

NM LS ✓

CLAIM NO. HCV 1171 OF 2005

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

BETWEEN	GARFIELD MCCOOK	CLAIMANT
AND	WILLIAMS THOMAS & ASSOCIATES ELECTRICAL CONTRACTORS CO. LTD.	1ST DEFENDANT
AND	JAMAICA PUBLIC SERVICE COMPANY LIMITED	2ND DEFENDANT

CONSOLIDATED WITH

CLAIM NO. HCV 1427 OF 2005

BETWEEN	THE ADMINISTRATOR GENERAL FOR JAMAICA (ADMINISTRATOR FOR THE ESTATE OF NAKIA EDWARD HINES)	CLAIMANT
AND	WILLIAMS THOMAS & ASSOCIATES ELECTRICAL CONTRACTORS CO. LTD.	1ST DEFENDANT
AND	JAMAICA PUBLIC SERVICE COMPANY LIMITED	2ND DEFENDANT

Mrs. S. Campbell instructed by Campbell & Campbell for Claimant.

Ms. S. Gayle instructed by Nicholson & Phillips for the 1st Defendant.

Mr. S. Hanson instructed by Livingston Alexander and Levy for the 2nd Defendant.

IN CHAMBERS

Heard : 28 February and 4th May 2007.

Mangatal J :

1. By Notice of Application dated 6th April 2006 the Claimants applied for an order that the Defendants make interim payments in the sum of \$1,000,000.00 on account of the damages to be recovered by the Estate of Nakia Edward Hines, and in the sum of \$500,000.00 on account of damages to be recovered by Garfield Mc Cook.
2. The grounds on which the application is made are stated to be as follows:
 - (1) If the Claims proceed to trial, the Claimants would obtain judgment against one of the Defendants or against them both for a substantial sum of money.
 - (2) The 1st Defendant is insured in respect of the Claim.
 - (3) The Defendants are persons whose means and resources are such as to enable them to make an interim payment.
3. Garfield Mc Cook's claim is that he was an electrician employed by the 1st Defendant and that the 1st Defendant was at all material times employed by the 2nd Defendant J.P.S. to do electrical work. The 2nd Defendant is the main provider of electricity in Jamaica. On or about the 8th day of December 2002 the Claimant was assigned to upgrade the voltage of the 2nd Defendant's power lines located at Beckford Street, in the Parish of Kingston, when the electric current was switched on causing the Claimant to suffer electric shock and injuries. The claim by the Administrator General is in relation to the estate of Nakia Edward Hines, deceased, who was at the material time on the same 8th December 2002 also employed to the 1st Defendant. He was electrocuted having suffered severe injuries and died later the same day.

4. The claims are that the accident, injuries, and respective death were caused by the negligence of the Defendants, their servants and/ or agents or either of them.
5. The particulars of Negligence relied on in the Statements of Case are stated to be as follows:

NEGLIGENCE OF THE 1ST DEFENDANT

- (1) Failing to ensure that the electrical current in the lines was turned off and remained off while work was being done.
- (2) Causing or permitting electrical current to be restored on the power lines before the work was completed.
- (3) Failing to ensure that suitable protective equipment was provided to the Claimant in circumstances where the Claimant would be exposed to a risk of injury while at work and in particular failing to provide the Claimant with proper clothing and equipment to insulate and guard against electrical shocks.
- (4) Failing to warn or alert the Claimant to the possibility that electrical current would be restored before work was completed.
- (5) Failing to provide a safe system of work for the Claimant.
- (6) Failing to devise and implement an emergency plan to rescue and treat employees injured whilst at work.

NEGLIGENCE OF THE 2ND DEFENDANT

- (1) Failing to institute, maintain and enforce an adequate system of monitoring to ensure the power lines were not electrically charged or become electrically charged whilst work was being carried out on them.
- (2) Causing or permitting electrical current to be restored on the power lines before work was completed.

