

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. N-006 of 1978

BETWEEN NEWTON NEMBARD PLAINTIFF
AND REVERE JAMAICA
 ALUMINA LIMITED DEFENDANT

W.B. Frankson, Q.C., for Plaintiff
J. Leo Rhynie and D. Scharschmidt for Defendant

November 29 - 30, 1982
February 21 - 23, 1983
June 27 - 29, 1983
April 4, 1986

WRIGHT, J.

The plaintiff's claim is for damages in respect of injuries sustained on 19.5.75 while employed at the defendant's Bauxite Plant at Maggotty, St. Elizabeth, when he was struck by high-voltage electricity (13.8 Kv) and thrown to the ground. The list of injuries is quite impressive but much more astounding is the fact that he survived such an ordeal and is still capable of performing normal functions. The injuries listed are as follows:-

- (a) Severe burns to the upper limbs.
- (b) Fracture of the second lumbar vertebra in the spine with narrowing of the disc space (permanent).
- (c) Irritation of sciatic nerve on the left side.
- (d) Low back pain radiating into the left leg.
- (e) Distinct Limp of the left leg.
- (f) Apparent scoliosis convex to the right with limitation of movement, particularly of flexion at the waist (permanet).
- (g) Tenderness over and to the left of the upper lumbar spinous processes.
- (h) Slight wasting of the left thigh and diminution of power of hip flexion.
- (i) Pinching of the theca at the level of a narrowed intervertebral disc between the second lumbar vertebra and the one above.

- (j) Decreased libido and inability to sustain penile erection.
- (k) Surgical scars.
- (l) Some alteration in sensation in the left upper limb.
- (m) Diminution of light touch and pinprick sensation from the clavicle to the groin (permanent).
- (n) Minimal angulation of the spinal column at the level of the compression fracture of the spine (permanent).
- (o) Severe pain in the spinal column exacerbated by major operative procedure and post-operative convalescent with continuing and persisting backache.
- (p) The likelihood of developing arthritis of the related joints with increased backpain.
- (q) Permanent partial disability of the function of the spine amounting to 25%."

The action is founded in negligence and breach of Statutory duty under the Factories Regulations, 1961 the particulars of which are as follows:-

"PARTICULARS OF NEGLIGENCE

- (a) Failing to de-energise the said cubicle before ordering the Plaintiff to work therein.
- (b) Failing to take any or any sufficient care to ensure the Plaintiff's safety.
- (c) Failing to ascertain that the said cubicle was free of energy before requiring the Plaintiff to work therein.
- (d) Restoring electrical energy to the cubicle whilst the Plaintiff was engaged on working therein.
- (e) Failing to provide any or any supervision of the flow of energy to the substation whilst the Plaintiff was working thereat."

"PARTICULARS OF BREACH of Statutory Duty

- (a) Failing to provide a safe system of work, that is by failing to ensure that the plaintiff whilst engaged in dangerous work received any or any sufficient or adequate supervision and by failing to furnish the plaintiff full and proper instructions before or at the time of performing such dangerous work as required by the regulations made pursuant to the provisions of the Factories Act.
- (b) Failing to provide and maintain efficient devices by which power can promptly be cut off.
- (c) Failing to take proper and effective precautions to prevent conductors and/or equipment from being accidentally or inadvertently charged with electricity whilst the Plaintiff was working in the cubicle.

- (d) Failing to furnish the Plaintiff with proper portable insulating stands or other suitable means of insulation whilst engaged on the aforesaid work."

The defence is a denial of liability under both heads plus a counter charge that -

"the shock sustained by the plaintiff was caused or contributed to by the negligence of the Plaintiff."

The particulars thereof are as follows:-

PARTICULARS OF NEGLIGENCE

- (a) Opening up Cubicle 3 and entering therein when he knew or ought to have known that it was energised.
- (b) Opening up Cubicle 3 and entering therein without any instructions so to do.
- (c) Failing to de-energize Cubicle 3 or to ascertain that it was de-energized before opening it up and entering therein.
- (d) Opening up and entering into Cubicle 3 instead of working in Cubicles 5, 4 or 6 which were already opened up, de-energized and ready for cleaning.
- (e) Failing to take any or any reasonable steps for his own safety when he knew or ought to have known that Cubicle 3 was energized.
- (f) Failing to obey specific instructions issued to him not to unbolt or enter into cubicles without permission or supervision.
- (g) Unbolting and opening Cubicle 3 without any instructions so to do.

It is obvious that the determination of the issues involved will necessitate a careful scrutiny of the system of work as well as the manner in which the work was undertaken on the day in question. Further, under both heads of claim, the plaintiff's standard of care for himself is a relevant consideration and in this regard it is worthy of note that he (36 years of age) was a Grade I electrician employed to do work on electrical installation. Briefly compressed the plaintiff's complaint is that he was unaccustomed to the type of work he was required to do on the day in question and that he was both inadequately instructed and inadequately supervised.

It is not my understanding that there is any controversy about the physical lay-out of the plant. Accordingly, the evidence of the

defendant's witness Shirley Shakespeare, the Supervisor in charge of operations on the day in question, who was involved in the construction of the plant from the early stage, may safely be accepted on this point.

The defendant was involved in the production of alumina from bauxite in which process a considerable amount of electricity was required - all of which was generated at the defendant's power house and then fed to six substations. This case concerns substation No. 5 which according to Mr. Shakespeare was a concrete building (sides and roof) about 20 ft. long X 20 ft. wide with two entrances. On the southern side was a single swing door about 3 ft. wide and on the northern side double swing doors about 3 ft. 6 ins. wide (each). Inside this building and on opposite sides were two electrical Switch Gears - a low voltage (460 volts) and a high voltage (13,800 volts).

We are here concerned with the high voltage gear which was a metal frame 18 ft. long X 7 ft. high X 6 ft. deep, divided into six (6) separate sections (cubicles) - each of which was 3 ft. wide and 7 ft. high and divided into an upper and a lower compartment by a shelf which served as an insulator. The bottom section of each cubicle had a swing door 4 ft. 6 ins. high and 3 ft. wide made of steel plate. The swing door was anchored to the metal frame by 3X 1/2 ins. anchor bolts, and on the left of the door there was a safety lock. On the frame at the right side of each cubicle was a handle fitted with a safety lock operated by the same key used for the safety lock on the door. The purpose of the safety lock was to prevent unauthorised entry. The handle, as will be shown later, was used to de-energise interrupter (an "on-and-off" switch).

The upper section of each cubicle was fitted with a metal inspection plate 3 ft. wide X 2 ft. 6 ins. high which was secured by 4 X 1/2" bolts - one in each corner. It would be necessary to use a ladder to reach the upper-most bolts. In this plate were three holes about 5 ins in diameter with inspection glass which allowed for the viewing of the mechanism inside.

Each inspection plate was labelled with capital letters in white 3/8 ins. high on a blue background as follows:-

- Cubicle No. 1 - Feeder No. 1
- " No. 2 - Incoming Line No. 2
- " No. 3 - Bus-Tie
- " No. 4 - Incoming Line No. 1
- " No. 5 - Feeder No. 2
- " No. 6 - Feeder No. 3

Current from the Power House reached the Sub-Station by two feeder lines to cubicles 2 and 4 which were accordingly fitted with meters.

Mr. Shakespeare's evidence is that these cubicles were manufactured by Canadian General Electric Company.

From the labelling on the cubicles it is patent that cubicle No. 3 was quite different from the other 5 cubicles and this difference lay at the root of the events under query.

The nature of the work to be done on the occasion was preventative maintenance which, of necessity, was undertaken in two phases. Phase 1 involved cubicles 1 and 2 and, according to Mr. Shakespeare, Phase 2 would involve cubicles 4, 5 and 6 - no work was to be done on cubicle 3, and this was made clear. This is a matter of critical importance the moreso because the plaintiff disputes it.

