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Translation HC

Residents living next to a phone mast vs.
the mobile phone company
Bouygues Telecom

French Republic

In the Name of the French People

Versailles
Court of Appeal

JUDGEMENT

4 February 2009

**COUR D'APPEL
DE
VERSAILLES**

Code nac : 64A

14ème chambre

ARRET N° 68

contradictoire

DU 04 FEVRIER 2009

R.G. N° 08/08775

AFFAIRE :

**S.A. BOUYGUES
TELECOM**

C/

Décision déferée à la cour :
Jugement rendu le 18
Septembre 2008 par le
Tribunal de Grande
Instance de NANTERRE
N° chambre : 8
N° Section :
N° RG : 07/02173

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SCP [REDACTED]

**REPUBLIQUE FRANCAISE
AU NOM DU PEUPLE FRANCAIS**

LE QUATRE FEVRIER DEUX MILLE NEUF,
La cour d'appel de VERSAILLES, a rendu l'arrêt suivant dans l'affaire entre :

S.A. BOUYGUES TELECOM

20, quai du Point du Jour
92640 BOULOGNE BILLANCOURT CEDEX

représentée par la SCP [REDACTED] - N° du
dossier 0845926
assistée de Me [REDACTED] (avocats au barreau
de Paris)

APPELANTE

Monsieur [REDACTED]

représenté [REDACTED] N° du dossier 00036505
assisté de Me Richard FORGET (avocat au barreau de Paris)

Madame [REDACTED]

représenté [REDACTED] N° du dossier 00036505
assistée de Me Richard FORGET (avocat au barreau de Paris)

Monsieur [REDACTED]

représenté [REDACTED] N° du dossier 00036505
assisté de Me Richard FORGET (avocat au barreau de Paris)

Madame [REDACTED]

représenté [REDACTED] N° du dossier 00036505
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Monsieur [REDACTED]

représenté [REDACTED] N° du dossier 00036505
assisté de Me Richard FORGET (avocat au barreau de Paris)

Madame [REDACTED]

représenté [REDACTED] - N° du dossier 00036505
assisté de Me Richard FORGET (avocat au barreau de Paris)

INTIMES

Facts and Proceedings

By the ministerial decree of 8 December 1994 the company Bouygues Telecom obtained authorisation to install in the country a radioelectric network open to the public, with a view to establishing a means of personal communication in accordance with the standard DCS 1800, now designated "GSM".

This decree was subsequently modified by other administrative decisions which, while upholding the permanence of the network and allied services, and the obligation to carry emergency calls without charge, have notably increased the coverage obligations by compelling the company Bouygues Telecom to assure the coverage by 1 July 2000 of the geographical areas that include at least 90% of the mainland population.

By the decree of 3 December 2002 the company Bouygues Telecom was authorised to install a radioelectric network open to the public with a view to establishing a means of personal communication in accordance with the standard UMTS.

In order for its network to cover part of the commune of Tassin la Demi-Lune and the commune of Charbonnières (in the Rhone *département*) the company Bouygues Telecom installed on land within the commune of Tassin la Demi-Lune on a plot numbered xxx on the local map belonging to Xxxx, a mobile phone base station consisting of a concrete pylon in the form of a tree, 19m high, as a support for antennas and technical apparatus.

Mr and Mrs Xxxx have lived since June 2003 in Tassin la Demi-Lune at Xxxx with their two children, their house being situated on plot number xxx on the local map, surrounded by the land of lots number xxx.

Mr and Mrs Xxxx have lived since September 1997 with their six children, their house being situated on plot number xxx on the local map.

Mr and Mrs Xxxx live with their three children on plot number xxx opposite that of the Xxxx family.

In view of the height of the pylon, the company Bouygues Telecom submitted to the Town Hall of Tassin la Demi-Lune a declaration of works not requiring a building permit, in accordance with article R 422-2 (e) of the town planning regulations.

