JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 45 & 48/85

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE WRIGHT, J.A.
THE HON. MR. JUSTICE DOWNER, J.A.

BETWEEN	JAMAICA PUBLIC SERVICE CO. LTD.	2ND DEFENDANT/APPELLANT
AND	WINSTON BARR	PLAINTIFF/RESPONDENT
AND	BRYAD ENGINEERING CO. LTD.	1ST DEFENDANT/RESPONDENT
AND	RAYMOND KARL ADAMS)	
	NOEL BRYAN)	THIRD PARTIES/RESPONDENTS
	DERVIN BROWN)	
	MILTON VERLEY)	

C. M. Daley and L. Heywood for 2nd Defendant/Appellant

D. Muirhead, Q.C. and Dorothy Lightbourne for 1st Defendant/Respondent

Dr. L. Barnett and E. Frater for Plaintiff/Respondent

W. K. Chin See, Q.C. and Dennis Morrison for Third parties/Respondents

March 2,3,5,6,31; April 2,3,6,7, 1987 and July 29, 1988

KERR, J.A.: (Dissenting on the apportionment of liability)

The plaintiff by Writ dated March 11, 1980 brought an action against the first and second defendants claiming damages for personal injuries and attendant loss and damages suffered by him as a result of an accident which occurred at Boone Hall, Golden Spring in the parish of Saint Andrew on the 23rd March, 1979. The plaintiff, a steel fitter, sustained his injuries through electrocution when the steel he was fitting to a house under construction by the first defendant (hereinafter referred to as Bryad) came in contact with the power lines of the second defendant, the Jamaica Public Service Company Limited (hereinafter referred to as J.P.S.).

Bryad is a building and construction company. The J.P.S. are the undertakers under licence granted pursuant to the Electric Lighting Act to supply electricity throughout the island.

In his statement of claim, the plaintiff alleged that at the material time he was employed by Bryad and his injuries were sustained in the course of his employment. He founded his action in respect of Bryad on (1) breach of his duty as an employer to take adequate and effective precautions for his safety (2) negligence and (3) liability under the Occupiers' Liability Act and against the Jamaica Public Service for (1) breach of statutory duty under the Electric Lighting Act and (2) negligence. From the prolix and oft amended pleadings, in addition to general denials as to liability, the issues specifically raised may be broadly categorised thus:

By Bryad

1. That the plaintiff was not at the material time an employee of Bryad but of Charles Porter, an independent contractor.

2. That the plaintiff was either solely to blame or materially contributed to his injuries.

3. That the J.P.S. in negligence or breach of statutory duty was solely responsible for or contributed to the injuries of the plaintiff.

4. That the injuries to the plaintiff were due to the negligence of Charles Porter an independent contractor and employer of the plaintiff or to that of Demercado and Associates, Independent Contractors, on whom lie the duty and responsibility to ensure that the power lines were re-located.

By J.P.S.

1. That Bryad was solely to blame for negligence and breach of duty towards the plaintiff.

2. That the injuries to the plaintiff were caused or contributed to by his own negligence.

3. By third party proceedings that if found negligent, J.P.S. was entitled to an indemnity from the third parties, who as registered owners were in breach of a covenant running with the land and endorsed on the registered title, in that they permitted the erection of buildings within the prohibited proximity to the power lines.

By the Third Party

1. That at the material time the lands were not in their possession but in the possession of developers, Verbad Limited, under an oral agreement for sale and they did not permit the erection of the buildings by Bryad.

2. That in any event the damages were too remote.

Ellis, J., after a hearing lasting fifteen days between September 1984 and March 1985, in a written judgment delivered September 23, 1985, gave judgment for the plaintiff:

> Against Bryad and J.P.S.,
>
> General Damages $532,190 with interest at 4% from the date of service of the Writ,
> Special Damages $21,557 with interest at 3% from the 23rd March, 1979.
> The judge apportioned liability in the ratio of 40% to Bryad and 60% to J.P.S. with costs in the same proportions.
> On the third party proceedings, he found in favour of the third parties with attendant costs against J.P.S.

From this judgment J.P.S. appealed in respect of (i) the finding of liability against J.P.S. (ii) the apportionment of liability and (iii) the judgment in favour of the third parties. Bryad appealed against (i) the failure of the learned judge to find contributory negligence in the plaintiff (ii) the finding that the plaintiff was servant or agent of Bryad and (iii) the finding of liability either wholly or partly against Bryad. The plaintiff embraced the opportunity and by Respondent Notices (a) sought an increase in the damages awarded by contending thet the award of damages was erroneously assessed (b) complained that the trial judge erred in holding that J.P.S.' breach of Regulation 9 of the Electric Lighting (Extra High Pressure Conductors) Regulations 1928 had no causal connection with the plaintiff's injury and were not liable for breach of statutory duty. The question of the plaintiff's employment was raised on behalf of Bryad by the following ground:

> That the learned trial judge erred in law and misdirected himself on the facts in holding that the plaintiff was the servant and/or agent of Bryad and not an independent contractor.

On this issue, the plaintiff gave evidence that he was employed and paid by Bryad. His statutory deductions were made by Bryad and he tendered a number of his pay slips. In cross-examination, he denied being employed by Porter but admitted that Porter gave him instructions. In re-examination he said that he had been working on the Boone Hall site about one year before the accident and when he went there "they were just excavating". As his witness, Mrs. Andrea King-Bird, Senior Legal Officer in the Ministry of Social Security, tendered certain records including those pertaining to deductions from his wages to the National Insurance Scheme and in which Bryad was the named employer making the deductions and payments. Porter's name did not appear on those records. To maintain this contest, Raymond Adams, Managing Director of Bryad and Project Engineer gave evidence that Charles Porter was the sub-contractor in charge of steel erection and that the plaintiff was employed on the site by Porter. In cross-examination, he said that Bryad supplied steel and had on site, its supervisor to supervise the work and that Bryad paid for the work. Hazel Thompson, the payroll clerk, said that Porter submitted a sheet containing the names of the workers and she paid them. The statutory deductions for National Insurance Scheme were for convenience. Although she referred to Porter as the foreman, he was really a sub-contractor. Such weekly payments to the plaintiff after the accident were gratuitously made. Charles Porter also gave evidence that the plaintiff was employed by him as a third class steel fitter. When he submitted his job-work claim to Bryad's office, his workers' wages were deducted from it and paid directly to them and the remainder paid to him.

On this question Ellis, J., said:

> "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 support of this ground of appeal, Mr. Muirhead argued that the learned trial judge failed to apply the proper determinants, namely (i) who had the proper control of the plaintiff in his work and (ii) if it was Porter, was he an independent contractor?

Although the trial judge's findings were concise, it would be an unwarranted assumption to hold that he did not address his mind to these important considerations. Accordingly, it is enough to say that on the evidence before him this finding was reasonable and, therefore, I find no merit in this ground of appeal.

On the question of liability, regard must be had to the issues in contention and the evidence relevant thereto and in particular to the chronology of events leading up to the incident in which the plaintiff was injured. At all material times, the Registered Proprietors of the land at the site as evidenced by two Certificates of Title dated August 29, 1978 were, as tenants in common, Raymond Adams, Noel Bryan, Dennis Brown and Milton Verley. All four were named as third parties but apparently Brown was not served with the proceedings and accordingly not before the Court. On the certificates incorporated by reference were the rights and covenants granted to J.P.S. by the former owners, Aubrey Frank Hall and his wife, Margaret, in similar indentures registered as encumbrances on December 15, 1954. The third parties before the Court are principals of a company named Verbrad which, by an agreement dated July 7, 1978 between that company and the National Housing Trust, the company undertook to provide a number of housing units for the Trust on the registered lands. It appeared that although there was no formal transfer, Verbrad was in possession pursuant to an oral agreement for sale between the registered proprietors and Verbrad. Bryad, a Registered Company in which the same third parties were again the principals owning all the equities, were the building contractors for the Boone Hall Project. Thus, the links between the registered proprietors, the developers, Verbrad, and the builders, Bryad, were self-evident. When the registered proprietors acquired Boone Hall the J.P.S., pursuant to statutory authority as well as the rights and covenants under a Way-Leave Agreement,

maintained high tension lines on Boone Hall. The diagram and maps tendered in evidence revealed that there were power lines along the side of the parochial road serving homes further along that road. The line on Boone Hall now was a spur and ended some distance inside the property. The only service from this line had been to one "Hayle House". The service had been disconnected for some time and "Hayle House" had been demolished prior to the accident in February or March 1978.

By letter dated March 29, 1978, Demercado and Associates, Electrical Contractors to Bryad, wrote the J.P.S. as follows:

> "Re - Boon Hall St. Andrew
>
> Further to our recent conversation on the 28th instant in connection with the abovementioned project - we enclose Site Plan indicating the existing electrical distribution system which is now causing a problem in operating heavy equipment.
>
> We would appreciate if you could remove the existing line which indicates "E" on the drawing so that the construction may be continued. If this is complied with, then the Contractors would be able to map out the proposed roadway making it easier for J.P.S. to relocate the existing pole line to the proposed roadway."