The work force assembled for the job was as follows:-

"3 Grade 1 Electricians - T. Tomlinson, H. Jones, N. Nembhard (the plaintiff) and one Grade 2 Electrician, N. Moxam - these were immediately answerable to a foreman J. Headley. Above Headley was Mr. Shakespeare, the General supervisor and above him two engineers, Messrs. Seaton Ricketts and one Mr. Adonis."

The plaintiff's evidence is that on Mr. Shakespeare's instructions he accompanied him to Sub-station No. 5 where he saw the other members of the crew and was instructed to do preventative maintenance on cubicles Nos. 1 and 2 but before such instructions were given Mr. Shakespeare left with Mr. Tomlinson and Mr. Ricketts to the Power House to de-energize the feeder for these two cubicles. That's what we heard Mr. Shakespeare say.

Points worthy of note here are that although the plaintiff had not worked in this sub-station before he had worked in other sub-stations similarly constructed as well as at the Power House where he had worked with high and low voltage devices which he claims are different from those in the sub-station. In the sub-stations where he had worked he had never done any work on the high voltage sections, he said, nor had he worked with Mr. Shakespeare before.

The evidence-in-chief of Mr. Tomlinson omits particulars of the de-energizing process at the Power House, so for this reliance must be placed on the evidence of Mr. Shakespeare which has not been challenged on this point.

In the Power House there was a switch which when flicked to the "off" position would de-energize the line to cubicle No. 2. But as an extra precaution Mr. Shakespeare said he did the following:-

"He lowered the breaker. This is a magnablast type breaker weighing approximately 1600 lbs. enclosed in a panel 3 ft. wide and 8 ft. high. The breaker was lowered by means of an electric motor. In this position the breaker is completely isolated from the switch gear thus ensuring that no current could pass through.

Next, he removed the fuses for this closed circuit and put them in his pocket.

Further, to guard against accidental replacement of the breaker by anyone two tags - a red and a white - were placed on the panel. These are known as "Danger Tags". On the red tag was written Tomlinson's name and Shakespeare's on the white."

Cross-examination of Mr. Tomlinson secured substantial corroboration of Mr. Shakespeare's testimony on this aspect of the case.

The system was that both men would have to return to the Power House and remove the tags at the same time before the breaker could be elevated to re-energize the line. This, says Mr. Shakespeare, was the system employed from the very start of operations at Revere. It may be commented that no evidence was presented to challenge this aspect of the system.

Mr. Shakespeare then returned to the sub-station along with the other two men and further safety measures were adopted. As to what these measures were and by whom undertaken there is no general agreement.

Accordingly, details will have to be set out.

In his evidence-in-chief the plaintiff said:-

"Mr. Shakespeare called Tomlinson to go with him to de-energize. I heard him say so. They returned and we commenced working on Nos. 1 and 2. When he returned Mr. Shakespeare pulled down the handle for Nos. 1 and 2 cubicles and the crew instructed to start working. We had two ladders and tools. I did not have my tools at that time. All the tops of the cubicles are fitted with the four bolts I referred to in No. 3. Handle had to be pulled before we could proceed to undo the bolts. The workmen pulled the covers. I did not climb ladder. I was on the ground. Two others climbed the ladder. While work in progress Mr. Shakespeare said that we would have to work through lunch period without breaking for lunch. Work on cubicles 1 and 2 nearing completion at that stage. Mr. Shakespeare did remain at the sub-station all the time while work on Nos. 1 and 2 going on. So did Mr. Ricketts, Mr. Adonis and Mr. Headley."

Further, he said that on completion of the work on these two cubicles Mr. Shakespeare told Mr. Headley to watch the volt meter and when it indicated "0" he should pull down the individual switches on the remaining four cubicles. Then Messrs. Shakespeare, Tomlinson and Ricketts left for the Power House to de-energize the feeder for the other four cubicles. According to him there was a meter on the covers of the other four cubicles. Mr. Adonis left too while Mr. Headley and the other two workers remained. Afterwards he drew Headley's attention to the fact that one of the meters was showing "0" and Headley proceeded to pull down all four switches. He asked why pull down all four since they were doing two at a time and Headley replied "While the iron is hot lets drive it". As an aside, I would observe that this question does seem incongruous in the light of his evidence that Mr. Headley was instructed to pull down the four handles.

The plaintiff contended that he did not have his tools with him up to then so he left to fetch them at the workshop about 5 chains away and during that time he heard the siren signalling lunch time, i.e. 12 O'Clock Noon. He returned to the sub-station with his tools to find that no one was there. Let it be noted that the only tools required for the job being done were a $\frac{1}{2}$ inch spanner or an adjustable spanner and a hack-saw blade.

Such other evidence from him relating to this period was extracted in a very exacting cross-examination. I will at this stage relate this additional evidence. He agreed that after Mr. Shakespeare had pulled down the handles on the two cubicles he removed the keys and placed them in his pocket. Then he admitted that if indeed Mr. Shakespeare had done at the Power House what I have outlined earlier, that would be a very important precautionary measure. Challenged with evidence he had given at an aborted trial he admitted saying then that Mr. Shakespeare had used a dielectric stick to lead off stored current to ground and that he had later ascertained from Mr. Shakespeare the reason for so doing which was that sometimes there was residual current in the lines. However, immediately after that admission he retracted and said it was he, the plaintiff, who had used a fibreglass stick to do so on instruction from Mr. Shakespeare. Consistent with this he could not recall having said at the said trial that Mr. Shakespeare had used a fuse stick in the sub-station. But he agreed that it was only after the precautionary measures had been taken that Mr. Shakespeare gave instructions for the work to commence. He denied that before such instructions were given Mr. Shakespeare had put his hand on the buss bar and said it was safe to work. Having worked at the Power House he knew that that sub-station was supplied by two feeder lines. But contrary to his evidence-in-chief he now said that Mr. Shakespeare had not stated the purpose of the trip to the Power House - he had only assumed so. Nor did Mr. Shakespeare on his return say he had de-energized the lines. He had just gone ahead and pull the handles down.

Trevor Tomlinson who had accompanied Mr. Shakespeare to the Power House testified for the plaintiff and in his evidence-in-chief he stated that on their return to the sub-station Mr. Shakespeare pulled down the handles of the two cubicles, removed the keys which "he must have put in his pocket or something", instructed that the covers to the cubicles be removed, and, when that was done Mr. Shakespeare used a fuse stick of fibreglass with a piece of 7/029 wire attached to it and the other end was brought into contact with the ground wire on the building

to drain away stored current in the buss bars. Only then did they start to work and work was completed on those two cubicles without incident and thereafter he, along with Mr. Shakespeare and Mr. Ricketts, returned to the Power House and re-energized those cubicles. He added that before they left for the Power House the handles for those cubicles were put to "On" and Mr. Shakespeare instructed Mr. Headley regarding the other four as the plaintiff had testified. At the Power House they re-energized Nos. 1 and 2 and de-energized the other four cubicles by turning a little automatic switch. The time was now "somewhere around 11 O'Clock", by which time he said he had already had lunch. Work had commenced "around after 9".

This witness was to make a very significant change in his testimony regarding the conduct of Mr. Shakespeare and the de-energizing procedures. It is noticed that at first he agreed with the plaintiff that there were two trips to the Power House after which neither Mr. Shakespeare nor Mr. Ricketts returned to the sub-station. In fact he had testified that when he returned to the sub-station after the second trip he did not see the plaintiff and that Headley, Jones and Moxam were already at work on cubicles 4, 5 and 6 and he joined in and helped them remove the covers. It must be noted also that in contrast to the very elaborate steps taken to de-energize Nos. 1 and 2 his evidence would seem to make short shrift of the process regarding 4, 5 and 6. All that seem to have been done, from his evidence, was the turning of a little automatic switch. However, in cross-examination he admitted that three trips were made to the Power House - the first two trips being concerned with the de-energizing and re-energizing of cubicles 1 and 2 and the third trip with the de-energizing of cubicles 4, 5 and 6. Further, he admitted that the same de-energizing process (which he said had required about half-hour at the power house in relation to cubicles 1 and 2) were undertaken with respect to Nos. 4, 5 and 6. And then this -

"on the first visit to de-energize No. 3 remained live. On the second visit to de-energize No. 3 was still alive."

