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Judgment Book

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. B.068 OF 1980

BETWEEN	WINSTON BARR	PLAINTIFF
A N D	BRYAD ENGINEERING COMPANY LIMITED	FIRST DEFENDANT
A N D	JAMAICA PUBLIC SERVICE CO. LTD.	SECOND DEFENDANT
A N D	RAYMOND KARL ADAMS)) NOEL BRYAN)) DERVIN BROWN)) MILTON VERLEY)	THIRD PARTIES

L. Barnett and E. Frater for Plaintiff.

D. M. Muirhead Q.C., Enos Grant and Miss D. Lightbourne for First Defendant.

C. M. Daley and A. LeeHing for Second Defendant.

W. Chin See Q.C. and Dennis Morrison for Third Parties.

September 17, 18, 20, 21, 24, 25, 26, 27, 28, 1984;
March 11, 12, 13, 14, 18, 19; and September 23, 1985.

ELLIS, J:

THE CLAIM

The plaintiff claims compensation from the defendants for personal injuries, loss and damages which he suffered on the 23rd day of March 1979 at a construction site at Boone Hall in St. Andrew. He alleges that the injuries and loss were suffered while he was employed to the first named defendant and they resulted because the first defendant was in breach of the duty to take adequate precautions for his safety and/or from the negligence of both defendants or their servants or agents.

The plaintiff supported his claim against the defendants by the evidence of Professor Golding, Mrs. Andrea King-Bird, Ivylyn Barr, agreed medical certificates, agreed correspondence between the defendants and evidence from himself.

Dr. Barnett at the beginning of the plaintiff's case sought leave to amend items of Special Damages as shown on "Amended Special Damages" which was filed.

Mr. Muirhead and Mr. Daley for the first and second defendants respectively and Mr. W. Chin See for the Third Parties objected to the proposed amendments. I dismissed the objections and granted leave to amend on the ground that the amendment would facilitate the just determination of the claims.

PLAINTIFF'S CASE

The plaintiff stated that on the 23rd day of March 1979 he was a second class steel erector on a building site at Boone Hall in St. Andrew. His wages were paid by the first defendants Bryad Engineering Company Limited and all his statutory deductions were made by that defendant. He evidenced this by Exhibits 3 and 4.

He said he saw a Mr. Adams on the site and Mr. Adams was connected to Bryad Engineering Company Limited and when he was on the site he spoke with the supervisor, foreman and personnel officer on the site. On the date of the accident, he had done steel work on more than twenty (20) other buildings on the site. On the site, he saw electric wires strung on light poles. Those wires were looped but the loops were not of the same height.

On the day of the accident a co-worker and himself went to the store for steel bars for use on building. The lengths of steel bars were thirty (30) feet long and half (½)" in diameter. The lengths were placed beside the building and he started to pull up the steel rods. In so doing, one length went above his head and touched one of the electric wires. The next thing he knew was that he was lying on the ground, twelve (12") feet below where he originally stood. He was in flames and his limbs were stretched out and he could not move.

He was taken to the Kingston Public Hospital where his arms were amputated and his legs which were burnt to the bones in parts were dressed. In August further amputations were done on his arms up to the shoulders.

Prior to the accident, he played football, he swam and cycled. He can no longer engage in any of those activities and he is now unable to board public transport on his own volition.

Since the accident, he is unable to carry out basic operations towards personal hygiene and he cannot dress himself and he has had to employ someone to assist him in these operations.

His artificial arms were fitted in November 1982, in England and are to be changed every two to three years. His sister accompanied him and cared for him during his stay in England and he intends to pay her for her services.

The plaintiff and his witnesses were extensively cross-examined by the defendants' attorneys. The tenor of the cross-examination was to establish inter alia:

(a) Contributory negligence on the part of the plaintiff; and

(b) Circumstances which would go to a reduction of his Special Damages.

DEFENDANTS' CASE

The first defendant contended that it was not in any way negligent and the plaintiff's injuries were solely caused by the second defendant's negligence or contributed to by him. This defendant also said that the second defendant was particularly negligent in not removing and relocating electricity lines which had become redundant.

The second defendant's case is a denial of any breach of statutory duty as alleged in paragraph 4(b) (i-ix) of the statement of claim and of any negligence. It is the contention of this defendant that the first defendant was negligent in that it did not take all reasonable measures to prevent the plaintiff from coming into contact with live high tension wires. That the first defendant was negligent in not taking reasonable and proper steps to ensure that there was no risk of injury to persons from electrically charged wires hanging over the area of its operation. In addition, it says the plaintiff contributed to his injuries.

However, according to this defendant, should it be held liable, it would be entitled to be indemnified by the Third Parties in the circumstances outlined in the Statement of Claim against the Third Parties.

The Third Parties (1, 2 & 4th) admit the existence of an instrument of Indenture but deny that it created any easement. In any case, they say that they transferred their interest in the property to other persons and in that case they are in no way liable to indemnify the second defendant.

LIABILITY

Was the plaintiff employed to the first defendant so as to cast a duty of care upon that defendant?