By a decree of 13 December 1994 the mayor of the commune authorised the realisation of the works specified in the declaration; the work of installation was carried out at the end of 2005 and at present the site covers an area of 2km².

Having in the first instance submitted to the administrative court in Lyon two requests intended to obtain on one hand, the suspension of the decree of 13 December 1994 authorising the erection of the mobile phone station, and on the other, the cancellation pure and simple of this decree, Mr and Mrs Xxxx, who live close to the base station, and with whom Mr and Mrs Xxxx and Mr and Mrs Xxxx allied themselves, on 18 January 2007 brought an action against the company Bouygues Telecom with a view to having the company Bouygues Telecom sentenced to remove the installation which is the subject of this litigation, with a penalty of 500€ per day of delay, and to having it sentenced to pay damages for the exceptional nuisance to one's neighbour and the depreciation of their house.

In its judgement of 18 September 2008, the Crown Court of Nanterre sentenced the company Bouygues Telecom, with immediate effect, to:

- Remove the transmission station, subject to a penalty of 100€ per day of delay following a period of four months counting from the day following the announcement of the verdict;

- To pay the sum of 3000€ each to Mr and Mrs Xxxx, to Mr and Mrs Xxxx and to Mr and Mrs Xxxx, as damages for their exposure to a health risk.

It dismissed the plaintiffs' request regarding the depreciation of their house and the visual nuisance and sentenced the company Bouygues Telecom to pay the sum of 3000€ [to the plaintiffs] in accordance with article 700 of the civil code, and to pay costs.

The court considered, with regard to the health risk, that:

- While the scientific discussion remains inconclusive, the company Bouygues Telecom has not demonstrated in the present case either the absence of risk nor the respect of any principle of precaution, since, apart from two administrative approvals that are not sufficient to do this, none of the documents provided relate specifically to the installation in question;

- To expose one's neighbour against his will to a risk that is certain and not hypothetical, as claimed by the defence, constitutes a nuisance to one's neighbour, its exceptional quality residing in the fact that it has a bearing on human health;

- The removal of the risk in this case can only be obtained by the removal of the installation.

It noted with regard to the visual nuisance that this is not established, even less so its exceptional character, thus the request of the couples Xxxx on this matter should be dismissed, and that there were no grounds for accepting the plaintiffs' claims with regard to the depreciation of their houses.

The company Bouygues Telecom lodged an appeal against this judgement.

On the authority of the notice issued on 21 November to summon the couples Xxxx, Xxxx and Xxxx to appear before the court on 7 January 2009, the company Bouygues Telecom complains that the sentence passed is based on an error of fact, in that it states that a definite risk to health exists, whereas scientific studies do not confirm the hypothesis of a risk for people living near base stations, and that scientists, when they invoke the principle of precaution, note the absence of risk where base stations are concerned.

The company notes that the studies taken into account by the first judges can be and have been contested and are in any case irrelevant, insofar as they refer to the use of mobile phones and not to base stations, which are at issue in the present case.

It observes that in judging that it has not produced any "specific" document demonstrating the absence of risk, while the plaintiffs have not complained of any pathology, the court has shifted the burden of proof onto the defendants.

It maintains that the risk invoked by the plaintiffs cannot be construed as harm that can be compensated on the basis of the theory of exceptional nuisance to one's neighbour, insofar as this risk is in the present instance only hypothetical.

It points out that the uncertainty as to whether the risk will materialise concerns not only the harm itself but also the link of cause and effect between this potential harm and their activity.

In consequence they request the appeal court to annul the previous judgement and, reconsidering the case, to release them from the sentence pronounced against them, to dismiss all the claims of the couples Xxxx, Xxxx and Xxxx; and to sentence them to pay 1000€ each to the company in application of the article 700 of the civil code, and to pay costs.