- (3) Failing to ensure that electrical current remained off while work was being done given the high risk of injury this posed to workers and members of the public.
 - (4) Failing to properly monitor the work of its independent contractor, the 1st Defendant.
6. The 1st Defendant has filed a Defence in which it denies any negligence as alleged or at all and states that the Claimants were provided by the 1st Defendant with a safe system of work. This Defendant denies being liable for the Claimants' injuries, loss or damage and says that these matters were solely caused by the 2nd Defendant its servants and/or agents or its customers. The particulars of negligence alleged against the 2nd Defendant are :
 - (a) Causing or permitting electrical current to be restored on the power lines while work was being conducted;
 - (b) Failing to ensure that the electrical current remained off whilst the work was being conducted;
 - (c) Failing to supervise the charging of the power lines so as to prevent same from being electrically charged prior to the completion of the work.
7. The 2nd Defendant makes no admission to the Claimants' employment status but admits that the 1st Defendant was an independent contractor employed to conduct electrical maintenance work on utility lines in downtown Kingston. The 2nd Defendant says that it is the licenced provider of electricity throughout Jamaica pursuant to the Electric Lighting Act and the All-Island Electricity Licence, 2001. This Defendant says that it turned off its entire relevant electrical grid for the downtown Kingston area, which included Beckford Street, on the day in question, from approximately 8:00 a.m. to 4:30 p.m. that day.

8. The 2nd Defendant states that it had taken all reasonable care to ensure that there was no power supply to the power lines. It does not admit that any electricity passed through the power lines at the material time but says that if it did, this was caused by a person or persons unknown to, and wholly unconnected to the 2nd Defendant.
9. The 2nd Defendant goes on to say that at all material times the work on the power lines and the relevant power lines were under the sole control of the 1st Defendant, its servants and/or agents. The 2nd Defendant also alleges either further or as an alternative defence, that the injuries alleged by the Claimants and/ or losses were caused and/ or contributed to by Garfield McCook and the deceased Nakia Hines and/or the 1st Defendant. They failed, neglected, and/or refused to take all reasonable care and/or to take the necessary steps to protect themselves against any flow of electricity through the power lines upon which work was being carried out.
10. Rule 17.6(1), (a), (d), (2), (3), (4), and (5) of the C.P.R. 2002 read as follows:-
 - 17.6(1) The court may make an order for an interim payment only if –*
 - (a) the defendant against whom the order is sought has admitted liability to pay damages or some other sum of money to the claimant;*
 - (d) except where paragraph (3) applies, it is satisfied that, if the claim went to trial, the claimant would obtain judgment against the defendant from whom an order for interim payment is sought for a substantial sum of money or for costs;*

...

- (2) *In addition, in a claim for personal injuries the court may make an order for the interim payment of damages only if the defendant is –*
- (a) *insured in respect of the claim;*
 - (b) *a public authority; or*
 - (c) *a person whose means and resources are such as to enable that person to make the interim payment.*
- (3) *In a claim for damages for personal injuries where there are two or more defendants, the court may make an order for the interim payment of damages against any defendant if –*
- (a) *it is satisfied that, if the claim went to trial, the claimant would obtain judgment for substantial damages against at least one of the defendants (even if the court has not yet determined which of them is liable); and*
 - (b) *paragraph (2) is satisfied in relation to each defendant.*
- (4) *The court must not order an interim payment of more than a reasonable proportion of the likely amount of the final judgment.*
- (5) *The court must take into account –*
- (a) *contributory negligence (where applicable); and*
 - (b) *any relevant set-off or counterclaim.*
11. This is a claim for personal injuries in respect of which I am satisfied that the 2nd Defendant J.P.S. is insured. I am so satisfied based on paragraphs 4 and 7 of the Affidavit of Glenford Watson sworn to on the 26th August, 2005. and paragraphs 3 and 5 of the Affidavit of Katherine Francis sworn to on the 6th September 2006. Further, I am satisfied that the 2nd Defendant, J.P.S., the licensed provider of electricity throughout Jamaica, has means and resources that would enable it to make the interim payment.

