premises that was destroyed. On the night of the fire, the domestic water supply to the hardware store and the club and indeed, to his home, had not been disrupted, but there was no water in the hydrants on the street at the crucial time.

The facts in this action are not disputed in so far as the material particulars are concerned. The plaintiff called two witnesses in support of his case. Ivan Brown told the Court that he was employed by the defendant to lock off the water supply between 9 p.m. and 5 a.m. every night, and that on this night of the 27th December, 1975 he had done so at 9 pm. Later in the night he heard something and as a result he turned on the water at about midnight. The other witness, Vernal Sampson, who was the Fire Brigade sub-officer in charge of the operations that night, told the court that on his arrival on the scene, the fire was confined to the upper floor of the building. He gave details of his fruitless efforts to get water from the hydrants, of his misfortunes at the river and of the ultimate destruction of the building.

Frankfield is supplied by water from a public water supply which is provided by the Clarendon Parish Council, the defendant, under the provisions of the Parishes Water Supply Act. The source of the water, in 1975, was a spring known as "Katta" situated high in the hills overlooking Frankfield. The spring is harnessed and the water is led off by a 4" water main to a reservoir which is some three miles further down the hill and on the outskirts of Frankfield. A 4" water main leads the water from the reservoir into the town. A 4" cast iron valve is attached to the main leading from the reservoir, to lock off the water flow to the town. It appears that some of the buildings in the town which are on the same elevation or higher than the reservoir are supplied by service pipes which run off the main between the spring and the reservoir, while the other buildings would be served by service pipes running off the 4" main from the reservoir. Fire hydrants are connected to the 4" main and a 4" cast iron valve, similar to that mentioned before, is fitted to each hydrant to control the flow of water to it. These hydrants are strategically placed in the town along the public highway, and they can be turned on and off by means of a hydrant key which fits into a section of the valve, or even by a wrench if the valve is not protected by a box.

The Parishes Water Supply Act (hereinafter called "the Act") prescribes (section 16) the bases on which water rate are payable within a defined district and states who is liable to pay such water rate. In a general way, the section provides for the payment of water rate by certain persons within a district provided with a public water supply. Section 20 of the Act prescribes a rate payer's right to obtain water within the district.

The plaintiff contended that his premises is within the defined district of Frankfield and that he was liable to pay and did pay water rates. As a rate-payer, he was entitled to water. The gravemen of his case is that the defendant having provided a public water system in Frankfield, and he being a person entitled to water from that supply, he was denied his entitlement to that water at a crucial time because of the negligence of the defendant. He contended that the defendant was under a statutory duty to supply him with an unlimited quantity of water

and that is so whether it flows into his premises or it otherwise constitutes a part of the public supply provided by the defendant under the provisions of the Act. This duty he contended flows from the provisions of section 5 & section 20 of the Act.

The defendant contended that section 5 and section 20 of the Act do not cast any duty on it. Counsel argued that the Act is an enabling statute establishing a scheme for water supply in a defined area and section 5 and section 20 simply prescribe parts of the machinery of establishing such a scheme. He asked the court to draw a distinction between the initial supply of water to a resident and the continuous supply of water to that resident. Section 20 is concerned with the initial supply of water to the resident and before he is entitled to a supply, he must have paid for it; there must be payment before supply. If section 20 means that the resident is entitled to a continuous supply, payment for the same must nevertheless precede the supply. If the section creates a duty, then the duty must be in relation to water for which the plaintiff has paid, and it is for the plaintiff to satisfy the court that he has complied with the conditions. Further, such duty could only be in relation to a supply of water for domestic purposes, and on the evidence, the domestic water supply was not disrupted at anytime.

The provisions of the Parishes Water Supply Act must be examined to ascertain whether or not it creates the duty contended for by the plaintiff. Section 5 and section 20 read as follows:-

Section 5 "In each case in which the Parish Council of any parish has been or shall hereafter be authorized to construct any water works under this Part it shall be lawful for the Minister to define the limits of the district (which may if the Minister thinks fit comprise the whole parish) for which such water supply is or shall be provided, and from time to time, as he shall think fit, to enlarge, lessen or alter, such limits, as also the limits of any district already defined by the Minister."