The plaintiff's contention is that he was employed by the first defendant. He supported that contention by producing as Exhibits 3 & 4 payslips and pay envelopes which he received from the first defendant. The payslips show that his statutory deductions were done by the first defendant. The first defendant agrees that the payslips, which show the plaintiff's statutory deductions, were in fact prepared by that defendant. It however says that the circumstances of preparation of the payslips and the deductions were only for convenience. Whose convenience it was not said. They were not intended to create the legal relationship of employer and employee. They should not be taken as indicia of an employer/employee relationship.

In the light of the pleadings, the question as to whether the plaintiff was or was not an employee of the first defendant is of crucial importance. If the plaintiff was not an employee of the first defendant he cannot succeed in his claim against that defendant on the basis of an employer and employee relationship.

In spite of the evidence of Messrs. Adams and Porter, I am left with the fact that the first defendant prepared payslips, deducted statutory impositions from the plaintiff's pay, paid the plaintiff and above all prepared the accident report (Exhibit 6) impressed with its corporate seal.

The existence of an employer/employee relation is a question of fact. The behaviour of the first defendant to the plaintiff in the circumstances outlined has constrained me to conclude that the plaintiff was an employee of the first defendant. In such a situation, the first defendant owed a duty of care to the plaintiff statutorily and at

common law.

The second defendant company undertakes to provide electricity in Jamaica. Its operation in providing electricity is governed by the Electric Lighting Act and Regulations made thereunder. It has a duty not to breach the statute to the detriment of anyone.

Were the first and second defendants in breach of any duty owed to the plaintiff?

The correspondence which were collectively tendered as Exhibit 1 place the first defendant in the position of occupier of the building site at Boone Hall. In that capacity, on the 29th March 1978, through its electrical Contractor De Mercado and Associates, it requested the second defendant to "remove the existing line which indicates E on the drawing so that the construction may be continued".

The second defendant acknowledged the letter of 29th March 1978, and demanded a fee of $1,318 for removing and relocating the existing electric line. It is to be noted that the second defendant's letter of 24th April 1978, raised no objection to the first defendant's request, neither did it register any disapproval of the first defendant carrying out construction of buildings in the vicinity of its highly electrified wires; what the second defendant did was to merely say "as soon as all preliminaries are finalised and your cheque for $1,318 is received we will arrange for the lines to be relocated". The subsequent letters,all from the second defendant,were in the nature of that of 24th April 1978. Indeed that dated 3rd April 1979, some 10 days after the "serious electical accident on the site", complained of not receiving $1,586 being the cost of removing the lines and although, to quote:

> " We are very concerned about the construction of buildings close to high-tension lines. . ..... The danger to life, limb and equipment on the site as long as the construction work continues under the power lines cannot be over emphasised".

The second defendant said:

> " Payment of the required contribution is a necessary pre-requisite to the removal of the lines from the site".

What callousness!

Then the first defendant on the said 3rd April 1979, ten (10) days after the accident of 24th March 1979, in the only correspondence from that defendant since 29th March 1978, sent a cheque for $1,586 to the second defendant being the cost of retiring the line across the building site at Boone Hall.

THE FIRST DEFENDANT'S DUTY:

Liability is imputed to the first defendant under the following heads:

(a) The principle of negligence as stated in Donoghue v. Stevenson 1932 A.C.;

(b) Under the Occupiers Liability Act for failure to discharge the common duty of care to the plaintiff;

(c) As employer of the plaintiff failure to impliment a safe system of work and failure to discharge the duty of care due to the plaintiff.

I am not convinced as to the applicability of Donoghue v. Stevenson principle to the circumstances of this case and attribute its inclusion as a head to an abundance of caution on the part of the pleaders of the plaintiff's cause. In any event Donoghue v. Stevenson establishes the "neighbour test" which gives rise to a duty of care; it does not make for a measurement or definition of that duty in a case of this nature. The other two heads are proper inclusions and can stand side by side in a claim as was stated by Lord Gardiner in the Privy Council judgment of Commissioner for Railways vs. McDermott /1967/ A.C. 169, 186 and 187. The then Lord Chancellor after saying that occupation of premises is a ground for liability and not one of exemption from liability said:

> " Theoretically in such a situation there are two duties of care existing concurrently neither displacing the other. A plaintiff could successfully sue for breaches of either or both of the duties if the defendant had committed such breaches, although for practical purposes the plaintiff could be content with establishing the general duty and would not gain any thing by adding the special and limited duty".

Although the first defendant was in occupation of the building site, I am of the opinion that liability, if any, of that defendant will not

attach to it qua occupier under the Occupiers Liability Act. The electric wires although over the site it occupied, were exclusively in the control of the second defendant. And I so find.

But it is the duty of an employer towards his employer, to take reasonable care for the employee's safety in all the circumstances. See Cavanagh v. Ulster Weaving Company Limited /1960/ A.C. 145 at 167 where Lord Sommervell said:

> " Courts of first instance, whether judge and jury or judge alone, will proceed more satisfactorily if what I call the normal formula - that is reasonable care in all the circumstances - is applied what ever the circumstances".

The duty exists even if the employment is not inherently dangerous.

The circumstances of this case as I understand them, from the correspondence (Exhibit 1) and from the evidence of Porter, whom I find to be the servant or agent of the first defendant, show that the first defendant knew or ought reasonably to have known that the wires were energised and quite near to the roof on which the plaintiff was working. This is what Porter said:

> " On Tuesday when I left the site current was still in the wires and up to Wednesday early I asked Channer about the wires. As a result of what Channer told me I did not expect anyone to work on the roof. I did not go to work on the Thursday. On the Friday I was surprised to see the men on the roof. Steel work had been done in my absence. After I touched the wires I left and I heard a noise and I saw Barr well burnt".

