JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 136/2005

BEFORE: THE HON. MR. JUSTICE PANTON, P.
THE HON. MR. JUSTICE COOKE, J.A.
THE HON. MRS. JUSTICE HARRIS, J.A.

BETWEEN	JAMAICA PUBLIC SERVICE COMPANY LIMITED	APPELLANT
AND	MARCIA HAUGHTON	RESPONDENT

Mr. David Batts and Ms. Daniella Gentles, instructed by Livingston, Alexander & Levy for the Appellant.

Mr. Raphael Codlin, instructed by Raphael Codlin and Company, for the Respondent.

July 16, 17, 18 and December 20, 2007

PANTON, P.

I agree that this appeal should be allowed. The learned trial judge, in my view, failed to give due weight to the evidence of the experts. That evidence was compellingly favourable to the appellant, and to the justice of the case.

COOKE, J.A.

1. Let me state at the outset that this appeal should be upheld, the judgment of the Court below set aside and judgment entered for the appellant.

2. The respondent, on the 30th November, 2005 succeeded in an action in negligence against the appellant for loss as a result of a fire which destroyed her business place and its contents. The business place was described as "Scrap's Mini Mart and Bar" and it was located in Sandy Bay in the parish of Clarendon. There was an award of $2,750,000.00 in damages.

3. For the respondent to be successful in the cause she had to establish:

(a) That the appellant, the supplier of electricity, had a duty of care to her that in providing its service it would exercise the care expected of such a utility company involved in that business activity.

(b) That there was a breach of that duty; and

(c) That as a consequence of that breach her business place was consumed in flames.

4. The evidence tendered on behalf of the respondent was within a small compass. This evidence which will now be recounted is taken from the witness statements.

(A) Keith Brown, a taxi operator said:

"3. On the 2nd October, 1996 at about 2:30 a.m. whilst I was travelling from May Pen towards Old Harbour, as I approached a bridge which is about twenty-five (25) yards from Miss Haughton's business place, I saw a fire running on the Jamaica Public Service line towards her shop."

(B) Ancerd Thompson said:

"
...

(3) It was about 2:30 a.m. when I saw sparks flying from a lightpost.

(4) The sparks extended to the next light post which was beside it, that post was beside Miss Haughton's shop.

(5) Immediately after that I saw smoke coming from Miss Haughton's shop and fifteen minutes after I went to the scene and saw firemen trying to extinguish the fire."

(C) Roy Thompson said:

"
...

(2) I have a canefield in Sandy Bay which is close to Miss Haughton's shop and on the 2nd October, 2004 at about 2:30 a.m. as I regularly do I was on my way to my canefield.

(3) I saw sparks coming from one of the Jamaica Public Service light pole.

(4) Then I saw the sparks shoot down to the next pole which was right at Miss Haughton's shop shortly after I saw smoke coming from the shop.

(5) A police vehicle that was passing stopped at the scene and the police called the fire station. Then I went over to the shop and saw that it was on fire.

(6) I have seen that particular lightpost spark fire on several occasions. It had caused several power cuts in the area."

By the time of the trial Roy Thompson was deceased and his statement was tendered.

5. Based on the phenomena described by those three witnesses the respondent sought to affix the appellant with negligence which occasioned her resultant loss. Her case was set out in her witness statement of which the relevant parts are:

> "(3) On or about the 2nd day of October, 1996 a fire engulfed the whole of my business place and destroyed the entire building, all stock, fixtures and equipment.
>
> (4) The fire originated on the wires erected by the Jamaica Public Service and spread to my business place.
>
> (5) I believe that the fire was caused by the negligence of the Jamaica Public Service.
>
> (6) The Jamaica Public Service were [sic] negligent in that:—
>
> (a) They failed to take any proper or adequate precaution in the event of a power surge.
>
> (b) They caused or permitted the electrical wires to be defective and to remain so when it was unsafe to my property.
>
> (c) They failed to take all reasonable and effective measures, whether by inspection, examination or otherwise to ensure that there would be no risk of fire ensuing from any short circuit that may arise from electrical wires.

(d) They had defective equipment so close to my property that it endangered same and caused severe damage.

(e) Because of the Defendant's negligence my property was destroyed and suffered loss in the region of Four and a Half Million Dollars ($4,500,000.00) being $1,500,000.00 destruction of bar and grocery. ($3,000,000.00) destruction of goods."

6. An analysis of the respondent's witness statement indicates that based on the "origin" of the fire it must be inferred that for any of the failings listed in para. 6 of her witness statement (supra) the appellant was negligent. The appellant in its written submissions endeavoured to meet this proposition by pointing out that:

> "She presented no evidence about any defect in the utility poles, wires or hardware of the Appellant. The Court was left to guess how the fire started. The facts presented by the Respondent were not such as to put the matter beyond mere surmise or conjecture as no evidence was proffered as to how this fire started at all."

7. I now turn to the evidence tendered by the appellant at the trial. In the witness statement of Lindy Elliott he said:

"1. I am a Detective Sergeant of Police stationed at the Mandeville Police Station in the parish of Manchester.

2. In October of 1996 I was a Detective Corporal of Police stationed at the May Pen Police Station in the parish of Clarendon. On the

morning of Wednesday the 2nd of October, 1996 sometime early in the morning, I was on patrol in the Sandy Bay, May Pen area along with Constables Murray, Special Constable Young and Woman District Constable Dingwall. While on patrol travelling along the Sandy Bay Main Road I observed thick black smoke coming from under the roof of Scrap's Mini Mart and Bar in the vicinity of the pothead. Scrap's Mini Mart and Bar is situated on the left hand side of the Sandy Bay Main Road as one faces Old Harbour.