This is so because of the significant difference between No. 3 and the other cubicles. No. 3 could only be fully de-energized if there was a total shut-down of the plant. Against this background must be viewed the evidence of the plaintiff and this witness that Mr. Shakespeare instructed Headley to pull down the handles on Nos. 3, 4, 5 and 6 when Mr. Shakespeare left on that second de-energizing trip from which he did not return, according to the plaintiff. But having regard to the elaborate precautions which, on the plaintiff's case, were adopted at the sub-station to render cubicles 1 and 2 safe for work it is a matter of no little interest to ascertain what, if anything was done there in connection with Nos. 4, 5 and 6; this the more so because work proceeded on those cubicles without incident.

Let me then relate Mr. Shakespeare's evidence as to the instructions and precautions given and observed at the sub-station in the pre-lunch period. This is important because, although the plaintiff mentions the giving of instructions he did not supply details thereof.

To begin with the preventative maintenance to be done included the cleaning of the insulators and re-taping of defective buss-bars (electrical conductors used in switch gears and distribution boards). The buss-bars are in the top section of the cubicles - none at the bottom. The bottom sections in cubicles 1 and 2 housed terminal points on the distribution side.

Mr. Shakespeare said he decided on the calibre of the men required - first class and second class electricians. He does not mention Mr. Adonis among that work crew. Having assembled the men he told them they would be doing preventative maintenance on the high voltage switch gears. Cross-examination revealed that the four electricians selected were taken from the fifteen (15) electricians who had been constantly employed to Revere for four years but he knew that Moran and Nembhard had not been exposed to that sort of work before.

As far as the calibre and experience of the men were concerned it may be useful to interpose further evidence he gave in cross-examination. The highly technical nature of the job determined the

calibre of the men chosen. He had not previously worked with the plaintiff nor Moran. Said he, "So far as I was concerned Nembhard had not done such work with me before but he might have with others. I can't say whether he had done such work with anyone else". He offered the explanation that from 1971-1973 the plant had been divided into two sections for maintenance purposes under two foremen - himself and another with whom Nembhard worked. Since 1973 the witness became General Foreman with responsibility for the whole plant and it was only since then that the plaintiff came under his direct supervision. He also explained that the electricians came to Revere as electricians and attained Grade 1 status by virtue of competence and experience on the recommendation of the Foreman to the General Foreman who reports to the Superintendent who makes the grading.

In this regard it is pertinent to note that Mr. Shakespeare disclosed that as at the date of testifying he was an electrician of 21 years experience. On the date of the incident under query he was Electrical General Foreman with responsibility for all electrical maintenance and modifications. He holds certificates in electrical maintenance through correspondence courses from International Correspondence School, Canada and had the following work experience -

7 years at Appleton Estate doing electrical maintenance on low voltage equipment.

2 years at Alpart with high and low voltage equipment.

10 years at Revere Jamaica Ltd. with high and low voltage equipment.

Further he had been engaged with the firm of Walsh Blunt in the construction of the plant - specially in the installation and commissioning of the Switch Gears of the electrical motors.

It was attempted in cross-examination to boost his stocks by suggesting that he was the only employee with a blue-print of the Plant but this was denied. He disclosed that he was not still employed to Revere but to Perry Equipment Co. which was carrying out the sales of the equipment on the plant site (the plant had closed down in September, 1975)

he being the chief employee on spot and he denied that there was any job offer from Revere still open to him. He specifically denied having any such offer to be taken up in New York depending on the successful conclusion of this case. No evidence was adduced in support of this suggestion. This obvious effort to prove bias and so impeach the witness' credit bore no fruit.

No special instructions were given. The instructions were issued to Mr. Headley, the foreman, in the presence and hearing of the men in keeping with organizational practice of not breaking the line of command. He admitted too in cross-examination that the work to be undertaken was highly technical and essentially dangerous but that he instructed the men on the spot of all the technical things they had to do. In answer to the question what were the instructions he said:-

"We were going to clean buss-bars of ionised dust, remove buss bars support in areas made safe for work, re-tape sections of buss-bars that were locking to earth. These areas to be made safe were made safe to work on. The section of the switch gear named buss-tie no work can be done in that particular cubicle unless we have a total plant close-down as at all times that cubicle would be live. That was all the technical instructions I thought necessary for them to do the work. That was all the instructions."

These instructions had taken ten minutes which he thought adequate. The only danger about which they needed to be instructed was the danger constituted by the cubicle with the buss-tie (No. 3) and he instructed them about it. After the precautions he had taken there was no danger about which they needed to be told. Further the men had all had on-the-job instructions by the Westinghouse Maintenance Group of Companies at the plant.

Mr. Shakespeare's evidence is that after he had re-energized the incoming line to cubicle No. 2 at the Power House he returned to the Sub-station with Ricketts and Tomlinson where he closed both cubicles by pulling up the handles after using the key to open the handle. When the handle is down it is in the locked position and cannot be pulled up without the use of the key. The intention thereafter was to work

on cubicles 4, 5 and 6 which were energized by in-coming line No. 1 and he announced this to the men informing them that No. 3 is live at all times and so could not be worked on. All the workmen were present, he said. Thereafter, accompanied by Ricketts and Tomlinson he returned to the Power House and carried out the de-energizing procedure and took similar precautionary measures in relation to cubicles 4, 5 and 6 as had been done in relation to Nos. 1 & 2. They then returned to the sub-station where he pulled the operating handles down on Nos. 4, 5 and 6 and removed the keys and gave instructions to Headley, the foreman, to have the inspection plates removed from these three cubicles. This done he used the keys to open the swing doors at the bottom of each cubicle and proceeded to drain off stored energy and short-out the buss-bars as had been done with Nos. 1 and 2. He then put the keys in his pocket and touched the buss-bars to indicate that they were safe to be worked on. Next he instructed the foreman to proceed with the removal of the insulators, cleaning the buss-bars, re-taping defective areas leaking to earth and cutting out the holes in the supports to facilitate the extra insulation on the buss-bars. There were two supports in each cubicle. The cutting was done with hack-saw blades. He was there when work commenced on Nos. 4, 5 and 6 and the inspection plates on Nos. 1, 2 and 3 were intact. Indeed, the tops and bottoms of Nos. 1 and 2 had been made secure on completion of the work in those cubicles. It is instructive to add that the type of work being done on that day was done on a nine or ten monthly cycle and the exact work required to be done in each cubicle was ascertained by the presence of "arcing" seen through the inspection windows. There was arcing in No. 3 as well but because of the special characteristic of that cubicle that work could not be undertaken that day.

Work proceeded on these cubicles for about 35 minutes by all the workmen, including the plaintiff, before the siren which signalled the lunch break - 12.00 - 12.30 p.m. The witness denies telling the men not to take the scheduled lunch break as well as telling them to work through the lunch break. Further, he knew nothing about the

instructions alleged to have been issued by Headley to "strike the iron while it was hot" with reference to working through the lunch period. This alleged instruction forming a very important part of the plaintiff's case calls for close examination because this work period during which the plaintiff was injured would have been bereft of any supervision and this would be quite a departure from the high-level supervision of the earlier period - such a departure as would justify a charge of recklessness against the employer. This calls for a clear determination inasmuch as it falls under particular (a) of the particulars of the breaches of statutory duties. But more of this anon.