The J.P.S. replied by letter dated April 24, 1978, the operative part of which reads:

> "You are required to bear the net cost of the work in the sum of $1,318 and, as soon as all preliminaries are finalised and your cheque for $1,318 is received, we will arrange for the lines to be relocated.
>
> Please note that the figure of $1,318 quoted above is subject to revision six months from the date of this letter."

Apparently, when there was no further response, J.P.S. by letter dated November 8, 1978, to Bryad, forwarded a copy of their letter of April 24, to Demercado and Associates and continued:

> "..... and ask you to let us know if you still wish to have the lines relocated.
>
> We would point out that the six months period has now expired and it may be necessary to revise our estimate of cost and requote you for the work."

This then was the position as regards re-location of the lines when the plaintiff was injured. The plaintiff, in evidence, said he was working at the Boone Hall Housing Scheme about one year before the accident and had done steel work on more than twenty other buildings. He had noticed the electric poles with wires and that on certain poles the wires were "looped" and some light posts had been previously removed. Before he did steel work, a building had to be at the decking stage. With respect to the building on which he was electrocuted, he had been working a day or two before.

The day in question he began working at 8:00 a.m. During the course of the day fresh lengths of steel were obtained from Bryad and were leaning against the building. Each rod was 30ft. long and 2" in diameter. Adonijah Marshall was his assistant. He was standing on the decking pulling up the rods when one touched the wire above his head. The shock flung him to the ground. He received extensive injuries.

The evidence of those injuries and other matters attendant or incidental to an assessment of damages will be dealt with hereafter in relation to the plaintiff's quest for an increase in the award of general damages.

In cross-examination, the plaintiff said he believed the wires had no current in them. He was led to so believe because Bryad's carpenters had worked on the building before and further on that day or some days before, Porter had held the wire and nothing had happened. He had pulled up several length before the accident. The wires which Porter held were lower wires, these were not the ones touched by his steel. He had come in contact with those lower wires and nothing had happened. He did not know that electricity could be cut off from lower wires while top lines were alive.

Raymond Adams, the Project Manager, said that the letter of March 29, 1978, was within the competence of Demercado and that Bryad had nothing to do with J.P.S.'s reply of April 24 as Bryad was not dealing with the matter. The power lines ran over the building on which the plaintiff was electrocuted. In his opinion, the height of the wire based on studies and information could vary from 18 feet on western point to 19'6" on the

opposite side. In cross-examination, he said that when the lands were bought from the Hayles, the house was supplied with electricity. He saw lines running to the house.

As regards his knowledge concerning the existing wires, the following extract from the judge's notes of evidence is worthy of note:

"Q. As an engineer with basic knowledge of electricity and experience as a contractor you must have been aware of the danger of constructing houses and high tension wires?

A. I would say yes.

Q. You took no step to see that no construction was done before the lines were removed?

A. I asked sub-contractor to have lines removed because they were live.

Q. You knew they were not removed up to the time of accident?

We started construction.

As far as we were concerned the lines went to the Hayle house which was demolished so why should they have a right to maintain lines to a demolished house?

The stand I took we were building because we expect J.P.S. to remove the lines any moment.

Building continued up to accident without lines being disconnected.

Electrical sub-contractor told me he was looking about removal of lines. The first I heard about expenses was when I got letter from J.P.S. Company.

Expenses would not have to come from Bryad Ltd. If De Mercado paid it would be a variation of the contract to take in the payment. I had no previous dealing I can recall with J.P.S. Company in relation to Boone Hall.

I was aware De Mercado should have been acting on Bryad's behalf. I did not understand why J.P.S. Company should have written to Bryad.

I passed the letter to De Mercado, the sub-contractor and continued building.

I took no advise as to the request of J.P.S. Company. It was dangerous, yes, to build under the wire but one can build 3ft of wall and foundation depending on height of line."

He admitted that before the lines were taken down, Bryad had put up some poles and lines for security lights. The sub-division plan had a new network of roads linking finally to the parochial road. Bryad requested existing power lines to be removed so as to finish the project. Bryad took possession of the premises in 1978. They tried to have lines removed before construction because the heavy equipment could probably come in contact with the wires. The roof on which the accident occurred was the last roof in that area.

Charles Porter, in evidence, admitted testing the electric wires. He said he went on the roof and took a piece of steel and flung it at the wire and nothing happened. He held wire with bare hands. He told the workers everything was O.K. and left them. When he left the site on Tuesday before current was still in the wire. He did not touch the wires on top because they were out of reach. He was aware that steps were being taken to cut off the power and he concluded that this had been done. For the J.P.S., their Supervisor in the Sales Department, Rachael Gibbons, gave evidence of the letters from J.P.S. prior to the accident and subsequently thereto of a reminder on March 28, 1979 with the upgraded costs and the belated payment by Bryad's cheque on April 3, 1979. In cross-examination, she said J.P.S. was aware of the construction work. Whether removal or re-location of the lines, payment would have to be received before such work was done. She did not expect any immediate danger as constructors do not construct under power lines. She did not know of the construction near to the high tension wires.

Alvest Walder, Electrical Engineer of the Government Inspectorate, Electricity Division, on March 26 attended the scene and took measurements. The building was 15 feet from the ground and the primary line 8 feet from top of the building.-

> "There was a remarkable sag in the line.
> It was 6 ft 6 in = (21'6")."

Rodney Roy Roberts, Government Electrical Inspector, gave evidence of the installations on Boone Hall in 1975. He was satisfied that as far as the high tension wires were concerned the minimum statutory

requirements had then been met. In cross-examination, he said he visited the scene of the accident. He said:

> "I took measurement from ground to a point of contact with overhead power line. There were 2 power lines of primary circuit. From ground to point of contact was 21 ft 3"."

There would be natural sag in the wire; lowest point of sag would be further down the valley, the wire was 1ft 3" above regulation height of 20ft. If request was made to remove the lines from an abandoned house, he should do so as a safety measure.

It is convenient to briefly deal with the question of contributory negligence on the part of the plaintiff. No argument, however plausible or attractive, can deny that on the plaintiff's evidence he had every good reason to believe that the wires were de-activated. Porter's testing of the lines merely gave him a false feeling of safety. On the basis of the evidence, a finding of contributory negligence would be unreasonable.

I now turn to a point raised both in the ground of appeal of Bryad and in the Respondents' Notice, namely that the learned trial judge erred as having found that J.P.S. was in breach of Regulation 9 of the Electric Lighting (Extra High Pressure Conductors) Regulations 1928, he found no causal connection with the plaintiff's injury and that J.P.S. was therefore not liable as the height of the wires below the regulation height did not contribute to the plaintiff's injury.

Dealing with this question, Ellis, J., said:

> "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.
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> The question however is, was the plaintiff injured as a result of that breach so as to make the second defendant liable?
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> 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 Bonningston Castings Ltd. v. Wardlaw [1956] A.C. 613)."

Mr. Daley, for J.P.S., challenged the finding of the learned trial judge that the lines were below the regulation height. Such a finding, he submitted, was unreasonable having regard to the evidence.

Mr. Muirhead contended that there was credible evidence to support the trial judge's findings of fact. However, argued Mr. Muirhead, he erred in his conclusion that the J.P.S. was not liable. The J.P.S. were aware of this breach with full knowledge of the activity taking place in the vicinity of the lines and accordingly they were liable. The Respondents' ground was of similar tenor and Mr. Muirhead's arguments were adopted by Mr. Chin See.

Now there is direct evidence from Roberts that from the ground to the point of contact as measured by him was 21 feet 3 inches. It was from a mound created by the building operations that there was a measurement of 19 feet 5 inches. There is merit in Mr. Daley's contention that this evidence is more reliable and should have been accepted by the learned trial judge rather than relying on the computations by which he arrived at this finding that the wires were below the regulation height. However, be that as it may, the learned trial judge is eminently right in holding that in the ciucumstances of this case, such difference below the minimum height of the power lines is of no moment.

In Bonningston Castings Ltd. v. Wardlaw [1956] A.C. at page 620, Lord Reid said:

> "It would seem obvious in principle that a pursuer or plaintiff must prove not only negligence or breach of duty but also that such fault caused or materially contributed to his injury, and there is ample authority for that proposition both in Scotland and in England. I can find neither reason nor authority for the rule being different where there is breach of a statutory duty. The fact that Parliament imposes a duty for the protection of employees has been held to entitle an employee to sue if he is injured as a result of a breach of that duty, but it would be going a great deal farther to hold that it can be inferred from the enactment of a duty that Parliament intended that any employee suffering injury can sue his employer merely because there was a breach of duty and it is shown to be possible that his injury may have been caused by it. In my judgment, the employee must in all cases prove his case by the ordinary standard of proof in civil actions: he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury."

As Ellis, J., did, I find that in this case the general proposition and the reasoning on which it rested were applicable to the instant case. Both in good sense and in law, the learned judge gave this contention the treatment it deserved when he said:

> "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 (sic) 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."