3. On seeing the smoke I parked the police car in the vicinity of the Jamaica Public Service Company Limited's (hereinafter called "JPS") utility pole, from which the Mini Mart got its electrical supply, and radioed the May Pen Police Station and made a report. I further requested that a fire unit be sent to the location. After making the call I realized that there was now fire on the utility pole under which I had parked so I moved the police car to the other side of the road to prevent any damage to it should the electrical wires burn off and fall on it.

4. I then saw flames coming from under the roof of the Mini Mart where I had first seen the smoke and therefore went to a dwelling house, which was at the rear of the premises which was on fire, where I spoke to Mr. James Scott who lived there with his family. Mr. Scott is the owner of the building which houses the Mini Mart and Bar. On my advice Mr. Scott and his family evacuated the house. By this time the Mini Mart had erupted in flames and I could hear loud popping sounds coming from inside."

It will be readily observed that this evidence is not in harmony with the description of the circumstances surrounding the "origin" of the fire as narrated by the eyewitnesses called by the respondent.

8. Mr. Beresford Williams was at the relevant time the maintenance engineer responsible for the operation of the appellant's distribution system in Clarendon. He had qualified as an electrical engineer in 1980. He was regarded as an expert witness. He visited the scene of the fire on the 3rd October, 1996. These were his relevant observations and his view as to the cause of the fire. His witness statement recorded as follows:

> "5. I went into the building which was destroyed where I observed the following:
>
> (a) The building, which was a concrete structure, had been gutted as a consequence of a fire.
>
> (b) The switches on the breaker, which is the property of the customer, were in the 'on' position which means that the breaker had not tripped. The breaker is designed to trip once there is a short circuit. Once there is a short circuit and the breaker does not trip out it could lead to a fire in the building and also lead to the service neutral burning off at the JPS pole. The service neutral is a wire on the pole. Such a failure of the breaker to trip, is attributable to an electrical short circuit on the customer's electrical circuit which causes significant heat to develop on the customer's electrical system as the current flow of

electricity would not be limited to the prescribed level.

(c) A section of the roof near the pothead showed heavy smoke and fire damage. The pothead is where the electricity enters the building and is attached to the customer's building. The electrical lines are fed through this pothead into the meter and into the customer's house. The service lines brings [sic] electricity from the transformers to the potheads and into customers' buildings. The pothead belongs to the customer.

(d) The service lines at and around the pothead area were burnt including about 2 feet of the pvc conduit from the pothead to the meter socket. The rest of the pipe from the pothead to the meter socket and from the meter socket to the ground was not burnt. Further, the service lines to the pothead, except for the last 3 feet of the lines closer to the pothead were not burnt. This indicates that the fire did not travel from the pole to the pothead and into the building as in that case the entire pvc conduit pipe would have been burnt straight down into the ground and the service wires, from the pole to the pothead, would have been burnt. The fire appears to have started in the shop and proceed from the shop towards the pole."

In para. 10 of this witness statement he said:

> "... it is significant that power was restored without replacing the transformer and the service wire to the shop, which also feed the house at the back of the shop. Further there was no damage to the pole which indicates that the fire did not start on JPS' pole."

In oral evidence he said:

> "My conclusions were influenced by the observations I made.
>
> I made observations in respect of electrical appliances.
>
> I observed freezers, deep freeze, Poker [sic] machine burnt out [sic] in the premises.
>
> Looking at the size flame could tell the appropriate rating.
>
> Given that observation regarding the breaker and number of circuits –
>
> it's a 110 supply. Therefore that supply would serve all the appliances.
>
> Cumulatively all the current used at the different circuits add up and may cause an overload.
>
> If freezer, [sic] 1 poker machine, the fan and the cash register with the other 2 deep freeze [sic] the fridge and the cooler that may cause an overload [sic].
>
> The time it takes to reveal that there is an overload on a circuit, depends on the state of the wire and by how much it is overloaded."

At this stage it should be noted that in oral evidence the respondent said that when she left her business place the:

> "Freezer with meats [was] plugged in.
>
> Freezer with drinks, poker machine, fan, component set and the cash register were plugged out."

9. Timothy Scarlett described himself as a professional electrical engineer i.e. he was registered with the Jamaica Institute of Engineers. He also was regarded as an expert witness. He had 37 years varied experience in his field. By letter dated 21st February, 2005 the appellant sought his opinion pertaining to the cause of the fire. Apparently the former sent to him (the principal of Power Services Company Ltd. Engineers and Consultants) all the reports it had pertaining to the fire. Scarlett's opinion is reproduced below. This is dated 21st March , 2005.

> "The significant observations from the attached reports are as follows:
>
> 1. The shop's main circuit breaker did not trip.
>
> 2. The other three (3) houses which were being fed from the same incoming service wires, were not damaged.
>
> 3. The pothead connection to the shop showed heavy smoke and fire damage.
>
> 4. The supply was rated 110V, 50Hz. This means only two (2) wires at the pothead, one (1) Phase and one (1) Neutral.
>
> Our conclusions are as follows:–
>
> 1. The fire damage was initiated at the shop's pothead, due to a breakdown of insulation level at the pothead's connections.
>
> This breakdown occurred at the customer's services wires, possibly due to the overload conditions in the shop, and slack connections at the pothead.

2. The pothead short circuit at the shop, created conditions which led to the fire. The shop circuit breaker would not trip under these conditions.

   The policeman's observation of seeing a glow of light at the western end of the shop, was in fact the short circuit at the pothead which was glowing.

