IN THE MAGISTRATE'S COURT
OF THE REPUBLIC OF VANUATU Civil Case No. 14 of 2003
(Civil Jurisdiction)

BETWEEN:	**JOHN ENOCK REISEN TASSO, JOHN STANLEY AND THEIR FAMILY MEMBERS**
	(Plaintiff)
AND:	**JEAN JACQUES PERRONETTE** 1st Defendant
AND:	**GEORGE BYE** Second Defendant

A Magistrate Court Claim was filed on 28 August, 2003.The Plaintiffs pray the court order defendants pay damages the sum of VT956,975, VT25,000 costs and 12% per annum on the amount claimed.

Brief Facts

In the year 2000 a massive earthquake shook Port Vila. Extensive damages were caused. On Clems Hill area excavations were carried out by the defendants having been sub-contracted by the Vanuatu Government through the Ministry of Public Works. It was claimed by the Plaintiffs that during excavations stones, ground and mud rolled over the hill damaging their crops as itemized in their claim. For this reason, the plaintiffs are now coming to this court praying defendants be ordered to pay damages to their crops.

Issue

The issue here is whether the defendants are negligent. If the answer to this question is 'yes' then the next question to ask is how much money should they pay? If the answer is no then the claim fails.

Evidence

The first witness for the Plaintiff is **John Enock**. At paragraphs 3 and 4 of his sworn statement he said that when he went to visit his garden 2 days after the work had started. He saw rocks and soil being pushed over the hill and onto his gardens. Some of the stones and soil fell into the creek. He said that many food crops such as taro, pawpaw, banana were completely destroyed. He said that the photographs displayed were those taken 8 months after. He claimed VT370,000 for the damages. During cross-examination the witness confirmed that the handwritten list of the damaged crops attached to his sworn statement is the correct one and not the list that was attached to the letter addressed to the Minister of Public Utilities dated 14 January, 2002.

The second witness for the Plaintiff is **Reisen Tasso**. At paragraph 3 of his statement he said after he had heard from **John Enock** he also went to visit his gardens. He said that he saw stones, ground and dirts being thrown down the hill and over the gardens destroying bananas and other crops. At paragraph 4 he said that at that time he saw many stones in their gardens washed down by the rain. He claimed VT159,950 for the damages. During cross-examination he also confirmed that the handwritten list of his damaged root crops attached to his sworn statement is the correct one.

The third witness for the Plaintiff is Emile Enock who also said that he went to visit his gardens after what he heard from **John Enock**. At paragraph 1 of his sworn statement he said that he was the one who told the driver to stop throwing rocks and ground over the hills. He said that he then went to see his big brother John Enock who then went to see the Police. At paragraphs 3 and 4 he said that the police did attend to Chief Albea David at Melemaat Village and thereafter the excavators loaded the rocks and ground onto lorries and damp it elsewhere. In cross-examination he also confirmed that his handwritten list of his damaged root crops attached to his sworn statement is the correct one.

The first witness for the defendants is **Jean Jacques Pierronette**. He said at paragraphs 6, 7 and 8 that on the outset it was Mr. Leon Lalie who told him to push the debris over the hill. He said that at all times there was supervision of a PWD employee on site. He said that between the date of commencing the works on 19 January, 2002, he followed the instructions from the Public Works Department and simply pushed the debris over the side off the road down a vegetated slope. He said that at no time did he

observe any debris falling on any market gardens during those times he attended. There were no cross- examination questions from the other parties.

The second witness for the defendants is **George Baros**. He said that he was the one who dug the debris from the road. At paragraph 3 and 5 of his sworn statement he said that he never remembered pushing the debris over the hill into the market gardens. He said that what he could remember was that he pushed the debris to the bottom of the hill. He also confirmed during cross-examination that he was instructed by the chief of Melemaat and PWD supervisor to push the debris over the hill.

The third witness for the for the defendants is Chief **Alec David** of Melemaat. At paragraphs 4 and 5 of his sworn statement he said that he was the one who authorized the Mr. Lalie at the time of their meeting to push the debris over the edge and down the embankment. He also confirmed hearing Mr. Lalie instructing the first defendant to disposed off the debris over the edge of the embankment. During cross examination witness confirmed that he was the one giving authorization for the debris to be pushed over the hill.