He told Mr. Chin See that he did not test the very high wires as they were not within his arms reach.

In the light of that direct knowledge or reasonably expected knowledge, to have permitted the pulling up of steel bars 30 ft. long under high tension wires which were legally required to be at least 20 ft. above ground was dangerous in the circumstances. It was not a safe system of work and the first defendant breached the duty to provide a safe system of work for its employees.

I therefore find and hold the first defendant liable for damages suffered by the plaintiff in consequence of that breach of duty.

The second defendant was the undertaker to provide electricity in the area of the first defendant's property. Its lines by which electricity was conducted, passed over the first defendant's land. This

defendant was in sole control of the lines and their maintenance. The removal, relocating or retiring of the lines were within its competence to the exclusion of every other person, subject to a reasonable request from anyone requiring any of the above actions.

Section 5 Subsection (2) of the Electric Lighting Act makes the undertaker subject to regulations which are made for securing the safety of the public from personal injury. Regulation 9 of The Electric Lighting (Extra High Pressure Conductors) Regulations 1928 is as follows:-

> "9. The conductors (wires) shall be carried by insulators of approved sdesign and manufacture to which they shall be securily attached with soft drawn tie wire not smaller than No. 8 S.W.G. No extra high pressure conductor shall have less than 20 feet clearance above ground at any point in any span".

Did the second defendant operate in conformity with regulation 9?

The witnesses who were called to prove this defendant's obedience to the regulation 9, to my mind certainly enlivened the proceedings but did very little to enlighten the path to second defendant's contention that the regulation was obeyed.

Indeed Mr.Hendricks who took "precise" measurements of the building on which the Plaintiff stood found it to be 11 feet high. He did not however take any measurement of the height of the two top-most wires from the top of the house. That measurement was taken by Mr. Walder who found it to be 6 feet 6 inches in one part and 8 feet in another. If one accepts the height of the building to be 11 feet and the height of the wire above that building to be 6 feet 6 inches or 8 feet one arrives at a position of the wires being 17 feet 6 inches minimum and 19 feet maximum above the ground. Mr. Daley is quite correct to say the second defendant is the only party which has given any evidence as to height of the wires but that evidence propels my thought in only one direction - the height of the wires was under the statutory requirement of 20 feet. The second defendant was in breach of the statutory duty as laid down in regulation 9 above.

The question however is, was the plaintiff injured as a result of that breach so as to make the second defendant liable?

It is for the plaintiff to prove on a balance of probabilities that the breach of duty caused or materially contributed to his damage (see Bonnington Castings Ltd. v. Wardlaw [1956] A.C. 613)

It is clear that even if the wires were 20 feet above the ground a 30 foot length of steel, handled in the manner it was would have still come in contact with the wires with 10 feet to spare. I therefore find that the breach of regulation 9 has no causal connection with the plaintiff's injury with the consequence that the second defendant is not liable on the ground of breach of statutory duty.

The first defendant requested, to my mind, quite reasonably, "alteration" of the then existing high tension wires which ran over the Boone Hall property. The reason for the request was clearly communicated to the second defendant and was accepted by that defendant as evidenced by the letter (Exhibit 1).

The second defendant was well aware that the first defendant had started construction on the site. However it insisted on the cost of "altering" the lines - its "pound of flesh" being paid before it took any action in relation to first defendant's request. (See Mrs. Gibbons' evidence which said on cross examination by Mr. Muirhead)

> "Jamaica Public Service was aware of the construction work. Our personel were required to be at the site".
>
> "Whether it was removal or relocation of the line the applicant's cheque had to be received before".

It is not apparent to me by what authority the second defendant demanded payment for "altering" the lines. It certainly is not in the statute and it may very well be from commercial practice. If the money was demanded from commercial practice, then commercial practice ought to have constrained the second defendant to carry out the work and to bill the first defendant for payment. The first defendant , being obviously not a "fly by night" company, could have

been processed in court if it refused to pay. I detected a feeling, when the second defendant's case was being presented by Mr. Daley, that because that defendant had power to erect and maintain conductor lines over a person's premises, any request for an "alteration" of the lines is at the outset unreasonable and will only be acted up on if and when the cost of the "alteration" is paid.

That is not so as may be seen from the clear terms of Regulation 4(1) of The Electric Lighting (Way-leaves) Regulations 1960

> 4. -(1) " Where pursuant to section 40 of the Act the owner or occupier of land requires undertakers to alter or remove supply lines, posts or apparatus and the undertakers fail within a reasonable time to carry out such removal or alterations a reference to the Minister in accordance with that section shall be by letter addressed to the Minister".

I hold therefore that the prime consideration of the second defendant should have been a removal of the lines with the request for money as a precondition, a poor second. A statutory authority such as the second defendant should behave with consideration for and humanity to the public for whose benefit and welfare it exists.

The action of the second defendant in all the circumstances, fell short of responsibility. That being my finding, I would adopt the statement from Citizen's Light and Power Co. v. Lepitre (1898) 29 S.C.R. 1 at page 5 and say:

> " This is therefore a case for the application of the principle now well established that persons dealing with dangerous things should be obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end".