3. This pothead fire caused the neutral at the JPSCo. pole connection to be burnt off.

4. All the above conditions would result in a loss of power to the other three (3) houses being fed from the same service wire, no damages.

The above is our professional opinion, and indicates that the fire did not start at the JPSCo. Pole [sic]."

In oral evidence in chief this is recorded:

"Ques: Would that opinion change – if told that on the morning of the fire persons observed a spark or fire on J.P.S. pole which run along the wire to the shop.

Ans: It would not change my opinion expressed.

Why?

Even if persons saw sparks on J.P.S pole and fire running along the service wire that would [be] caused by fire originating at the pot heads.

Fire seen at pole would be due to over current in the neutral wire at the J>P>S [sic] pole which could have burnt the service wire connection at that pole.

There is a connector at the pole between the J.P.S. line and the secondary line.

> The over current caused by the short circuit at the pothead would have caused a weakening of the joint at the J.P.S. pole and subsequent sparking at the pole.
>
> ....
>
> If problem had started from the J.P.S. pole it would have affected all the houses connected from that pole and not just that premises.
>
> My experience shows that there were [sic] something wrong on the building burnt and not with any other building."

In cross-examination he answered as is recorded:

> "My conclusions were based entirely on data given to me by J.P.S. Company.
>
> My background professional experience helped me.
>
> Even if sparks were running from the pole to roof it is quite possible for sparking at the pole to have been caused by wire burning at the pothead.
>
> If the incident had started at the pole the defect would have affected all the building connected to that pole – even if the breakers in other building had tripped.
>
> The problem in the shop did not occur because breaker did not trip.
>
> I did not visit the scene. I doubt that the fire could have started at the pole and went to the pothead.
>
> Its possible the fire could have started at the pole and runs along to the pothead. But is highly unlikely."

10. Clyde Brown's witness statement revealed that:

> "2. On or about the 8th May, 1996 Rohan Finnikin, Kirnaldy Tyndale and I carried out a routine detailed patrol on JPS's poles, transformers, conductors, insulators and other hardware in the Sandy Bay area to ascertain if there were any defects/problems with any of the poles, transformers and hardware so that repair or replacement work could be carried out if necessary.
>
> 3. One of the poles checked during the routine detailed patrol was a pole in Sandy Bay, May Pen, Clarendon along the main road just outside shop premises. The pole is numbered 49. Investigation of the said pole revealed that the pole was rotten. It was replaced before 2nd day of October, 1996. No maintenance or repair or replacement work was required in relation to the lines, wires, transformers, switches or other hardware on the said pole. Upon completion of the routine detailed patrol, a detailed report was completed. The detailed patrol report recorded among other things the problems discovered, the pole number and location."

11. In his judgment, the learned trial judge made the following findings:

> "(i) The Defendant is a company registered under the laws of Jamaica with authority to provide and distribute electricity.
>
> (ii) The Claimant was a customer/consumer of electricity supplied by the Defendant.
>
> (iii) On or about the 2nd October, 1996 an electrical fire destroyed the Claimant's shop and bar.
>
> (iv) I accept the evidence of Keith Brown, Ancerd Thompson and Roy Thompson in particular

that they saw sparks at the JPS light pole and fire "running" along the (service) line towards the shop before any fire was seen at the shop's pothead.

(v) That when Lindy Elliott arrived on the scene sparks and fire had already moved from the pole to where he saw thick black smoke coming from under the roof in the vicinity of the pothead.

(vi) That the Claimant had that night plugged out some of the equipment used in the shop.

(vii) I find that at that time of night and with less demand on the electrical system it is not likely that there was an 'overload' on the system.

(viii) The inspection done by Clyde Brown in early May 1996 and the subsequent replacement of the defective JPS pole is not conclusive of that all the equipment on the pole was in good working order.

(ix) ...

I therefore find on a balance of probabilities that the evidence of Brown, Thompson, Roy Thompson is preferred to that of the electrical engineers who have differed as to the cause of the fire."

He also found that:

"The Defendant in paragraph 4 of its defence stated its defence but failed to lead such evidence to show that fire was caused by an excess load on the circuit due to the number of appliances on it."

12. There were a number of grounds of appeal which were filed and argued but they were all variants of the core complaint that the learned trial judge was

in error in concluding that the respondent had satisfactorily, on a balance of probabilities, proved her case. It was submitted that the learned trial judge's approach to the assessment of the expert evidence within the context of the totality of evidence was inadequate. The judgment was criticized in this regard, in that it did not demonstrate any logical analysis of the expert evidence and did not demonstrate the rational bases for rejecting that evidence. It is my view that there is merit in this submission. The learned trial judge "preferred" the evidence of the eyewitnesses called by the respondent "to that of the electrical engineers who have differed as to the cause of the fire". I find this conclusion inexplicable as those eyewitnesses did not (and were not competent so to do) proffer any opinion as to the cause of the fire. At best this evidence provided material on which according to the respondent the Court should infer that the fire originated at the light pole of the appellant. However, such an inference can only be properly drawn within the context of the totality of the evidence before the Court. Therefore it was imperative for there to have been a proper assessment of the expert evidence. It is insufficient to minimize the evidence of the electrical engineers because they have differed as to the cause of the fire. The difference is that while Scarlett regarded malfunctioning at the pothead as cause of the fire Williams opined that it was overloading. It should be noted that Scarlett did not rule out the possibility of overloading of as a contributory factor to the malfunctioning at the pothead. There was unity in the opinion that the fire started at the respondent's business place and that the appellant was

blameless. In reviewing the evidence of Scarlett (which took up some eight lines of the record) the learned trial judge did not include his opinion as to the explanation of sparking (fire) on the electrical lines. More importantly he did not mention Scarlett's opinion that:

> "If problem had started from J.P.S. pole it would have affected all the houses connected from that pole and not just that premises."