* * * * *

The respondents Mr and Mrs Xxxx, Mr and Mrs Xxxx and Mr and Mrs Xxxx are in favour of confirmation of the judgement passed insofar as it has ordered that the installations be dismantled, requesting in addition that the penalty for delay be raised to 500€ per day and that the company Bouygues Telecom be sentenced to pay, on the basis of exceptional nuisance to one's neighbour, in compensation for the harm already caused linked to exposure to a health risk the sum of 10,000€ each to Mr and Mrs Xxxx, to Mr and Mrs Xxxx and to Mr and Mrs Xxxx, and moreover to pay to the respondents as a group a sum of 7500€ in accordance with article 700 of the civil code.

They point out that the acknowledgement of the responsibility of the one who causes exceptional trouble to his neighbour is not based on the proof of wrongdoing but on the existence of a nuisance as experienced by the plaintiff.

In the present case they emphasise the fact that as a result of the installation very near their house they and their children are exposed to a health risk that creates a disturbance that should be rectified by the removal of the danger and compensation for the harm caused.

They draw attention to the fact that the scientific controversy surrounding the effects of electromagnetic radiation linked to mobile phones, which are far from being proved harmless, increases the intense feelings of anxiety created by the proximity of the phone mast which emits a beam in their direction, since the risk affects health, and that many national and international scientific studies known to the respondents show that the pathologies associated with exposure to electromagnetic radiation of the mobile phone type can be very serious, for example various types of cancer.

On the basis of numerous scientific reports published since the statutory limits for exposure to electromagnetic radiation were set by the decree no. 2002-775 of 3 May 2002, in accordance with the proposal made in 1998 by the International Commission for Non-Ionising Radiation Protection (ICNIRP) and confirmed by the recommendation of the Council of the European Union 1999/519/EC of 12 July 1999, they state in opposition to the claims of Bouygues Telecom that these limits are now considered obsolete, having been established with regard only to the obvious effects, thus excluding the application of the principle of precaution, which by definition becomes relevant when the scientific verdict is uncertain.

They conclude from this that simply respecting the official limits does not remove the risk, in particular that caused by the non-thermic effects of electromagnetic fields.

They do not accept that the distinction between the radio waves from mobile phones and that emitted by relay stations is relevant and emphasise that it is a known fact that the latter emit extremely low frequency (ELF) microwaves, which means that they should be placed in category 2B of the WHO classification that recognises potential harmfulness, since this category "may be carcinogenic in man".

They have noted, in addition to the warnings contained in various appeals from doctors emphasising the urgency of fixing new standards, the fact that various member states of the European Union have adopted limits below those in force in France or even below the emission levels imposed by charter in certain cities such as Paris or Besançon, levels very much lower than those specified in the decree of 2002.

They point out that the situation imposed on them by the close presence of the phone mast constitutes a violation of the individual's right "to live in an environment that is balanced and respectful of health" and that the right to take preventative action in situations involving private individuals, which is not disputed in the law relating to the environment, in the social law recognising the right of a salary earner to a pension, and on the issue of unfair competition, must "make it possible to sanction behaviour in terms of the risks of harm in the future to which others are subjected."

In addition they emphasise that imposing a waiting period until the risk is realised would result in the prolongation of an exceptional and illegal risk and would make the victim suffer the eventual result.

Further they point out that even if the outcome of the risk is still a matter of conjecture, the certainty that it exists, as revealed by the controversy among scientists, is enough to cause significant psychological distress to the victim.

They request compensation for harm linked to exposure to a health risk, the psychological distress which is of a kind to affect their personal situation, and the harm to the value of their capital arising from the depreciation of their property resulting from the actual presence of the phone mast on a property adjacent to theirs and affecting particularly the Xxxx couple, which has resulted in the depreciation of the value of their house.

