IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. 2002 J-066

BETWEEN	**JOHNATHAN JOHNSON**	**CLAIMANT**
AND	**ATTORNEY GENERAL OF JAMAICA**	**1st DEFENDANT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**2nd DEFENDANT**
AND	**CABLE & WIRELESS JA. LIMITED**	**3rd DEFENDANT**

Mr. Garth McBean instructed by Ms. Charmian Rhoden for the Claimant;
Mrs. Julie Thompson and Ms. Danielle Archer instructed by the Director of State Proceedings for the 1st Defendant;
Mr. David Batts instructed by Livingston, Alexander, Levy for the 2nd Defendant,
Mr. Kent Gammon instructed by Dunn Cox for the 3rd Defendant.

Heard March 5 and 30, 2007

CORAM: Anderson J.

On November 29, 1999 at about 6:30 p.m. Mr. Johnathan Johnson, ("the Claimant") was walking along the pavement ("sidewalk") on Hagley Park Road in the Parish of St. Andrew when he tripped over a piece of copper rod protruding from the said pavement. As a result of the fall, the Claimant suffered injuries, loss and damages. He sued the National Works Agency, ("NWA") (represented by the Attorney General of Jamaica in these proceedings pursuant to the Crown Proceedings Act) on the basis that the NWA, an Executive Agency of the Government of Jamaica, was the agency responsible for the widening of the road in the area where the incident occurred, and that this was the genesis of the obstruction. The view was that the NWA had failed to remove the obstruction in circumstances in which it had a duty to act to remove the obstruction or have it removed as, in leaving it where it was, it was reasonably foreseeable that persons could be injured by it being there.

The Claimant also sued two (2) utility companies, the Jamaica Public Service Company Ltd. ("JPS") and Cable and Wireless Jamaica Ltd. ("C&WJ") since he was not sure which of these defendants was the owner and therefore responsible for negligently leaving the offending rod on the sidewalk and in a position to do harm to him, or other persons using the sidewalk.

As between these two (2) latter defendants, either sought to blame the other on the basis that the offending rod in question did not belong to it. Counsel for the Attorney General submitted that based on the pleadings there was no cause of action pleaded against the NWA to which it should be required to answer. The NWA did not use copper rods in its operations and would not have had occasion to use it in road widening. It was the view of counsel that any liability must lie between the JPS or C&WJ.

Evidence for the NWA was given by Mr. Garth Sharpe, Assistant Parish Manager of the NWA that he had been made aware of the existence of the piece of rod in the concreted sidewalk in 1999. He could not give direct evidence as to whether there was any copper rod sticking out of the pavement at the time the road widening project was completed as he had not personally inspected the site. However, he was of the view that given the "standard inspection procedures" of the NWA, if the offending object had been there, the contractor would not have been paid until it had been removed. But Mr. Sharpe was not in a position to say that the normal "procedures" had been followed. He confirmed that the NWA would have no need to use any copper rod such as that which caused Mr. Johnson's injury, in the course of its own activities. In particular the need to move the "furniture" of any utility company would have been met by requesting the company in question, to so move it. He also confirmed that there had been no need to remove the pole used by the companies which pole was close to the exposed piece of copper rod. He himself had never seen a copper rod such as that put in as Exhibit 6. Mr. Sharpe was unable to say from the photograph (Exhibit 2B) whether the copper rod belonged to C&WJ.

It is convenient to consider as a first issue whether the Attorney General of Jamaica, as the representative of the NWA, should be required to state a defence. That the Attorney General should not, seems to have been the burden of the Attorney General's submission that based on the pleadings there was no real allegation of negligence to which the NWA should be required to answer although no formal "no case" submission was made. The Claimant in his Statement of Claim, had pleaded that the rod was negligently left in place by the servants and/or agents of the NWA.