Section 20 "Every person resident within a district who shall pay the water rates for such district in manner aforesaid, and produce when required his receipt therefor, shall be entitled to be supplied with water from the public water supply of such district, subject only to the rules and regulations for the time being affecting the same made and approved under this Part, and to any limit which shall thereby be prescribed."

An "enabling Act" may be described as a statute which makes it lawful to do something which would not otherwise be lawful. Such statutes are usually expressed in permissive language, for example, the words "it shall be lawful" or the provision that something "may be done," are employed. In such a case those words import a discretion, unless there is something in the subject matter to which they are applied or in any other part of the statute to shew that they are meant to be imperative. In Julius v. Bishop of Oxford ((1880) 5 App. Cas. 214 page 222), Lord Cairns said:-

> "The words 'it shall be lawful' are words making that legal and possible which there would otherwise be no right or authority to do. They confer a faculty or power, and they do not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so. These words being, according to their natural meaning, permissive or enabling words only, it lies upon those who contend that an obligation exists to exercise this power to shew in the circumstances of the case something which, according to the principles I have mentioned, creates this obligation."

The Act in my view, empowers the Parish Councils in the various parishes to which the Act extends, to construct water works and provide an adequate water supply within defined districts. Section 5 of the Act does nothing more than to empower the Minister responsible for domestic water supplies to define the limits of districts to be provided with water from a particular water works. The Act prescribes the way in which districts are defined for the provision of water. If a Parish Council obtains authority to construct water works then the costs of such construction may be advanced by Central Government through the Accountant General, such advance to be repaid primarily by rates leviable within the district for which such water supply is provided. Section 16 of the Act gives the Parish Council, inter alia, the power to fix water rates for the purposes of the repayment of such an advance, and states how these rates are to be fixed, and how and by whom they are payable. Section 20 of the Act states when a person shall be entitled to be supplied with water from the public water supply within a district. A person resident within a district who pays the water rates which have been fixed for that district, and thereafter, produces when required, the

receipt for such sum that he has paid, then and only then does he become entitled to be supplied with water from the public water supply of such district. But such entitlement is not absolute; it is subject to rules and regulations made affecting the same. It seems to me that this section makes a general and not a particular statement of a person's entitlement to water. It does not create a duty on the parish council to supply a rate-payer at all times with water. I am fortified in this view by the provisions of section 32 of the Act which empowers Parish Councils to make by-laws for the management of public water supplies. Included in those powers are provisions for the Parish Councils to make by-laws:-

(d) for regulating the sale and delivery and supply and use of water in the parish, and

(e) for prescribing the amount manner and limit of the supply of water to any rate payer or class of rate payers in the parish, and

(f) for defining and regulating the powers, rights, duties and conduct of all persons employed, in about or in connection with the water works or water ways situated within the parish and of all persons seeking a supply of water from any such water work or water way, and

(g) for the cutting off and stoppage of supply of water to premises - (i) if the water rate in respect of such premises is in arrear and unpaid, or

(ii) if there has been waste of water supplied to such premises whether such waste was occasioned by an act or default of the person paying the water rates or not.

By-laws governing the Frankfield water works were made and published in the Jamaica Gazette on the 15th November, 1951. It is these regulations that give a person resident within the Frankfield water works district a specific right to obtain water from the public water supply. It prescribes the manner in which application for a service pipe to premises within the district is to be made, and establishes the rates payable for the supply of water to the premises. It empowers the Superintendent of Parochial Roads and Works (who has, subject to instructions from the Parish Council, immediate charge of all water works

within the parish), to cut off the water supply from private premises for non-payment of water rates in arrears, and prohibits persons supplied with water from giving it away except in case of fire. It shows clearly that section 20 of the Act was not intended to create any duty on the defendant. The word "entitled" used in the section should not be given a strained meaning; it does no more than give a person a claim to apply for a service pipe as defined by the Act; it does not create the right contended for by the plaintiff.

