

THE HIGH COURT**1996 922 P****BETWEEN****MICHAEL AMBROSE****PLAINTIFF****AND****PATRICK SHEVLIN****DEFENDANT****JUDGMENT delivered by Ms. Justice Dunne on the 11th day of December, 2009.**

Michael Ambrose lives in a bungalow which is located on the Aghalile Road, Carrickmacross, Co Monaghan. The house is located some distance back from the public road. To the left of the house, as one looks at it from the public road, is McNally's field. To the right, is a field belonging to the defendant, Patrick Shevlin. The site on which the bungalow is built is rectangular in shape, with the short side fronting onto the public road and the long side going to the back of the site. The long side of the site is approximately 100m long rising quite steeply towards the back and also rising more gradually towards the road.

Some 300 to 400m away from the house going away from the direction of Carrickmacross, is a stream which crosses the road adjacent to a Mr. Lennon's house by means of a culvert under the road. Between the place where the stream meets the road and Mr. Ambrose's house are a number of fields. This area has been described as "saucer shaped". I would describe the area as one where the land adjoining the road is lower than the road itself and rises more steeply to a hill further away from the road.

On the field belonging to Mr. Shevlin is a farm track or roadway described in the course of the evidence as a farm "pass". This runs all the way up the field along the boundary with Mr. Ambrose's property and beyond. This pass is at the heart of these proceedings.

It is also relevant to note that the land falls gradually from left to right as depicted on a map produced in the course of the proceedings by Mr. Osborne, an engineer, so that the land adjacent to the Lennon's house beside the stream is higher than the land situated further along the road going towards Carrickmacross. Thus, the site on which Mr. Ambrose's house is located is at a lower level than the houses of Mr. Matthews, Mr. Lennon and Mr. Smith shown on the map prepared by Mr. Osborne on behalf of Mr. Shevlin. Therefore, the natural flow of water from the stream, should it overflow, would be downhill towards and indeed, past Mr. Ambrose's house.

Having set the scene, it is now necessary to look at what occurred over the weekend of the 25th, 26th and 27th February, 1994. Mr. Ambrose arrived home from work on Friday the 25th. There was heavy rain falling but there was no problem at that stage. By seven o'clock in the evening, Mr. Ambrose noted that the water levels around his home were rising. He accessed the Shevlin property via the public road and noted that at a point adjacent to the gable end of his house, a 3 inch pipe under the farm pass was obstructed by a stone and he removed the stone from the mouth of the pipe.

A key area of dispute in this case concerns the farm pass. The case made by Mr. Ambrose is that the farm pass had been constructed in 1993 approximately, that it was constructed above the ground level of the field in which it was located and that it was at a higher level than Mr. Ambrose's house with the result that it acted as a dam when water levels in the area rose. It was also a part of his case that the pipes under the farm pass were inadequate to drain away the water that accumulated in that area.

In the course of the evidence, Mr. Ambrose stated that he met Mr. Shevlin and his daughter at around 7pm and he expressed his concerns about the situation in relation to the rising water levels around his house and his concerns as to the farm pass to them but he stated that Mr. Shevlin did not respond, he simply walked off. Mr. Shevlin disputed this account in the course of his evidence. Later that evening, around nine o'clock, Mr. Ambrose called to the Shevlin's home and spoke to Mrs. Shevlin but again he got no satisfaction. According to him, Mrs. Shevlin told him that the river was flooded and that was her only response to the situation. In the course of her evidence, Mrs. Shevlin stated that she had no recollection of Mr. Ambrose calling to the home on Friday evening.

By 9:20 pm, Mr. Ambrose noted that water was coming through the back door of his house. At that stage, he went up to a neighbour's house for assistance and finally he called in to the home of Mr. Mark O'Callaghan, a local county council engineer. He took Mr. O'Callaghan into his office and shortly before midnight, Mr. O'Callaghan, together with a JCB driver, Mr. Lennon, and gardai came to the scene. The water was at that stage being dammed by the farm pass. The farm pass was breached by the JCB on the instructions of Mr. O'Callaghan. It took a short time to do this and when this was done the water levels subsided. Mr. Ambrose stayed elsewhere that night due to the damage done to his home by the flood. He was clear in giving evidence that once the farm pass had been breached the water flowed away.

The following day he returned to clean up the house. He noted that the water level in the house had reached up to 8½ inches above the floor level. This figure was based on the "tide mark" visible on pieces of furniture in the house. The following day was relatively dry but during the night it rained again. The trench which had been opened in the farm pass had been filled in and consequently, when the water levels rose again his home was flooded again. He arrived at his home on Sunday morning to find it flooded.