On the question of liability in the first defendant, he held that Bryad was in breach of the duty to take reasonable care for the employee's safety in the circumstances of this case relying on the statement of Lord Somervell in Cavanagh v. Ulster Weaving Co. Ltd. [1960] A.C. at page 147. He identified the relevant circumstances thus:

> "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.
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> .....
>
> In the light of that direct knowledge or reasonably expected knowledge, to have permitted the putting 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."

With respect to the second defendant, J.P.S., he found that as undertaker for the utility, J.P.S. was in sole control of the lines and their maintenance. The removal, re-locating 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. He found Bryad's request for "alteration" of the existing lines over Boone Hall quite reasonable, that the reason for the request was communicated to J.P.S., that J.P.S. was aware that construction had started but insisted on the costs of altering the lines being paid before so doing. He commented strongly on this demand for payment by J.P.S. and referred to Regulation 4(1) of the Electric Lighting (Way-Leaves) Regulations 1960. He concluded that the action of J.P.S. fell short of responsibility and relying on the statement of principle in Citizen's Light and Power Co. v. Lepitre (1898) 29 S.C.R. found that J.P.S. was clearly negligent.

Mr. Daley attacked this finding on several fronts. First, that J.P.S. had every right under statutory authority as well as pursuant to a Way-Leave Agreement to have and maintain the lines on Boone Hall and there was no obligation on J.P.S. to move or remove those lines merely at the behest of the owner or occupier. The failure of Bryad to respond to the request for pre-payment was unwarranted and it is Bryad who was wholly responsible for the non-removal of the lines and the injury to the plaintiff. In any event, if Bryad was objecting to the request for pre-payment, they ought to have pursued the procedure under Section 4(1) of the Electric Lighting (Way-Leave) Regulations 1940 which provides:

> "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."

Further, that not only was there no duty on J.P.S. to remove or re-locate the lines at the request of an owner or occupier but implicit in the Act

and in particular, Section 44, the owner or occupier has no right to have the lines removed or re-located except by agreement or decision of a Commission of Enquiry appointed under the Section and clearly a refusal by J.P.S. of a request to remove or re-locate was within the contemplation of the Act. No negligence or breach of statutory duty arises by refusing to accede to the request to remove the lines. Secondly, and following upon that conclusion, he submitted that negligence can only arise if J.P.S. in maintaining the lines does or omits to do something which it ought to know will cause injury to the plaintiff. On this, Mr. Daley argued that if a developer of housing desires re-location of the Company's lines for his own commercial benefit, there can be nothing unreasonable for J.P.S. to require the developer to pay in advance for the costs of re-location. In the present case, the contribution sought by J.P.S. was the net cost of the work. He submitted that J.P.S. cannot be liable unless it could reasonably foresee that from not complying with the request, the injury which the plaintiff suffered was likely to occur. In that regard, the act of Bryad in constructing buildings underneath the high tension wire in the circumstances was "an act of folly that no reasonable person could contemplate". The reasonable expectation is that Bryad would refrain from building in breach of the covenant and would not commence until the removal of the installations had been effected. Thirdly, the statement relied on by Ellis, J. in Citizen's Light and Power Co. v. Lepitre (supra) is not apposite as the injury to the plaintiff was not caused by failure to utilize any known safety device.

On the question of J.P.S.'s liability, Mr. Muirhead drew attention to the extent of the re-location requested and adverted to the fact that the one house served from the power line had been demolished in March 1978 and that this house had been abandoned and not serviced for some time before. He submitted that having regard to the letter of March 29 and the plan submitted to J.P.S., that Company was not only aware of the activity in contemplation but was put upon enquiry in circumstances in which they ought to have foreseen that an accident such as occurred was likely and to have guarded against such an eventuality. The house, having been demolished, there was a duty on the J.P.S. to retire or remove the

existing line with knowledge of the activities taking place. Secondly, the Electric Lighting Act imposes on the undertaker, the obligation to deal with situations that are dangerous or likely to so become with urgency in order to eliminate the risk of injury to persons. As regards the duty of an undertaker in a dangerous utility such as electricity, he referred to the case of Dominion Natural Gas Co. v. Collins [1909] All E.R. Reprint 1961. From this case, he extracted the principle that the Utility Company being negligent and the accident having occurred, the onus was on the Company to show that the proximate cause of the accident was the deliberate act of another. Failure to do so would render the Utility Company entirely to blame. J.P.S. was aware of the activities taking place and there was a duty on J.P.S. to take such steps as were necessary to guard against what in fact did occur. (See North-Western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd. [1935] All E.R. Reprint at p. 138). Now the headnote in the Dominion Natural Gas Co. v. Collins (supra) case reads:

> "In the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed on those who send forth or install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that an accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then the defendant will not be liable.
>
> Accordingly, where a gas company installed in a repair shop of a railway company a plant for the supply of gas and negligently fitted a safety valve with an emission into the shop instead of into the open air, and there was an explosion, one of the railway company's servants being killed and another injured,
>
> Held: the gas company was liable to the dependants of the dead man and to the injured man in damages for negligence."

And that in the North-Western Utilities, Ltd. v. London Guarantee and Accident Co., Ltd. (supra) reads:

> "Gas is a dangerous thing within the rules applicable to things dangerous in themselves. The rule in Rylands v. Fletcher (1) (1868), L.R. 3 H.L. 330, is not limited to cases where

"the defendant has been carrying or accumulating a dangerous thing on his land. It applies equally where, in exercise of a franchise to do so, an undertaker has been carrying gas in mains laid in the soil of another person, and, therefore, he is liable to pay for damage caused by the gas if it escapes, even though there is no negligence on his part. The rule has, however, been modified by the admission of the defence (among others) that the mischief which happened was brought about, not by any negligence on the part of the undertaker, but by the negligence of a third party. The undertaker may still be liable in negligence if he fails to foresee and guard against the consequences to his works of the third party's act.

Under a franchise granted to the appellants' predecessors in title by the city of Edmonton, the appellants laid gas-pipes under the streets of the city for the purpose of supplying natural gas to consumers. In 1923 the appellants laid a 12-in. inter-mediate pressure gas-main at a depth of 3ft.6in. In the pipe were three welded joints. In 1932 the local authority constructed a storm sewer system beneath the appellants' main. In 1932 gas from the appellants' system escaped into an hotel. It ignited, and the hotel was burned down. It was ascertained that the cause of the escape was a break in a welded joint in the gas main through which the gas percolated into the hotel basement, and that that break was caused by the operations of the local authority which had resulted in a general subsidence of the ground. In an action brought by the respondents as owners of the hotel and their insurers,

Held: the appellants were put on inquiry as to the operations which the local authority were conducting in the vicinity of their mains, and their failure to know of them was not consistent with due care on their part in the interests of members of the public likely to be affected, and, therefore, they were liable to the respondents for the damage suffered by them."

In neither of these cases was the liability of the master for not providing a safe system of work for his servant considered. No arguments of Mr. Muirhead, however attractive, could affect the unassailable fact found upon clear and cogent evidence that Bryad sent its workman to work in conditions which to Bryad's knowledge were fraught with danger. For so doing, Bryad is plainly liable for the injury the plaintiff suffered in the course of his employment and I know of no authority in law nor any common-sense consideration nor am I adverted to any view of the evidence that could in any way affect the finding of Ellis, J. on this aspect of the case.

What of the liability of J,P.S.?

I accept the reasoning of Mr. Daley that in the light of the authority conferred on the J.P.S. by statute and by Way-Leave Agreement, the mere fact that instead of promptly acceding to the request of Bryad to remove the lines they sought pre-payment of the costs could not render them negligent or in breach of a statutory duty. Negligence, therefore, must be founded,as he himself indicated,on the failure of J.P.S. to take such steps as the nature of the undertaking require to prevent foreseeable injury arising from that omission to a person reasonably within contemplation. Accordingly, there does not seem to be any great divergence of opinion between Counsel as to the duty of an undertaker in relation to a dangerous utility operated and maintained by the undertaker. The debate is whether in the circumstances of this case, there was in J.P.S. a breach of that duty with consequential injury to the plaintiff.

From his judgment, it is clear that the learned trial judge was moved to his conclusion by the following,amongst others, findings of fact:

(1) That J.P.S. had knowledge actual or imputed of the activities on Boone Hall;

(2) That the power lines ran over the field of activity;

(3) That a request for removal or re-location of the line was to enable them to carry out construction activities.

Mr. Muirhead drew our attention to Regulation 8 of the Regulations under the Electric Lighting Law (1890) published in the Jamaica Gazette, March 2, 1922 at page 134 and which reads:

> "An overhead line shall not be permitted to remain erected after it has ceased to be used for the supply of energy, unless the owners intend within six months again to take it into use."

This regulation was apparently not brought to the attention of the learned trial judge. However, it emphasizes what would be prudent procedures in relation to a line not in use or not likely to be in use for a reasonable period.

With the knowledge attributed to J.P.S., the lines could be de-activated or disconnected or removed without inconvenience to anyone.