Continuing, Mr. Shakespeare said that at 11.55 a.m. when about one hour's work remained to be done on those three cubicles he left to the office leaving Headley in charge and from there he went to lunch when the siren sounded at 12.00 noon.

To reflect for a moment on the pre-lunch period it is relevant to note that stored energy in the busses was said to amount to about 24 volts - not enough to kill a person but sufficient to cause discomfort. Up to the time that the siren sounded there was no complaint even of discomfort. This is a relevant factor in considering the questions arising under both heads of damages.

Quite naturally this aspect of Mr. Shakespeare's evidence did not go un-challenged and in response to such challenge he replied that apart from the knowledge gained in construction he did not receive any specific instruction as to the operation of the plant and its maintenance but that such knowledge was supplemented by the knowledge he had gained from his previous jobs as well as from working at Revere. Such knowledge he had acquired on his own initiative aided by reference to the blue-prints to which he could refer from time to time. So far as the supervisory cadre of employees was concerned he said that for the entire plant there were three electrical engineers, namely, Ricketts, Adonis and Salazar, none of whom had been with the defendant company at the time the plant was being constructed. Next in line to them were a General Superintendent, a General Foreman or Supervisor, a section

Superintendent and two Foremen. However, two of the engineers were technical and not in the line of command. But despite his position in the hierarchy the witness agreed with a suggestion that in 1975 there was no Revere employee who knew as much about the plant as he did.

However, said he, he shared his knowledge and did not keep it selfishly to himself. The witness conceded that the work at the plant was highly technical and in most instances dangerous; hence the need to disseminate his knowledge so as to greatly reduce the dangers. He also agreed that the knowledge and skill of the electricians in the defendant's employ could be greatly improved. Be it noted, however, that this does not necessarily mean that such skill and knowledge as they possessed were inadequate to the jobs they were required to perform.

He testified that the six sub-stations carried high voltage machinery and that these required a higher level of maintenance. Most importantly he disclosed that as the only Supervisor, he was the only one who would undertake preventative maintenance of the type undertaken on the day in question. He conceded that he had in mind that the plaintiff and ~~Moran~~ needed to be treated differently from the others but he never thought they might have stood in need of special instructions. Said he also, that to a person unfamiliar with cubicle No. 3 apart from the tag and the fact that the handle was down there was nothing to distinguish it from the other cubicles. But the experience of these two electricians in low voltage equipment similarly constructed should enable them to understand the working of the high voltage mechanism, even if they had not previously worked on such mechanism.

It is appropriate to interject that the voltage in the low voltage mechanism be it 440 or 460 volts, as has been variously stated was known by the plaintiff to be much in excess of the minimum that can prove fatal.

On the question of the buss-tie label in cubicle No. 3 insofar as the question of the adequacy of instructions was concerned the witness said that even if these two electricians had not previously worked on that particular switch-gear their knowledge gained from working in low voltage equipment similarly constructed would enable them to understand

the meaning of "buss-tie". He was questioned and answered the obvious, namely, that the buss-tie in high voltage equipment conducts a much more dangerous level of electricity than the buss-tie in the low voltage equipment.

With particular reference to the Plaintiff, Mr. Shakespeare said he had been employed there as an electrician from 1969-1971 during the construction period and from 1971 onwards he was employed in a similar capacity in the plant - a total of six years up to the time of this incident.

Concerning the level of supervisory staff on the job the witness Tomlinson who had admittedly done high-voltage work before said, he had never seen such high level of such staff assembled for any other job as was assembled for this job in question. And let me say here and now that although both the plaintiff and Tomlinson mention Mr. Adonis as being among such staff, I do not believe (accepting Mr. Shakespeare on this) that Mr. Adonis was there beyond the initial stage. Apart from the statement that he was there no word or action is attributed to him. Supervision, therefore, was provided by Messrs. Headley, Shakespeare and Ricketts - all of whom are known to have been actively engaged. On this aspect of the case no challenge has been mounted by adducing evidence to show that either in numbers or skill or both the supervisory staff was unequal to the task.

To summarize briefly, then, it is agreed that before the siren blew signalling the commencement of the lunch period cubicles Nos. 1 and 2 had been completed and re-energized without any problem under the constant supervision of Messrs. Headley, Shakespeare and Ricketts. According to the plaintiff, supported by his witness Tomlinson, Mr. Shakespeare had left to the Power House to de-energize cubicles 3, 4, 5 and 6 instructing Headley to pull down the handles on these cubicles when their meters registered "0" and that Headley did pull all four handles down. But a very significant observation is that only No. 4, for the reason already stated, was fitted with a meter. Attracting attention is the plaintiff's testimony that he had worked from somewhat after 9.00 to past 11.00 O'Clock

without his tools so he then left to fetch the tools having in mind that on the instructions of Messrs. Shakespeare and Headley work should proceed throughout the lunch period - Tomlinson supports him in this - and that up to when he left Mr. Shakespeare had not returned. It was while he was away, he said, the siren blew. To the contrary is Mr. Shakespeare's testimony of the scrupulous observation of all the precautionary measures essential to rendering Nos. 4, 5 and 6 safe to be worked on and the instruction, for the given reason, that No. 3 could not and would not be worked on that day. Further, the inspection plates had been removed from all three cubicles, the swing doors at the lower sections opened by him and that work had proceeded with all workmen present from about 35 minutes up to 11.55 when he left to the office leaving Headley in charge. Mr. Shakespeare is supported by Mr. Tomlinson, that with the exception of the removal of the inspection plates, the system operated was such that no work was done until Mr. Shakespeare had personally rendered the five cubicles safe.

Mr. Tomlinson's evidence poses a problem regarding the whereabouts of the plaintiff at the time Mr. Shakespeare left at 11.55 A.M. because having at first testified that only two trips had been made to the power house to de-energize the cubicles, that Mr. Shakespeare had not returned to the sub-station after the second trip and that when he, the witness, returned to the sub-station he did not see the plaintiff he had retracted his evidence about the number of trips. In the result he said there had been three trips and that Mr. Shakespeare did return to the sub-station and render the cubicles safe. In the apparent effort to render his evidence safe for consumption he had supplied the details that on his return from the second trip he had found Headley, Moxam and Jones removing the bolts from cubicles 4, 5 and 6 and that he assisted them. What effect does his retraction have on the rest of his evidence? This will be examined in due course. However, on his evidence when the siren blew Headley, Jones and Moxam left. He alone remained in the sub-station but he did no work and while he was there the plaintiff returned. It might not be very important but he is in conflict here with the plaintiff.

Cubicle No. 3 is the main object of concern during the post-siren period. It is appropriate, therefore, to describe its features before relating the events involving it. The two incoming lines in cubicles 2 and 4 are paralleled, that is, brought together in cubicle 3. When the handle on cubicle 3 is up the buss-tie is closed and when it is down the tie is open. Accordingly, when the handle on cubicle 3 is up the top and bottom sections are alive and when it is down only one section is alive, that is top or bottom depending on the positions of the two incoming lines. If the two incoming lines are closed (cubicle handles up) the top and bottom are alive. If one incoming line is closed and one is open and the handle on cubicle 3 is down either the top or bottom of cubicle 3 would be de-energized.

Regarding the position of the handle on cubicle 3 Mr. Shakespeare's evidence is that when he arrived for work that morning the handle was down and he pulled the key and placed it in his pocket when he de-energized cubicles 1 and 2 thus leaving the handle locked. This of course contradicts the evidence of the plaintiff who testified that after the completion of work on cubicles 1 and 2 Headley pulled down the remaining four handles on Shakespeare's instructions. From Mr. Shakespeare comes the information that when cubicles 1 and 2 were worked on the top section of cubicle 3 was energised but that while Nos. 4, 5 and 6 were being worked on all the busses in the top section were dead. It is worthy of note that the bottom section of this cubicle was never opened that day. That is so because the handle was locked and Mr. Shakespeare had the key. At least so Mr. Shakespeare said. Nearing the end of his stay in the witness box the plaintiff in answer to the Court said Headley had the keys for Nos. 3, 4, 5 and 6.