Reading the Act as a whole, I have formed the view that it is an enabling act conferring certain discretionary powers on the parish Councils to provide a water supply system within the parishes, and I hold that section 5 and 20 do not create the statutory duty contended for by the plaintiff.

Counsel for the plaintiff further contendéd that even if the Act does not create a duty, "but merely gives a power to the Parish Council to embark upon a scheme for the supply of water in the parish, once that Parish Council embarks upon a positive exercise of that power, it is liable (in damages) if it performs that exercise in a negligent way. The performance in a negligent way does not depend upon any duty contained in any statute, and that all the plaintiff needs to show is a positive embarkation on the exercise of the power conferred upon it." He argued that the statute has given power to the Parish Council to provide the service, but this does not mean that it may not also be a duty. "Duty," he says, includes "power." The defendant owed a duty to the plaintiff, the rate-payer, to ensure that water which that Parish Council had provided under the power given by the Act would be made available to the Fire Brigade so that it could have continued its task of extinguishing the fire which had been brought under control by the use of the water from the fire unit. If water was readily available in the hydrant, no more than $1,000 in damages would have been done to the building. The question of non-feasance did not arise as the defendant embarked on a positive act by providing all facilities and water itself. Any negligence in the exercise of their control would give rise to liability. He invites the court to make a clear distinction "between the situation where a local authority is empowered to perform a function and that authority (a) does not perform the function at all, (b) performs the function but does so negligently. If (a) is applicable, the authority may

not be liable for the non-feasance but if "(b)" applies, then the authority is liable."

If I understand this argument correctly, the plaintiff is expressing what seems to be trite law, namely, if a body does exercise its statutory powers to do certain acts, it owes a duty to any person whose property may be affected by those acts, to exercise reasonable care, and it will be liable in damages to any such person who suffers by its breach of that duty. This principle of law was perhaps aptly stated by Lord Parker of Waddington when in Great Central Railway Co. v. Hewlett (1916) 2 A.C. 511, at 519 he said:-

> "It is undoubtedly a well-settled principle of law that when statutory powers are conferred they must be exercised with reasonable care, so that if those who exercise them could by reasonable precaution have prevented an injury which has been occasioned, and was likely to be occasioned, by their exercise, damage for negligence may be recovered."

I respectfully express my agreement with those views on the law. It cannot be disputed that if the defendant in the performance of its permissive statutory powers, inflicts injuries on the plaintiff through lack of care or skill, it would be liable in damages for such injuries. For instance, if the defendant had allowed water to escape from its water works unto the premises of the plaintiff, thereby causing damage to crops or building, it seems to me that the plaintiff could recover in damages, under the principle of Rylands v. Fletchers. Again if the defendant negligently laid down its water mains and as a result the mains were to burst and cause damage to property or person the defendant would be liable. The standard of care is what is reasonable in the prevailing circumstances to prevent escapes caused by forseeable eventualities and the liability for escapes depends on negligence in the last mentioned example, and not on the breach of any statutory duty or statutory power.

In East Suffolk Rivers Catchment Board v. Kent and Another (1941) A.C. 74 the House of Lords had to consider whether the appellants, a statutory body, owed the respondents a duty, and if so, the nature of that duty. The respondents were the owners of pastureland protected by a wall from inundation by a tidal river. At a time when the heights of a spring flood was increased by a northerly gale, the wall partly collapsed,

leaving a breach 20 feet to 30 feet wide. As a result, the respondents' pasture land was flooded. The appellants in the exercise of their statutory powers undertook the repair of the wall, but carried out the work so inefficiently that the flooding continued for 178 days, thereby causing serious damage to the respondents pasture land. If the appellants had exercised reasonable skill, the breach in the wall might have been repaired in 1½ days. Viscount Simon L.C., in delivering his judgment, had this to say:-