The second defendant did not act within the quoted injunction and was clearly negligent.

THE DEGREE OF EACH DEFENDANTS LIABILITY

The first defendant is a construction company. When such a company embarks on developing a building site, vast amounts of capital, heavy mechanical equipment and man power have to be mobilised. The capital is attractive of interest immediately it is raised, rental

has to be paid on equipment and certain classes of man power have to be paid even if operation is at a standstill. A construction company in the circumstances, could not be expected to have its capital and equipment idle for any length of time. Moreover, buildings have to be completed within times stipulated in contracts.

In the nature of things, it is obviously far easier to remove an electrical line than to close down a construction operation. That fact to my mind, has to be considered in assessing the degree of each defendant's liability.

It is true to say that no argument was advanced to say that the first defendant was within the circumstances I have stated above. However in a situation where I am required to do justice I am not going to sit by, artificially devorced from every day reality.

The first defendant, according to Mr. Muirhead, should be liable to the extent of 20%, the second defendant 60% and the Plaintiff 20%. His computation of liability leads me to now consider the question of contributory negligence on the part of the plaintiff. Contributory negligence does not depend on any breach of duty owed by the plaintiff to the defendants who were negligent. It depends on the question whether the plaintiff could reasonably have avoided the consequences of their negligence (Ellerman Lines Ltd. v. Grayson Ltd. /1920/ A.C. 477)

The plaintiff gave evidence to say that he was aware of the danger in working close to high tension wires. His evidence was to the effect that he did not expect the wires to have been electrified. His not expecting the wires to have been electrified was not unreasonable in the light of the evidence of Porter. Where a person takes a reasonable risk, that risk is not evidence of contributory negligence if the defendant created the risk by his negligence. It would be less contributory negligence where no risk was taken.

I do not hold that the plaintiff in this case took any risk. He was led to believe that the wires were safe by the

negligence of both defendants and he could not have reasonably avoided the consequence of that negligence.

I therefore find that the plea of contributory negligence does not avail either defendant to reduce the extent of liability.

In the light of that finding and on my reasoning in the opening paragraphs under this heading it is my opinion that the liability of the defendants is in the following ratio:-

first defendant 40%

second defendant 60% and I so find.

Is the second defendant entitled to be indemnified by the third parties?

The second defendant founded his claim to be indemnified by the third parties on the grounds that -

(a) they were transferrees of the land on which the buildings were being constructed;

(b) certain covenants which were contained in an instrument of indenture and which attached to and ran with the land were permitted to be breached by the third parties;

(c) the third parties were under a duty to the second defendant to observe and perform the covenants they having notice actual or constructive of the covenants.

The third parties denied that the instrument of indenture created any easement in favour of the second defendant. They argued that it created a licence to install electric lines to serve the original grantor's house.

The third parties say that even if the Instrument of Indenture binds them, which they do not admit, they neither caused nor permitted the erection of any building in breach of any covenant.

In addition if they are in breach of any covenant any damages suffered by the plaintiff are remote.

An easement admits inter alia, of the following essentials:-

(a) There must be a dominant and a servient tenement.

(b) The easement must accommodate the dominant tenement.

(c) The easement must be capable of forming the subject matter of a grant.

In this case, only (c) above is applicable and in that circumstnace, I hold that the indenture did not create any easement. What it created was a licence allowing the second defendant to erect and maintain electric lines over the land. As a matter of fact the Indenture Exhibit 8 apprehended the conclusion I hold because it says at paragraph 5.

> "If and so far as these presents may at any time for any reason fail to be effective as a grant of easement the same shall be construed as granting a licence to the company comprising such of the rights and liberties herein mentioned as may fail to be effective as easements".

If there was no easement, no covenant ran with the land and the second defendant cannot rely on the breach of any such covenant.

But if I am wrong as to the existence of an easement, I hold that the third parties did not cause or permit any erection in breach of any covenant. In so holding, I find support from Tophams, Ltd. v Sefton (Earl) [1966] 1 All E.R. 1039 and particularly the speech of Lord Guest at page 1044 letter H - I which is as follows:-

> "To cause a thing to be done is the same thing as to be its causa causans. "Causa causans" is the real effective cause as contrasted with the causa sine qua non which is merely an incident which precedes in the history or narrative of events".

The mere fact that the third parties sold to the first defendant with knowledge that the demised property would be used to erect buildings cannot be construed as causing or permitting by the third parties.

Having found that no easement existed and that the third parties did not cause or permit the breach of any covenant it is not necessary to make any finding on the claim that any damage to

the plaintiff is remote.

The second defendants' claim against the third parties fail.

DAMAGES

The plaintiff has suffered injuries which have left him armless above the shoulder and at present totally dependent on other persons to perform for him simple personal tasks. His legs were also burnt with the consequence that the tendons of the left lower limb have been fused to the bones. This has resulted in the foot being turned inwards making it painful for him to stand or walk.