The events involving this cubicle began when, according to the plaintiff, he returned from the workshop with his tools to find cubicles 4, 5 and 6 open and no one there. Rather than proceeding to work on any of these cubicles he set out to do what in the morning required two men, namely, the removal of the bolts and the inspection plate. In the morning the plates had been removed by two men with the use of a wooden ladder.

This was so because of the height of the bolts from the ground. The plaintiff says that with the aid of the ladder he removed the bolts from the inspection plates then removed the plates and proceeded to remove and inspect the insulators and observed they were burnt. While thus engaged he saw Mr. Adonis to whom he gave the burnt insulators and Mr. Adonis left with them with a promise to return. Then he, the plaintiff, removed the third pair of insulators, came off the ladder with them, placed them on the floor, then climbed the ladder with a piece of rag with which he proceeded to clean the buss bars. While thus engaged he heard an explosion inside the cubicle and he was thrown on his back to the floor sustaining a burnt arm. Tomlinson came in from outside, enquired what had happened but he was unable to speak; so Tomlinson left and in his absence two men came and lifted him into a van and he was taken to the First Aid Clinic and thence to the Mandeville Hospital where his back was X-Rayed and he was hospitalised for six weeks and some days after which he received treatment as an out-patient once or twice per week, but to no avail, it would seem, because of the continuing pain. His treatment was supervised by Dr. Newman.

After about one month of physiotherapy he was referred to Dr. McNeil-Smith at his request. Dr. McNeil-Smith treated him but according to him, there was no improvement so off he went to Dr. Soas at Maxfield Medical Centre from where he was referred to Dr. Chutkan. After he left Dr. McNeil-Smith he was responsible for his medical bills. Dr. Chutkan said he was alright but he disagreed and so was referred to Professor Cross at the University of the West Indies. He thinks he was hospitalized there for three weeks and some days during which time he had an operation which produced some improvement. After discharge he visited the out-door clinic for examination until he was stopped after some six or seven visits. There was great improvement, he said, but that he had not up to the time of trial reached full recovery. He would say he was getting better every day. His defects up to then were a slight discomfort from a burning sensation in the area of the operation; he couldn't twist and had to treat his back gingerly; restrictions in his activities because of the back

injury; he could not lift heavy loads.

The injuries of which he initially complained were -

"Right arm burnt from wrist to upper arm; severe pain in his back - the main problem - as a result of which he had to remain in one place."

Scars and keloids mark the burnt areas and in the right inner aspect of the burnt arm there is a "biting" sensation.

Now, in the light of what transpired in the morning and what the plaintiff said he did it is relevant to explore the state of his knowledge. Of particular importance is his knowledge of cubicle 3 as well as his reason for interfering with this cubicle which showed no signs of having been made safe for working. Had he been injured working on one of the open cubicles it is difficult to think of a defence to his claim.

So far as the nature of preventative maintenance was concerned he had done such work before in other sub-stations. But even in his evidence-in-chief there is a conflict in this area. Says he -

"Preventative maintenance work is work I have done before but not on that particular sub-station. All sub-stations are not the same because some of the equipment are different, that is, the connections. The operations of the electrical devices in their are High Voltage and Low Voltage. Some cubicles are 13,800 volts and 440 volts where there are motor control centres. That was the first time I worked on this sub-station. The other sub-stations are not different. They are the same. Never did preventative maintenance in the high-voltage sections. I had previously worked on low voltage as well as high voltage but not in the sub-station At the power house with different devices. Before I started working on No. 5 no one pointed out the difference between it and the other sub-stations where I had previously worked."

The conflict is patent and can do without comment.

Cross-examination was to reveal that he had been trained as an electrician at V.A. McBean where he progressed to the Grade I level and after working there for upwards of 6 years he had ^{been} transferred to Walsh Blunt as a second-class electrician, doing maintenance work, and then made his way back up to Grade I before he went to work at Revere in 1971.

Confessing his greatest respect for electricity he admitted that it is hazardous to interfere with High Voltage unless one knows precisely

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what one is doing as well as that it is dangerous to interfere with High Voltage equipment unless one knows precisely how that equipment operates. He admitted too, that as an electrician and for his own safety the High Voltage equipment must be safe to work on, it is dangerous to do such work unless the equipment is absolutely safe and that it is dangerous to assume it is safe.

He admitted that he knew that there was a buss-tie in Cubicle 3 which was so labelled and no other was similarly labelled. Yet it did not alert him to the fact that this cubicle performed in a manner different from the others. In fact he did not know what the label meant. Buss-bar he knew but not the term tie. But before entering the cubicle he made no attempt to ascertain the meaning.

Referred to the safety precautions adopted by Mr. Shakespeare earlier that day he admitted that he saw Mr. Shakespeare short-out the busses to ground by wrapping a piece of 7/029 wire around the buss bars. This he said was to check for stored energy. This shorting-out, he said would foil any effort to close the breaker at the Power House. Also the reason why no work was done on Cubicles 1 and 2 before the de-energizing team had returned from the Power House was that it would be dangerous to do any work until it was known that all was in fact done which was necessary at the Power House. Regarding Mr. Shakespeare he agreed he was knowledgeable and experienced in High Voltage equipment. Bearing in mind what he said he did in cubicle 3 working by himself it ought not to pass without notice that he had seen earlier in the day that when the insulators were removed they were handed to Mr. Shakespeare or Mr. Headley for inspection. Now, he was undertaking the supervisor's function all by himself.

But while describing the lay-out of the sub-station he had said in his evidence-in-chief:-

"Nos. 1 and 2 are connected. Nos. 3 not connected to No. 2 -- there is a combination tie that connects 3, 1 and 2. No. 3 has two sections. When handle is in "off" position that means the bottom section is live and feeds back to 1 and 2, i.e. both sections of 3 are tied to 1 and 2. When the handle is in the "on" position No. 3 is tied with 1, 2 and 3 from the left (i.e. 4, 5 and 6 from right).

In answer to a question by the Court he said -

"No. 3 cannot be completely dead unless there is a total close-down of the plant."

In the light of this evidence there is no doubt that he was familiar with the term "tie" as well as with the peculiar nature of cubicle No. 3. How did this knowledge influence his dealing with the cubicle? Any such exercise is subject to the same caveat that has to be observed in dealing with any aspect of his testimony. He vacillates - a consistent feature of his testimony due either to a bad memory or a lack of compunction about contradicting himself if that seems to be the solution to any predicament in which he finds himself.

Having testified that when cubicles 1 and 2 were worked on both sections were opened at the same time and that when Mr. Shakespeare took the precautionary measures already described both sections of the cubicles were open he now said that although only the top sections of 4,5 and 6 were open he presumed that -

"What had been done on the first two had been done on these cubicles but I did not know for sure if anything had been done. It never crossed my mind whether the same safety measures taken by Shakespeare had been done regarding these.

I decided to work on No. 3 following the instructions that I had. Yes, I was told to work on No. 3. Mr. Shakespeare had said to work on the rest without going for lunch. No supervisor told me to work on No. 3 specifically I opened No. 3 although I had not spoken with either Shakespeare, Tomlinson or Ricketts who had gone to the Power House."