There is some dispute between the parties as to the timing of various events that occurred on Sunday, 27th February. There is no doubt about one aspect of the matter. On Sunday, the breach that had been made in the farm pass on Friday was no longer open. It was necessary on Sunday to reopen the breach. Mr. Lennon, the JCB driver and who is the same Mr. Lennon who lives adjacent to the stream was called to reopen the breach. Mr. Lennon says that he was called around 10.30 on Sunday morning by Mrs. Shevlin. He went up to the farm house with his JCB and arrived around 10.30. He noted that there was water around Mr. Ambrose's house. He said that Mr. Ambrose asked him not to do anything at that stage as he had contacted the authorities and a photographer. Mr. Lennon said that at this stage he stepped back as he did not wish to appear to take sides. The Shevlin's were distressed. He waited for Mr. O'Callaghan to arrive and when Mr. O'Callaghan arrived, he was directed by him to open the farm pass again. When the trench in the farm pass was reopened he was aware that new pipes were to be placed in the trench. According to Mr. Lennon the trench was dug by lunchtime. Subsequently, on the directions of Mr. O'Callaghan, he went up to the area where the stream was located and he opened a number of cuttings on both sides of the road adjacent to where the Smith house is now located. This had the effect of diverting the flow of water from the stream, which had been flowing down the fields towards Mr. Ambrose's house, back into the river. The problem caused by the overflowing stream and the excessive rain was alleviated straight away once that was done. He accepted that the flood at Mr. Ambrose's house had been alleviated by breaching the farm pass. He also agreed that on the Friday evening, the effect of breaching the farm pass on the flooding was immediate. He agreed with Mr. O'Callaghan in that regard.

The area of dispute between Mr. Lennon and Mr. Ambrose relates to the timing of events on the Sunday as I have already mentioned. Part of the difficulty in that regard is that a photographer was indeed called to his home by Mr. Ambrose with a view to recording the scene. On the back of a number of photographs taken by that photographer depicting the scene on Sunday the legend indicates that the photographs were taken around 3:30 pm. Some of the photographs show Mr. Lennon at work in the JCB. As already mentioned, his evidence was that he had finished work at the farm pass by lunchtime. Mr. Ambrose's evidence was to the effect that the photographs were taken around 3:30 pm.

In the course of his evidence, Mr. Ambrose referred to a contemporaneous record that he made in relation to the events that occurred. In the course of those notes, he described the various events and the times at which certain incidents occurred. It was not disputed that those notes were indeed a contemporaneous record of the events. It is clearly the case that Mr. Ambrose was at the time sufficiently concerned about the events that had occurred to record details of those events in a contemporaneous record. No doubt, Mr. Ambrose used those notes to refresh his memory in relation to the evidence given before me. In respect of the evidence given by Mr. Ambrose as to a number of issues, namely the meeting between Mr. Ambrose and Mr. Shevlin and his daughter on Friday evening, his visit to the Shevlin home at approximately 9.00 pm on Friday evening and his evidence as to the timing of events on Sunday I prefer the evidence of Mr. Ambrose to that of other witnesses. I do not think much turns on the issue of the timing of the events on Sunday and the evidential dispute between Mr. Lennon and Mr. Ambrose on this point. There is no dispute between them as to the fact that the photographer, when he came, was in a position to photograph Mr. Lennon at work in the JCB.

There is no dispute between the parties as to the events that gave rise to the flooding. A combination of excessively heavy rain and the failure of the culvert to take the excessive rainfall going into the stream led to a situation where the stream overflowed at the point of the culvert resulting in a flood or overflow flowing down the fields towards the Ambrose house. It seems that the problem at the culvert was that the pipes at the entrance to the culvert were obstructed by stones and silt. Consequently, the stream which was swollen by the extremely heavy rainfall then overflowed.

The central issue in this case is whether the flooding to the Ambrose home is attributable to the farm pass on the Shevlin land. In looking at that issue, it is necessary to consider a number of matters raised in the course of the evidence. The first question that arises relates to when the farm pass was constructed. In the course of his evidence, Mr. Ambrose stated that the farm pass had been constructed around 1993. He did not dispute the fact that there had been a path in use along the boundary with his house but he said that around 1993 a large amount of quarry stone had been brought on to the site and works were carried on resulting in a substantial road being put in. According to his recollection, lorries brought hard-core or quarry stone to the site and a mechanical digger was used.. He wasn't entirely clear as to the precise time when that work was done. He was aware that Mr. Shevlin had put in an application for planning permission around that time relating to the construction of cattle sheds, a slurry pit and a service road in that field. It was put to him that in anticipation of planning permission being granted Mr. Shevlin had brought materials on to the site with a view to the work he intended to carry out. These were mounds of hard-core material. It was also put to Mr. Ambrose that the work done by Mr. Shevlin to the farm pass was confined to doing minor repairs from time to time. He disagreed. It transpired that Mr. Ambrose had objected to the application for planning permission and planning permission was refused.