No other building "connected from that pole" was damaged. The learned trial judge did not bestir himself to undertake the essential task of evaluating the expert evidence especially, that given by Scarlett. This neglect means that the inference that the fire originated at the appellant's light pole was without regard to the totality of the evidence.

13. The appellant helpfully brought to our attention two passages from authorities which speak to the proper approach of a court in respect of expert evidence. The first is from the judgment of Otton L.J. in **In re B (a minor) (Split Hearing: Jurisdiction)** [2000] 1 W.L.R. 790 which reads:

> "The circumstances when judges of the High Court can reject the evidence of a body of medical opinion are rare. This situation was considered by the House of Lords in **Bolitho v. City and Hackney Health Authority** [1998] A.C. 232 when revisiting the well known test of **Bolam v. Friern Hospital Management Committee** [1957] 1 W.L.R. 582. Although an action for damages for personal injury arising out of alleged medical negligence, certain observations are of relevance in this case. Lord Browne-Wilkinson, giving the sole speech, with which

the other members of the committee agreed, said [1998] A.C. 232, 243:

> "In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion ... But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible. I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable ... It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct falls to be assessed."

...

> But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation where as here there is disputed expert evidence; but it is not necessarily limited to such cases."

The other is from that same case at page 796 where Dame Elizabeth Butler-Sloss P. said:

> "The credibility or otherwise of the lay witnesses on the facts of this case, in my view, cannot stand so high as to make the evidence of the two consultant radiologist [Engineers] of no effect".

Although **In re B (a minor)** was specifically concerned with expert medical evidence the breath of the views expressed would be pertinent to all categories of expert evidence. As already said the learned trial judge did not say why the evidence of the two experts as to where the fire started should be regarded as unreasonable. The phenomena described by the eyewitness called by the respondent, does not stand alone and the overwhelming prominence given to that evidence is in the context of this case unwarranted.

14. The foregoing discussion indicates that, I disagree with the learned trial judge that the respondent discharged the burden of proof in the Court below. Besides what I have already said, I will do no more than reproduce an excerpt from the speech of Lord Denning in **Brown v. Rolls Royce Ltd.** [1960] 1 All E.R. 577 at 581 I — 582 D.

> "The legal burden in this case was imposed by law on the appellant. In order to succeed, he had to prove that the respondents were negligent and that their negligence caused the disease: see **Bonnington Castings, Ltd. v. Wardlaw** (5) by LORD REID and by LORD TUCKER. In order to discharge the burden of proving negligence, the appellant proved that
>
> > "barrier cream is commonly supplied by employers to men doing such work as the [appellant] was doing."
>
> This was a cogent piece of evidence and raised no doubt a "presumption" or a "prima facie" case, in this sense, that, if nothing more appeared, the court might well infer that the respondents were negligent, and in that sense it put a burden on the respondents

> to answer it. But this was only a provisional burden which was raised by the state of the evidence as it then stood. The respondents might answer it by argument, as, indeed, they did, by pointing out that "there is no evidence as to what, if any, other precautions these employers take"; or the respondents might answer it by calling evidence themselves, as, indeed, they did, by proving that they "relied on their medical officer, Dr. Collier, who exercised proper care and skill" and they carried out the precautions advised by him. In this way a provisional burden may shift from one party to the other as the case proceeds or may remain suspended between them. But it has no compelling force. At the end of the day, the court has to ask itself — not whether the provisional burden is discharged — but whether the legal burden has been discharged, that is to say: Has the pursuer proved that the defenders were negligent?"

15. The respondent, in this Court submitted that it was not open to this Court to disturb the finding of fact of the court below that the fire did not start at the respondent's business place. Emphasis was placed on the consideration that the learned trial judge saw and heard the witnesses which of course, is an experience which has been denied us.

> In **Union Bank of Jamaica Limited v Dalton Yap** (Privy Council Appeal No. 17 of 2001 delivered 28th May, 2002 unreported) their Lordships' Board in paragraph 4 said:
>
> > "The approach which an appellate court must apply when dealing with an appeal on fact from a judge who has seen and heard the witnesses giving evidence is not in doubt. Their Lordships refer for convenience to the decisions of the House of Lords in **Thomas v Thomas** [1947] AC 484 and of the Board in

> **Industrial Chemical Co (Jamaica) Ltd v Ellis** (1986) 35 WIR 303. One situation where, exceptionally, an appeal court may be entitled to differ from the judge of first instance on such questions of fact is described by Lord Thankerton ([1947] AC 484, 488) in these terms:
>
> > 'The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court.'
>
> As Lord Shaw of Dunfermline observed in the earlier case of **Clarke v Edinburgh and District Tramways Co** 1919 SC (HL) 35, 37, the appeal court cannot interfere unless it can come to the clear conclusion that the first instance judge was "plainly wrong."

In this case the issues of where the fire started and the cause of that fire called ultimately for findings of fact(s) by the trial court. These findings were not straightforward in the sense of deciding which version of conflicting evidence to accept. These issues had to be resolved by critical scrutiny of all the evidence. In respect of the respondent's claim her sole contention was founded on the inference of liability to which I have earlier adverted. **Whitehouse v Jordon and Another** [1981] 1 All E.R. 267 is judgment of the House of Lords. The accurate headnote *inter alia* states that:

> **Held** — Although the view of the trial judge (who had seen and heard the witnesses) as to the weight to be

> given to their evidence was always entitled to great respect, where his decision on an issue of fact was an inference drawn from the primary facts and depended on the evidentiary value he gave to the witnesses' evidence and not on their credibility and demeanour, an appellate court was just as well placed as the trial judge to determine the proper inference to be drawn and was entitled to form its own opinion thereon."