He claims Special Damages under the following heads -

(a)	Loss of clothing	-	$49.00
(b)	Cost of Medical Examination and Certificate	-	30.00
(c)	Local travelling	-	50.00
(d)	Getting treatment in England		
	(i) Return air fares		
	(ii) Medical Physiotherapy		
	(iii) Cost of artificial limbs		
	(iv) Travelling and subsistence		
	(v) Fees for training at Queen Marys Hospital.		
(e)	Amount for attendant for 30 weeks		
(f)	Amount for attendant ofor 164 weeks		
(g)	Amount for attendant for 80 weeks		
(h)	Loss of earnings from date of accident.		

The items at heads (a) - (c) have been conceded and total $129.00.

The items at (d) (i) - (v) are agreed as to the quantum but it was submitted that since the amounts were paid from a "Fund" within the National Insurance Scheme (See National Insurance (Injury Benefits) Regulations 1970 Regulation 3(1) (d)) they should be counted in the assessment of damages. Before I go further let me state that the Legal Officer of the Ministry of Social Security gave evidence that the plaintiff was not obliged to repay what he received from the

Fund.

Mr. Muirhead for the first defendant invited the court's attention to the case of Cornilliae v. St. Louis /1965/ 7. W.I.R. 492 and argued that the case suggests the proper approach to the assessment of damages. He also cited among others, the case of Lincoln v. Hayman and Another as reported in the Times of February 18, 1982. Dr. Barnett for the plaintiff, to the contrary, said that the benefits and pension paid by the National Insurance Scheme should not be counted. He placed reliance on Parry v. Cleaver (1969) 1 Lloyds Report at page 183 and Boarelli v. Flannigan 36 D.L.R. 4.

I have read the Cornilliae case and found that the decision does not go to the issue of whether the benefits and pension should be counted or not. What it does is to reiterate what I may call the classic division of damages into the categories of special and general. The Lincoln's case demands some consideration.

In that case, the Court of Appeal in England held that Supplementary Benefit under the English National Insurance Act was deductible from an amount paid to the plaintiff as Special Damages.

Lord Justice Dunn in delivering the judgment of the Court appears to have said that Parsons vs. B.N.M. Laboratories Ltd. /1964/ 1 Q.B. 95 held that unemployment benefit was deductible and despite obiter dicta by Lord Reid in Parry v. Cleaver /1970/ A.C. 1 Parsons case was binding on the Court of Appeal. I have read the Parry's case and with deference to Lord Dunn I do not find anything said in Lord Reid's speech which would prevent me accepting it as good law. As a matter of fact, the cases such as Bradburn v. Great Western Rly Company (1874) L.R. 10 Ex. 1; Liffen v. Watson /1940/ 1 K.B. 556; Redpath v. Belfast and County Down Rly. /1947/ N.I. 167 and Peacock v. Amusement Equipment Company Limited /1954/ 2 Q.B. 347 on which Lord Reid based his speech, were accepted by Lord Pearson, one of the dissentients in Parry, as seeming to be uncontroversial. Lord Pearson however went on to say, without giving any reason, that

he would adhere to the decision in Parson's case and to the passage in his judgment at pages 141 - 144 of the report. Parry's case [1970] A.C. 1; [1969] 1 Lloyds Rep. 183 which decided against the deductibility of benefits under Social Security Acts has found favour in Bowker v Rose (1977) 121 Sol. Journal 274 and Daish v Wauton [1972] 2 Q. B. 262 in England and in Canada in Boarelli v Flannigan 36 D.L.R. (3d) 1973.

The issue seems to me to be in a state of fluidity. However in all the circumstances, I find my thoughts being propelled to an acceptance of the pursuasive decision in Parry's case.

I cite with approval and acceptance the following from Lord Reid's speech at pages 14 and 183 of the respective reports

> "It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or the public at large and the only gainer would be the wrong doer. We do not have to decide in this case whether these considerations also apply to public benevolence in the shape of various uncovenanted benefits from the Welfare State, but it may be thought that Parliament did not intend them to be for the benefit of the wrong doer".

Later on in his speech Lord Reid said:

> "It appears to me that public policy must enter largely into our decision and that, therefore, it is very relevant to see what policy Parliament has followed in dealing with a closely related subject".

He then went on to show what was the position of a plaintiff under Lord Campbell's Act as regards deduction of benefits and the progressive alteration of that position under The Fatal Accidents Act of 1959 section 2. He then said:

> "If public policy, as now interpreted by Parliament, requires all pensions to be disregarded in actions under the Fatal Accidents Act, I find it impossible to see how it can be proper to bring pensions into account in common law actions..... In my judgment, a decision that pensions should not be brought into account in assessing damages at common law is consistent with general principles, with the preponderance of authorities and with public policy as enacted by Parliament, and I would so decide".

In Jamaica, we have in our Fatal Accidents Act at Section 4(5) a similar provision to Section 2 of the English Act and any interpretation of that Section 2 may be deemed applicable to our Act. In addition, we have Section 15 of the National Insurance Act and the Regulations under that Act which make for the payment of benefits and pensions to injured persons.

I would therefore adopt the reasoning of Lord Reid and hold that public policy in Jamaica dictates that benefits and pensions under the National Insurance Act are not to be taken into account in assessing damages. (See Section 15 and 16 of the National Insurance Act and Regulation 3 of the National Insurance (Employment Injuries) (Benefit) Regulations, 1970). In consequence, the receipts by the plaintiff from the Ministry of Social Security as shown at (i) - (v) at head (d) and evidenced by Exhibits 5 & 5A are not to be taken into account.