In this regard, counsel for the Claimant, pointed out in his submission, that the sole witness for the First Defendant, Garth Sharpe, was unable to say whether the area in which the widening had taken place had been inspected after the completion of the works so as to determine that the works had been properly completed. Counsel acknowledges the general principle that when there is no duty to act, there can be no cause of action from an omission to act. Thus a highway authority cannot normally be sued for nonfeasance, as opposed to misfeasance, on its part. This, it was submitted, was to be distinguished from the circumstances in the instant matter which were more akin to the case of **KSAC v Pottinger (1972) 12 JLR 889**. The head-note to that case reads:

> The Respondent was injured as a result of falling into a manhole on the sidewalk near the entrance to her home. She sought to recover damages for negligence in an action against the appellant in a Resident Magistrate's Court. The evidence disclosed that in the ordinary course of discharging its obligation in connection with the maintenance of the manhole, the appellant's employees had removed, and properly replaced, the cover only five days before the respondent's injury. There was, however, evidence that manhole covers had been removed from time to time by "intermeddling third persons" and that the appellant knew this. The Magistrate found, *inter alia*, that the appellant had taken no reasonable steps to prevent the mischief which ought to have (been) contemplated as likely to arise and, accordingly, awarded judgment in favour of the respondent.
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> On appeal: Held: that the appellant had placed the manhole and its cover on the sidewalk and it was its clear duty to use reasonable care to maintain them in a safe condition; once the respondent established that she had fallen into an uncovered manhole, the onus was on the appellant to show that it had taken all reasonable practicable precautions as were available to prevent the malicious act whereby the cover was removed, and the consequences of that act, and this they had failed to do.

At page 890, Fox J.A. in the Jamaican Court of Appeal, referring to the judgment of the Resident Magistrate in the lower court, said:

> She therefore determined the question of liability adversely to the KSAC in accordance with the general rule that whereas a plaintiff would fail in an action against a highway authority for mere nonfeasance of the authority in the discharge of it s duties, he would succeed if he could show some act amounting to positive misfeasance as opposed to mere nonfeasance.

The NWA is under section 6 of the Main Roads Act, the agency responsible for maintenance of roads, including Hagley Park Road, on which the widening had taken place, as well as the removal of any encroachments thereon, as defined by the Act. The section provides as follows:

> Subject to the directions of the Minister, the laying out, making, repairing, altering, widening, deviating, maintaining, superintending and managing of main roads, and the control of the expenditure of all moneys allotted thereto, shall be vested in the Director, with such engineers, superintendents and other subordinate officers as the Governor General may from time to time appoint, and such temporary staff or superintendents and other subordinate officers as may from time to time be appointed, all of whom shall be deemed to be officers of the Public Works Department within the meaning of any enactment relating to the same.

It was submitted and I accept the submission, that "roads" includes the sidewalk. The Public Works Department has now been converted into the NWA. By virtue of the Chief Technical Director (Transfer of Functions and Change of Statutory References) Act 2000, the responsibilities of the Chief Technical Director of that agency, have now been transferred to the Chief Executive Officer of the NWA. The first defendant is entitled to remove or have removed, "encroachments" on a road. Pursuant to section 23 of the Main Roads Act, "encroachment" is deemed to include "*any debris or refuse, or the obstruction of any part of the road remaining or resulting from anything done by or on behalf of the owner or occupier of any land, fence, building or construction, adjourning the land*" Claimant's counsel, Mr. McBean, was of the view, and so submitted that the fact that the rod was left "cemented in the sidewalk" was itself evidence of negligence on the part of the First Defendant, presumably on the basis that the copper rod represented an "encroachment".

In her written submissions, counsel for the first defendant pointed out that it is trite law that "no action will lie for doing that which the statute has authorized, if it be done without negligence, although it does occasion damage to anyone; but an action will lie for doing that which the legislature has authorized, if it be done negligently". **(Thompson v Mayor of Brighton, Oliver v Local Board of Horsham CA [1894] 1 QB 332)**. She also points out that at common law, there is no liability on the part of a highway authority for nonfeasance. She submitted that there was no evidence that the NWA had constructed the sidewalk negligently. Notwithstanding these submissions, I

am of the view that, on the pleadings, the first defendant ought not to be relieved of a responsibility to answer the allegations of negligence.

