IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. HCV 3081/2004

BETWEEN	**LINCOLN NEMBHARD**	**CLAIMANT**
AND	**WAYNE SINCLAIR**	**1ST DEFENDANT**
AND	**LINTON HARRIOT**	**2ND DEFENDANT**

Ms. Arlene Beckford, instructed by Brown Godfrey & Morgan for the claimant.

Mr. Seymour Stewart, instructed by Mr. Debayo Adedipe for the 1st defendant.

Ms. Dorothy C. Lightbourne for the 2nd defendant.

Heard: 15th and 17th July 2007 and 25th July 2008

Campbell, J.

Negligence – Employers' Liability
Employee Sustaining Severe Electrical Burns
High Voltage Electrical Wire Close to Building Being Erected
Whether Employer Failed to Provide a Safe System of Work

(1) The claimant, a carpenter and mason, had worked for the 1st defendant, a building contractor for the past 16 years. On the 31st December 2002, they were working on a building owned by the 2nd defendant. The building was part of a development of commercial units of which two were already completed and two were then under construction. The building was forty feet wide and fifty feet deep. At the time of trial there were seven buildings in the complex. The building consisted of two floors, and contained a stairway which leads to the roof. This stairway started inside the building. All the parties agree that there were Jamaica Public Service power lines running "adjacent and parallel" to the building.

(2) The owner of the building, the 2nd defendant, Linton Harriot, describes the power lines as being "high voltage." According to him, the lines were higher than the roof of the building. The lines ran parallel to the building and were about 5 - 6 feet away. The lines consisted of three strands and had been there before the construction on the building commenced. The lines were a little higher than the building; about 18 inches to 2 feet higher (see cross-examination of Dean Martin).

(3) The claimant had been instructed by his employer, the 1st defendant, to dress the window lintels on the upper floor. It was agreed that only masonry work was being done that day. There were some thirteen workmen employed on the building that day. The 1st defendant testified that he had entered into an agreement with the 2nd defendant for construction of a two-floor commercial building. Under the agreement, he was to provide supervision for the labour involved in the construction, electrical and plumbing that the agreement contemplated. This contract was not before the court.

(4) The claimant describes his work process as "to dress the columns one has to clamp boards on the side to dress it." It is the same procedure for the window lentils. He said there were no scaffolds along the walls. The provision of clamps and scaffolding was an area in which the evidence between the parties diverged. The 1st defendant testified in cross-examination, "that scaffolding was provided through and through the building to facilitate every type of work." He further testified that all the necessary tools, such as the steel clamps, were supplied. These clamps appear to be vital in enabling the claimant to perform his duties. They were used to secure boards to the wall. He says that there was a sufficiency of clamps and boards that were cut to the desired length.

(5) On the other hand, the claimant denied that he was provided with clamps. As a result, he resorted to nails. In order to nail the board to the wall and in the absence of the scaffold, he went on the roof. The defendant said there was no need to proceed to the roof. He was not ordered to go there and with the tools available to him, he could safely perform his duties from within the building. The 1st defendant called a worker who was present on the building, one Dean Martin, who testified that he was responsible for the provision of the steel clamps of which there were adequate supplies.

(6) The claimant testified that he, along with one Dave Lewis, was asked by the 1st defendant to do the rendering or dressing of the windows that day. He said that in order to render the top of the walls, the use of a scaffold was a necessity. In the absence of the scaffold, the claimant and Dave both went on the decking (roof). After nailing a piece of board, they needed another. He used the tape to measure the board "so I bent down and stretched the tape and was getting up, when the tape touched the Jamaica Public Service high tension wire. He said he next woke up in the Mandeville Public Hospital to find himself surrounded by 20 persons.

(7) The 1st defendant testified that the work assigned to the claimant did not require him to leave the building. He said he could see no reason for him to go on the roof. There was no challenge to the claimant's contention that he was occupied in doing assigned work when the tape measure came into contact with the high tension wires. The claimant had not been prohibited from going onto the roof. The 1st defendant admits that he has seen "bosses" (contractors) indicate to workers the presence of high tension wires. He had not done so because he had not "seen it causing any harm." However, after the accident, he warned other workers.

(8) Despite the testimony of Mr. Wayne Sinclair (1st defendant) that there were adequate tools to facilitate the claimant completing his assignment without going onto the roof, there was no suggestion that the claimant could not perform the assigned task by going onto the roof. The more experienced 1st defendant did not foresee the harm posed to the workers by the presence of the high tension wires. However, the 1st defendant's brother, Mark Sinclair, who was left to supervise the workers in the absence of the defendant, said that, had he seen the claimant going on the roof, he would have stopped him. He testified that he had not called attention to the power lines, because "everybody has eyes to see it."

