JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO. 62 OF 1993

BEFORE: THE HON. MR. JUSTICE RATTRAY, PRESIDENT
THE HON. MR. JUSTICE DOWNER, J.A.
THE HON. MR. JUSTICE PATTERSON, J.A.

BETWEEN	**PUMPS & IRRIGATION LIMITED**	**APPELLANT**
A N D	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**APPELLANT**
A N D	**WINSTON PUSEY**	**RESPONDENT**

Dennis Goffe Q.C., and Miss Michelle Henry for Pumps & Irrigation Limited

Clifton Daley and Dwight Dacres for Jamaica Public Service Company Limited

Dennis Morrison, Q.C., and Lynden Wellesley for Winston Pusey

January 30-31; February 1-3 ; June 19-20, and July 31, 1995

RATTRAY P.:

The relevant facts of this appeal are fully and accurately stated in the draft judgment of Downer J.A. which I have read and I will not repeat them. The quantum of damages was not challenged and it was not sought to challenge the entitlement of the plaintiff to a judgment.

The issues therefore which now call for determination are:

> (1) Was the trial judge in error in finding a legal liability in either or both of the appellants Pumps & Irrigation Limited (referred to as ("Pumps") and Jamaica Public Service Company Limited (referred to as ("J.P.S.")?
>
> (2) If his legal conclusion was correct on the facts in finding both Pumps and J.P.S. liable, was he in error in relation to his finding on the contribution of each of the appellants, that is that they were both equally to blame?

The learned trial judge found in a disputed area between both appellants that he accepted the evidence of Pumps supervisor Mr. Miller: "that among his jobs for the day was the cutting out of the old abandoned 69 KV transmission wires within the area given for the outage." That finding of fact reasonably made from the evidence destroyed the contention of J.P.S. that the accident occurred when the plaintiff was carrying out work not

covered by the Permit to work given by J.P.S. to Pumps to be carried out that day within the area given by J.P.S. for the outage.

Furthermore, under the terms of the contract between J.P.S. and Pumps the contractor Pumps was "free to arrange the order of the work to benefit from the most economical development of plant, equipment and labour, and to suit the method of construction adopted."

Having therefore completed the main job programme for that day, that is, the connecting of wires to new posts on one side of the road, and time being still available Pumps' supervisor, Mr. Miller, was well within the contractual provision just cited to instruct the plaintiff to climb the old post on the other side of the road and within the area of the outage and cut down the old abandoned wires which had been de-energized and expected by all not to contain electrical current at that time. In the words of Mr. Boswell the J.P.S. resident engineer whose duties included checking on the work performed by Pumps to ensure that it was properly done - "the line they attempted to cut down was de-energized at that time."

WHAT THEN WAS THE CAUSE OF THE ACCIDENT?

Some five to six weeks before, Pumps had removed sections of the old abandoned 69 KV wires leaving another

section to be removed subsequently. That section was placed into clamps so as to prevent it getting in touch with the underbuild which contained electrical energy. Mr. Boswell was satisfied that the work including the clamping of the wires was properly done. He had been present and witnessed the carrying out of that work. After the accident Pumps' supervisor Mr. Miller traced the lines two to three miles away from the site of the accident "and discovered that one leg of the old retired 69 KV line which his team had worked on five to six weeks before had slipped from the clamp and was touching the live 24 KV line below causing the old abandoned 69 KV line to be energized." How then did the wires slip out of the clamp? The learned trial judge accepted the evidence which established that the line had been securely clamped. The work had been inspected and approved by J.P.S. after it was done. He was querulous as to what could have caused the line to slip from the clamp. "Notwithstanding", said the learned trial judge in his judgment:

> "... the Jamaica Public Service had a duty to so monitor its lines that it could take corrective measures whenever it became necessary. It is well recognised that Jamaica Public Service lines from time to time come into contact with each other for known and sometimes unknown reasons. It is not unforeseeable."

The learned trial judge found in relation to the cause of the accident as follows:

> "... that the accident occurred in the manner stated by Mr. Miller in his evidence that the abandoned 69 KV wire had slipped from its clamp and had come into contact with the live 24 KV underbuild. Unknown to any of the parties this energized the abandoned 69 KV wires as far as to the area of the outage. In his attempt to retire this abandoned wire the plaintiff received his injury."

There is sufficient evidence to support the finding of Reckord J. in this regard and I would not disturb it.

WAS PUMPS NEGLIGENT?

The evidence of the clamping of the abandoned wires came from Mr. Miller the Pumps supervisor who stated that:

> "The underbuilds at the spot where Pusey (the plaintiff) was working had no current in it."