Mr. Shevlin in his evidence indicated that he never constructed a road at the site of the farm pass and that all he had done was to repair or maintain the existing farm pass. He said that he had brought in hard-core materials in preparation for the building work he hoped to do and for which he had applied for planning permission. He stated that the material accounted for the mounds apparent on the field. He disputed that lorry loads of stone or gravel had been brought in to create the pass. Mr. Shevlin accepted that he had received a warning notice from the County Council in relation to the work being carried out at the field. The warning notice was dated 13th August, 1993 and it stated that:

"It appears to the Monaghan County Council that the land referred to in the schedule to this notice is being or is likely to be developed in contravention of s. 24 of the Local Government (Planning and Development) Act 1963 (i.e., otherwise than under and in accordance with the permission required under that Act). The Monaghan County Council by this notice require that development of the said land shall not be commenced, or if such development has commenced, that it shall be discontinued forthwith and the land restored to its original condition."

In the schedule to the warning notice, the following appeared:

"Description of land to which this notice refers

Construction of farm roadway and filling of land at Aghalile."

By way of response Mr. Shevlin wrote to the County Council stating:

"Received your letter of today 13- 8- 93. I would like to inform the Council that I am not developing land. I am reclaiming land and gravelling an existing pass.

Enclosed is map with pass marked from A to B."

There was some notation on the letter which it is accepted was placed there by County Council officials. These stated:

"Please refer to Mr. M. O'Callaghan

re (1) Changes in ground level

(2) Confirmation that this is a farm road."

One further document was put to Mr. Shevlin and that was a document relating to an application for a grant in respect of farm improvement programmes. The description of the work referred to was as follows:

"Construct farm roadway 215m x 3.0m in accordance with the specification S.127...."

Mr. Shevlin stated that there was an error in the form in respect of the application for the farm grant. The application was for a grant to maintain the road not to construct the road. He went on to explain that the planning permission for the construction of the slurry tank and other works he had contemplated in 1993 was refused because of flooding and the impact on the visual amenity of the area and the proximity to Mr. Ambrose's house. He denied having any antipathy towards Mr. Ambrose because he had objected to the planning permission for this work.

In the course of the evidence and bearing in mind the photographs produced in court, I am satisfied that the farm pass was constructed of hard-core material. I am satisfied that that material was brought onto the land by Mr. Shevlin. I do accept his evidence and that of Mr. McNally that there was an existing track alongside the boundary with Mr. Ambrose's property but I have little doubt that in 1993 Mr. Shevlin engaged in significant works to improve the farm pass. The evidence of Mr. Ambrose in this regard is borne out by the warning notice served by the County Council and the application for a farm grant submitted by Mr. Shevlin himself.

The next question to consider is whether the works done by Mr. Shevlin in 1993 raised the level of the farm pass such that it was at a higher level than the floor level of Mr. Ambrose's house. If not, then it is difficult to see how the construction of the farm pass could have led to or contributed to the flooding of Mr. Ambrose's house.

There is no doubt that the area in which Mr. Ambrose's house is located is part of the floodplain leading down from the stream towards Carrickmacross. The house built by Mr. Ambrose was constructed on a site, the level of which was raised some 2 to 2.5 feet above ground level. The floor level of the house itself would have been somewhat higher again. It seems to be clear that the construction of the house has created an obstruction in the natural flow of water through the fields. Nonetheless, the evidence was that although the house is constructed in a floodplain, from the time it was built and until 1994 the house has never flooded.

Mr. Osborne, an experienced consulting engineer, gave evidence on behalf of the defendant. He prepared a number of drawings and a helpful map of the area. He carried out an examination of the levels that are relevant to these proceedings. Mr. Osborne made a number of visits to the land in October of this year. That is obviously more than 15 years since the events giving rise to these proceedings. The net effect of his evidence was that the level of the farm pass adjacent to the gable end of Mr. Ambrose's house coincides with the floor level inside the house. That being so, he concluded that the farm pass could not have had a damming effect such that it caused the water levels to build up behind it leading to the flooding of the house. Mr. Osborne had clearly done considerable work in relation to the various levels relevant to this case. Mr. Fahy, the engineer on behalf of the plaintiff had not carried out a similar exercise. Mr. Osborne in the course of his evidence was also of the view that the farm pass was not constructed above the ground level of the surrounding field. He did concede that parts of the farm pass might be higher than the surrounding ground level at certain points.