(9) Mr. Linton Harriot, the owner of the building, testified that it was the developer that had had the plans for the buildings passed by the Parish Council. The 2nd defendant states that he did not see any danger posed by the proximity of the power lines. He said this, despite describing the wires as JPS high tension wires, and that they were close to the building. He testified that he was not sure whether they were in stretching distance" and further, he had not realized that the building would be so close to the power lines. A witness called by the 1st defendant, a workman on the site, Dean Martin, testified that he did not think that the wires were too close to the building. Mr. Harriot testified that some weeks after the incident, he noticed that the power lines had been removed and were further away from the building.

Analyses

(a) Safe System of Work

(10) There is a duty imposed at common law upon the employer to his servants, to take reasonable care for their safety. The central issue is, did the employer take reasonable care for the safety of the workmen. At common law, the employer is to provide a safe system of work for

his employees, and further to ensure that the system is adhered to. The employer's duty is to take such precaution as a reasonably prudent employer in the similar situation. The learned authors of **Charlesworth and Percy** on Negligence 127th Edition, para. 11-03 notes;

> "In **Wilsons & Clyde Coal Co. Ltd. v English** (1938) A.C. 57, 84, the general nature of the duty owed by a master to a servant was described by Lord Wright as follows. I think the whole course of authority consistently recognizes a duty which rests on the employer and which is personal to the employer to take reasonable care for the safety of his workmen, whether the employer be an individual, a firm, or a company and whether or not the employer takes any share in the conduct of the operations. The obligations are three fold, as I have explained (i.e "the provision of a competent staff of men, adequate material, and a proper system and effective supervision")."

And at para. 11- 03

> "Duty is personal and not delegable. Now it is no longer necessary to put the duty under three heads. It is a single personal duty, which is no-delegable, and the importance of this feature is that the employer must see that care is taken by all those persons engaged by him. . . it is insufficient for him to take care himself. Lord Oakley expressed his opinion by saying that; 'The duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case. . .' It has also been described as the duty of taking reasonable care '....So to carry on his operations as not to subject those employed by him to unnecessary risk.' Lord Keith opined that 'the ruling principle is that an employer is bound to take reasonable care for the safety of his workmen, and all other rules or formulas must be taken subject to this principle'. It flows from the above that the masters duty is stricter than the duty to take reasonable care for oneself, and it exists or no whether or not the employment is inherently dangerous." (Emphasis mine)

(11) Did the 1st defendant subject the claimant to unnecessary risks? Has the 1st defendant discharged his responsibility of ensuring that care is taken by all those persons engaged by him, including the claimant? The employer said he did not see the risk that the wires posed. The occupier, Mr. Harriot, on reflection, did recognize there was a risk inherent in the lines being so close to the building. The 1st defendant issued warnings subsequent to the electrocution of the claimant. In the circumstances where young workmen are working "within stretching distance" of high tension power lines, what is required to ensure that these workmen take the requisite care? What is the standard of care which an ordinarily prudent employer would have taken in all the circumstances of this case? Would the prudent employer do nothing, or contend as the 1st

become a risk." The employer further said that although he had seen employers in a similar situation warn their workers, he had not done so because he had not seen it (the wires) causing any harm. I think a prudent employer in a similar situation would caution his workforce about the high-tension wires. He would say, "Fellows, those are dangerous lines. A man carrying a ladder or using steel from the roof could be seriously injured, be careful when you are on the roof." Further, he would have taken steps to have it insulated and or removed.

(12) The employer here was dealing with a workforce of some twelve men. The claimant had been in the construction field for 15 years, having started at age 16. He started as a labourer and then apprenticed as a mason and has been gaining experience for eight years. The claimant was not particularly skilled; he listed his level of competence as "a mason" as being about 40 out of 100. In the witness box, he appeared to have achieved a very basic level of literacy. The claimant's description is not inconsistent with the mass of young men who are involved in the construction industry in this country. **In Woods v Durable Suites, Ltd. (1953) ALL ER 391**, a case on which the 1st defendant relied, the Court of appeal upheld the judge of first instance order dismissing the workman's claim for negligence in not providing a safe system of work. The court held that the 56 years old plaintiff had been provided the necessary equipment, that the employee had been made aware of the danger inherent in not adhering to the preventative measures prescribed. Additionally, he had been specifically spoken to of the preventative steps he should take. The issue revolved around the fact of the unavailability of a supervisor standing over him to ensure compliance with the company's preventative directives. (In the instant case, the employer's brother was supervising the work in his absence. He himself was not present where the claimant might be.) Singleton L.J said at page 395, at letter c;

> "I do not believe it to be part of the common law of England that an employer is bound, through his foreman, to stand over workmen of age and experience, every moment they are working, and every time they cease work, to see that they do what they are supposed to do. That is not the measure of duty at common law."

at letter H, on the same page,

> "If there are young people or trainees employed in a factory, obviously the need for watching them is greater than in the case of skilled and experienced men."