> "The problem of law which now arises for solution is by no means an easy one. Its essential elements are these. (1) The appellant Board were under no statutory duty to repair the breach, but they had the power to enter upon the land for the purpose of endeavouring to effect such repair and they did so enter. (2) it was the original breach in the wall, caused by the act of nature, which produced the flooding of the respondents' land and it was the operations of the tide which kept it flooded; the efforts of the appellants were directed to abating this damage. The appellants' want of skill did not cause such damage at all. (3) If the appellants had not shown such want of skill in trying to repair the wall, and if they had been served by an adequate well-trained staff, the gap in the wall would have been closed much sooner than it was and the flooding would have been more promptly abated.
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> The question is whether, in the above circumstances, the appellants are liable to the respondents in damages to such amount as would represent the net loss to the respondents due to the delay in abating the flood..... It is not, of course, disputed that if the appellants, in the course of exercising their statutory powers, had inflicted fresh injury on the respondents through lack of care or skill, they would be liable in damages for the consequences of their negligent act. If, for example, the appellants, by their unskilful proceedings had caused a further area of the respondents' land to be flooded, or had prolonged the period of flooding beyond what it would have been if they had never interfered, they would be liable. But (apart from two minor matters, which it is agreed do not govern the main issue) nothing of this sort happened. The respondents would have gained if the flooding had been stopped sooner; their complaint against the appellants is that they did not act with sufficient skill to stop it more promptly; but the respondents cannot point to any injury inflicted upon them by the appellant Board, unless it be the Board's want of success in endeavouring to stop the flooding at an earlier date.
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> In order that the respondents should succeed in this action, it is necessary that they should establish, not only that the appellants were wanting in care and skill when exercising their statutory powers, but that they inflicted injury and loss upon the respondents by their negligence..... In the present case the damage done by the flooding was not due to the exercise of the appellants' statutory powers at all. It was due to the forces of nature which the appellants, albeit unskilfully, were endeavouring to counteract.....These considerations lead to the conclusion that the respondents' claim is ill-founded. They have suffered damage by the flooding of their land during four months or more. They seek to recover compensation from the appellants for all of this loss except the first fortnight. But the appellants did not cause the loss; it was caused by the operations of nature which the appellants were endeavouring, not very successfully, to counteract. It is

> admitted that the respondents would have no claim if the appellants had never intervened at all. In my opinion, the respondents equally have no claim when the appellants do intervene, save in respect of such damage as flows from their intervention and as might have been avoided if their intervention had been more skilfully conducted."

This case clearly settles the point that where a statutory authority is entrusted with amere power it cannot be made liable for any damage sustained by a member of the public by reason of a failure to exercise the power. If in the exercise of its discretion the authority embarks upon an execution of the power, the only duty owed to any member of the public is not thereby to add to the damages which that person would have suffered had the authority done nothing. So long as the authority exercises its discretion honestly, it can determine the method by which, and the time during which, the power shall be exercised; and it cannot be made liable, except to the extent just mentioned, for any damage that would have been avoided if it had exercised its discretion in a more reasonable way.

The plaintiff's action is founded on a breach of statutory duty and/or common law negligence. The plaintiff therefore, in order to succeed, must show inter alia, that the damage complained of is the result of the breach of duty imposed either by statute or the common law. His claim is based on the defendant's omission or neglect to provide water at a crucial moment; he says that as a result of its failure to provide water in the hydrants (whether it be by virtue of a statutory duty or a power coupled with a duty, or by virtue of the common law,) his premises was totally destroyed, the damages running into many thousands of dollars, whereas if either water was in the hydrants or reasonable care had been exercised to make water available in the hydrants, the damage to the premises would not have amounted to more than one thousand dollars.