I have a difficulty with the evidence of Mr. Osborne. First of all, the evidence of a number of witnesses, namely, Mr. Shevlin, Mr. O'Callaghan and Mr. Lennon, not to mention Mr. Ambrose, all confirmed that when the breach was made in the farm pass on the Friday evening the water levels subsided. Mr. O'Callaghan had described in his evidence how deep the water was on the Ambrose side of the farm pass. If Mr. Osborne's evidence was correct as to the levels at different points, it is difficult to see how the various witnesses who were present on the night of the flooding could have observed the water levels subside in the way described following the breach of the farm pass. Secondly, in the course of his evidence, I asked Mr. Osborne about one of the photographs in which a number of shovels can be seen just beyond the trench made in the farm pass which are leaning up against the farm pass. It is clear from that photograph that at that point the farm pass is raised higher than the adjoining land on the Ambrose side. Indeed I think it is clear that the ground on the other side of the farm pass also slopes down from the pass. In those circumstances, I am reluctant to rely on the evidence as to levels supplied by Mr. Osborne notwithstanding the care taken by him in preparing the information, given the passage of time which has elapsed since the flooding. I do not know what changes may have occurred to the farm pass in the intervening years since the flood occurred apart from the regular use to which it has been put. However, as I have mentioned above, the key factor, it seems to me, is that when the breach was made in the farm pass, the water level subsided. That evidence has not been contradicted by any witness who was present on the night of the 25th February, 1994.

I am satisfied that construction works took place on the farm pass in 1993. I am also satisfied that the result of that work was to raise the level of the farm pass with the result that on that weekend in February 1994, it acted like a dam, impeding the natural flow of the overflow from the stream and causing the flooding of the house.

The claim against Mr. Shevlin has been brought in nuisance and negligence. I was referred to the case of *Fitzpatrick v. O'Connor* (Unreported, High Court, Costello J., 11th March, 1988) in which Costello J. stated at p. 7 of the judgment:

"I now turn to the claim for damages from nuisance. The proper legal principles which I should apply are set out in *Home Brewery v. Davis and Company* [1987] 1 All E.R. 638. The legal position is as follows: the defendant was under no obligation to receive water from the plaintiff's land but if the use of his land by him is unreasonable and is resulting in damage to a higher occupier, which the plaintiff is, then a nuisance is created."

It is useful to look at the decision in the *Home Brewery* case referred to above more closely. The head note states:

"Held, (1) that an occupier of land had no cause of action against the occupier of higher adjacent land for permitting the passage of natural, unchannelled water over or through the higher to the lower land, but neither was he under any obligation to receive such water and was entitled to take steps consistent with his reasonable use of the land to prevent it from entering thereon, albeit that damage was thereby occasioned to the occupier of the higher land; that where the occupier of the higher land established that the lower occupier's use of his land in taking such preventative steps was unreasonable, and that the resultant damage to the higher land was reasonably foreseeable, an action in nuisance would lie but that since the filling of the clay pit in the land generally with a view to its development was a reasonable use by the defendants, the plaintiffs had no cause of action against them in nuisance in respect of the major part of their claim that the damage suffered as a result of the defendants use of their land impeding drainage from the plaintiff's land. ...

but (2), giving judgement for the plaintiffs, that since the temporary additional flooding caused by the ejection of water onto the plaintiff's land in the course of infilling the osier bed was reasonably foreseeable the defendants were liable to the plaintiffs, either in nuisance or trespass for the damage occasioned thereby, namely, the additional cost of pumping and maintenance during their 'squeezing out period'."

One of the questions that arose in that case was the question of reasonable foreseeability. In this case, I have already stated that I am satisfied that the immediate cause of the flooding was the construction work that took place on the farm pass in 1993. Thereafter, a combination of events occurred. Exceptionally heavy rainfall fell that weekend. There was also a failure at the culvert by reason of the heavy rain and the silting up of the culvert which led to the stream overflowing. The natural flow of the water after those events was through the fields leading to Mr. Ambrose's house. This is an area which is prone to flooding at a lower point along the road although not to the levels seen that weekend.

I do not think that the events of that Friday night were or could have been reasonably foreseeable by Mr. Shevlin. The combination of events was exceptional. That, however, does not conclude the matter. Further exceptional rain fell on Saturday night/Sunday morning. The culvert had not been cleaned out and the stream overflowed again. In the meantime, the breach in the farm pass had been filled in. Mr. Ambrose gave evidence to this effect. Mr. Shevlin did not admit to doing this but I cannot accept his evidence on this point. I am satisfied that he filled in the breach sometime on Saturday. He did so without taking any steps to put in suitable drain pipes to allow any flood water that might accumulate to escape. He should have taken reasonable steps to ensure that there would be no further problem. The result was inevitable. Further flooding took place. This was entirely foreseeable. He subsequently took the necessary steps to avoid a similar occurrence on the Sunday by inserting large drain pipes in the breach at ground level.

In the circumstances, I am satisfied that Mr. Shevlin is liable to Mr. Ambrose for the damage done to his property. I note that a figure has been agreed in respect of damages. I do not think that it would be possible to make any distinction between the level of damage done on the Friday night and the damage done subsequently. Accordingly, I will give a decree in the sum agreed.