That some workmen on the site, having regard to the nature of the activity, may be injured by the live power line was clearly not outside reasonable contemplation and for their omission to take reasonable steps to prevent this occuring in my view render them liable in negligence.

This brings me to the question of apportionment of liability. In the course of his judgment, the learned trial judge said:

> "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.
>
> 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 defendnnt, being obviously not a "fly by night" company, could have been processed in court if it refused to pay.
>
> 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 pre-condition, a poor second. A statutory authority such as the second defendant should behave with consideration for humanity to the public for whose benefit and welfare it exists."

and later:

> "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 divorced from everyday reality."

Mr. Daley was critical of these expressions of the learned trial judge and rightly so. The learned trial judge was tootling on the sentimental flute and allowed disaffection to sway his reason.

The J.P.S. is a business enterprise run with intent to make a profit. So is Bryad. The removal of the lines was solely for the benefit of Bryad. There is nothing unreasonable for J.P.S. to ask that Bryad pay for the removal. J.P.S.' advice was ignored. They prudently sent a reminder to Bryad. This, too, was not even given the courtesy of a reply. It is worthy of note that the building on which the plaintiff was working was one of the last two to be completed. Bryad had worked around the dangerous area up to them. If callousness and indifference there be, it was Bryad's. J.P.S.' liability in not de-activating or removing the lines must be measured against Bryad who sent their man into an area of known danger.

Mr. Muirhead urged that in apportionment regard should be had to the higher duty on the Utility Company. That duty in a general sense may be said to be higher, in that, the persons in contemplation cover a wide range. But as regards this plaintiff, the employer had a more intimate relationship and a duty definitely more specific. As apportionment in general rests on the extent of a defendant's responsibility having regard to all the circumstances, in my view, a fair and just apportionment of liability would be 2/3 Bryad and 1/3 to the J.P.S.

This brings me to J.P.S.' claim against the third parties. The statement of claim against them as registered proprietors of the land at Boone Hall contains this general averment:

> "..... that it (J.P.S.) is entitled to damages for breach of covenant contained in a certain instrument of Indenture as hereinafter set forth and for an indemnity on the part of the Third Parties or one or other of them and all costs incurred by the Second Defendant in defending this action and the costs of these Third Party.

The third parties in their pleaded defence, while admitting they are the registered proprietors, denied that the instrument of indenture created an easement and aver that pursuant to an oral agreement for sale in April 1977, Verbrad, a development company was put in possession, and also denied that they permitted the building construction on Boone Hall, and pleaded as alternative remoteness of damage.

The learned judge in dealing with the questions of law and issues of fact arising after dealing with the essential elements in an easement held (i) that the indenture did not create an easement but a licence and sought support for his conclusion thus:

> "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'."

and (ii) that the third parties did not cause or permit any erection in breach of any covenant - Tophams, Ltd. v. Sefton (Earl) [1966] 1 All E.R. 1039.

Mr. Daley submitted that the learned judge erred in accepting the arguments of Counsel for the third parties that there being no easement, no covenant ran with the land and the second defendant cannot rely on it. Such an argument, he submitted, not only nullifies the effect of the statute but nurtures the fallacy that a covenant cannot run with land unless it is comprised in an easement. He submitted whether or not the Way-Leave Agreement created an easement was irrelevant to the issues in the case. The Electric Lighting Act provides for its registration and the benefits and burdens enforceable by and against successors in title. If, therefore, the covenants bind the third party they must be liable to indemnify the second defendant for any damage sustained by reason of its breach. He submitted that the learned trial judge erred in holding that the registered owners did not permit the construction of the buildings on

the land. In any event, that argument could not hold for the third party Adams, the project manager and director of Bryad.

In reply, Mr. Chin See submitted that (i) there was no breach of contract between third parties and J.P.S., (ii) J.P.S. cannot rely upon their own negligence and thereafter seek an indemnity from third parties, (iii) assuming that there was a breach of contract, the negligence of J.P.S. was a novus actus interveniens and (iv) the claim against the third party having been framed in contract, J.P.S. cannot be indemnified for their own blameworthiness in Tort. In support of these contentions, Mr. Chin See referred to Quinn v. Burch Boothers (Builders) Ltd. [1966] 2 All E.R. at page 283; Sole v. W. J. Hallit Ltd. [1973] 1 All E.R. 1032 at page 1040; Hogan v. Bentinck West Hartley Collieries (Owners), Ltd. [1949] 1 All E.R. 589; The Fritz Thyssen [1967] 1 All E.R. 631.

Mr. Daley, in reply, said J.P.S. need not frame its claim specifically pleading a Tort. Where breach of contract is also a negligent act, damages are recoverable for both and as between contracting parties it is that one has to pay for the negligence of the other - See Lister v. Romford Ice & Cold Storage Co., Ltd. [1957] 1 All E.R. 125. In respect to the procedure in relation to the adding of the third parties, he referred to Rule 16(1) of the Rules of the Supreme Court.

It seems convenient here to deal with an incidental complaint on behalf of the J.P.S. At the trial against objections, the agreement in writing between Verbrad and the National Housing Trust for the providing of houses as specified therein was tendered in evidence. Before us, Mr. Daley contended that the judge erred in doing so.

Now Adams' evidence was of his own personal knowledge as to the transactions between the Registered Proprietors and Verbrad and between Verbrad and Bryad. It was submitted that there was no memorandum in writing to satisfy the statute of frauds in relation to the agreement for sale between the Registered Proprietors and Verbrad. He, however, gave evidence that the Registered Proprietors had all been paid. Verbrad was put in possession and then Bryad took over the project. Although from the notes of evidence and the judge's findings, Adams' evidence in respect

of certain issues was clearly not accepted, it was open to the trial judge to accept him on this aspect of the matter and to hold that there were sufficient acts of part performance as was indubitably referable to the agreement for sale as alleged and to the ultimate conclusion that the Registered Proprietors by placing the purchasers in possession had divested themselves of possession. The agreement between Verbrad and National Housing Trust was obviously tendered to bolster the credibility of Adams as evidence of the agreement for sale and the putting of Verbrad and Bryad in possession of the Boone Hall lands. The objection was to deny Adams the support to his credibility that would undoubtedly flow from that evidence. In my view, technically the objection was well founded. Verbrad was not a party to the action and the ultimate disposal of the houses was irrelevant. The agreement to provide houses was executory and could refer to intentions that would be carried out on the future acquisition of the lands. However, it is difficult to see in the context of his case what harm has been occasioned by its admission having regard to the oral testimony of Raymond Adams.

Reverting to the main questions, the addition of the third parties was permissible and in accordance with the jurisdiction conferred by Rule 16(1) of the Supreme Court Rules to add a party who ought to have been originally in the action as plaintiff or defendant or whose presence may be necessary in relation to questions arising if it is just and convenient so to do. However, the category in which a party is added is important as it defines the role of the added party in the proceedings. In the instant case, the third parties were brought by the second defendant, J.P.S., as being contractually liable to indemnify the J.P.S. should it be found negligent and this was the issue in contention.

Before us, Mr. Chin See did not pursue his arguments as to the category of the rights of J.P.S. over Boone Hall and the duties of the Registered Proprietors of the land pursuant to the Way-Leave Agreement and the Electric Lighting Law. It is, therefore, unnecessary to indulge in any analytical discussion as to the essential elements of an easement or the heresy of an easement in gross. Rights such as those enjoyed by the

J.P.S. have been categorised as a licence coupled with an interest. By whatever name called the covenants in the indenture are registrable encumbrances and impose the obligations therein on all transferees and all who hold through them. But the resolution of this question provides no solution to the question as to whether or not in the instant case the Registered Proprietors are liable on the basis of the covenants in the Way-Leave Agreement to idemnify J.P.S. for its own independent negligence.

Now a plaintiff may elect from among potential co-defendants any one or more for the institution of proceedings. In the instant case, the plaintiffs made no claim against the Registered owners of Boone Hall and no averment was made against them in his pleadings. The issue is, therefore, between J.P.S. and the third parties and the basis of J.P.S.' claim against them is as important as their role in the proceedings. I accept as correct the concise statement in Clerk & Lindsell on Torts - 14th Edition page 118 # 209, that contractual indemnity or contribution in respect of liability in Tort "may arise where there is a contract of insurance properly so called or as an incident of some other contract such as typically, a contract for plant or equipment" and the case of Spalding v. Tarmac Civil Engineering Ltd. [1967] 1 W.L.R. 1508 was cited as illustrative.