Reasons for the Judgement:

Considering that the appeal lodged on 19 November 2008 by the company Bouygues Telecom was duly registered under the number 08-8775 preceding the authorisation to issue a summons which resulted in the delivery and deposition of a notice to attend on 27 November 2008 registered under the number 08-9058;

That since they concern the self-same matter there is cause to order that the dossiers listed under the numbers 08-9058 and 08-8775 be treated as one;

Considering that it is not contested that the installation in question operates within the limits specified by the decree of 3 May 2002, and that the reading taken on 1 June 2006 by Dr Pierre Le Ruz at the request of Mr and Mrs Xxxx shows that the effective electrical fields (RMS) measured in volts per metre (V/m) between the hours of 7 and 7.45pm were from 0.3 V/m to 1.8 V/m;

That it is also established that the respondents who live closest to the antenna installed in the commune of Tassin la Demi-Lune are not exposed to a risk linked to the thermic effects of electromagnetic radiation;

Considering that, an exceptional nuisance to one's neighbour having been alleged, the compliance with official standards, the legality of the activity, and its usefulness to the public are not in themselves grounds for denying the existence of a nuisance;

Considering that in the present case the original plaintiffs draw attention in particular to a health risk caused by exposure to the non-thermic effects of electromagnetic radiation and notably to the exposure to radio waves of extremely low frequency (ELF), produced discontinuously in brief impulses (pulsed);

Considering that, according to the judgement of 11 June 2004 pronounced by the Council of State, it appears from a report submitted to the government in 2001 that in the current state of scientific knowledge it is not established that electromagnetic radiation has non-thermic effects that are dangerous for public health;

Considering that the report referred to (the Zmirou Report) esteems that "the only damaging effects on health" that are scientifically established are, in the radio frequency range, "certain effects due to heating"; that there exist according to current scientific data various biological effects for levels of energy that do not lead to a rise in temperature; that the lack of knowledge about these non-thermic effects makes it impossible to identify the impact on health or to determine new values that would guarantee a reduction or even an elimination of this risk to health, which has yet to be proven; that it formulates certain warnings inspired by the principle of precaution, emphasising however that it does not confirm the hypothesis of a health risk;

That in addition, apart from prudent avoidance measures regarding the use of mobile telephones, this report recommended notably the pursuit of an objective of reducing to a minimum the exposure of the public, and in particular that potentially sensitive people - children and the sick - should not be in direct range of the beam from an antenna coming from a station situated less than 100m away;

That the guide published in 2001 by the international ICNIRP commission for establishing limits of exposure to electrical, magnetic and electromagnetic fields, which is relied on by all those involved and which is referred to in most replies from ministers to parliamentary questions on the exposure to health risks of those living near relay masts, makes it clear that two categories of limits are presented: "basic restrictions: levels of exposure to electrical, magnetic and electromagnetic fields which are established on the basis of obvious effects on health" and "the reference levels ... the respect of which guarantees respect for the basic restrictions";

That this guide makes it clear that it is "founded only on the immediate effects on health, such as the stimulation of muscles or peripheral nerves, shock and burns produced by contact with conducting objects, or the rise in tissue temperature from the effect of absorbing energy";

That it mentions "with regard to the possible long-term effects such as an increase in the risk of cancer" that "ICNIRP has concluded that there were not enough scientific data to serve as a basis for the establishment of specific limits to exposure," mentioning however "epidemiological research studies that have provided indications hinting at a connection between exposure – at intensities of magnetic flux far lower than the levels recommended in the present guide, for fields of 50-60Hz – and carcinogenic effects";

Considering that the recommendation in 2001 of measures intended to protect against a potential risk that remained to be proven, for lack of scientific results, left completely open the discussion on the topic of the existence of non-thermic effects of electromagnetic radiation; and that the 2002 decree imposes a restraint making it possible to avoid those damaging health effects that are "scientifically proven", that is to say in the range of radio frequencies "certain effects due to heating";

Considering that since that date, now in the distant past when compared with the rapidly soaring rise of phone telephony, in view of the blossoming all over the country and in its remotest corners of innumerable phone masts belonging to several competing phone companies that are legally obliged to provide coverage of the whole country, two reports were published in 2003 and 2005 by the French Agency for Environmental Health and Safety (AFSSE), based on the consultation of various scientific studies, the first of them concluding that "it is not possible to attribute an impact on health to base stations" and the second observing "that no new scientific data published since the preceding expert report reveals a risk to health linked to radiation emitted by mobile phone base stations";