The fourth witness for the defendants came from the Government side and he is Mr. **Kensi Yosef**. At paragraphs 3 and 4 of his sworn statement he said that before the work started he met with the Senior Shefa Road Foreman Mr. John Poilapa and the chief of Melemaat. He said that it was during this meeting that they inspected the site where the debris was to be dumped. He said that they all consented to the chief's decision to dump the debris over the hill to the site they visited which had no gardens on. During cross examination he again confirmed that he was instructed to push the debris over the hill. In another cross examination question he said that when they walked up the hill with the chief and Mr. **John Poilapa** he saw nothing below the hill by way of market gardens.

The last witness for the defendants and from the government side is **Willie Iau**. He is an Agricultural Officer who at the time of the incident was working in Vila. At paragraphs 5, 6. 7 and 8 of his sworn statement he said that he was asked to evaluate the damage on behalf of the plaintiffs. Upon receiving such notice he went to Chief David Albea who showed him where the debris was deposited at the base of Klems Hill. He said that he could hardly see any gardens in that area. For that reason, he said that he could not produce any report on the damages. During cross examination he confirmed

that during the visit he was escorted only by Chief David Albea alone but without members of the plaintiffs' family.

The law

At the beginning of this discussion 'negligence' was raised as the main issue here. In law, 'negligence' has 2 meanings. First, it may signify the attitude of the mind of a party committing the tort, that is to say mental inadvertence or carelessness. Secondly, 'negligence' can be an independent tort resulting from a breach of a specific duty. For this reason, there are 3 elements to negligence which must be proven for liability to stand. Firstly, is the duty of care, secondly, that that duty of care was breach resulting in the third element which is damages.

The question I must ask myself now is what is meant by a duty of care? Or better still is there a general principle to determine the existence of a duty of care? In the case of **Donoghue-v-Stevenson [1932] AC 562, Lord Atkin** laid down his famous neighbour principle:

" The rule that you are to love your neighbour becomes, in law, you must not injure your neighbour, and the lawyer's question Who is my neighbour? receives a restricted reply.....The answer seems to be- persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omissions which are called in question."

It must be said that the application of the neighbour principle is limited and restrictive. In other words, I am only to be held liable for my carelessness where 2 limiting factors exist that is the harm inflicted must be reasonably foreseeable and must be such that there is close and direct relationship between the plaintiff and the defendant. But what in any given case is 'reasonably foreseeable' and what is 'close and direct' relationship must inevitably be a variable and it has recently been common for the courts to say that it has to be decided upon the bases of what is just and reasonable in the circumstances. (see case of **Governors of the Peabody Donation Fund-v-Sir Lindsey Parkinson & Co Ltd [1985]Ac 210 per Lord Keith).**

The question then, whenever a person suffers injury, is whether this can be said to have been reasonably foreseeable on the part of the person whose act caused the injury.

The question as to proximity or directness can be explained to mean some sort of nearness between the parties and this could be physical in terms of spatial or geographical limitations. This concept is an artificial one and depends more on the court's perception of what is reasonable area for the imposition of liability....(see case of **Alcock-v-Chief Constable of Yorkshire Police [1992] 1 AC 310).** This case must be distinguished from the **Home Office-v-Dorset Yacht Co Ltd [1970] AC 1004** case where the court held that proximity does exist than in the former case. In the Yorkshire case the court held that there is no proximity because the girl who was murdered was the only girl murdered among the many thousands of girls living in Yorkshire. It would be different if the girl or her parents had phoned the police up and informed them that the murderer was threatening the girl. In this case, they did not. In both cases, the court has applied the principle laid in the case of **Governors of the Peabody Donation Fund** case where the court has to decide on the case base on what is just and reasonable in the circumstances.