The power was in the underbuild behind them. Where the wires slipped out of the clamp there was power in the underbuild. The plaintiff had used a cutter supplied him by Pumps. The cutter was not insulated. Mr. Miller however stated that "the cutter that Pusey used is the proper cutter to be used for that job." In cross-examination he said that:

> "It was J.P.S. decision to energize up to the dead end pole rather than de-energize the whole line so as to allow the work to proceed. Had the whole line been de-energized Pusey would not have been injured."

Mr. Miller maintained that the wire was securely clamped when he left it and there was no danger there at the time. In answer to Mr. Daley under cross-examination the following emerges.

> "Q: would it not be a safe precaution to use insulated cutters?
>
> A: I have never seen an insulator cutter. We have pliers with insulated handles - we use those pliers to cut wires. The men could not use insulated pliers to cut these wires. The men would not be tall enough to reach those wires. It is both convenient and quicker and the way to do it is to use a long cutter."

He further said however:

> "If insulated cutters had been used the plaintiff would not have been injured. We don't use insulated cutters as we don't work on live lines."

Mr. Boswell the J.P.S. resident engineer supported Mr. Miller with respect to the use of insulated cutters. Mr. Daley asked him in examination-in-chief:

"Q: Would it have been prudent or desirable from safety point of view to use insulated cutters or other protective devices?

A: It would not have been necessary because we would have made sure that the line was safe to work on without such equipment. It is a policy of J.P.S. not to use contractors to do any form of live line work and on that day that policy was in effect. The line they attempted to cut down was de-energized at that time."

With respect to the work done five to six weeks before which would include the clamping he said:

"It would be my responsibility to check and determine when lines retired that they have been properly and safely been done. At the end of each day of an outage I would go through to ensure that everything is in order before the line is energized.

"The Court can properly assume that the work that was done 5 - 6 weeks before had been checked by me. I was satisfied that it was properly done."

The learned trial judge found that:

"... the fact that the Jamaica Public Service Engineer passed the job done by the first defendant as satisfactory would not exonerate the first defendant if it were badly done. The in-escapable finding therefore is that the first defendant was

> "negligent in clamping the wires, which subsequently slipped from the clamp and came into contact with the live underbuild and became energised. It may well be said that the inspection done by the Jamaica Public Service Engineer was very perfunctory hence the failure to discover that the wire had not been securely clamped."

There is in my view no evidence to support this finding and it led to the contributory negligence of Pumps being assessed at 50%.

This however is not the end of the matter as far as the liability of Pumps is concerned. Pumps owed a duty to its employee to provide a safe system of work. The work was being performed with respect to a dangerous element to wit electricity. It has not been unknown that electric lines thought to be de-energized have become energized by coming into contact with energized areas accidentally or otherwise, in this case the underbuild. The use of an insulated cutter or protective insulated gloves would have prevented the accident. The fact that both Mr. Miller for Pumps and Mr. Bowell for J.P.S. did not consider it necessary that the Pumps employee should be protected in this way, does not make the system of work safe, nor does it absolve Pumps from the consequence of its failure to provide its workman with a safe system of work, a duty

which was owed by Pumps to the injured plaintiff. The failure by Pumps in this regard established negligence on its part which contributed to the injury and damages suffered by the plaintiff.

WAS J.P.S. IN BREACH OF A STATUTORY DUTY?

J.P.S. is an undertaking licenced under Section 3 of the Electric Lighting Act to supply electricity to the general public and is the sole supplier of electricity throughout Jamaica. Under Section 5(1) of the Act the undertaker is:

> "Subject to such regulations and conditions as may be inserted in any licence, order or special Statute, affecting their undertaking with regard to the following matters -
>
> (a) ...
>
> (b) ...
>
> (c) the securing of the safety of the public from personal injury, or from fire or otherwise."

Under Section 5(2):

> "The Minister may, from time to time, make such regulations as he may think expedient for securing the safety of the public from personal injury, ..."

Regulations made under the Act and gazetted in the Jamaica Gazette 2nd of March 1922 include specific

regulations with regard to overhead lines defined as "any electric line which is placed above ground and in the open air."

Regulation 3 requires the overhead line to be "attached to poles or supports by suitable insulators and shall be so guarded that the wires cannot fall away from the poles or supports, or come into contact with other overhead lines."

Regulation 5 reads:

> "Where an overhead line is constructed, renewed or repaired so as to cross or be in close proximity to any other overhead line already existing precaution must be taken by the person constructing, renewing or repairing against the possibility of such lines coming into contact with each other by breakage or otherwise and also against a low pressure electric lighting line coming into contact with a high pressure electric lighting line."

Regulation 6 requires:

> "Every overhead line including its poles or supports and all structural parts and electrical appliances and devices belong to or connected therewith shall be, where not otherwise specified in these regulations, of such material, description and construction as may be approved by the Electrical Inspector, and shall be duly and efficiently supervised and maintained by the owners in keeping with the requirements of these regula-

> "tions, and to the satisfaction of the Electrical Inspector."