I am satisfied that this is a case which we are not only entitled but, on the state of the evidence, obliged to disturb the conclusion of the court below. The reasons given by the learned trial judge, if they may be generously so called, were not satisfactory. This Court is permitted to evaluate the evidentiary value of the evidence of the witness called by the respondent. It is subject to our consideration. It is my view that the inference drawn by the learned trial judge that the appellant was negligent cannot be sustained.

16. This appeal should be upheld. The judgment of the Court below should be set aside and judgment entered for the appellant which should have its costs both here and in the Court below.

HARRIS, J.A.

This is an appeal from a judgment of James, J. delivered on November 30, 2005 in favour of the respondent.

The appellant is the exclusive supplier of electricity throughout Jamaica. The respondent was the operator of a Mini Mart and bar at

Sandy Bay in the parish of Clarendon. On October 2, 1996, between 2:30 and 3:00 a.m., the respondent's business establishment and contents were destroyed by an electrical fire.

On October 20, 1998 the respondent commenced an action against the appellant claiming damages for negligence. The allegations against the appellant were particularized as follows:

> "(a) Failing to take any/or any proper or adequate precaution in the event of a power surge.
>
> (b) Causing or permitting the electrical wires to be defective and to remain so when it was manifestly unsafe to the property of the Plaintiff.
>
> (c) Failing to take all reasonable and effective measures, whether by inspection, examination or otherwise to ensure that there was not or would not be any risk of fire arising from any short circuit that may and/or was likely to arise from the electrical wires.
>
> (d) Having defective equipment so close to the Plaintiff's property as to endanger same and causing damage to the Plaintiff".

These particulars of negligence were denied by the appellant in its defence to the action.

Three eyewitnesses testified on behalf of the respondent. These witnesses were Keith Brown, Ancerd Thompson and Roy Thompson.

Mr. Brown's evidence was that he was travelling from May Pen towards Old Harbour and on approaching the respondent's business place, he observed fire running along the appellant's electrical wires towards the Mini Mart and bar.

It was Messrs Roy and Ancerd Thompson's evidence that they saw sparks coming from a utility pole. These sparks continued towards another utility pole close to the Mini Mart and bar. Thereafter, they observed smoke coming from the building. Mr. Roy Thompson went on to relate that the building subsequently became engulfed in flames.

The appellant placed reliance on evidence from four witnesses: Clyde Brown, a technical assistant in the employ of the appellant, Lindy Elliot, a policeman who was on patrol in the Sandy Bay/May Pen area, Beresford Williams a maintenance engineer employed to the appellant and Timothy Scarlett an electrical engineer who submitted a report and was examined and cross-examined on that report.

Mr. Brown stated that on May 8, 1996 he carried out routine inspection on the appellant's utility poles, transformer, conductors, insulators and other equipment. This led to the discovery of a utility pole, in close proximity to the respondent's business place, being in a

state of disrepair. The defective pole was repaired prior to October 2, 1996. No other pole or any equipment required repair or replacement.

It was Mr. Elliot's evidence that he observed thick black smoke emitting from beneath the roof of the building in the vicinity of the pothead. Following this, he saw a utility pole ablaze. Later, the smoke at the roof developed into a conflagration. The fire brigade subsequently arrived, extinguished the flames but the building and contents were destroyed.

Mr. Williams visited the scene on the day following the fire and carried out an inspection. He stated that his examination revealed that the switches on the breaker in the building were on. This, he said, was indicative of the fact that the circuit breaker had not tripped, breaking the flow of the current.

He further related that the breaker is designed to trip whenever a short circuit occurs. However, if a short circuit occurs and the breaker fails to trip this would not only result in a fire but also in the burning of the service neutral at the utility pole. The service neutral is a wire on the pole which is not positively charged with electrical current.

An area of the roof of the building close to the pothead exhibited evidence of heavy smoke and fire damage, he said. The pothead is the customer's property. It is a gadget attached to the customer's building through which electricity is conducted into the building through service wires.

The service wires at and around the pothead were burnt as well as an area approximately 2 feet of the PVC conduit leading from the pothead to the meter. It was his opinion that the fire did not travel from the utility pole to the pothead but that the fire started in the building. There was no damage to the pole.

Mr. Scarlett's report states as follows:

"1. The shop's main circuit breaker did not trip.

2. The other three (3) houses which were being fed from the same incoming service wires, were not damaged.

3. The pothead connection to the shop showed heavy smoke and fire damage.

4. The supply was rated 110V, 50Hz. This means only two (2) wires at the pothead, one (1) Phase and one (1) Neutral.

Our conclusions are as follows:

1. The fire damage was initiated at the shop's pothead, due to a breakdown of insulation level at the pothead's connections.

This breakdown occurred at the customer's services wires, possibly due to the overload conditions in the shop, and slack connections at the pothead.

2. The pothead short circuit at the shop, created conditions which led to the fire. The shop circuit breaker would not trip under these conditions.

   The policeman's observation of seeing a glow of light at the western end of the shop, was in fact the short circuit at the pothead which was glowing.

3. This pothead fire caused the neutral at the JPSCo. pole connection to be burnt off.

4. All the above conditions would result in a loss of power to the other three (3) houses being fed from the same service wire, no damages.

The above is our professional opinion, and indicates that the fire did not start at the JPSCo. Pole".