Apply law to the facts

For the defendants to be liable in negligence plaintiffs must demonstrate that they have gardens on the site in question. They must also demonstrate that the defendants had knowledge of these gardens. At this stage the question which must be asked is what would a reasonable man do if he is aware that the place where is about to dump the debris had gardens on it? If he had known that there were gardens in the area a reasonable man would have foreseen that if he was not careful he could cause damages to the plaintiffs. As to the question of proximity the first, second and third defendants are people who do not live at Melemaat village. At no time in their life or during the time they were excavating did they come to know who the plaintiffs were until they received complaints of the damages from them. There is no evidence adduced indicating that before the excavations the plaintiffs did approached the defendants warning them of their gardens. For this reason, proximity cannot apply because plaintiffs are among the many people out there at Melemaat and the defendants are not been informed. (see case of **Alcock-v-Chief Constable of Yorkshire Police [1992] 1 AC 310).**

The first question I must ask myself is whether a duty of care exist? To establish this the Plaintiff must first show that the loss they suffered was reasonably foreseeable and secondly, that the parties stood in proximity with

each other. According to the evidence from the Plaintiffs they had gardens at the bottom of the hill. Mr. John Enock said that he went after 2 days and discovered that his gardens were all covered with debris thrown over the hill. The other 2 claimants, Reissen Tasso and Emile Enock, also gave evidence that they went to see their gardens after 2 days and saw that they were damaged by debris being thrown over the hill. Their evidence was strongly opposed by the defendants. The first witness, Mr. Jean Jacque Pierronette said that he was instructed by the PWD employee, Mr. Lalie, to push the debris over the hill and at no time did he observe any debris falling over into market gardens. This was confirmed also by Mr. George Baros who said that he never pushed the debris over the hill but could only remember pushing it to the bottom of the hill under instructions from Chief David Albea. Again the third witness, Chief Alec David said that he authorized the defendants to push the debris over the embankment. The fourth witness, Mr. Yosef, said that before the work started he visited the place where the debris was to be dumped and they all agreed to dump it on the side of the hill where there were no gardens. The last witness, Mr. Willie Iau, said that he was asked by the Plaintiffs to assess the damages. He said that when he arrived with Chief Alec David at the place where the debris was dumped he could hardly see any gardens. For this reason, he said that he did not make any report because there were no damages to report on.

Findings

I find as a matter of fact that there were no gardens on the site of the hill where the plaintiffs claimed they had gardens on it. There are 3 reasons why I said this. First is that before excavations a survey was carried out by Mr. Yosef, Operation Manager of Public Works Department, Shefa Senior Road Foreman, Mr. John Poilapa, Mr. Jean Jacques Pierronnet and Chief Albea of Melemaat. Secondly, Mr. Willie Iau, an agricultural technical officer also witnessed that he did not produce any report on the damages because there were no gardens on the place the debris was dumped. Thirdly, both Chief Albea of Melemaat and Jean Jacques Perronnet also confirmed that there were no gardens on the site where debris were dumped. I also find as a matter of fact that the plaintiffs never notified the defendants that they had gardens on the site in question. The court found that the plaintiffs only became aware of the damages as claimed after 2 days. In the absence of this communication by the plaintiff to the defendants it cannot be said that proximity exist between the parties. In other wards, there is no special

relationship existing between the parties to allow the defendants to act with reasonable care not to cause damages to their gardens. The plaintiffs are part of the whole population living at the village of Melemaat and the defendants did not know who they are unless plaintiffs informed them of their concern.

Having said all these I now answer the following questions:

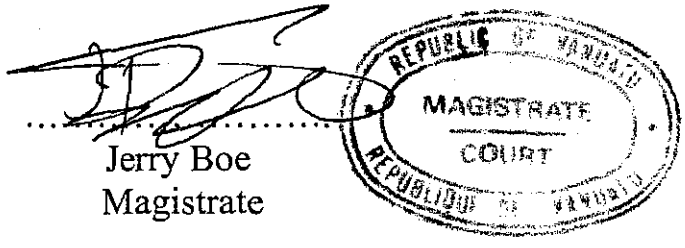
Is there a duty of care on the part of the first and second defendants? The answer to this question must be 'No'. Are the first and second defendants liable? The answer again must be 'No'. It follows then that there can be no breach and damages to discuss.

I therefore find no liabilities against the first and second defendants and dismiss this case at its entirety.

The Claimants to pay the Defendants and the Third Party's costs as taxed or agreed. JB

Dated at Port Vila this 30 day of May, 2005.

BY THE COURT



Jerry Boe
Magistrate