The ages of the claimants are not the only point of departure between the cases. The employers in **Woods'** case had not only provided the necessary equipment as the instant employer

claims he did, but importantly **had disseminated the preventative procedures throughout the workplace and had specifically brought the attention of the plaintiff to the preventative procedures.**

(13) In **Speed v Thomas Swift and Co. Ltd (1943) K.B. 557** at page 567, Lord Greene;

> "The duty to supervise workmen includes a duty to take steps to ensure that any necessary item of safety equipment is used by them. In devising a system of work an employer must take into account **the fact that workmen are often careless as to their own safety. Thus, in addition to supervising the workmen, the employer should organize a system which itself reduces the risk of injury from the workmen foreseeable carelessness.**" (Emphasis mine)

(14) The high tension wires being 5 – 6 feet away, should the employer, using his common-sense, not appreciate that a less than careful workman, carrying a length of steel, or a ladder, or an extended tape measure may come into contact with these wires? Should the availability of a stairway leading to the roof not alert him that his workmen are likely to go up there even if they were not so assigned? The answer to these questions must be in the affirmative. Mark Sinclair testified that going on the roof to dress the window lentil was a method of doing the claimant's assigned task, should a prudent employer have foreseen that it was likely that the claimant would use that method and the likely consequence should he do so?

The 1st defendant relied on the House of Lords decision in **Latimer v A.E.C. 1953 2All ER 449**, where it was held that the employers had taken every step which an ordinarily prudent employer would have taken in the circumstances to secure the safety of the appellant, and so they were not liable to the appellant for negligence at common law. An unprecedented heavy shower had flooded the employer's factory floor, which mixed with oil, created a very slippery surface. The employers utilised the services of some 40 workmen to spread sawdust to cover most of the area of the floor, in an area not so covered, the employee slipped and fell. Lord Tucker, at page 455;

> ". . . the respondents were faced with an unprecedented situation following a phenomenal rain storm. They set up forty men to work on cleaning up the factory when the flood subsided and used all the available supply of sawdust, which was approximately three tons. The judge found that they took every step which could reasonably have been taken to deal with the conditions . . . but held the defendant liable because they did not close down the factory . . . there

was no evidence in the present case to justify a finding of negligence for failure on the part of the respondents to take this step."

(15) In the instant case, the work on the building had been going on since October 2002. The employer had done nothing. There was no evidence that the employer did anything to bring to his workers' attention the danger of making contact with the high-tension lines. No evidence that he had alerted them to those tools in use that were conductors of electricity. There is abundant testimony that after the electrocution of the claimant, the lines were moved to a further distance of eight feet away and was insulated, by having PVC piping placed over it for a distance of sixty feet, the entire length of the building. The insulation of the wires by JPS was done about one week after the unfortunate incident with the claimant. Neither the1st nor the 2nd defendant has said they were instrumental in having the wires removed or that they knew who caused them to be removed.

(b) <u>Occupiers' Liability</u>

(16) The claimant has alleged that he was a lawful visitor to the premises of the 2nd defendant, which he had entered in the course of his employment. He further alleged that in the course of his said employment, he was using a measuring tape on the roof of a building in close proximity to JPS power lines; he was electrocuted, suffered injuries and damages. He has particularized the 2nd defendant's negligence, inter alia;

(i) Causing or permitting the building to be constructed in such close proximity to the power lines as to become or remain in a dangerous and unsafe state, in that construction, workers on the said building were likely to come into contact with the said power lines.

(ii) In the circumstances, failing to discharge the common duty of care to the claimant under the Occupiers Liability Act. The 2nd defendant denied he, his servants or agents were negligent or breach their duty of care under the Occupiers Liability Act.

The 2nd defendant alleged that the claimant's injuries were caused by the claimant's own negligence or he contributed to his injuries. One of the particulars of negligence of the claimant, "that he attempted to use a metal measuring tape on the roof of the said building in close proximity to or beneath the JPS power lines which he knew or ought to have known it was unsafe and dangerous so to do."