In the amplification of his report, he expressed the view that the fire seen at the pole would have been as a consequence of over current in the neutral wire at the appellant's pole, which, could have burnt the service wire connection at the pole. It was also his opinion that over current resulting from a short circuit at the pothead could have occurred as a consequence of the weakening of the joint at the appellant's pole and eventually the sparking at the pole.

He further asserted that if the fire had begun at the pole it would have affected all other properties connected to that pole. In cross-examination he said that if the fire started at the pothead the breaker would not trip.

The learned trial judge made the following order:

> "1. Judgment for the Claimant for $2,750,000.00 with interest at the rate of 6% with effect from 2nd October, 1996 to 30th November [sic] 2005.
>
> 2. Costs to be agreed or taxed."

Fourteen grounds of appeal were filed. These Grounds are as follows:

> "(a) The learned trial Judge was wrong in law in that he placed the burden of proof on the Appellant to prove that they were not negligent given the fact that there was no evidence that the Appellant's utility pole and equipment was defective or not in good working order.
>
> (b) The learned trial Judge's statement that the Defendant's inspection in May 1996 and replacement of the utility pole is not conclusive that all the equipment on the pole was in good working order is inconsistent with the evidence of Clyde Brown that the equipment and apparatus on the utility pole was checked in May 1996 and again after the fire and was found to be in good working order.
>
> (c) The learned trial Judge also erred in law as he put an onus on the Defendant to provide conclusive proof and this is a

higher standard than is required in law or at all.

(d) In reaching his decision the learned Judge placed reliance on the evidence of Keith Brown, Ancel Thompson and Roy Thompson and failed to take any or sufficient account of the evidence of the expert evidence of Timothy Scarlett and Beresford Williams. These expert engineers deponed that the most probable cause of the fire was a short circuit and that there was unlikely to be any other cause in view of the fact that the poles insulation was not damaged or broken. They further opined that the burning of the neutral wire at the utility pole was a safety feature that protected the spread of the effect of the short circuit.

(e) The decision of the learned trial Judge that the fire started on the Appellant's utility pole is inconsistent with the evidence of Timothy Scarlett that the insulator was neither damaged nor broken and that a slack connection would have caused a disruption in the electrical supply to the other houses. Further that had a fire started at the pole all buildings supplied would have been affected and not only the Claimant's house. The burning of the service neutral wire on the utility pole was a safety feature which in effect saved the spread of the short circuit from the Claimant's house to the other persons supplied from that pole.

(f) The decision of the learned Judge that the presence of sparks on the wires running from the utility pole to the shop meant that the fire started on the pole is inconsistent with the expert evidence that the sparking would be seen in the

course of a short circuit and that if the fire commenced at the Claimant's house sparking on the pole could be expected.

(g) The learned judge made no specific finding of negligent acts or omissions on the part of the Appellant.

(h) The learned Judge's finding that the destruction of the bar and grocery meant loss of opportunity to carry on business in those premises is unsupported by the evidence of the pleadings.

(i) The learned Judge's finding that the period from which the Respondent should be compensated for loss of profits is eighteen (18) months is unsupported by the evidence or [sic] the pleading.

(j) The learned Judge's decision to reduce the claim for the destruction of the bar and grocery [loss of profits] by 50% was unsupported by the evidence.

(k) The learned Judge's decision to reduce the claim for loss of goods by 33 1/3% was unsupported by the evidence.

(l) The learned judge's finding that there is no evidence of efforts which the Respondent made to resume business elsewhere is inconsistent with his decision to make an award for loss of profits and the obvious failure to mitigate.

(m) The learned Judge's findings that no evidence was lead by the Appellant to show that the fire was caused by an excess load on the circuit is inconsistent with the evidence of Beresford Williams as to the nature of equipment which was in the Mini Mart and the consequences of

them being connected even taking into account that some may have been unplugged.

(n) The learned Judge's findings as to liability and damages is against the weight of the evidence".

Grounds (a) to (g) will now be considered.

The burden of Mr. Batt's submissions is that the learned trial judge erred in that the evidence adduced by the respondent failed to establish a prima facie case that the building and contents were destroyed by reason of the appellant's negligence and that the learned trial judge by his findings had placed the onus of proof on the appellant.

Mr. Codlin argued that the learned trial judge considered the conflicting evidence before him and accepted that which was adduced by the respondent's eyewitnesses in preference to that of the appellant's witnesses. He contended that there is nothing to show that the learned trial judge was clearly wrong in arriving at his conclusions.

The determination of this case rests on two principles. Firstly, whether the loss suffered by the respondent can be ascribed to the appellant's negligence. Secondly, whether this court is empowered to set aside a trial judge's decision on a question of fact.

The question as to whether negligence on the part of the appellant has been established is one of fact. A claimant's success in an action for negligence is dependent on whether there is cogent evidence to establish that the defendant's negligence caused his injury. In discharging the burden of proving the defendant's negligence, the claimant must show the existence of sufficient relationship of 'proximity' or 'neighbourhood' between the defendant and himself, the forseeability of damage by reason of the defendant's negligent performance of an operation resulting in injury to the claimant. See ***Caparo Industries plc v Dickman*** (1990) 1 ALL ER 568.

Thus, a burden resides with a claimant to establish a prima facie case, that is, to raise a presumption that the defendant was negligent and his injury is as a consequence of such negligence. See ***Brown v Rolls Royce Ltd*** 1960 1 ALL ER 577; ***Whitehouse v Jordan*** (1988) 1 ALL ER 267.

I now turn to the question relating to the power of a Court of Appeal to interfere with a trial judge's decision. The evidence which the learned trial judge had before him is with reference to the circumstances under which the fire started. A fundamental issue therefore, is whether this court can review and disturb the trial judge's

findings and conclusions as to how the fire started and impose their own decision contrary to that of the learned trial judge.