The evidence of the Claimant is that the area where the rod protruded from the ground was dark at the time of the accident. This was a place where the Claimant had passed regularly before that fateful evening. The actual widening of the road had long before been completed and the Claimant did not see the area condoned off. The Claimant also said he did not see any person from the JPS removing the rod from the sidewalk.

The 2nd Defendant, JPS, called two witnesses. The first was Kenston Tomlinson, a contractor with JPSCo, but who had worked with that company for over forty (40) years and was intimately knowledgeable about its affairs. He explained that guy wires were used to hold poles in place where transmission wires terminated or changed directions. The guy wires are attached from the pole to a piece of metal which is anchored in the ground to prevent the utility pole from being pulled down. He said he noticed that at the utility pole in the photograph at Exhibit 2B, the C&WJ wires terminated and went underground. There would be a necessity to have a guy wire in place. Further, there was a broken guy wire wrapped around the pole which was connected to the pole at the position of the C&WJ conductors and this would indicate that it was the guy wire of C&WJ. The guy wire was connected to a round piece of metal at the top of the metal rod which was then cemented into a ground. Accordingly, it was his view that the wire and the rod to hold the pole in place had been put in by C&WJ. He also said that based upon his experience, the copper rod which was the cause of the accident and was in court as an exhibit, was not a kind used in his years of experience at JPS but was used by C&WJ.

The evidence of the second witness for the JPS, Mr. Aston Daley, was to like effect. He had served the JPS as an electrical technician for over forty-six (46) years, and is currently employed as a claims investigator for the company. He also averred that in his experience the JPS had never used copper rods as that involved in the present incident to anchor guy wires. Further, in his experience, this was of the type used by the third defendant, C&WJ.

The third defendant called one witness, Mr. Ervin Scott, the Liability Management Officer of C&WJ. He said that it was his function to investigate reports of incidents involving the company in order to establish whether the company had any liability therefore. He said that he had checked the company's records and had found no indication of the company having carried out any "pole/line work" in the area where the accident giving rise to this suit had occurred. Such work would involve the moving of equipment. It may be useful to note here that according to the evidence of Mr. Sharpe, the widening of the road in question did not necessitate the moving of the utility pole which was near to the offending rod.

Mr. Scott said he was familiar with the guy wires used by C&WJ. Moreover, he was able to determine by checking the company's records, from 1996 to 2005, that the type of rod was not "stocked" by C&WJ. He conceded in his witness statement however, that the type of rod would only "be used on towers because the size of those rods, make them more suitable for towers which are exposed to great bolts of electricity from the atmosphere".

The burden of proof that there has been negligence on the part of any of the defendants, is on the Claimant. It is necessary, if the Claimant is to succeed, for him to show that one or more of the defendants either caused or permitted the rod to protrude from the pavement, or that having been aware of its existence and the danger caused thereby, it did nothing, having been under a duty to do some positive act to remedy the problem. With respect to the NWA, the Claimant must also prove that that defendant was guilty of misfeasance. (**Sunbeam Transport Service Ltd. v The Attorney General; Lorna Smith et al v Sunbeam Transport Ltd. [1997] Vol 26 JLR 1)** The defendants in the action have all filed ancillary claims against each other seeking contribution and indemnity in the event it was found liable. A defence to the NWA ancillary claim was filed by JPS but not by C&WJ.