The head (e) of the particulars of Special Damages claims $4,500 as an amount due to Ivylin Barr who accompanied the plaintiff to England and attended him there. Miss Barr who gave evidence, said she was in England for seven months and as a consequence she lost wages of $150 per week from her work at Joy Lane's Fashions.

I am not convinced that Miss Barr's earnings at the relevant time was a steady $150 per week. I am of the opinion that her earnings fluctuated and did not exceed an average of $100 per week. Statutory deductions would reduce that to $80.

That wages for seven (7) months or 28 weeks would be $2,240.

The next head (f) claims $50 per week for 164 weeks for services rendered by the said Miss Barr to the plaintiff. This period covered that between the date of the accident in March 1979 to July 1982, when she accompanied the plaintiff to England. In the light of the findings at (e) above and since Miss Barr said that the attendance on her brother cut her earnings by 50% her maximum loss would be $40 per week for 164 weeks giving a figure of $6,560.

The claim at (g) is for an amount due to an attendant who has been so serving as of February 1983 to date of hearing. The claim is for 102 weeks at $30 per week making a total of $3,060.

Are these claims maintainable?

Mr. Muirhead addressed to say:

(a) The claim at (e) should be rejected as it was not specifically proved and also that there was no proof that she had the opportunity to earn $150 per week;

(b) The claim at (f) should also be rejected as being merely gratuitous. In any case, the plaintiff was in hospital where nursing attention was provided;

(c) That there was no intention to enter into legal relationship so as to render the plaintiff liable to pay for the services provided by Miss Barr.

Dr. Barnett argued that the claims are perfectly maintainable. He said that the claims are reasonable not by reference to what the provider of the services earns but by the value of the services rendered.

He cited several cases in support of his contention. The cases he cited are quite relevant but for shortening this judgment, I will mention only 3 of those cases namely -

Wattson v. Port London Authority [1969] 1 Lloyds Report page 95;

Cunningham v. Harrison [1973] 3 W.L.R. 97, and

Donnelly v. Joyce [1973] 3 W.L.R. 514.

In Wattson's case the plaintiff was injured so that it was necessary for him to have nursing care. His wife gave up her job to render that nursing care. The issue for determination was whether the claim for an amount for the wife's loss of earnings was maintainable.

The Court held that it was and it did not matter that there was no firm undertaking that plaintiff would pay his wife the amount for her services.

In Cunningham's case, which was a most tragic one, a stong Court comprising Lord Denning then M.R., Orr and Lawton L.JJ. held that:

> " When a gravely injured husband is entitled to damages and his wife renders services to him instead of a nurse he is entitled to recover compensation, ... for the value of the services without any need for a legal agreement."

In Donnelly v. Joyce the Court held:

> " Since the loss to the plaintiff caused by the defendant's wrong doing included the existence of the need for the nursing services provided by his mother, he was entitled to recover her loss of wages....."

I accept the principles laid down in the cited cases as being applicable to the instant case and I would say that where a plaintiff suffers injury which necessitates care and attention he is entitled to recover the cost of such care and attention from the author of his injury for and on behalf of whoever provides such care and attention be it a relative or a stranger.

The claim (e) & (f) as adjusted by the Court and (g) are therefore maintainable.

The last head of Special Damages is for loss of earnings for 308 weeks at $75 per week. I find that in the light of the vagaries of the construction industry it is very unlikely that the plaintiff would have worked for 308 weeks. I hold that he would have worked for 208 weeks at $46 per week. Evidence was led and not challenged to say that the plaintiff was aloowed $150 per fortnight for 10 months.

Mr. Raymond Adams expressly stated that the allowance was "by reason of benevolence". "It was certainly not obligatory. Barr got more than what he got previously as it did not relate to any

particular rate of pay. He got about $150 per 2 weeks. The payment after the accident was not out of Porter's money."

The question therefore is what is the nature of this payment? It it to be taken into account in the assessment of special damages?

There can be no doubt that the payment was ex-gratia. It related to no wage rate as Mr. Adams said. A similar situation arose in the Cunningham's case cited above. In that case, the plaintiff was paid an ex-gratia sum of £828 annually for life. It was the similar amount he would have received if he had worked to retirement age. The court held that the payment should not be taken into account. Lord Denning said at page 102B.

> " It is an established principle of our law that damages awarded to an injured person are not to be reduced by reason of ..... nor by reason of gifts made to relieve his distress (See Redpath v. County Down Rly. /1947/ N. Ir. 167) Similarly, I think that the damages are not to be reduced by reason of ex-gratia payments made by his employer".

On the authority of Cunningham, I hold that the $3,000 paid to the plaintiff over the 10 months period should not be taken into account. In any case, the first defendant's action was laudable and I am convinced that it would be surprising to that defendant if the payment were not to be discounted. According to the evidence, an amount of $18,000 was collected from the public on behalf of the plaintiff at the suggestion of two of the country's media houses, Radio Jamaica and the Star Newspaper.

There was the submission that the $18,000 collected and given to the plaintiff should be deducted from his damages. In answer I would cite with approval the statement of Andrews L. C.J. in Redpath v. Belfast and County Down Rly. /1947/ N.I. 170 -

> " ... that it would be startling to the subscribers to that fund if they were to be told that their contribution were really made in ease and for the benefit of the negligent Railway Company. To this last submission I would only add that if the proposition contended for by the defendants is sound the inevitable consequence in the case of future disasters of a similar character would be that the springs of private charity would be found to be largely, if not entirely, dried up".