An appellate court is loathe to disturb the findings of a trial judge but will do so if it has been shown that he is wrong in law or obviously wrong on the facts, he having seen and heard the witness. In resolving this issue the approach to be adopted by this court was eminently propounded by Lord Thankerton in ***Watt (or Thomas) v Thomas*** [1947] 1 All ER 582 when at page 587 he said:

> "I. Where a question of fact has been tried by a judge without a jury and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses could not be sufficient to explain or justify the trial judge's conclusion.
>
> II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence.
>
> III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court".

The role of an appellate court was also clearly enunciated in ***Chin v Chin*** Privy Council Appeal 61 of 1999 delivered on February 12, 2001. At paragraph 14, the advice reads as follows:

> "The normal and proper function of an appellate court is that of review. An appellate court can, within well-recognised parameters, correct factual findings made below".

In examining the case under review, there can be no doubt that a conflict exists between the evidence of the respondent's witnesses and those of the appellant. In such circumstances a duty is imposed on a trial judge to give adequate consideration to the totality of the evidence and elicit therefrom such inferences as are reasonable.

The critical question was whether the fire began inside the building as a result of a short circuit or whether it originated on the appellant's utility pole and was transmitted along the electrical lines to the Mini Mart and bar.

The learned trial judge dealt with the evidence in this manner. He took into consideration the evidence of the respondent's eyewitnesses. He said that Messrs Keith Brown, Clyde Brown and Ancerd Thompson saw sparks on the defendant's utility pole and fire running along the wire towards the building. He also took into account Mr. Roy Thompson's statement of seeing sparks on the pole that

"shoot down to the next pole which was right beside Miss Haughton's shop" and that he thereafter saw smoke coming from the shop.

He then proceeded to consider the evidence of the appellant's witnesses. In dealing with Mr. Elliot's evidence, he acknowledged that Mr. Elliot saw thick, black smoke exiting from the vicinity of the pothead of the Mini Mart and bar.

In considering Mr. Clyde Brown's evidence, the learned trial judge acknowledged that Mr. Brown observed a defective pole in May 1996 which was replaced and that no other equipment was found to be defective.

The learned trial judge next dealt with the evidence of the two expert witnesses, Messrs Williams and Scarlett. It is therefore critical to see how he dealt with that evidence.

At page 3 of his judgment he said:

> "Beresford Williams is an Electrical Engineer employed to the Defendant. He visited the scene on the 3rd October 1996 and observed that the switches on the breaker were in the "ON" position which means that the breaker had not tripped. He said the breaker is designed to trip once there is a short circuit. This could lead to a fire in the building and also lead to the service neutral burning off at the JPS pole. Mr. Williams concluded that the cause of the fire was attributable to the connection of several pieces of equipment to

the power supply which resulted in an overload of the system".

On pages 3 and 4 of the judgment he continued by saying:

"6. The last witness for the Defendant was Timothy Scarlett a professional engineer with 37 years experience. His opinion was sought nearly nine (9) years after the fire. He concluded that the fire damage was initiated at the shop/pothead due to a break down of insulation level at the potheads connections.

He also gave the following reasoning:

1. The break down occurred at the customer's wires, possibly due to the overload conditions in the shop and slack connection at the pothead.

2. The pothead short circuit at the shop, created conditions which led to the fire.

   The shop's circuit breaker would not trip under these conditions.

3. The pothead fire caused the neutral at the J.P.S. Company pole connection to be burnt off.

4. All the above conditions would result in a loss of power to the other three (3) houses being fed from the same service wire.

7. From the evidence of Beresford Williams it is fair to conclude that he based his conclusions on the belief that the electrical system in the shop was overloaded by the connection to it of several items of equipment. He further said that when there is an overload

> and the breaker does not "trip" that can cause the conductors to heat up a 'short out'.
>
> There is evidence which is that the breaker did not trip".

Continuing on page 4 the learned trial judge said:

> "8. On the other hand Timothy Scarlett seem [sic] to contradict that of Beresford Williams. He said the problem in the shop did not occur because the breaker did not trip. A fire starting in the pothead would not cause the breaker to trip.
>
> Mr. Scarlett gave some instances which may cause "sparking" at the JPS pole.
>
> He listed them as follows: –
>
> (a) If the insulators are broken – (although he said this is quite rare).
>
> (b) Slack connections can cause sparking at the pole.
> (c) If the service wire itself is defective. (sic)"

He later stated as follows:

> "Mr Scarlett testified that a fire could move or run along the service wire at a speed causing no burning of the service wire".

The findings of the learned trial judge are of manifest significance.

These are outlined hereunder:

> "(iv) I accept the evidence of Keith Brown, Ancerd Thompson and Roy Thompson in particular that they saw sparks at the JPS light pole and fire "running" along the (service) line towards the shop before any fire was seen at the shop's pothead.

(v) That when Lindy Elliot arrived on the scene sparks and fire had already moved from the pole to where he saw thick black smoke coming from under the roof in the vicinity of the pothead.

(vi) That the Claimant had that night plugged out some of the equipment used in the shop.

(vii) I find that at that time of night and with less demand on the electrical system it is not likely that there was an 'overload' on the system.

(viii) The inspection done by Clyde Brown in early May 1996 and the subsequent replacement of the defective JPS pole is not conclusive of [sic] that all the equipment on the pole was in good working order.

(ix) The evidence of Timothy Scarlett did not rule out the possibility of any of the conditions at paragraph 8 above.