In Lister v. Romford Ice & Storage Co., Ltd. (supra), the employers of a lorry driver for whose negligence they were held vicariously liable to a third party were held entitled to claim damages from the driver equivalent to an indemnity. The claim rested on the basis that the driver was in breach of the implied terms in his contract of employment to perform his duties with the reasonable care and skill expected of him in that capacity. The decision is clearly of limited use and application. It does not apply where the employer is independently guilty of negligence. (See Jones v. Manchester and Others Corporation [1952] 2 Q.B. 852). Indeed in Lister v. Romford Ice & Cold Storage Co., Ltd. (supra), the majority in the House of Lords held that the claim to contractual indemnity was independent of the right to contribution under the Tortfeasors Act (1935). In my view, Lister v. Romford Ice & Cold Storage Co., Ltd. (supra) is unhelpful to J.P.S.' cause as the claim against J.P.S. by the

plaintiff is for independent negligence. Further, I have not been adverted to any term in the Way-Leave Agreement either expressly or by implication that would support a claim for contractual indemnity. Accordingly, I do not accept Mr. Daley's submission that in the instant case the nature of the claim is immaterial. The importance of the basis on which a claim is made lies in the fact that different questions arise where the claim is for contractual indemnity and in the case where the claim is based on the right to contribution from joint Tortfeasors. This is illustrated in the case of Sole v. W. J. Hallit Ltd. [1973] 1 All E.R. 1032. In that case it was held that:

> "The plaintiff's claim had to be pleaded in contract, his contributory negligence would have constituted a break in the chain of causation, and a defence to such a claim. Since it was open to him to found his claim in tort, he was entitled to recover damages subject to a deduction for contributory negligence." (Emphasis supplied)

The J.P.S. had committed itself to contractual indemnity and as said before, I do not see any obligation in the registered encumbrance or in the Way-Leave Agreement on the Registered Proprietors amounting to an indemnity to the J.P.S. for its independent act of negligence. It is on this basis that I hold that the claim against the third parties must fail.

If it were necessary to decide the question whether or not the registered owners permitted the erection of this building within 12 feet of the electrical conductor in breach of the Way-Leave Agreement, I would hold on the findings of the trial judge as to possession of Boone Hall having been passed by the registered owners to Verbrad pursuant to an oral agreement for sale, that the third parties, Bryan and Verley, did not "permit" such erection irrespective of whether one gave a narrow or wide interpretation to the word "permit". The same, however, could not be said of Raymond Adams, the project manager, and managing director of Bryad. He was the "erector" of the buildings and he signed as grantor the instrument of March 4, 1975, conferring the licence to the company in respect of Boone Hall and containing the prohibition against the erection of buildings within 12 feet of the electrical conductors. However, because of the

conclusion to which I have come on the question of contractual indemnity I consider this finding immaterial.

In the end, for the reasons set out herein, I would allow the appeal of J.P.S. against the apportionment of liability and make the following apportionment:

Bryad - 2/3

J.P.S. - 1/3

I would dismiss the appeal by J.P.S. against the judgment in favour of the third parties and affirm the order of the Court below.

I would dismiss the appeals of Bryad against J.P.S. and the plaintiff.

The award of costs would follow these events.

Since preparing this draft, I have had the benefit of reading the draft judgment of Wright, J.A. and his assessment of damages. In this I concur. On the apportionment of liability, despite discussions with my brothers Wright and Downer, JJA, I feel constrained to dissent for the reasons set out herein.

WRIGHT, J.A.:

I have had the benefit of reading the judgment in draft of Kerr, J.A., and will, in my brief contribution, avoid dealing afresh with the areas in which we are in agreement. I propose therefore, in addition to the question of damages, to deal with the apportionment of responsibility with which we are not in agreement. We agree on the dismissal of the appeal of the Jamaica Public Service against the judgment in favour of the third parties as well as on the dismissal of Bryad's appeal against the plaintiff and the consequential order as to costs.

Let me deal first with the question of apportionment of liability.

It has been established on the evidence that the Jamaica Public Service lines were on the property by virtue of the way-leave which granted to the Jamaica Public Service a licence coupled with an interest. Jamaica Public Service is the sole undertaker having absolute control of a dangerous utility and concomitant with that a very high duty of care to anyone who would be likely to suffer injury resulting from a breach of such duty of care. As long as Hale House was being serviced by the lines in question and there was no change in the use of the property, there was no danger against which Jamaica Public Service had to take care since according to the evidence, the lines had been constructed in accordance with the statutory requirements. However, it is my opinion that once the Jamaica Public Service was alerted to activities on the property which affected their relatively safe position they were required to take such steps as prudence dictated. The injury to the plaintiff was on March 29, 1979 almost a whole year from the date of the letter of March 23, 1978, requiring the removal of the lines. While it is true that the immediate benefit of removing the lines would be Bryad's, who had a duty to provide a safe system of work, it is also true that in the long run the Jamaica Public Service stands to benefit

immensely from the development in the area.

The evidence of Raymond Adams is that"Hale House was demolished about February to March 1978 to facilitate development of site." So that at the date of the request to have the lines removed those lines were serving no purpose. Then, too, this request was made quite early to facilitate clearing the site and this would be long in advance of construction. What is more, the Jamaica Public Service received a plan of the proposed development and thus knew how the location of the lines would affect construction. At that time Bryad had no need for electricity on the site. Said Adams, in his evidence-in-chief, "prior to the demolition I don't know what happened to the electricity." However, in cross-examination when questioned about steps taken to ensure there was no construction before the lines were removed he said:

> "I asked sub-contractor to have lines removed because they were live."

Obviously, this state of knowledge must have pre-dated the letter of 29th March, 1978. What was not disclosed was his state of knowledge up to and including the time of the accident. But he was not the only Bryad witness who spoke about the state of the lines. Charles Porter who had the immediate supervision of the plaintiff, is the other witness in this regard. An extract from his evidence reads:

> "Marshall, Samuels there. I spoke to Marshall who said wires were dead. ..... After Marshall spoke to me I understood the wires were dead. I went up on the roof. I took a piece of steel and throw it on the wire. Nothing happened. I held wire with my bare hands. I told workers everything is OK and I left them. The wires were in the open for everyone to see."

The Court ruled against admission of evidence by this witness as to the presence of Jamaica Public Service van on the site which seems strange in the light of evidence later given by the Jamaica Public Service witness, Mrs. Rachael Gibbons that:

"Our personnel were required to be
at the site."

What, however, is not clear is who were Marshall and Samuels? It cannot, however, be presumed that they were Jamaica Public Service employees. It is worthy of note that while the plaintiff did not mention these two persons he corroborated Porter as to the steps taken by Porter before the latter permitted them to work in the danger area. But as the evidence stands, there is no positive statement that Jamaica Public Service who had control of the utility had said that work could be safely carried out. Obviously, there were lines other than those tested by Porter and as events proved, it was unwise to presume that all were dead because some proved to be dead. Hence Bryad's negligence in sending the plaintiff to work without such assurance from Jamaica Public Service.

But what had the Jamaica Public Service done from the time they received the letter up to the date of the incident? Apart from sending two letters setting out the charges, there is no evidence of even a visit to the site. In either of those letters, and preferably in both, Jamaica Public Service could have added a note of warning to Bryad that the lines were live and that no work should be done in the vicinity of those lines. They had the actual knowledge that the lines were live while Bryad at the highest seemed to have only constructive knowledge. Quite apart from Regulation 8 (supra) which required the removal of an overhead line after it has ceased to be used for supply of energy, unless the owners intend within six months again to take it into use, Jamaica Public Service had nearly 12 months notice and ought at least to have monitored the progress of work in the vicinity of their lines (See North-Western Utilities Ltd. vs. London Guarantee and Accident Co. Ltd.) (supra) but failed to take the necessary steps in keeping with the duty of care imposed upon them by the nature of their dangerous utility. Had they at least de-activated the lines there would

no longer be any danger. The lines would be reduced to being a mere inconvenience to Bryad.

When all the evidence surrounding the incident is considered, including the fact that Bryad was not precipitate in building in the vicinity of the lines, the fact that Bryad did not comply with the request for payment does not to my mind outweigh the duty of care owed by the Jamaica Public Service. I think the scales are heavily tipped against Jamaica Public Service and in all the circumstances, I would dismiss the appeal of Jamaica Public Service against apportionment and apportion liability at 25% to Bryad and 75% to Jamaica Public Service Company Limited.

Costs will follow the event.

I will now deal with the plaintiff's appeal against damages.

The injuries in respect of which the plaintiff sought compensation were pleaded as follows:

"(a) severe electrical burns to both upper limbs and to a lesser extent both legs,

(b) bilateral amputations to both hands below the elbow on 28/3/79,

(c) bilateral amputations of both arms above the elbow on 15/5/79,

(d) recommended to Queen's Hospital, England for fitting of above elbow prosthesis,

(e) disability assessed as considerable and devastating,

(f) hospitalisation from 23rd March, 1979 and continuing.

The plaintiff's evidence relating to the injuries is noted as follows:

"Accident was about 11 a.m. When I found self on ground I was in flames. Pants and shirt burning. I was lying on my face and I could not move. Some guys ran to me and put me in a van. Limbs stretched out and

"could not move. I was taken to Stony Hill Health Centre - I was taken to Kingston Public Hospital and admitted. In the night I was taken to operating theatre. Arms were slit by doctor three places. On the following Wednesday I was taken to theatre where arms were amputated. My legs were burnt and stiff. Parts burnt to the bone.