Given the evidence, it appears to be a perfectly reasonable inference that the rod was the remnant of that to which the guy wire was attached. It seemed to have been accepted by certainly the Claimant and perhaps JPS and C&WJ, that the copper rod was cemented into the ground while it was in the broken condition in which it was when Mr. Johnson had his accident. It seems only to have occurred to counsel for the NWA, that the cementing may have taken place while the guy wire was still attached

to the copper rod doing what it was supposed to do, that is, anchoring the post and preventing it from toppling over. Indeed, Mr. Scott for C&WJ, did give his opinion that the ¼ inch rod of the kind in issue, "breaks under pressure". In that scenario, the broken guy wire which was observed wrapped around the utility pole would be explained by someone having decided to secure the broken wire by tying it to the utility pole. This would probably also explain why the round metal piece which would normally have been at the top of the rod was missing. It also seems that it would be incredibly foolish, and probably impractical, in completing the widening of the road, to have cemented around a piece of metal sticking out of the sidewalk, and just leaving it there where it seemed to have no purpose.

I think the court is entitled to assess the likelihood of that having been done as opposed to the break having occurred post the widening. I am also strengthened in this view by the Claimant's evidence that this was a place he had traversed several times as it was his way home. There was no evidence that he had ever considered that there was a dangerous "impediment" to his passage. Further, the only evidence about NWA's knowledge of the existence of the protrusion was that when they became aware of it, they immediately contacted both JPS and C&WJ. Nor did they have any right to interfere with the "furniture" of any utility company under the Public Utilities Protection Act. In such circumstances, I have formed the view that the rod was broken after the completion of the widening.

Notwithstanding Mr. McBean's submission that NWA had a duty to make the road safe, and his suggestion that the court should draw an inference that the work was completed with the protrusion sticking out, there was no evidence to ground such an inference. Further, with respect to Mr. Batts' assertive submission on behalf of the JPS that the "NWA through its witness admits that it created and cemented the sidewalk around the pole" and he adds, "around the copper rod". And that this leads to an "irresistible inference" that NWA either uncovered the rod or placed it there, I regret that I am unable to come to that view. I accept Mr. Batts' submission that there is no credible evidence that the rod belonged to the JPS. Once I have arrived at this view of the evidence, it follows that there is no basis on which to ground an action in negligence against the first defendant. Nor is there any solid evidence which on a balance of probabilities would allow me to find against the JPS. I so find.

Having regard to the totality of the evidence, it seems that on a balance of probabilities, the offending rod was in fact that of the third defendant and I so find. The evidence especially as to where the guy wire was attached on the pole, at the level of C&WJ's wires, the evidence of the second defendant's witnesses, Tomlinson and Daley, and the fact that the research of the company's records by Mr. Scott was limited and not adequate to lead inevitably to the view that the company did not use as opposed to "stock" the rods of the specifications of the rod in issue.

Accordingly, I find that on a balance of probabilities, the third defendant is liable for the damage caused to the Claimant.

DAMAGES

The parties have agreed that special damages would be assessed at $186,380.00, and I award this sum with interest at 6% from November 29, 1999 to the present.

As far as general damages are concerned, I have been referred to the case of **Charmaine Powell v Milton O'Meally & Edward Allen reported at Khan's Volume 4 page 56.** There the plaintiff suffered pain in the right knee, abdomen and chest; several tigamentum patella and shock. She was admitted to the University Hospital and discharged with cylinder plaster. Her residual disability was assessed at 4% of the whole person. She was awarded $450,000.00 for pain and suffering in June 1997, a figure that now converts to $1,046,247.80. In this case, Mr. Johnson's injuries do not appear to be as severe and there is apparently no residual disability. It was suggested that a figure of $350,000.00 would be adequate to compensate Mr. Johnson for pain and suffering.