The amount of $1800 will not be accounted.

In Summary, the plaintiff's Special Damages will be:-

(1)	Amount due to attendant for 164 weeks @ $40 per week	=	$6,560
(2)	Amount due to attendant for 28 weeks @ $80 per week	=	$2,240
(3)	Amount due to attendant for 102 weeks @ $30 per week	=	$3,060
(4)	Loss of earnings for 208 weeks @ $46 per week after deductions	=	$9,568
(5)	Loss of clothing, local travel costs and cost of medical certificate	=	$129
		Total	$21,557

That amount is to bear interest at the rate of 3% from 23rd March 1979 to date.

General Damages

The Plaintiff's damages here will be for -

(a) Loss of his arms with consequential loss of amenities

(b) Pain and suffering

(c) Injury to his legs with consequential loss of amenities

(d) Loss of future earnings

(e) an amount to provide for the need for full time attendant

(f) an amount to cover the cost of replacing artificial limbs in the future.

The loss of both arms at the shoulders must be one of the most devasting injuries a person can suffer. It is my opinion that in Jamaica, such a loss will be the more traumatic and difficult to mitigate as there is an absence here, of adequate facilities and opportunities for training and employment for one so disabled.

The total loss of both arms is not a usual type of injury and understandably, there are not many cases dealing with damages for such loss. Not one case from Jamaica which dealt with a total loss of arms was cited to me. If there were any such decision in the Jamaica Courts I am certain the industry of Counsel in this case would have found it. Of 15 English cases to which my attention was invited, only 2 dealt with injuries to both arms but neither dealt with a total loss of both

arms. For those reasons I dare say this case is unique. The two English cases are, Merrington v. Ironbridge Metal Works [1952] 2 All E.R. 1101 (Hallet J.) and Done v. Air Ministry (Times, November 18, 1959, Liverpool Assizes; (Ashworth J.)

In the first case, a male part-time fireman of 40 lost his right arm and left hand in a fire and explosion. Mr. Justice Hallet awarded him £14,000. That £14,000 was held to value £114,000 at December 1982.

The plaintiff in the Done case was aged 30 and was an electrician. He was severely burnt resulting in the amputation of his right arm below the elbow and his left arm becoming virtually useless. Mr. Justice Ashworth awarded him £12,500 which amount is said to have valued £82,000 at December 1982.

As stated before, no Jamaican or West Indian case has been cited so I will have to quantify the plaintiff's loss, under this head with reference to the English cases.

Between 1952 and 1982 a period of 30 years £14000 valued £114000 that is to say the money moved £333 in each year. Between 1959 and 1982 a period of 23 years £12,500 valued £82,000 a movement of £300 in each year, very close to £333. I would take the movement to be £333 because the Merrington case is closest to the instant case in terms of similarity of injury. Taking that figure of £333 for each of the 3 years 1982 to 1985 I arrive at a figure of £999 which I add to £114000 making £114,999 - say £115,000. The £114000 in 1982 would therefore value £115,000 in 1985. Or £14,000 in 1952 values £115,000 in 1985.

In Central Soya of Jamaica Limited v. Junior Freeman, Supreme Court Civil Appeal 18/84 the learned President of the Court of Appeal, Mr. Justice Rowe at page 15 said:

> " Counsel on both sides agreed that a trial judge in assessing damages for non-pecuniary loss in cases of negligence is entitled to make his assessment in the 'money of the day' i.e. the money of the day at the time of trial, which would, then take account of any inflationary trends in the economy. .....
> and that accordingly, a victim of a tort feasor should not have his damages reduced in order to contain inflation. This means in effect that as the real value of money falls, the quantum of damages will increase, not with a

> view to giving the injured person a greater benefit than someone in a similar position, say ten years earlier, but to place him in the same position as near as possible to that earlier plaintiff". (my underlining).

The learned President concluded that between 1978 and 1984 the Jamaican dollar depreciated between 75% - 100% and went on to say at page 16:

> " Therefore an award in 1984 could not be said to be excessive or wholly out of line if reflected a 100% increase over an award made in 1978 or 1980".

I am impressed with and bound by the cited passages where they are applicable. But I have no Jamaican award for 1980 to which I can apply the depreciation formula. I cannot apply the formula to the English case as that would not be depreciating the Jamaican dollar but English pound although that currency has depreciated. Mr. Muirhead suggested that I take the $20,000 awarded for pain and suffering in Prince Henry v. Simeon Brown case at page 75 of Khan's book multiply it by 3 for a figure of $60,000. That $60,000 on an application of the Central Soya formula would double to $120,000.

It is to be noted however, that in the Prince Henry case the plaintiff was left handed and he lost his right arm below shoulder. The award did not include an element for loss of amenities. The damages for the loss of both arms at shoulder cannot be properly quantified merely by multiplying damages for the loss of one arm by 2. This type of damages is not arithmetically calculable. In any event, $120,000 could never be adequate compensation in this case.

Dr. Barnett on his part, in dealing with damages for loss of amenities and pain and suffering admitted that the value of £14000 awarded in 1952 was between £80,000 - £114,000 in 1982. He then invited the court to consider and adopt certain formulae based on certain economic theory.