In August I went back and there were further amputations. I also had burns under arms and on body. I have as a result scars on body and legs. I can't stand for long as both legs burn me if I do standing for long. If I walk legs burn and pain me."

Pre-accident sporting activities no longer possible, were swimming, football, cycling and dancing. Also he cannot dress himself. To feed himself a spoon has to be pushed between two fingers and he is now only able to sign his name if a pen is pushed between his fingers; nor can he bathe himself or board a bus normally nor urinate. He has to employ help. Artificial limbs were fitted in England in 1982 whither he was accompanied by his sister. The right stump was operated on in England and he had to wait for stump to heal. There is a bump on the right stump which pains. Artificial limbs to be changed every 2-3 years. He testified that he had graduated from the Maldon Secondary School in Grade 11 where he had done Cabinet-making. He then went to an Industrial Training Centre where he learnt steel work.

The evidence of Dr. John Golding in support of the plaintiff was as follows:

"As regards his legs he had extensive burns to both lower extremities above and below the right knee and particular outer side of the left lower limbs where there has been a full thickness loss of skin about 4" above the ankle which has bound down the tendons to the bone causing foot to turn in when he stands or walks. This results in difficulty when he walks for any length of time with pains in legs. First saw him October 1981 two years after the original incident. I last saw him today 17th September, 1984. Legs have not made much change.

By Court: Pain would be less now than it was before but still some discomfiture and pain."

There can indeed be no question but that this 24 year old plaintiff has suffered devastating injuries. Damages were awarded as follows:

"(a)	Loss of arms, injury to legs pain and suffering and loss of amenities	$366,160.00
(b)	Loss of future earnings	79,872.00
(c)	Cost of services of attendant	56,160.00
(d)	Cost of repairing and replacing artificial arms	30,000.00

The learned trial judge approached his award of damages with this appreciation:

> "The loss of both arms at the shoulders must be one of the most devastating injuries a person can suffer. It is my opinion that in Jamaica, such 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 decisions in the Jamaican 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."

It is well recognised that the award of damages for non-pecuniary loss is never free from problem let alone in a case such as the instant which is appropriately classified as unique. The two English cases from which the learned trial judge sought some guidance in resolving the problem are: (1) Merrington vs. Ironbridge Metal Works [1952] 2 All E.R. 1101 in which Hallet, J., awarded a 40 year old part-time fireman £14,000 for the loss of his right arm and left hand in a fire and explosion. This amount was held to value £114,000 in 1982;

(2) Done vs. Air Ministry (Times November 18, 1959) (Liverpool Assizes) in which Ashworth, J., awarded a 30 year old electrician £12,500 for the amputation of his right arm below the elbow and his left arm becoming virtually useless the result of being severely burnt. This latter award was in 1982 represented by £82,000. Choosing the Merrington case as a better guide, the learned trial judge arrived at a figure of £115,000 as being the 1985 value of the £14,000 awarded in 1952. Then he said:

> "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."

But this statement is not as conclusive as it may seem for he proceeded forthwith to reduce the amount by 50% for contingencies thus arriving at an award of £57,500 which at J$7.96 = £1 worked out at $457,700 which was further reduced by 1/5 for immediacy of payment. In arriving at the award for loss of future earnings, a multiplier of 16 representing a scaling down from 24, the contemplated working life, was chosen.

In attacking the assessment of General Damages as wholly erroneous, Dr. Barnett is mostly concerned with these scalings-down which in the event resulted in what he contended is inadequate compensation for the damages suffered by the plaintiff. He complained that the learned trial judge failed to have regard to the fact that the amount of £114,000 which he felt would be a reasonable award to a plaintiff in Jamaica in 1985 was arrived at after taking contingencies into account. Accordingly, any further scaling-down on account of contingencies as did the learned trial judge must be a move in the wrong direction. Indeed, said Dr. Barnett, the factors mentioned by the learned trial judge in making his award are factors which favour a scaling-up. Said he, in arriving at his figure after accepting that £115,000 would be a reasonable award in 1985 for these injuries:-

> "I am however a believer in the proposition that damages should bear a reasonable relation to which the economy of the country can bear. It is obvious that the Jamaican economy is not as strong as the English economy. In that circumstance, I am of the opinion that the Jamaican 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 the plaintiff's injury is not one which will improve over the years are factors which go to support an award which will allow the plaintiff to provide those facilities from his own resources."

Earlier in reasoning his way out, the learned trial judge had disclaimed any aptitude for economics but if that is so then in transposing the English award into Jamaican terms he must have been its unwitting agent. It must be borne in mind that the £114,000 was for injury far less traumatic than, and not as difficult to mitigate as the plaintiff's injuries. In order to meet the economic considerations and, bearing in mind the multiplier of 16, Dr. Barnett submitted that a scaling-down of the £115,000 by 1/5 would be acceptable.

As for contingencies, it was submitted it should be recognised that they are not all adverse to a plaintiff, e.g., in the instant case the evidence discloses that there are occasional increases in the rates earned by the employees in the building industry, an industry with continuity of development. So that while it is not unreasonable to accept that he might not be constantly employed - this being reflected in the multiplier - it is not reasonable to hold that the plaintiff's earnings would remain fixed.

Opposing the move to increase the award, Mr. Heywood submitted that there should be no interference because it has not been shown that the learned trial judge misapprehended the facts nor made any erroneous estimate of the damages. He had shown an awareness of the inflationary trend and in discounting the award for immediate payment he was only doing what is standard.

Miss Lightbourne's position was that she had no complaint with the result but with the method adopted. She then obliged with her view of the method she prefers but since this is only another route to the same destination, no harm is done by its omission.

The recognised grounds on which an appellate Court will interfere with the assessment of damages by a trial judge were well stated by Greer, L.J., in Flank v. Lovell [1935] 1 K.B. 354 at page 360 where he said:

> "..... this court will be disinclined to reverse the finding of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a lesser sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

The assessment is not being assailed as involving the application of any wrong principle of law but on the second ground as being an erroneous estimate of the damage to which the plaintiff is entitled.

The uniqueness of this case referred to by the trial judge is reflected as well in the fact that neither in the West Indies, where the need to achieve uniformity in awards is recognised, nor among the English cases has any award in a comparable case been found. The starting figure employed by the trial judge is not in fact taken from a comparable case but a start must be made and he has not been criticized for choosing that figure. There is no formula for achieving equiparation between any West Indian currency and the English pound so as to relieve a trial judge of the difficulty attendant upon the use of awards in English cases as guides in making assessments within our region. In Aziz Ahmad Ltd. vs. Raghubar [1967] 12 W.I.R. 353 at 357, Wooding, C.J., in seeking a grounding for assessing general damages in a case of

personal injury rejected the practice of equiparation between the Trinidad dollar and the English pound, then said:

> "Nevertheless, it is right that I should add that such uniformity as may be practicable should conform with current trends here and not elsewhere. As Lord Morris of Borth-Y-Gest, speaking for the Privy Council, said in Singh (Infant) vs. Toong Fong Omnibus Co. Ltd. (1964) 3 All E.R. 925 at 927:
>
> 'to the extent to which regard should be had to the range of awards in other cases which are comparable, such cases should as a rule be those which have been determined in the same jurisdiction or in a neighbouring locality where similar social economic and industrial conditions exist'."

But I think that where justice demands, as I think it demands in this case, where the required guide cannot be found in awards in the same jurisdiction or in a neighbouring locality then recourse should be made to such source as will aid the Court in coming to a just and fair conclusion. Hence the justification for employing as a guide the figure used by the trial judge in the instant case.

What does present great difficulty in this case is the obvious shift by the trial judge away from his finding that £115,000 would be a reasonable award to the plaintiff by proceeding to discount it by 50%. A discounting by 50% followed by another discount of 20% in circumstances where the loss of future earnings is also discounted with reference to his working life put at 16 years does pose a problem concerning the estimate as to what is adequate compensation for the devastating injuries suffered by the plaintiff when the relevant factors are taken into account. Does not a 50% discount for contingencies in the circumstances seem so inordinate as to justify the interference of this Court? I think so.

Accepting the trial judge's starting figure of £115,000 and bearing in mind the difference in the English and Jamaican economies, I would scale that down by 30% for contingencies thus producing $640,780. It is recognised practice that there is a discounting for immediacy of payment. Accordingly, I would make the final figure $550,000. Although Dr. Barnett complained about the implications of choosing a multiplier ; he supplied no basis for disturbing the award for loss of future earnings or any of the other awards. These will, therefore, not be disturbed. Accordingly, the award will now read:

Under	(a)	$550,000
	(b)	79,872
	(c)	56,160
	(d)	30,000
		$716,032

The amount on which interest at 4% will be paid now reads $550,000.

DOWNER, J.A.:

The injury suffered by Winston Barr has raised important issues in the law of damages, and the liability in tort of employers and public utility companies operating pursuant to a statute. These matters have been fully dealt with by Kerr and Wright, JJ.A., and I propose to confine my observations to the issue of the apportionment of liability between Jamaica Public Service Company Limited on the one hand, and Bryad Engineering Company Limited, the employer of Barr, on the other.