Absurd though it obviously sounds he let himself say -

"On my return with tools I did not know whether the shorting-out with 7/029 wire had been done to the cubicle on which I went to work. The fact that No. 3 was closed would lead one to believe that no such procedure had been carried out I took off the cover and took my own safety precautions similar with the 7/029 wire-wrapped around the bars tied to fibre glass fuse stick and short-out to the earth wire in the corner of the building. It was alright. I did not have the wire on the buss bars while I worked. That morning was the first time I had seen that exercise done - done by Shakespeare. I had never done it before. I was sure that what I was doing was right according to what I had seen Shakespeare do. Did not think anything wrong with going ahead before anyone who had been there (Power House) in my absence had returned. "

Bearing in mind his earlier testimony as to how the precautionary measures had been carried out by him and not Mr. Shakespeare, I can only say his latest testimony on the issue must certainly earn him a minus on the question of credit. Not only that, he clearly demonstrates how unreservedly he exposed himself to the risks he knew were posed by the very peculiar nature of the cubicle.

Vacillating was also a marked characteristic of the plaintiff's witness and time and again plain questions had to be repeated upon his confessing ignorance of the meaning of the question. But he was forced to retract his evidence-in-chief that he did not know that no work^{should} have been done on cubicle 3, and admit that on 19.5.75 he knew such to be the case and that that explains why they proceeded to open Nos. 4, 5 and 6 top and bottom and left No. 3 closed "because no work was to be done on it". This certainly does not support the plaintiff's contention. He also testified -

"Had I noticed he was working on No. 3 I would have said something to him. I would have told him not to work on that cubicle."

"Q: Is that because you knew it should not be worked on?"

A: Could you please repeat for me.

Q: (Question repeated)

A: Yes."

Again it may be asked whether this evidence does not deal a very severe blow to the plaintiff's case that Shakespeare instructed Headley to pull down the handles on the remaining four cubicles and that work should proceed on them. Indeed this contradicts this witness' evidence-in-chief that -

"Before we left to the Power House Mr. Shakespeare instructed Justin Headley, the foreman to see when the volt meter indicated "O" and pull the handles down to "off" and to commence working on them."

This registers a manifest inconsistency which is aggravated by his further evidence in cross-examination -

"On first visit to de-energize, No. 3 remained alive. On the second visit to de-energize No. 3 was still alive."

This witness also underscores the necessity for two persons to work on each cubicle as had been done in the morning because one person would stand on the ladder, remove the inspection plate and pass it to the other person on the ground. What if the plaintiff had slipped and fell while undertaking this adventure alone?

Mr. Shakespeare maintains - and Tomlinson supports him - that all covers had been removed from Cubicles 4, 5 and 6 and work done (he says for about 35 minutes, Tomlinson says about half-hour). Not only did he deny giving instructions to work through lunch-time but, said he, he instructed all workmen including the plaintiff that no work could be done on No. 3 because it was live at all times. On the question as to whether the way was in a sense clear for the men to work through the lunch period by them having lunch before the 12.00 O'Clock siren and before the completion of cubicles 1 and 2, Mr. Shakespeare said that was not so - that would have been between 9.00 a.m. and 11.15 a.m. The safety precautions that had been taken regarding cubicles 4, 5 and 6 were still intact when this witness inspected the Power House after the accident.

Having regard to what the plaintiff said he did in Cubicle 3, Mr. Shakespeare's opinion was solicited with a view to ascertaining how the plaintiff could survive such a shock and he gave the following explanation. First he said the three busses in the top section of cubicle 3 were the same three running through cubicles 4, 5 and 6 which were already de-energized by him. Accordingly, so far as they were concerned they could be worked on safely. But there was another buss known as stubbing protruding for about 3 inches into the top section from the bottom section and this buss was live. When the mechanism operating the switch-gear is in the closed position the protrusion is about 14 inches into the top section. This buss could be the source from which the plaintiff received his shock. If the 7/029 wire was wrapped around this buss to attempt a short-out or a draining off of stored energy a short circuit would result sufficient to burn off the wire which is about $\frac{3}{16}$ inch in diameter. Again, if he used his hand to wrap the wire he would be shocked. So what appears to have happened is that his elbow was in contact with the metal frame while

his hand came into contact with the stubbing and because he was standing on a wooden (non-conductive) ladder a short circuit would result passing through his hand to earth through the metal frame. He escaped death because the voltage of approximately 7,700 volts did not pass through his whole body.

Contrary to the evidence of the plaintiff that he did not know the meaning of the term buss-tie and of his witness Tomlinson that a Grade I electrician would not be expected to understand the term, Mr. Shakespeare maintains that that is not the case. To an electrician of that Grade it would be obvious that such a cubicle operates in a different manner from the others. And this commends itself for my acceptance. Further, the protruding stubbing is a feature absent from the other cubicles and ought to have alerted the plaintiff that this cubicle differed from the others. That the plaintiff could not be a stranger to the term buss-tie is evidenced by the fact that the switch-gear in the Low Voltage Cubicles where the plaintiff admitted he had worked carried a buss-tie similar to that in the High-Voltage switch-gear. And indeed, Sub-station 4, said the witness Shakespeare, had a cubicle similar to cubicle 3 in Sub-station 5. Of the six sub-stations Mr. Shakespeare said he served only two, namely 5 and 3. He said also that the plaintiff was on the permanent staff and that from the system of deployment all the electricians would get to know the general operations of the plant.

Mr. Frankson canvassed the idea of having pad-locks on the tops of the cubicles but it is relevant to note that there is no plea of unsafe machinery. However, the evidence is that the equipment was manufactured by a company which manufactures a very wide range of electrical products and what is more the safety measures at the plant had been inspected by the Factory Inspectors. The question was allowed not as being in support of any pleaded claim but merely as it affected the witness' credit. On the question of credit also the witnesses were challenged but not confronted with previous testimony in the aborted trial and in making an assessment regard must be had to the fact that some 3 years had elapsed since the incident and 3 years since that trial in addition to any short-comings otherwise disclosed.

It is my view that the evidence has been sufficiently ventilated to enable the submissions to be considered. For his part Mr. Leo Rhyne submitted in substance, quite correctly, that the Court is proscribed from making a finding in favour of the plaintiff which does not fall within the pleaded particulars. He identified the legal issues for consideration in relation to the question of liability as -

- 1. Negligence
- 2. Contributory Negligence
- 3. Breach of Statutory Duty.

To prove negligence the plaintiff must establish -

- (a) that the defendant owed him a legal duty of care;
- (b) that the defendant breached that duty in one or more ways particularised in the statement of claim;
- (c) that there was a direct causal connection between such breach(es) and the damage or injury suffered by the plaintiff in the sense that such breach(es) was/were the operative or effective cause of the plaintiff's injury.

The duty of care owed by an employer to an employee, he submitted, is to take reasonable care for the employee's safety in all the circumstances of the case, that is, taking reasonable care so to carry on his operations as not to subject those employed by him to unnecessary risks, viz., any risk that the employer can reasonably foresee and can guard against by any measures the convenience and expense of which are not entirely disproportionate to the risk involved. The duty is not absolute and is limited to the reasonable exercise of care and skill to guard against danger which as a reasonable person the employer ought to have anticipated. For these submissions reliance is placed on Charlesworth on Negligence 6th Ed. paragraphs 1180, 220, 1032, 1034, 1046.

To establish Contributory Negligence he submitted the defence need prove only that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.

Regulation 16 of The Factories Regulation 1961 upon which the plaintiff relies is as follows:-

"No person shall be allowed to operate any dangerous machinery unless -

- (a) he is competent to do so or is directly under the supervision of a person competent to operate such machine; and
- (b) he has been fully instructed as to the dangers attendant upon the operation of such machine and the precautions to be taken."

Mr. Leo Rhynie is strongly of the view that if this action relies on the above-stated regulation then the action is misconceived because for it to be applicable there are two principal considerations:

- (a) Is the action brought in respect of the kind of harm which the statute was intended to prevent?
- (b) Is the person bringing the action one of the class which the statute is designed to protect?