It has been said and rightly so in my opinion, that "As a general rule, a mere omission to act when there is no duty to act gives rise to no cause of action even when damages is caused. An omission in the course of performing a duty to take care is indistinguishable in its legal effect from an act."
(See Charlesworth on Negligence (4th edition) at paragraph 51) I have already expressed the view that the defendant was not under a statutory duty to supply water in unlimited quantity at any given time, to the

plaintiff. As to his common law claim in negligence, one of the necessary factors is to show the particular duty owed by the defendant to the plaintiff. Lord Wright expressed it succintly when in Lochgalley Iron & Coal Co. Ltd. v McMullan (1934) A.C. 1 at p. 25) he had this to say:-

> "In strict legal analysis, negligence means more than heedless or careless conduct, whether in omission or commission. In properly connotes the complex concept of duty, breach, and damage thereby suffered by the person to whom the duty was owing."

One must not lose sight of the distinction between acts that create injury or a positive risk of injury and a failure to act or to efficiently act to prevent a threatened or obvious harm. Where a person who is not under a duty to act does nothing but fail to act, he cannot incur liability. Even if he undertakes a task which he is not obliged to perform, he owes no duty to take care in its performance as long as he does not thereby add to the damage which would have been caused had he done nothing. The duty of care required of all men is not to injure the property or person of another. I share the view that "A person owes a duty to take care when he should foresee as a reasonable man that his acts and conduct are likely to cause physical damage to the person or property of another or others in the ordinary course of things, or in the circumstances actually known by him to exist at the time. If he can foresee consequences not intended by him which, though possible are not probable, such consequences are regarded as too remote and he is under no duty to take care in respect of them. An omission to act, otherwise than in the performance of a duty to take care, is not a breach of duty to take care, even though it can reasonably be foreseen that such omission is likely to cause physical damage to person or property..... It is a question of law whether a duty to take care arises in any given case." (See Charlesworth on Negligence (4th Edition) paragraph 52).

It is interesting to note that similar principles to those mentioned above and those enunciated in the East Suffolk case obtain in other jurisdictions. The appellate division of the Supreme Court of Ontario seems to have decided the case of Vanvalkenburg v. Northern Navigation Co. (1913 30 O.L.R. 142; 19 D.L.R. 649) on similar principles. Charles Vanvalkenburg was a seaman employed on the defendant's steamer "Hamonic.". While off duty he and the rest of his watch were amusing themselves running around the docks, and he slipped and fell backwards intothe

sea. One of his companions immediately pressed the electric bell button which was the signal for "man overboard." After waiting a minute or two, his companion again signalled but the ship continued on its way. Vanvalkenburgh at this time could still be seen swimming. Not until after an oral report was made to the captain some five minutes later was the ship turned around, and Vanvalkenburgh was then one to two miles astern. He was not rescued. The parents of Vanvalkenburgh brought action for damages resulting from the death of their son. At the trial, the plaintiffs were non-suited and they appealed. Mallock C.J. Ex. in delivering the judgment of the court said this:-

> "The evidence shows that the deceased was not on duty at the time of the accident, and had recklessly put himself in a position of great peril, and that his own want of care caused the accident. Thus, the defendant company are not responsible for his having fallen into the water. The question then arises whether the defendants were guilty of any actionable negligence in not using all reasonable means in order to rescue the drowning man.....
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> It is further argued that the vessel was unseaworthy, in that the electric bell system was out of order, thereby causing a fatal loss of time in attempting the rescue.
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> The evidence, I think, warrants the findings that the bells were out of order, and that in this respect the vessel was unseaworthy, contrary to the provisions of section 342 of the Canada Shipping Act. The evidence also shows that the seamen were never instructed in regard to the use of life-buoys, and it may be inferred from Jay Dale's failure to throw the life-buoy overboard at once that he was an incompetent and inefficient seaman, and that such inefficiency also constituted unseaworthiness.....
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> There was evidence, further, upon which the jury might have found that, if Dale had promptly thrown the life-buoy to the deceased on his falling into the water, and if the vessel had reversed immediately on Dale touching the electric button, the deceased could, in all reasonable probability, have been saved, and, if the defendants owed to the deceased the legal duty of using all reasonable means to rescue him, then they were guilty of negligence in not having done so; but,....., I am unable to see wherein they owed such legal duty to the deceased. He fell overboard solely because of his own negligence. His voluntary act in thus putting himself in a position of danger, from the fatal consequences of which, unfortunately, there was no escape except through the defendants' intervention, could not create a legal obligation on the defendants' part to stop the ship or adopt any other means to save the deceased."