Since the injury was caused from Barr's contact with live electric wires through a steel rod he was handling during the course of his employment, it is pertinent to examine the statutory provisions which seeks to protect the public from personal injury. Section 5 of the Electric Lighting Act, so far as is relevant, reads:

> "5.—(1) The undertakers shall be subject to such regulations and conditions as may be inserted in any licence, order or special Statute, affecting their undertaking with regard to the following matters—
>
> (a) .....
>
> (b) .....
>
> (c) the securing of the safety of the public from personal injury, or from fire or otherwise;"

Regulations 7 and 8 pursuant to this Act, published in the Jamaica Gazette, March 2, 1922 at page 134, reads:

> "(7) Every high pressure electric line, conductor or other apparatus shall be protected by a suitable automatic or fuse cut-off at the point of junction with the source of supply.
>
> (8) An overhead line shall not be permitted to remain erected after it has ceased to be used for the supply of energy, unless the owners intend within six months again to take it into use."

It does not appear that these regulations were cited before Ellis, J., but as this is an appeal by way of rehearing, it was permissible to advert to it in this Court. Moreover, the issues were raised below. Here is how Barr the plaintiff/respondent pleaded the matter in his amended statement of claim at page 37 of the record, under the caption Breach of Duty, in respect of the utility company:

> "4.(b)(iii) Failure to de-energise or insulate the said electricity lines, more particularly as the house of the recipient of the current - the grantor of the licence or easement had been demolished.
>
> (iv) Failure to de-energise or insulate the said electricity lines when it knew or ought to have known that construction work was being carried on in the vicinity of the said lines.
>
> (v) Failure to remove, retire or relocate said lines promptly or within a reasonable time on request."

These particulars were also pleaded by Bryad in their Further Amended Defence at page 49 of the record. The utility company denied these particulars of negligence.

The liability for articles dangerous in themselves as electricity was stated by Lord Dunedin in Dominion Natural Gas Co. v. Collins [1908-10] All E.R. Rep. 61 at 64, thus:

> "It has, however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth to install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and a light is set to it. Yet Dixon v. Bell (1816), 5 M. & S. 198; 1 Stark. 287; 105 E.R. 1023; 36 Digest (Repl.) 80, 431, Thomas v. Winchester (1852), 6 N.Y.R. 397, and Parry v. Smith (1879), 4 C.P.D. 325; 48 L.J.Q.B. 731; 41 L.T. 93; 43 J.P. 801; 27 W.R. 801; 36 Digest (Repl.) 81, 433 are all illustrations of liability

> "enforced. On the other hand, if the proximate cause of the accident is not the negligence of the defendant, but the conscious act of another volition, then he will not be liable. For against such conscious act of volition no precaution can really avail."

Further on page 65 Lord Dunedin explained how the gas company could escape liability in that case. Here is how he states the rule:

> "Accordingly their Lordships hold that the defendants, the gas company, have failed to show that the proximate cause of the accident was the act of a subsequent conscious volition, and that, there being initial negligence found against them, the plaintiffs are entitled to recover."

It should be noted that in that case, the railway company, the employers of the deceased were also sued and specific questions were put to the jury which were as follows:

> "1. Was the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants, the railway company? A.—Yes. 2. If so, wherein did such negligence consist?—A. By the company allowing their men to tamper with the gas plant. 3. Was the injury to the plaintiff Collins and to Perkins caused by any negligence of the defendants, the gas company?—A. Yes. 4. If so, wherein did such negligence consist?—A. By not running a pipe up through the roof. 5. If you find the accident was caused by the escape of gas, from which valve do you find the gas escaped?—A. Safety valve."

On these answers, the trial judge found for the plaintiff against the gas company, but dismissed the suit against the railway company. As the plaintiff resisted the appeal of the gas company but acquiesced in the decision absolving the railway company, the Privy Council in this Canadian appeal did not have to consider the liability of the employers.

The other important case cited in this regard was North-Western Utilities, Ltd. v. London Guarantee & Accident Co., Ltd. [1935] All E.R. Rep. 196. This was another case from Canada to the Privy Council and it is relevant to issues that have to be decided. The

relevant facts are referred to in the headnote at page 196 and they are as follows:

> "Under a franchise granted to the appellants' predecessors in title by the city of Edmonton, the appellants laid gas-pipes under the streets of the city for the purpose of supplying natural gas to consumers. In 1923 the appellants laid a 12-in. intermediate pressure gas-main at a depth of 3 ft. 6 in. In the pipe were three welded joints. In 1931 the local authority constructed a storm sewer system beneath the appellant's main. In 1932 gas from the appellants' system escaped into an hotel. It ignited, and the hotel was burned down. It was ascertained that the cause of the escape was a break in a welded joint in the gas main through which the gas percolated into the hotel basement, and that that break was caused by the operations of the local authority which had resulted in a general subsidence of the ground. In an action brought by the respondents as owners of the hotel and their insurers, ...".

An unusual feature of this case was the failure to plead the issue on which the case was decided. In pointing this out, Lord Wright said at page 199:

> "The respondents' case originally was that the city's work had been properly designed and carried out, so that there could be no reason at any time, either while it was being carried on or at any subsequent period, to anticipate that it could cause any mischief, but in the course of the trial there was alleged, as a new and alternative ground of negligence or breach of absolute duty against the appellants, that the appellants either knew or ought to have known what work the city was doing, and failed to take, as they could and should have done, all proper precautions to prevent the escape of the dangerous gas which they were carrying in their mains. No amendment has ever been made of the pleadings, nor have any precise particulars been given of this head of claim. Their Lordships must observe that it is pessimi exempli to admit a new head of claim without a proper amendment of the pleadings. But this ground of claim has been considered by the trial judge and by the Appellate Division and must now be regarded as a relevant issue in the case. The trial judge decided against the contentions of the respondents, but the Appellate Division allowed the appeal solely on the new ground of claim."

An important matter for the decision was whether the public utility company was liable under the rule of Rylands v. Fletcher or only liable in negligence. Lord Wright approached the matter thus at page 200:

> "Where undertakers are acting under statutory powers it is a question of construction, depending on the language of the statute, whether they are only liable for negligence, or whether they remain subject to the strict and unqualified rule of Rylands v. Fletcher (1868), L.R. 3 H.L. 330; 37 L.J.Ex. 161; 19 L.T. 220; 33 J.P. 70, H.L.; 36 Digest (Repl.) 283, 334. Thus in the Charing Cross Electricity Supply case [1914] 3 K.B. 772; 83 L.J.K.B. 352; 111 L.T. 198; 78 J.P. 305; 30 T.L.R. 441; 58 Sol. Jo. 577; 12 L.G.R. 807, C.A.; 36 Digest (Repl.) 284, 338 cited above it was held—following the previous decision in Midwood v. Manchester Corpn., [1905] 2 K.B. 597; 74 L.J.K.B. 884; 93 L.T. 525; 69 J.P. 348; 54 W.R. 37; 21 T.L.R. 667; 3 L.G.R. 1136, C.A.; 38 Digest 50, 288—that the defence of statutory authority was limited by a clause in the statutory order providing that nothing therein should exonerate the corporation from liability for nuisance. In Hammond v. St. Pancras Vestry (1874), L.R. 9 C.P. 316; 43 L.J.C.P. 157; 30 L.T. 296; 38 J.P. 456; 22 W.R. 826; 38 Digest 25, 135, where the Act imposed on the vestry the duty of properly cleansing their sewers, it was held that, as these words were susceptible of meaning either that an absolute duty was imposed or that the duty was only to exercise due and reasonable care, the latter meaning was to be preferred, since the absolute duty could not be held to be imposed save by clear words. That case was followed in Stretton's Derby Brewery v. Mayor of Derby [1894] 1 Ch. 431; 63 L.J.Ch. 135; 69 L.T. 791; 42 W.R. 583; 10 T.L.R. 94; 8 R. 608; 38 Digest 26, 140."

As the words of Section 5 of Electric Lighting Act case are susceptible to either form of liability, a duty to exercise the statutory power with due and reasonable care, is to be preferred. Although in this case there was no employers liability in issue, it was possible to throw the blame on the local authority. On this aspect of the matter, Lord Wright at page 202 said:

> "There remains the further point, which is, that, assuming that the city in fact let down the ground and caused the pipe to break, still the appellants should have foreseen and guarded against the risk of their pipes being affected. This alternative plea of negligence was, as has been said, not pleaded, but it was dealt with by the trial judge and by the Appellate Division without the pleadings being amended and without any demand by the appellants for leave to adduce further evidence. As it has

> "been dealt with in the court below, their Lordships do not feel able to exclude it. But it certainly calls for most critical consideration, and the respondents are not relieved, by failing to plead properly, from proving their case properly.
>
> The authorities already cited herein show that, though the act of a third party may be relied on by way of defence in cases of this type, the defendant may still be held liable in negligence if he failed in foreseeing and guarding against the consequences to his works of that third party's act."