Both, he submitted, are questions of construction of the particular statutory provisions and that it appears from a line of cases that the construction is strict. He further submitted that the Regulation is intended to protect operators of dangerous machinery, that is, persons who manage by putting in motion a machine for the purpose of having the machine function the way it was designed in order to achieve the commercial purpose. For this submission he prayed in aid the Oxford English Dictionary meaning of operate, viz., to cause or activate the working of; to work (a machine) (see Words and Phrases judicially defined P.P. 35,36). Mr. Frankson counters with a rather ingenious submission to give a meaning to "operate" which would embrace the day's activities. He calls attention to the meaning of factory in the Factories Act, viz.,

"any premises in which or within the close or curtilage or precincts of which -

- (a) acetylene, steam, water, wind, electric, internal combustion or other mechanical power is used; or
- (b) ten or more persons are employed in manual labour"

for certain processes which would embrace the processing at the plant. Accordingly runs, the submission, the sub-station is a factory. Hence cleaning, repairing and maintaining the sub-station is part of the operation

of the factory and the corrective work being done at the time comes under the heading of operating. Continuing he submitted that what the defendant was doing and not the particular assignment of the plaintiff was the process of operating. The defendant was operating machinery for generating electricity and the plaintiff was engaged as part of that process. The electricians were merely employed at different points in the operation of the machinery at the plant.

Counsel's inventiveness is obvious but clearly falls short of showing that the plaintiff was operating machinery which before the plaintiff was put to work had to be drained of all the energy which enabled it to be operated! I certainly commend his effort but must reject his conclusion. It still remains a question of fact whether the plaintiff was put to work on cubicle 3 from which such energy had not been drained or whether the defendant's negligence or breach of statutory duty was the operative or effective cause of the injury suffered by the plaintiff.

Mr. Leo Rhyne referred to a line of cases in support of his submission that provisions such as Regulation 16 (supra) are strictly construed:

In Norris vs William Moss & Son Ltd. (1954)
1 ALL ER 324

where a plaintiff had sustained injury in seeking to correct a fault in scaffolding by a method which the court in dismissing a claim for personal injuries, based on common law negligence and breach of a Building (Safety, etc.) Regulation found to be "fantastically wrong" it was held on appeal that -

"although at the time of the accident there was a breach by the defendants of the Regulation the real cause of the accident was the plaintiff's negligence in employing an unsuitable method of trying to correct the fault; neither the breach of statutory duty nor the failure of the defendants foreman to warn the plaintiff of the fault (due to the plaintiff's work) contributed to the accident; and therefore the defendants were not liable."
 (Emphasis supplied).

The decision to dismiss the appeal was unanimous and it may be instructive to quote from Vaisey J at pp. 327-328 where he said -

"It is sometimes difficult to decide whether an antecedent act or event is the cause, or one of the causes of a subsequent event, or whether, on the other hand, it is merely one of the

surrounding circumstances in which as part of the background in front of which, the subsequent event has taken place. Here it seems to me that the accident to the plaintiff was due entirely to his own negligence in doing a piece of work well within his competence, in a manner which the learned judge described as "fantastically wrong". True it is that it was on the learning standard that the work in question had to be carried out, but the fact that the standard was in that condition, cannot in my judgment be treated as being in any reasonable sense a cause of the accident. It is not, I think, admissible to construct chains of causation in a case such as this where a single cause - simple obvious and amply sufficient to account for what happened - is to be found in the inexcusably careless behaviour of the workman himself."

Another case in which the employers escaped liability though in breach of their statutory duty is Rushton V. Turner Brothers Asbestos Co. Ltd. (1959) 3 ALL E.R. 517. The defendants had failed to fence a dangerous part of the machinery but Ashworth J. held they were "not liable in damages to the plaintiff because the cause of the accident, in the sense of the operative act and effective cause was the plaintiff's own negligence in inserting his hand into a moving groove". In this case the plaintiff had acted in defiance of specific instructions not to do what he eventually did.

Again in Hodkinson vs. Henry Wall Work & Co. Ltd. (1955) 3 ALL ER 236 where the employers were found to be in breach of their statutory duty and held to be 50% liable in damages to the plaintiff, the Court of Appeal reduced the employers capability to 10% holding that -

"although the defendants were in breach of their statutory duty yet, since the plaintiff had acted in defiance of the established practice of the factory doing something which he knew it was not his business to do, he should bear ninety percent of the responsibility for the accident and the defendants should bear only ten per cent and the damages recoverable by the plaintiff would be reduced accordingly.

Other cases considered include Higgins v. Harrison (1932) 25 B.W.C.C. 113, 125 (question of dangerous machinery considered) Smith vs. Austin Lights (1959) 1 W.L.R. 105, Horne v. Lee Refrigeration (1965) 2 ALL ER 898.

It is Mr. Frankson's submission that these cases are easily distinguished on the ground that specific instructions had been given and the workman had acted contrary to those instructions and so occasioned injury to themselves which, he maintains, is not what happened in this case.

A point not to be overlooked is that in these cases under consideration the instructions related to jobs which the workmen would be required to perform over a period whereas in the instant case the instructions were concerned with the day's performance. Accordingly, the manner of giving the instructions was tailored to suit the case and need not be identical with the manner employed in any other case provided the instructions reached the workmen in a form they understood and were adequate to alert them as to what was required of them and the dangers attendant upon the job because of the nature of the work in which they were engaged. This was not a case where novices were being recruited. Rather it concerns men who were all professionals in the field in which they were being engaged.

On the question of the manner of giving the instructions to the workmen through the foreman - all being present and could hear - no evidence has been adduced to impeach it as an industrial practice - accepting Mr. Shakespeare as a forthright and reliable witness whose competence and experience have been amply demonstrated. I accept as a fact that the instructions were given in the manner indicated and so reached the men directly from Mr. Shakespeare. Further, in assessing the adequacy of the instructions it is of great significance to note that no harm resulted to any of the workmen during work on the five cubicles which was carried out under supervision and as Mr. Shakespeare testified, in keeping with the system in vogue from the commencing of the plant some four years previously. I take into consideration also the competence and experience of the workmen, not as apprentices, but as electricians with years of working experience at that plant and in sub-stations similarly constructed to Sub-station No. 5. And this is so despite the effort of the plaintiff and his witness, both of whom prevaricated unabashedly when they thought it would advance the plaintiff's cause.

But Mr. Frankson contended that the statutory duty of care is absolute and no escape by delegation is permissible. He cited for support Gallagher v. Dorman Long & Co. Ltd. (1947) 2 ALL. E.R. 38 in which case the relevant statutory provision was section 24 of the Factories Act 1937

which prohibited the loading of a crane or other lifting machine being loaded beyond the safe working load marked thereon. The questions in issue there were as to delegation by the defendants of the statutory duty of care and contributory negligence on the part of the plaintiff, one of the persons to whom such delegation was alleged to have been made. Both questions were concluded as a matter of evidence against the defendants. This case I find to be unhelpful, there being no question of delegation to the plaintiff in this case.

In support of the claim that the plaintiff received injury during the course of work being done Mr. Frankson referred to the head note in Potts OR Riddell v. Reid (1942) 2 ALL. E.R. 161 which was concerned with deciding "the area of the building under construction". This was obviously a question of fact to be decided from the evidence. And so it is in the instant case. Undoubtedly, the plaintiff sustained injury during the course of work being done by him. The point of contention is whether the work was either authorised or permitted without any or any sufficient supervision.

On the issue of liability - sufficient has been said to enable a summary of the findings of fact to be given and in this regard let me state clearly that no evidence has been adduced in support of the following particulars of Negligence - (a), (c), (d) and (e) and of particulars (b) and (c) under the head Breach of Statutory Duty. What is left, therefore, are particulars (b) under Negligence and (a) under Breach of Statutory Duty.