The Court of Appeal of New York had to consider a similar situation to that in the instant case. In 1928 the case of H.R. Mock Co. v. Rensselaer Water Co. (1928 159 NE. 896) came before that court. The defendant, a water works company under the laws of New York state, made a contract with the city of Rensselaer for the supply of water during a term of years. Water was to be furnished, inter alia, for service at fire hydrants at the rate of $42.50 a year for each hydrant. Water

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was to be furnished to private takers within the city at their homes and factories and other industries at reasonable rates, not exceeding a stated schedule; while this contract was in force, a building caught fire. The flames, spreading to the plaintiff's warehouse nearby, destroyed it and its contents. The defendant, according to the plaintiff was promptly notified of the fire, but omitted and neglected after such notice, to supply or furnish sufficient or adequate quantity of water, with adequate pressure to stay, suppress, or extinguish the fire before it reached the warehouse of the plaintiff, although the pressure and supply which the defendant was equipped to supply and furnish, and had agreed by said contract to supply and furnish, was adequate and sufficient to prevent the spread of the fire to and the destruction of the plaintiff's warehouse and its contents." By reason of the failure of the defendant "to fulfill the provision of the contract between it and the city of Rensselaer", the plaintiff is said to have suffered damage, for which judgment is demanded. In delivering the judgment of the court, Cardoza C.J., had this to say:-

> "We think the action is not maintainable as one for a common-law tort. It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all.....The plaintiff would bring its case within the orbit of that principle. The hand once set to a task may not always be withdrawn with impunity though liability would fail if it had never been applied at all. A time-honoured formula often phrases the distinction as one between misfeasance and nonfeasance. Incomplete the formula is, and so at times misleading: Given a relation involving in its existence a duty of care irrespective of a contract, a tort may result, as well from acts of omission as of commission in the fulfilment of the duty thus recognized by law.....What we need to know is not so much the conduct to be avoided when the relation and its attendant duty are established as existing. What we need to know is the conduct that engenders the relation. It is here that the formula, however incomplete, has its value and significance.
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> If conduct has gone forward to such a stage that inaction would commonly result, not negatively merely in witholding a benefit, but positively or actively in working an injury, there exists a relation out of which arises a duty to go forward. Bohlen, Studies in the Law of Torts, p. 87. So the surgeon who operates without pay is liable, though his negligence is the omission to sterilize his instruments..... the engineer, though his fault is in failure to shut off steam.....the maker of automobiles, at the suit of some one other than the buyer, though his negligence is merely in inadequate inspection.....The query always is whether a putative wrongdoer has advanced to such a point as to have launched a force or instrument of harm, or has stopped where inaction is at most a refusal to become an instrument for good.....

> The plaintiff would have us hold that the defendant, when once it entered upon the performance of its contract with the city, was brought into such a relation with every one who might potentially be benefited through the supply of water at the hydrants as to give to negligent performance, without reasonable notice of a refusal to continue, the quality of a tort,..... We are satisfied that liability would be unduly and indeed indefinitely extended by this enlargement of the zone of duty. The dealer in coal who is to supply fuel for a shop must then answer to the customers if fuel is lacking. The manufacturer of goods, who enters upon the performance of his contract, must answer, in that view, not only to the buyer, but to those who to his knowledge are looking to the buyer for their own sources of supply. Everyone making a promise having the quality of a contract will be under a duty to the promisee by virtue of that promise, but under another duty, apart from contract, to an indefinite number of potential beneficiaries when performance has begun. The assumption of one relation would mean the unvoluntary assumption of a series of new relations, inescapable hooked together. Again we may say in the words of the Supreme Court of the United States, "The law does not spread its protection so far." The judgment should be affirmed, with costs"