In indicating the liability at common law for things dangerous in themselves as gas and it must also apply to electricity, Lord Wright at page 203 said:

> "In truth the gravamen of the charge against the appellants in this matter is that though they had the tremendous responsibility of carrying this highly inflammable gas under the streets of a city, they did nothing at all in all the facts of this case. If they did not know of the city works, their system of inspection must have been very deficient. If they did know, they should have been on their guard: they might have ascertained what work was being done and carefully investigated the position, or they might have examined the pipes likely to be affected so as to satisfy themselves that the bed on which they lay was not being disturbed. Their duty to the respondents was, at the lowest, to be on the watch and to be vigilant: they do not even pretend to have done as much as that. In fact, so far as appears, they gave no thought to the matter. They left it all to chance. It is, in their Lordships' judgment, impossible now for them to protest that they could have done nothing effective to prevent the accident: and in any case their Lordships cannot accept that as the true view."

To my mind on the facts of this case, had the action proceeded against the utility company alone, they might well have been found liable. What were the facts? They were only to be referred to briefly in this judgment. It is sufficient to point out that there was a request from the electrical contractors, DeMercado & Associates Limited on behalf of Bryad to relocate the wires from 27th March, 1978 almost one year before the accident on 23rd March, 1979. The utility company emphasised the cost of the relocation to be paid by Bryad and ignored their duty to

secure the safety of the public from injury. It would seem that they could have either removed the lines and take action against Bryad or de-energise the line or resort to such measure of safety as was necessary. They and only they controlled the wires which injured Barr, and they must bear a portion of the responsibility for his injury since they have not shown that his injury was caused by conscious act of another volition. Moreover, the utility company failed to guard against the consequences to the workers on the site. They knew that construction was being undertaken, as the learned trial judge rightly found. That finding was based on the evidence of Mrs. Rachael Gibbons who stated under cross-examination that the Jamaica Public Service was aware of construction work and that their personnel were required to be on the site. Further, she admitted at page 105 that the wires were carrying dangerous electric current. It is true that the cross-examination of Dennis Hendricks, the Safety officer of the utility company, was directed to the sagging of the line. Nonetheless, his reply under cross-examination is remarkable. He confessed that he could not say when was the last time the line was inspected.

To my mind, the utility company "left all to chance". I must add that I find unconvincing the argument by counsel for the utility company that because Section 36 of the Electric Lighting Act empowered them to supply lines for the safe and efficient supply of electricity, any request for removal which was refused must go through the elaborate steps pursuant to Sections 40 and 44 of that Act which contemplate an enquiry by a commission appointed by the Minister into the matter. These provisions must be balanced against the requirement to secure the safety of the public from personal injury pursuant to Section 5 of the Act and general law of negligence for things dangerous in themselves as adumbrated in the two Privy Council cases referred to above. In any event, there need be no resort to the Minister to de-energise or insulate the electricity lines or to retire them. Where the lines serve a building which was demolished, they should not remain erected, See Rule 8 (supra).

Ellis, J., in the Court below made the utility company liable for 60% of the damages and we must now turn to the liability of the employers Bryad, to determine whether the learned judge's finding that the apportionment of 40-60% was correct in law. The starting point for an employer's liability for an employee's safety, was as the learned trial judge rightly stated that the employer should act reasonable in all the circumstances. This was stated by Lord Sommervell in Cavanagh v. Ulster Weaving Company Limited [1960] A.C. 145 at 167. He said:

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

What were the circumstances as found by the learned trial judge and demonstrated by the evidence. The circumstances were that Barr was injured when he was handling a length of steel from the roof of one of the houses under construction. His immediate supervisor, Porter, thought it was safe to work there as he tested some of the wires with his hands and the other he tested by throwing a length of steel against the wire. Nothing happened, and Porter assumed there was no risk, and so he told the workers that everything was safe. But Porter said that he knew there was current in the wire up to the Wednesday before the accident and he did not test the uppermost wires. It should be pointed out that when he went on the site initially, he saw foundation of a house and a house door. The foundation was on the premises. The importance of this becomes clearer when we note Raymond Adams' evidence. The wire which caused the injury led to this demolished house. There is also some evidence from Rodney Roberts from the utility company that when he inspected the site on June 2, 1975 he recalled one old building. Moreover, under cross-examination, he admitted that although he could not recollect where the derelict house was, on Exhibit 16 the plan of the existing and proposed lines - it was on the right hand side just where the existing line ended. Significantly also, he said that if the line to

the right on Exhibit 16 were removed it would not affect Mrs. Hale's house on the top left.

Apart from Porter, the other witness who gave evidence from Bryad as to the circumstances was Raymond Adams the project director and Managing Director of Bryad Engineering Limited. He gave evidence that Hale House was demolished in February 1978 to facilitate development on the site and that he employed DeMercado & Associates Limited, a firm of electrical contractors to remove and relocate the lines as it was causing a problem for operating heavy equipment. Since men had to operate the equipment he, no doubt, had them in contemplation also. The utility company replied requesting payment before this could be done. There was a reminder, this time to Bryad, but they did not reply to the utility company until after the accident. There can be no doubt that Bryad knew that the lines were live at the commencement of construction. Here is how Raymond Adams displayed this knowledge at page 85 of the record under cross-examination by counsel for the utility company:

> "I asked the sub-contractor to have the lines removed because they were live."

In this regard the electrical contractors sent a letter to the utility company, Exhibit 1 dated 29th March, 1978 accompanied by a development plan 15 indicating the lines that ought to be retired in the light of the proposed new roadway. Adams continued:

> "As far as we were concerned the lines went to Hayle House which was demolished so why should they have a right to maintain lines to a demolished house?
>
> The stand I took we were building because we expect J.P.S. to remove the lines any moment."

Using the test laid down in Cavanagh (supra) could it be said that the steps Bryad took were reasonable in all the circumstances as regards the safety of Barr their employee. That they took some measures cannot be denied. Porter carried out a rough and ready test with his hands and tested some of the wires by throwing a piece of steel onto the wires. Adams secured the services of an Electrical Contractor to negotiate with

the utility company; when the company replied to him he did nothing other than to pass the letter to the electrical contractors. Reasonable, in all the circumstances, must be higher than that. Since this was the last phase of the building project and the wires were not removed, they could have ascertained from the utility company if it was dangerous to work in that area. They did not. Since they failed to reach the high standard the common law has imposed on them, they too must be liable in damages to Barr.

How then did Ellis, J., approach the question of apportionment? At page 140 of the record he said:

> "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."

Bearing in mind the requirement to be "just and equitable", see Section 3(2) of the Law Reform (Tort-Feasors) Act, I think that a true test for apportionment must take into account the very high degree of care imposed on a public utility company as indicated in the two Privy Council decisions from Canada. The other factor to be taken into account is what was done towards carrying out their duty. This duty is to secure the safety of the public from personal injury or from fire or otherwise. They did nothing as regards that duty although they knew that there was construction being done in that area. They did not inspect and they gave no account either as to why the lines were not de-energised, or retired.

There was unchallenged evidence in the case from Adams and Porter that Hale's House was demolished, there was further evidence from Rodney Roberts that if the line to the demolished house was retired it would not affect the supply of electricity to Mrs. Hale's house on the left in Exhibit 16. They did not take into consideration the injury that may have occurred to a member of the public, i.e., Barr, who worked

on the site or had business there so far as relocation was concerned. They demanded a fee and refused to act until it was forthcoming. Having regard to their high duty of care, they could have removed, retired or relocated and de-energised the offending line and then determine the legal rights to collect if the money was not forthcoming. I agree with Ellis, J., that they must bear the major responsibility but I would apportion 75% of the liability to them, and dismiss their appeal against apportionment. Had Ellis, J., considered the matter of de-energising or retiring the line, he may well have come to the same conclusion. As it was, he concentrated on relocation.

As for Bryad, the 25% apportionment means that I have allowed their appeal in this regard, as reflected in Ground 6 of their Notice and Grounds of Appeal at page 6 of the record. They too had a high duty but they did do something about it. Further, they had no control over the wires.

It only remains for me to say that as regards those matters that I have not touched, I agree with Kerr, J.A., and so far as damages are concerned, I have read the draft of Wright, J.A., and I agree with it.

KERR, J.A.:

By unanimous decision the Plaintiff's appeal by Respondent's Notice against the award of General Damages is allowed: the general damages are assessed at $716,032.00 - $550,000 of which will attract interest at 4% and the judgment varied accordingly. Costs of appeal to be the Plaintiff's against Jamaica Public Service and Bryad.

Unanimously, the appeal by Bryad claiming contributory negligence against the Plaintiff is dismissed with costs to the Plaintiff.

Again, unanimously, the appeal by Jamaica Public Service against the judgment in favour of the third parties is dismissed with costs to the third parties.

By a majority (Kerr, J.A. dissenting) the appeal against apportionment by Bryad is allowed and the appeal by Jamaica Public Service dismissed and liability varied to the following effect - Bryad 25% - Jamaica Public Service 75% with costs to Bryad.

All costs to be taxed if not agreed.