I have no aptitude for economics and in any case, no economist was called to give evidence. I will not therefore base my calculation on any such theory.

I have found that the present value of £14000 awarded in 1952 is now £115,000. It would therefore, in my view be reasonable to say

that a plaintiff in Jamaica in 1985 should be awarded an amount of £115,000 for the loss of both arms.

I am however a believer in the proposition that damages should bear a reasonable relation to what the economy of a country can bear. It is obvious that the Jamaica economy is not as strong as the English economy. In that circumstances, I am of the opinion that an award of the Ja. dollar equivalent of £115,000 would not bear a reasonable relation to the Jamaican economy. At the same time, it cannot be ignored that the absence of Social Welfare facilities here and that plaintiff's injury is not one which will improve over the years are factors which go to suggest an award which will allow the plaintiff to provide those facilities from his own resources. Mindful of those contingencies, I am of the opinion that an award of 50% of £115,000 would be a reasonable one in the circumstances. That would be ½ of £115,000 = £57,500. That amount of £57,500 will have to be converted to the Jamaican Dollar equivalent at the date of trial. At that date, it took J$7.96 to buy one English Pound. The Jamaican Dollar equivalent is therefore £57,500 x 796/100 = $457,700. That figure I would scale down by 1/5 for immediacy of payment and other eventualities.

The exercise of scaling down would leave an amount of $366,160. I therefore award to the plaintiff that amount as a global figure to cover -

(a) Loss of arms with consequential loss of amenities;

(b) Pain and suffering; and

(c) Injury to legs with loss of amenities.

LOSS OF FUTURE EARNINGS:

The average earnings of the plaintiff at the time of the accident was $46.00 (see evidence of Miss Hazel Thompson). I have awarded him that amount per week as loss of earnings in his claim for Special Damages.

It is reasonable to assume that the plaintiff's earnings

would increase in the future irrespective of the type of work or for whom he worked. In an effort to make a fair estimation of future earnings I would say a figure of $120 per week after deductions would be a reasonable wage. I have come to that figure after taking into account the vagaries of the building industry etc. Having established a multiplicand of $120 what is to be the multiplier?

The plaintiff is now aged 24 years old. His working life could be 24 years other things being equal. There are circumstances such as illness and attrition which might curtail that period of 24 years. That being the case, a reasonable multiplier would be 16 years. Loss of future earnings will be $120 x 52 x 16 = $99,840 scaled down by 1/5 = $79,872.

The life pension of $40.50 received by the plaintiff weekly is not counted under the principle enunciated in Parry v. Cleaver /1970/ A.C. 1.

The next head of General Damages is expenses for the services of a full time attendant.

The minimum wage at present is approximately $60.00 per week. That will undoubtedly increase but a sum awarded now and prudently invested will provide the cost of attendant. I am of the view that a multiplicand of $60 per week for 18 years i.e. 2 years beyond his working life will provide a reasonable sum for the cost of an attendant-$60 x 52 x 18 = $56,160.

The cost of repairs to and replacement of the artificial arms in the future.

The evidence of Professor Golding is that the life of an artificial limb is approximately 5 - 7 years. During that period it would be necessary to carry out repairs to the hands - 3 pairs of hands in the period at a cost of $4,500 per pair. The arms would have to be replaced at the end of 5 - 7 years at a cost of $7000 per pair.

In all the circumstances, I am of the opinion that a sum of $30,000 is a fair estimate of the cost of future repairs and replacements to the artificial arms.

In summary I make the following awards for General Damages -

(a)	Loss of arms, injury to legs, pain and suffering and loss of amenities	-	$366,160
(b)	Loss of future earnings	-	79,872
(c)	Cost of services of attendant	-	56,160
(d)	Cost of repairing and replacing artificial arms	-	30,000
		Total	$532,192

The plaintiff is to have interest on $366,160 of the total figure at the rate of 4% as of date of service of the Writ on the last defendant served.

COSTS:

The plaintiff is to have his costs of these proceedings paid by the first and second defendants in the proportion of each one's liability. In addition to paying a proportion of the plaintiff's costs, the second defendant is ordered to pay the costs of the Third Parties.

Such costs are to be agreed or taxed.

C.L. B.068 of 1980

WINSTON BARR

VS.

(1) Jamaica Public Service Company Limited.

(2) Bryad Engineering Company Limited.

(3) Third Parties.

List of Exhibits

Exhibits	Subject Matter
1	Series of correspondence.
2	Agreed Medical Certificates.
3	Payslips for Winston Barr.
4	Envelopes for payslips.
5	Document showing amount of $6,040 spent for air tickets.
5A	Foreign Exchange Form in $20,981.25.
6	Document re accident, stamped with seal of Bryad Limited.
7	Payslips of Ivylyn Barr.
8	Easement Agreement with J.P.S. Co. Ltd.,
9A	Copy Certificate of Title Folio 390.
9B	Copy Certificate of Title Folio 392.
10A	Indenture for way leave.
10B	Plan of way leave.
11	Agreement between verbrad and National Housing Trust.
12	Agreement with De Mercado.
13	Foreman's advice sheets (3).
14	Job work sheet
15	Development Plan.
16	Drawing showing proposed lines.