12. I am also satisfied that the 1st Defendant is insured in respect of the claim based on paragraph 4 of the Affidavit of Pete Thomas sworn to on the 17th day of January 2007.
13. In the course of argument opposing the application for interim payment, Mr. Hanson on behalf the J.P.S. cited to me the case of **Ricci Burns Ltd v. Toole and Another** [1989] 3 All. E.R. 478 and he submitted that the claimant was required to prove the likelihood of success against a particular defendant before any interim order could be made against that defendant.
14. However, the rule under discussion in that case was differently worded than the applicable Jamaican rules i.e. 17.6(3) and 17.6 (2), which specifically deal with personal injuries. Further, the rule under discussion in the **Ricci Burns** case was applied to a case that did not involve personal injuries and is more similar to our rule 17.6(1)(d) which in my view deals with non-personal injury cases. In his work "A Practical Approach to Civil Procedure" by Stuart Syme, 5th edition at paragraph 32.2.4.1 and 32.2.4.2 the author comments as follows:-
"32.2.4.1 – Multiple defendants in non-personal injuries cases. The wording of C.P.R., r. 25(7)(1)(c) confirms the position stated in Ricci Burns Ltd. v. Toole [1989] 1 W.L.R. 993 as regards multiple defendants in non-personal injuries cases. It is not enough for the claimant to establish to the required standard that the claim will succeed unless the Claimant also establishes to that standard that the claim will succeed against the defendant who is being asked to make the interim payment. This is often very difficult where there is more than one defendant, and in cases where it is clear that the claimant will win, but unclear which of two defendants who blame each other will lose, no interim payment can be ordered.
32.2.4.2 – Multiple defendants in personal injuries cases. The operation of the rule discussed in 32.2.4.1 is mitigated in personal

injuries cases by C.P.R. 25.7(3), which provides that in these cases an interim payment order may be made against any defendant provided the court is satisfied the claimant will obtain judgment for substantial damages against at least one of the defendants and that the resources requirement discussed at 32.2.2 is fulfilled in relation to each of the defendants. If it later transpires that the wrong decision was made, it should be possible if all the defendants are (for example), insured, to adjust the position after final determination of the case.”

15. The English interim payment rules in relation to personal injuries are similar to our own.
16. In a nutshell, the 1st Defendant denies that it was guilty of negligence, and puts the blame on the 2nd Defendant J.P.S. The J.P.S. say that they make no admission as to whether electricity was passing through their power lines, but if it did, this was caused by persons unconnected to them. Alternatively, the Claimants' injuries and losses were caused by the negligence of the 1st defendant or the contributory negligence of the Claimants.
17. The standard of proof is on a balance of probabilities. However, the correct realm is at the upper end of the scale of probabilities, since the court must be satisfied that the claimants would obtain judgment against at least one of the Defendants. Being likely to succeed is not enough. See Syme – paragraph 32.2.3 and the reasoning in **Shearson Lehman Brothers Inc v. MacLaine Watson & Co. Ltd.** [1987] 1 W.L.R. 480 at 489 and **British & Commonwealth Holdings Plc v Quadrex Holdings Inc** [1989] Q.B. 842 at 863-865.
18. In this case, the Claimants blame one or the other or both Defendants. The first Defendant blames only the 2nd Defendant. The 2nd Defendant blames alternatively a number of persons, including the 1st Defendant and the Claimants. The Claimant

Garfield McCook is described by his doctor, the doctor having taken a history of receiving electrical burns, describes Mr. McCook as indeed having partial thickness burns. Both the Claimants and the 1st Defendant say that the J.P.S'. lines had electricity passing through them at the material time, at a time when the lines were not expected to have electricity running through them. All of the parties are agreed that the power lines should not have been in an energized state, or have electricity running through them at the time. One of the allegations that the Claimants make against the 1st Defendant as employers is that they failed to ensure that suitable protective equipment was provided to the Claimant in the circumstances where the Claimant would be exposed to a risk of injury and in particular, failed to provide the Claimant with proper clothing and equipment to insulate and guard him against electrical shocks. In its Defence to these issues the 1st Defendant simply says that it denies any negligence as alleged or at all and avers that at all material times the Claimants were provided with a safe system of work by the 1st Defendant. In its Defence, although the 2nd Defendant, J.P.S. have alleged contributory negligence against the Claimants, this allegation has not at this stage been pleaded with any great particularity.

19. In my judgment, there is a high degree of probability that these Claimants would obtain judgment against at least one of the Defendants for substantial damages. In addition I am satisfied that both Defendants are insured.
20. Taking into account allegations of contributory negligence, I would award as a reasonable proportion of the likely amount of the final judgment, in the case of the Estate of Nakia Hines, \$400,000.00 and in the case of Mr. Garfield McCook, the sum of \$250,000.00. The Defendants are each to pay half of these amounts to the Claimants' attorneys-at-law by the 1st of June 2007.

21. Costs of this application to the Claimants to be taxed if not agreed or otherwise ascertained.