I therefore find on a balance of probabilities that the evidence of Brown, Thompson, Roy Thompson is preferred to that of the electrical engineers who have differed as to the cause of the fire.

The Law

I agree with Counsel for the Defendant that the rule is ***Ryland v Fletcher*** is not applicable in this case.

The Claimant has, though her witnesses established that spark and fire came from the Defendant's utility pole traveled along the service wire and on to her premises.

> The Defendant in paragraph 4 of its defence stated its defence but failed to lead such evidence to show that fire was caused by an excess load on the circuit due to the number of appliances on it".

It is obvious from the foregoing that the learned trial judge failed to give adequate consideration to the critical question as to the origin of the fire. It was incumbent on him to have determined whether the fire resulted from defective electrical wires leading from the appellant's utility pole to the respondent's building or by an overload of the electrical system by the respondent. This he ought to have done by scrupulous analysis of the evidence before him.

There was evidence from the respondent that on the day of the fire, in the building were several pieces of electrical equipment, namely, 3 freezers, a refrigerator, a two piece component set, a poker machine, a fan and a cash register. She said two freezers and the refrigerator were attached to the electrical system. Her witnesses spoke of seeing sparks being transmitted from the utility pole to the building immediately before the fire.

Against this evidence was that of the appellant's witnesses, in particular that of the experts, Messrs Scarlett and Williams. Both experts were of the view that the fire could have started by reason of a short circuit. This the learned trial judge rejected for the reason that

a fire starting at the pothead could not have caused the breaker to trip.

Certain aspects of the experts' evidence which were of supreme importance were ignored by the learned trial judge. There was Mr. Williams' evidence that the breaker is designed to trip should a short circuit occur but if it failed to trip, this could result in significant heat developing in the customer's electrical system causing excessive flow of current and consequently a fire.

Mr. Scarlett opined that the fire started due to a breakdown of the insulation level at the connection at the pothead. It was his further opinion that the fire may have resulted from an overload on the circuit or slack connections at the pothead and if these conditions existed the breaker would not trip.

Mr. Williams spoke of the burning off of the neutral wire at the appellant's pole. In support of this, Mr. Scarlett expressed the view that defective service wire, slack connections or broken insulators could cause the burning of the neutral wire at the pole due to an excessive supply of current. Both experts gave explanations as to how the sparking could have occurred, that is from over-current on the neutral wire, namely a short circuit.

There was no evidence that the service wires near to the pole were damaged or broken. Mr. Scarlett stated however, that the possibility exists for fire to run along the wire yet no sign of damage to the wire is seen. This notwithstanding, he issued a caveat that if that were the case, three other buildings situated on the property with the Mini Mart would have been affected by the fire.

The evidence of the experts was germane to the primary issue to be decided by the learned trial judge. His rejection of the evidence of Messrs Scarlett and Williams, merely on the basis that there was a discrepancy as to the reasons given by each for the failure of the breaker to have tripped, shows that he had fallen into error.

I am not unmindful that a trial judge is under no obligation to accept the evidence of an expert witness where it conflicts with that of non-expert witnesses. Although the credibility of the witnesses is a matter of which a trial judge should take cognizance, the credibility of eyewitnesses cannot in itself negate the value of evidence of experts. In ***re B (a minor)*** 2001 1 WLR 790 at page 796 Dame Elizabeth Butler Schloss said:

> "the credibility or otherwise of the lay witnesses on the facts of this case, in my view, cannot stand so high as to make the evidence of the two consultant radiologist [Engineers] of no effect".

Where a trial judge accepts the evidence of a lay witness and rejects that of expert, it must be shown that the expert's opinion is incapable of withstanding logical analysis. This proposition is bolstered by a dictum of Lord Browne Wilkinson in ***Bolitho v City and Hackney Health Authority*** (1998) A.C. 232 when at page 243 he said:

> "In the vast majority of cases the fact that distinguished experts in the field are of a particular opinion will demonstrate the reasonableness of that opinion ... But if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible. I emphasise that in my view it will very seldom be right for a judge to reach the conclusion that views genuinely held by a competent medical expert are unreasonable... It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct falls to be assessed".

This case under review is not one of the exceptional cases showing that the body of expert opinion is incapable of "withstanding logical analysis". It follows therefore that it was obligatory on the part of the learned trial judge, having rejected the expert's evidence, to have given reasons for so doing. See ***Re B (a minor).*** (supra)

The evidence of the respondent's witnesses did not establish on the balance of probabilities that any defect or malfunction of the

appellant's electrical system created the fire. A careful assessment of the evidence tends to show that the fire started at the pothead. Mr. Elliot, the policeman saw thick black smoke coming from under the roof. The service line to the appellant's utility pole remained intact while a few feet of the service line from the pothead was burnt. There were signs of heavy smoke and fire damage near the pothead. If the fire had begun on the appellant's pole, or by a fault in the appellant's electrical system, this would have affected the other buildings on the premises where the Mini Mart and bar were housed. Those buildings sustained no damage. Electricity was restored to the area the very night of the fire which is indicative of the fact that the appellant's electrical system and equipment were in proper working order. The clear inference is that the fire had its genesis inside the building consequential to the occurrence of a short circuit.

It is clear that the respondent had not discharged the burden to show that any act of negligence can be attributed to the appellant.

It is unnecessary to consider the remaining grounds of appeal as these relate to damages.

I would accordingly allow the appeal, set aside the judgment of the court below and award judgment to the appellants with costs to be agreed or taxed.

PANTON, P.

ORDER:

The appeal is allowed. The order of the Court below is set aside. Judgment is entered in favour of the appellant with costs below as well as in this Court to the appellant; such costs to be agreed or taxed.