I was also referred to the case of **John Thomas v Marcella Francis and Anor, Khan's Volume 5 page 54.** There the plaintiff suffered a swollen left knee and an avulsion fracture of the anterior tibial plateau. He had open reduction and re-attachment of the fragment under general anesthetic. Remained in hospital for three days and was discharged on crutches. One year later, the plaintiff was still in pain, had stiffness in the knee, and flexion was restricted 0-75 degrees. He could no longer ride a motorcycle for the performance of his duties. He was assessed with a permanent partial disability of the left lower limb of 15%. He was awarded damages of $450,000.00 in September 1999 a figure which would now convert to approximately

$850,000.00. It was submitted that the injuries in that case were more serious and I accept that submission.

The only other authority referred to was that of **John Shirley v Jamaica Premix Ltd. and Hopeton Smith, Harrison's Assessment of Damages for Personal Injuries, Page 34.** There $200,000.00 awarded as damages for pain and suffering by Theobalds J. in October 1992, would now be worth $1,177,050.00. There the injuries were a fracture of the right femur, a blow to the right thigh, multiple abrasions and lacerations over the right arm and elbow. Again, I am of the view that the injuries in that case were much more serious. Having considered all the cases cited, I have formed the view that the Claimant, who has apparently no residual disability and, in any case did not pursue other medical recommendations, should be awarded the sum of $800,000.00 for pain and suffering and loss of amenities. Interest on that sum will be awarded at 6% from the date of the service of the writ or the entry of appearance, if the date of service cannot be ascertained, until today.

COSTS

The question of the costs is the last matter outstanding. The general principle is that a successful party is to have his costs paid by the unsuccessful party and this position does not appear to have been affected by the new Civil Procedure Rules. Counsel for the JPS, Mr. Batts, invited the court to consider the making of a so-called bullock or Sanderson Order. I was not referred to any local authorities where this has been ordered.

A "Sanderson" order compels an unsuccessful defendant to pay the costs of a successful defendant directly. It derives from **Sanderson v Blythe Theatre Co [1903] 2 KB 533.** It is often associated with a "Bullock" order after **Bullock v London General Omnibus Co and Others [1904-07] All ER Rep 44** as a result of which the claimant is ordered to pay the successful defendant's costs but is allowed to include these in its overall costs recoverable from the unsuccessful defendant.

In a recent English case, **Michael Irvin v Commissioner of Police for the Metropolis [2005] EWCA Civ 129,** the Court of Appeal considered the application of this type of cost order. It said that the reasonableness or otherwise of joining

another party to an action should be borne in mind when deciding liability for costs. It was clear from the judgment that, before making an order imposes a liability for the successful defendant's costs on the unsuccessful defendant's costs on the unsuccessful defendant, the court will examine:

a. whether the claimant's action in joining the successful defendants was reasonable;

b. whether the case against the successful defendant was pleaded "in the alternative".

In **Hanlon v Hanlon (No 2) 2006 TAASC**, in the Tasmanian Supreme Court decided February 9, 2006, Underwood CJ had this to say:

> The High Court turned it attention to the circumstances in which such an order should be made in **Gould v Vaggelas (1984) 157 CLR 215**. in that case, Gibbs CJ held that to be entitled to a so-called Bullock or Sanderson Order the successful party had to show that not only was it reasonable to join the successful defendant in the action, but also that the conduct of the unsuccessful defendant was such that it was fair that he should pay the costs of the successful defendant. Brennan J put the question in these terms at 260:
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> "A judicial discretion can be exercised to make a Bullock order against an unsuccessful defendant in an action brought against two or more defendants for substantially the same damages only if the conduct of the unsuccessful defendant in relation to the plaintiff's claim against him showed that the joinder of the successful defendant was reasonable and proper to ensure recovery of the damages sought."

It is clear that in considering such an order for costs, the court must bear in mind the over-riding objective, to act justly as between the parties. I do not believe that, in the instant case, the court should exercise its discretion to make such an order. Accordingly, the order as to costs should be as follows.

Costs to the Claimant on the Claim as against the third defendants: Costs to the first and second defendants on the Claim as against the Claimant. On the Ancillary claims, each party is to bear its own costs. All costs to be taxed, if not agreed.