That the relevance of these reports should be evaluated in the light of the assessment of the scientific working methods of the AFSSE, as ascertained in December 2005 by the national Inspectorate of Social Affairs:

Considering also that, although the World Health Organisation in a memorandum published in May 2006 as number 304, relating to the effects of base stations (item no. 21) considers that: "Taking account of the very low levels of exposure and the research results so far obtained, there exists no element of scientific proof confirming the possible harmful effects on health of base stations and wireless networks," it nevertheless indicates in this same memorandum: "While one can expect that exposure to the RF fields of base stations and wireless networks has no impact on health, the WHO advises nevertheless that research should be carried out to determine whether more concentrated exposure to mobile phone radio frequencies could have an effect on health";

Considering that the confirmation of the existence of harmful effects on the health by definition negates the existence of risk since it involves the observation of damage to health that in the present case would lead to a health catastrophe;

Considering on the other hand, that through various statements and warnings such as the appeals from Salzburg in 2000, from Friburg in 2002, from Bamberg in 2004, and from Helsinki in 2005 doctors have declared and made public their anxiety concerning the pathologies that have developed among certain of their patients who live near relay antennas;

That in 2006 the Benvenuto resolution declared that "biological effects can be caused by exposure to extremely low frequencies (ELF) as well as to radio frequencies (RF). Epidemiology, in addition to experiments *in vivo* and *in vitro*, shows that exposure to certain ELF's can increase the risk of cancer in children and cause other health problems in adults as in children" and encourages governments "to adopt a framework of recommendations dealing with the exposure of the general public and of professionals to electromagnetic fields based on the principle of precaution, as certain countries have already done";

Considering that while most of the effects that are obviously harmful, or those taken into account in the name of the principle of precaution (as citizens were invited to do by a communiqué from the Minister of Health on 2 January 2008), which have been known since 1998 relate to the intensive use of mobile phones, the question of the relevance of making a complete distinction between the radiation and the magnetic fields generated by base stations which do not seem to have a thermic effect, and those of mobile phones which are classed as more aggressive, remains open in the light of the similarity between the radio waves passing between mobile phones and their relay antenna and of the production by these relay stations of extremely low frequency ELF waves and fields, a fact that the National Frequency Agency (ANFR) does not deny;

Considering that the research under the aegis of the Interphone project launched on an international scale has only just begun;

That a recent report entitled Bio-Initiative was presented on 31 August 2007 by people whose university credentials and body of work accomplished show them to be worthy of respect, and provide grounds for setting aside the criticism made by the company Bouygues Telecom based on the absence of any mandate issued by a national or international body and of any statement that did not distinguish between electrical installations and mobile phones;

That this Bio-Initiative report (a report which the European Parliament, on reading it, said had challenged their thinking), without providing a definitive answer on the point, concluded that the limits of ELF exposure set by ICNIRP in particular are inadequate to protect people, and that although the health impact of electromagnetic fields is still not fully understood, there is now enough scientific knowledge to take measures for risk management;

Considering also that while certain studies coming from doctors can be criticised, if not ignored, due to a lack of rigour in their research or the taking of measurements, all the publications, even those produced by the company Bouygues Telecom in support of their appeal, make it clear that, because of the fragmentary state of knowledge, there is a need to pursue research on the possible harmfulness of an exposure which, in the case of radio waves emitted by antennas and relay stations, is continuous and inescapable;

That no factor provides grounds for categorically denying the existence of an impact on public health from exposing people to ELF radio waves and electromagnetic fields;