(17) The primary duty of an invitor is to do all that is reasonable to remove unusual danger to the invitee to which he has or ought to have knowledge. The invitor is not in breach of duty if, by means of his warnings or otherwise the invitee recognizes "the full significance of the risk" or has

full knowledge of the nature and the extent of the danger." The 2nd defendant has argued that the claimant was experienced and ought to have known of the wires. And that he has discharged the duty of care on him by employing a competent building contractor. In support of that proposition, counsel relied on **Green v Fibreglass Ltd. 1958 2All ER 521**. The claimant was contracted by another party to clean the offices of the defendants. Whilst so engaged, she touched an electric fire and was severely burned. The fire was defective and was in an off position. On taking occupation of the premises, the defendants had had their offices rewired by experts. The court held they were not liable because they had employed competent electrical contractors to do the work which required technical knowledge that the defendants could not be expected to possess themselves. The action failed. Salmon J said at page 526;

> "The only obligation of the invitor, in essence, is an obligation imposed by law to take reasonable care and nothing more. In each case the question must be posed; how ought that obligation to be performed? The answer to that question must depend on the particular facts of each case. If, as in this case and in **Haseldine v Daw & Son Ltd.**, some act is to be performed which calls for special knowledge and experience which the invitor cannot be expected to possess, then, in my judgment, he fulfils his duty of care as a prudent man by employing a qualified and reputable expert to do the act."

(18) The defendants in **Green's** case had taken steps to ensure that the offices were competently wired. There was no such corresponding action on the part of the 2nd defendant. It was the defendant that brought the building in such close proximity to the wires. After that, he did nothing. He did not think it necessary. The employment of the 1st defendant to construct a building consistent with plans presented to them by the 2nd defendant would not relieve the 2nd defendant of his duty to use reasonable care. The identification of the risk posed by the wires required no specialized technical skill that was beyond the competence of the 2nd defendant. Neither was the removal of the problem beyond them.

(19) The wires were not a clear threat to persons in the occupiers land before the building was constructed. He having brought about a situation which constituted danger to invitees, he ought to take steps to remove such danger. The invitee, in the present circumstances, did not fully appreciate the danger, when he ventured onto the roof. I find the 1st and 2nd defendants jointly and severally liable in negligence for the injury caused to the claimant

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Quantum of Damages

(20) The injuries of the claimant are catalogued in three medical reports receive into evidence, the first was over the signature of Dr. Carlos Wilson who reports that the claimant was admitted to Mandeville Regional Hospital on the 31st December 2002, examination revealed he was suffering from:

1 Deep third degree electrical burns to the left hand

2 Burns to the left chest

3 Burns to right arm, forearm and hand

4 Burns to left foot

Dr. Junior A. Taylor MB, BS, FRCSED, Senior Registrar in Plastic and Reconstructive Surgery, that in his examination calculated the total burns at 19%. He notes a direct damage to the left median nerve by the electrical injury. He assessed, according to American Medical Association Guides, a 100% impairment of the left hand, 90% impairment of the left upper limb and 54% impairment of the whole person. When Dr. Steve Mullings reported on the 29th July 2003 that the claimant was seen on the 10th June 2003, examination revealed multiple healed scars involving the right palm, right forearm, right leg, chest wall and occipital region of scalp. The left hand/wrist was deformed; there were circumferential scars (keloid) to the left wrist. There was hypertrophied scars to the left palm and marked wasting to the small muscles of the left hand. Range of motion was reduced in thumb, interphalangeal joint, carpometacarpal joint. He stated that the left hand was useless. He assessed him at 82% of the left upper limb and at 49% whole person impairment.

(21) The case of **Winston Pusey v Pumps & Irrigation and Jamaica Public Service Company** (Suit No. CL. P041) reported at Khans Vol. 4 91, unconsciousness, pains all over body, burns to hands, legs and chest, fingers of the right hand "hooked up", suffered severe loss of amenities, embarrassed at loss of his hand and his whole life had changed. Dr. Rose assessed his loss at 90% of the upper extremity equivalent to 54% whole person disability. It was 60% of the whole person. On 16th July 1993 General Damages for pain and suffering and loss of amenities assessed in the sum of $800,000.00 when updated to May 2007 presents a figure of $4,261,974.00.

Othniel Ellis v Jamaica Public Service Company Ltd., severe burns to left hand and right leg exposing bone, experienced pain in arm and leg, felt a sensation of heat radiating throughout his body. Displayed features of anxiety and clinical depression, mild impairment of his attention and concentration and suffered post traumatic stress disorder. General Damages were assessed on 18th March 1995 in sum of $988,920.00, updated to May 2007, the sum is $3,429,858.50.

(22) The injuries in Winston Pusey, I find, approximates the instant case and I agree with the submissions that an assessment at a point between the two awards would be appropriate, I make an award of $4,000,000.00 for pain and suffering.

Handicap on the Labour Market

He earned $2,500.00 per week in the employ of the 1st defendant. A multiplier of 10% is selected. This represents a sum of $1,300,000.00. This figure is scaled down by 30% for contingencies and further discounted for immediacy of payment. I make an award of $800,000.00 for Handicap on the Labour Market.

Special Damages in the sum $734,780.00 with interest.

Judgment for the claimant against the 1st and 2nd defendants as follows:

General Damages $4,000,000.00; Handicap on Labour Market $800,000.00; Special Damages $734,780.00

Costs to the claimant to be agreed or taxed.