Fundamental to, though not conclusive of, the issue of liability is the answer to the question whether the workmen, including the plaintiff, were instructed to work through the lunch period. The meticulous, and I might say, scrupulous care for the safety of the workmen manifested in the pre-lunch period stands out in stark contrast to the lunch period when no one apart from the plaintiff essayed to even turn a single nut. Indeed, at the sound of the siren all who were present left for lunch. That is the time I find that the men went to lunch and not earlier while work was being done as the plaintiff and his witness would have me believe. I find that there were no instructions to work through the lunch period. Is it not strange that but for the plaintiff everybody else would have ignored

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those twice-given instructions? I am guided to my conclusion by an assessment of the witness and by the out-of-character behaviour of the supervisory staff in relation to such instructions to work through the lunch period. In the pre-lunch period even after the precautionary measures had been taken to render the cubicles safe the supervisory staff, with the exception of Adonis who was not shown to have been actively involved, remained on site. Contrast this with the fact that not even one remained for the lunch period and it becomes clear that to accept that the instructions were given would one have to be very gullible. But even assuming that such instructions had been given it would be my finding that the work to be done was clearly indicated as confined to cubicles 4, 5 and 6 and no one was injured while working on those cubicles. I do not have to find an answer for the question why did the plaintiff interfere with this maverick cubicle No. 3? Could be vanity, stupidity, inadvertence or a combination of all plus any other unidentified factor. But I have no doubt, despite the plaintiff's dissembling, that prior to the accident he not only knew of the nature of a buss-tie but was warned against interference by the label on the cubicle and the instructions by Mr. Shakespeare.

That the plaintiff could have been recruited at the workshop where his tools were by Mr. Shakespeare who knew the requirements of the job, taken to the work-site and allowed to work for well over two hours without his tools which were a mere 5 chains away is too much to believe. Why did he not fetch the tools on either of the trips made by the team to the Power House to de-energize the respective cubicles? During that time and while precautionary measures were being taken in the cubicles no work was done. No, I don't believe the plaintiff's case that he left to fetch his tools and returned in total ignorance of what had been done in Cubicles 4, 5 and 6. Rather I accept the evidence that he was present and witnessed the de-energizing of cubicles 4, 5 and 6 and participated in the work done in them up to the time Mr. Shakespeare left at 11.55 a.m. and had heard the instructions as to why Cubicle 3 was ~~excepted~~. For whatever purpose he left he must have done so just

after Mr. Shakespeare departed or after the siren went.

I don't believe Mr. Adonis returned to the sub-station during the lunch period. Nor, despite the lack of evidence as to the condition of the inside of cubicle 3 after the incident, do I accept the plaintiff's evidence that he was able to enter that cubicle and do the amount of work claimed to have been done by him because it has not been shown that he could have done so without coming into contact with the live buss.

Mr. Frankson submitted that if Mr. Shakespeare de-energized cubicles 4, 5 and 6 and pulled the key from cubicle 3 what would this reveal of the system of work employed by the defendant? Said he, if he pulled the handle down apart from the instruction not to enter the defendant would be employing a very dangerous system of work. It was a mute invitation to the workmen (including the plaintiff) to enter a cubicle in which a part of the buss-bar was alive and laden with 13,800 volts. Unwary workmen or improperly instructed workmen as to the dangers would be lured into contact with a very dangerous situation. In this regard the evidence I accept is that of Mr. Shakespeare that the handle on cubicle 3 was in the down position when he arrived for work and that during the de-energizing of cubicles 1 and 2 he pulled the key from cubicle 3 thus leaving the handle locked. Indeed, if invitation there was it would have undoubtedly been to enter cubicles 4, 5 and 6 which were open and not the one which was securely bolted. That submission accordingly fails.

From the plaintiff's evidence it is plain that he knew cubicle 3 was alive at all times and that the Power House would have to be totally shut down to totally de-energize this cubicle.

It is equally clear from the answers he gave in cross-examination that he knew he was taking on tremendous risks to enter cubicle 3 as he did. A final effort by Mr. Frankson brought forth the submission that on the evidence it was dangerous for the sub-station to have been left un-manned at any time such as when the plaintiff returned and no one was there.

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My findings on the plaintiff's departure and return ought sufficiently to answer this submission. However, I will add that this aspect was not canvassed with any witness. But the ultimate question is what was the effective and operative cause of the injury suffered by the plaintiff? In this regard must the defendant have foreseen that a Grade I electrician with several years experience or any other electrician for that matter would assume the death-laden risk of entering that cubicle and so guard against him so doing? No. I don't think so. It would seem to me that if they did and yet employed him they could not escape condemnation on a charge of reckless disregard for human life in employing him at all because his unsuitability for employment in such an enterprise would have been manifest. Undoubtedly, it was the plaintiff's lack of care for his own safety that was the real cause of the injury he suffered. He was not authorised or permitted to do the work on which he was injured.

For completeness, however, I will examine the question of Damages. Regarding Special Damages it can easily be stated that in keeping with the failure of the plaintiff to inspire confidence in his evidence he failed to prove any of the items under this head of damages. And as for General Damages on the basis that there is no permanent disability, according to Professor Cross, then there can be no claim for Prospective Loss of Earnings. There is also no evidence he attempted to obtain employment so as to mitigate his loss. It was agreed that Pain and Suffering and Loss of Amenities is the only head to be considered. Such would of course be limited to the period of recovery and for which Mr. Frankson would expect an award of between \$35,000 and \$40,000.

Despite the list of injuries the plaintiff's evidence in relation thereto was limited to the burnt arm and the pain in his back but the back was the cause of his trekking from one doctor to another even after he had been pronounced fit for work by Dr. McNeil-Smith about five months after the incident. On 15.3.76 he was seen by Professor Cross on referral for back pain and pain in the left leg. A limp in this leg was detected and physical examination disclosed as well -

curvature of the spine - restricted forward bending at the waist; tenderness over the spine in the middle part of the back and over the muscles to the left of the spinal column;

the left thigh slightly smaller (1/2 cm) in circumference than the right;

mild diminution in power of the muscles which flexed the thighs - noticeably on the left thigh, limitation of forward bonding.

X-Ray of the Lumbar spine revealed a compression fracture of the second lumbar vertebra - the inter-vertebra disc above that vertebra was narrowed in height. A myelogram indicated prolapse of the inter-vertebrae discs but this was not confirmed by the subsequent operation. Opinion was that the process of the operation had destroyed evidence of the suspected thickening of the ligaments and to this extent it was felt that the surgical intervention was beneficial in that the symptoms improved on bed rest in hospital. But during his stay in hospital he suffered from broncho-spasms due to a previous asthmatic condition unrelated to the back injury. In Professor Cross' opinion the back pain could be attributed to the fracture of the second lumbar vertebra and damage to the inter-vertebral ligaments. The leg pain resulted, he said from injury to the associated nerve root and subsequent scarring of the root.

When first seen by Professor Cross and at some other time at the Clinic the plaintiff manifested anxiety and in August 1976 he had several complaints some of which were not obviously related to the back injury. He complained of inability to sustain penile erection and decreased libido, but of these two complaints there was no supportive physical evidence. A subsequent re-screening of the myelogram proved normal. Evidence of the fracture was present as well as minimal curvature. By October 1979 when he was last seen there was no limitation of movement of the back but there were some features related to the previous fracture. So far as the physician's help was concerned the plaintiff had attained maximum improvement by September 1978. However, there remained the risk of degeneration resulting from the trauma with the passage of time.

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Had the evidence favoured judgment for the plaintiff I would have awarded him \$20,000. But the evidence is over-whelming in favour of the conclusion that the plaintiff is wholly to blame for the injuries he sustained. There will accordingly, be judgment for the defendant with costs to be taxed if not agreed.