Considering after all that the example of other countries that no longer rely on the standards set by ICNIRP and that have introduced legislation based on values between 0.6 V/m (Austria, Liechtenstein, Italy, Poland, Russia, China) and 4 V/m for Switzerland and even 3 V/m in the case of Luxembourg, and also the demarcation of exclusion zones around buildings, have done nothing to calm the fears that might be felt by people living close to a relay antenna, which emits within the statutory limits set in France by the decree of 2002 but above the level allowed in several other European countries;

Considering that, while the reality of the risk remains hypothetical, it becomes clear from reading the contributions and scientific publications produced in debate and the divergent legislative positions taken in various countries, that uncertainty over the harmlessness of exposure to the waves emitted by relay antennas persists and can be considered serious and reasonable;

That in the present case the company Bouygues Telecom has not undertaken with regard to this installation the specific and effective measures that it is technically capable of taking, as established by the charters signed between certain communes and the telephone operating companies that set emission levels far below the standards currently in force in France or that site mobile antennas at a distance from residential areas;

Considering that the respondents, who cannot be guaranteed an absence of risk to their health generated by the relay antenna installed on lot no. xxx situated in close proximity to their family home, are justified in having a legitimate fear that constitutes a nuisance;

That the exceptional character of the nuisance so caused can be inferred from the fact that since the risk is a matter of health, the materialisation of this risk would cause harm to the person of the respondents and that of their children;

Considering that the cessation of the psychological distress resulting from the extreme anxiety caused and suffered by the respondents from the fact of the installation of this relay antenna on the nearby property, demands, in the absence of any proposal whatever from the company Bouygues Telecom, that it be dismantled;

That the decision already taken should be confirmed on this point, except that after the period of four months counting from the announcement of the present decision, the penalty for delay specified shall be increased to 500€ per day;

Considering that the installation of the relay antenna in close proximity to their home and the fact that they have been living within its beam since 2005 has undeniably created a feeling of extreme anxiety, proof of which can be inferred from the numerous actions they have undertaken;

That since this anxiety has lasted for more than three years compensation for the distress suffered by each of the couples concerned should be fixed at the sum of 7000€;

Considering that the respondents are not entitled to cite in support of their financial claim the depreciation in value of their house, a possibility that can be excluded insofar as the dismantling of the antenna that was the hypothetical cause of the loss of capital value has been decreed;

Considering that in the present case the company Bouygues Telecom being obliged to abandon its claims should be sentenced in application of article 700 of the code of civil procedure to pay to the respondents as a group the sum of 6000€;

For these reasons:

The court,

Acting in consideration of all the evidence and as a last resort;

Orders that the dossiers identified by the numbers 08/9058 and 08/8775 be treated as one;

Confirms the judgement given for the respondents on 18 September 2208 by the Crown Court of Nanterre, except that it fixes the amount of compensation for psychological distress suffered by Mr and Mrs Xxxx, Mr and Mrs Xxxx and Mr and Mrs Xxxx at 3000€ (three thousand euros); and for the penalty amount;

Acting in consideration of claims that have been denied;

Sentences the company Bouygues Telecom to pay 7000€ (seven thousand euros) in compensation respectively to Mr and Mrs Xxxx, Mr and Mrs Xxxx and Mr and Mrs Xxxx, as compensation for the psychological distress caused to them;

Declares that, after a period of four months counting from the announcement of the present decision, the penalty that accompanies the sentence to remove the installation pronounced by the Crown Court is fixed at a sum of 500€ (five hundred euros) per day of delay;

In addition;

Sentences the company Bouygues Telecom to pay to the respondents the sum of 6000€ (six thousand euros) in accordance with article 700 of the code of civil procedure;

Sentences the company Bouygues Telecom to pay costs, authorisation being given to the lawyers in the case to recover them in accordance with article 699 of the code of civil procedure.

This decision is made public by putting it at the disposal of the clerk of the court, the respondents having been previously advised of its content in the conditions envisaged in the second clause of article 450 of the code of civil procedure and signed by Mr Xxxx, president, and Mrs Xxxx, clerk, to whom the written record of the decision has been given by the signing magistrate.

The Clerk of the Court

The President

Translation HC

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