In the instant case, there is evidence to support a finding of fact that on this ill-fated night, the defendant had cut off the flow of water to the fire hydrants at 9 pm. and that when a fire commenced on the plaintiff's promises at about 1.30 pm. there was no water in the fire hydrants. The Fire Brigade acted efficiently and with despatch, and no blame can be attached to them for failing to control or extinguish the fire, once they started to act. On a balance of probabilities, it can be inferred that they would have been successful in putting out the fire when only slight damage had been done to the building, if they were not hampered by the lack of water in the fire hydrants. Their action in seeking an alternate source of water from the nearby river was commendable; the fact that the unit got stuck in the effort is unfortunate. It was their duty to identify all available water sources that may be used in fighting a fire. So there was no real reliance on any one source, be it fire hydrants or what is described as "open sources." I find that the members of the Fire Brigade were aware of the fact that the supply of water to the hydrants was curtailed between the hours of 9 pm. and 5 am. each night, and that the siren on the unit was sounded with the hope that the person responsible (Mr. Brown) would turn on the water to the hydrants. The open source was quite accessable and within easy reach and it was preferred to use that source instead of awaiting the turning on of the water supply to the hydrants.

There is no evidence before the court to say what caused the fire on the plaintiff's premises; whether it was the work of arsonists, or through the negligence of the plaintiff or his tenants, the JAMAL foundation, or some other reason, it is not know. It was never suggested that the lack of water caused the building to commence burning. What the plaintiff is saying is that however the fire started, the defendant is under a duty to supply him with water from its hydrants to put out that fire, and that that duty arises either from the specific provisions of the Parishes Water Supply Act or at common-law. The defendant has failed to perform the duty of supplying the water and as a result, more damage was done to his premises than would have been done had he been supplied the water / and consequently the defendant must pay. I find myself quite unable to agree with this contention. It is entirely novel. The defendant is not an insurer so as to be liable / to pay for the damage done by fire to the plaintiff's building. The defendant, acting under discretionary statutory powers, supplies water to the Frankfield area, and the plaintiff is a person on whom a benefit is bestowed as a result of the exercise of the statutory powers. The only duty that the defendant owes to the plaintiff, whether it be in the exercise of its statutory powers or at common law, is the common duty of care; to see that by its acts or omission in its operations, it does not cause injury to the property or person of another through negligence.

In my judgment, the defendant was under no obligation, either as a result of any statute or at common law, to provide a constant flow of water in the water main and hydrant or any sufficient flow therein. The Parishes Water Supply Act does not place a duty on the defendant "to provide a proper water supply by which water would be available to the Fire Brigade at all times," nor have I been pointed to any statutory or common law obligation on the defendant so to do. Having provided a public water system for the town of Frankfield and its outlying districts, the defendant is not bound to keep water in its mains and hydrants at all times. Indeed, the evidence is that the locking off of water at nights was necessary in order to build up the quantity of water in the reservoir by night to meet the demands by day. The source was proving inadequate to

meet the demands. This course of action is not unusual throughout the length and breadth of Jamaica, and public policy demands it. The defendant is not to be made liable for failing to provide water in the mains or hydrants at any given time. Sections 5 and/or 20 of the Parishes Water Supply Act do not cast any duty on the defendant so as to make it liable for failing to provide water in the mains or hydrants at all times or at any given time. The defendant is not to be made liable because in the exercise of its powers it did not have water flowing in the hydrant or main, or because it discontinued the flow during the nights although a fire occurred during that time. The lack of water in the hydrants did not cause the fire. The fire was raging before it was discovered that no water was in the hydrants. The Fire Brigade do not depend on hydrants alone for water. In the exercise of their discretion, they turned to the river for water when it was discovered that no water was in the hydrants. Mr. Brown told of the steps he took to turn on the water into the mains just as soon as he was notified, and there is no evidence to suggest that he was negligent in turning on the water, or that he did not respond promptly. Water was returned to the hydrants before the Fire Brigade returned from the river, but how soon before cannot be ascertained. The defendant did not act negligently in turning on the water, nor is there any evidence to suggest that it failed to provide an efficient system for releasing water into the water main and hydrants. The evidence is that the water is locked off by means of a valve affixed to the main near to the reservoir. That valve can be opened and closed by a special tool made for the purpose or by any ordinary wrench, if the valve is not protected by a valve box. It does not appear that Mr. Brown had any difficulty in opening the valve and thus turning on the water. I can find nothing wrong with the system for releasing water into the mains. I accept that if water was in the hydrants at the first time when they were turned on, the damage to the building would not have amounted to more than about $1,000.00, but for the reasons stated above, I hold that the defendant is not liable for any damage caused to the building or to its contents by the fire.

The plaintiff further argued that he is entitled to rely on the provisions of section 6 of the Parochial Fire Brigade Act in support

of his claim. He contended that the Parish Council is under a clear duty to provide a Fire Brigade with all that is necessary to extinguish a fire whenever it occurs. He realises the fact that his pleadings did not allege that the defendants breach of duty arose under the provisions of the Parochial Fire Brigade Act but he said that the object of pleading a statute is "to alert the opponent as to the case he has to meet in relation to that statute. So if the plaintiff pleads a statute and seeks to rely on it, the defendant is entitled to point the court to the fact that the statute does not avail the plaintiff, but instead it avails the defendant, and by parity of reasoning, the converse applies. One of the effects that a defence may have is to strengthen the plaintiff's case, and in the instant case even though the plaintiff did not plead the Parochial Fire Brigade Act the defendant having pleaded and relied upon it, has left it open to the plaintiff to make such use of the provisions of the Act as can enure to the plaintiff's benefit." On the other hand, the defendant argued that the plaintiff did not plead the Parochial Fire Brigade Act and any statute on which the plaintiff is relying and such particulars of the statute as are necessary to formulate the duty or duties contended for, must be pleaded.

Section 6 of the Parochial Fire Brigade Act reads as follows:-

> "When under the provisions hereinbefore contained this Act shall be in force in any town or district, the duty of extinguishing fires, and of protecting life and property in cases of fire within such towns or district, shall be entrusted to a Fire Brigade, to be constituted and maintained by the Parish Council of the parish within which such town or district is situated, and to be subject to the orders of such Council; and, for the proper performance of this duty, the Council shall provide, for the use of the Fire Brigade, as many fire engines, accountrements, tools implements, and appurtenances as they may consider necessary, and shall cause the same always to be kept by the Fire Brigade in proper repair and serviceable order.

The defendant pleaded, inter alia:-

> "14. The Defendant will rely on the provisions of the Parishes Water Supply Act and the Parochial Brigade Act as Amended."

I agree that the function of pleadings is to give fair notice of the case which has to be met and to define the issues on which the court will have to adjudicate in order to determine the matters in dispute between the parties. But a party is bound by his pleadings and his case is confined to the issues raised on the pleadings unless and

until they are amended. If the plaintiff, after seeing the defence, thought it prudent to rely on the provisions of the Parochial Fire Brigade Act, then he was at liberty to apply to amend his pleadings to embrace such a claim. He did nothing of the sort. I hold that he cannot pray in aid any duty that the statute may place either on the Parish Council or the Fire Brigade to establish a claim either under that Act or at common law. The plaintiff did not at any time contend that the Fire Brigade was negligent in the way in which they went about fighting the fire or that the Parish Council was negligent in the manner that it constituted and maintained the Fire Brigade, and consequently no such evidence was adduced.

Having regard to the foregoing considerations, I have formed the view that the plaintiff's claim must fail. Accordingly, there will be judgment for the defendant with costs to be agreed or taxed.