Regulation 8 states that:

> "An overhead line shall not be permitted to remain erected after it has ceased to be used for the supply of energy, unless the owners intend within six months again to take it into use."

These lines were retired and not intended to be put into use again.

It is clear that the regulations are made inter alia to protect persons from the very mischief which is complained of by the injured plaintiff. They placed a statutory duty on J.P.S. in respect of overhead lines to protect the public from personal injury.

The law is well established as to the nature of a statutory duty and the consequences to the undertaker of its breach. The relevant authorities have been cited by Downer J.A. in his judgment and I do not find it necessary to add to them. J.P.S. was in breach of the statutory duty imposed by the Electric Lighting Act and the regulations made thereunder as identified by me above and its breach contributed to the injury and damage suffered by the plaintiff. It must bear the larger burden of the liability.

The learned trial judge erred in finding that the breach of statutory duty was not established against J.P.S. It was this error which led him to apportion the liability between Pumps and J.P.S. on a 50/50 basis.

I agree with the order on apportionment as to liability as well as costs as proposed by Downer J.A.

In the event therefore the appeal of the appellant Pumps & Irrigation Limited is allowed in part. The order of the Court below on apportionment is set aside and it is hereby ordered that apportionment of liability be as follows:

> ***75% against the Jamaica Public Service Company Limited.***
>
> ***25% against Pumps & Irrigation Limited.***
>
> ***Jamaica Public Service Company Limited is to pay Pumps & Irrigation Limited half of their costs in the Court of Appeal.***

When this appeal came on for hearing on the 30th of January Mr. Dennis Morrison Q.C., representing the respondent announced that the judgment had been paid in full by the appellants, and by consent of the parties sought and obtained leave to withdraw from the appeal proceedings subject to such order as the Court may on the conclusion of the appeal deem to be appropriate.

It is therefore ordered that the appellants pay to the respondent his costs of this appeal up to and including the first day of hearing.

DOWNER JA

The appellants Pumps and Irrigation Ltd (Pumps) and Jamaica Public Service Co Ltd (Public Service) have appealed against the apportionment made by Reckord J whereby he found each party 50% liable for the injuries suffered by the respondent Winston Pusey on 23rd October 1985. Public Service is the utility company which supplies the island with electricity while Pumps had a contract with it to install and remove overhead lines and a transformer on the Spur Tree Magotty route. The respondent Pusey was a linesman employed to Pumps. The initial enquiry must be directed to the finding of the learned trial judge as to how the injuries occurred and then, having regard to the correct finding, there must be a legal analysis to determine if the apportionment was based on sound principles. There was no appeal against quantum. The amount awarded was set out thus:

> " NOW THEREFORE IT IS ADJUDGED that the Plaintiff do recover against the aforesaid Defendants the sum of JA SEVENTY TWO THOUSAND ONE HUNDRED AND THIRTY DOLLARS (JA$72,130.00) and US TWENTY SIX THOUSAND FOUR HUNDRED DOLLARS (US26,400.00) for Special Damages and FIVE HUNDRED AND FIFTY THOUSAND DOLLARS ($550,000.00) for General Damages and Future Loss of Earning and EIGHT HUNDRED THOUSAND DOLLARS ($800,000.00) for Pain and Suffering and Loss of Amenities with costs to the Plaintiff to be taxed if not agreed."

How was Pusey injured?

There is no dispute as to when Pusey was injured. Here is how Reckord J described it:

> " The plaintiff first did some work on a new post on one side of the road and returned to the ground. His supervisor then instructed him to go on an old pole, on the other side of the road and cut down three legs of wires. With the assistance of his belt and hand line he climbed the post. A co-worker on the ground passed up to him a cutter to be used by him to cut the wires. He held the cutter in both hands, stretched the cutter towards the wire and then there was 'big explosion.' He was knocked unconscious.
>
> The following day he recovered consciousness in the Mandeville Hospital. He had pains all over his body. His hands, legs, chest were burnt. The fingers of his right hand were 'hooked up,' were not making any form of movement. When he looked at himself he was frightened. Despite efforts by the doctors to save his hand, they had to amputate the right hand on the 15th November, 1985. He was a right handed person. His operation was done by Dr. Frazer. He also saw professor Golding and Dr. Rose

After stating that the cutter used by Pusey was not insulated the learned judge continued thus:

> " Rupert Miller an electrician, testified for plaintiff. He was employed to the first defendant up to 1985 and was the plaintiff's supervisor on this project. The 23rd of October 1985, his crew was working in the Pak district of St. Elizabeth. After discussion with Mr. Boswell, the engineer for the second defendant, and carrying out the usual routine to ensure that it was safe to work, he was provided with a work permit which he signed,

> assigning him to work in that area for the day. His job for that day was planting poles, dressing poles, straighting (sic) wires, cutting out old wires and general clearing of wires on both sides of the road. After doing some work on the new line after lunch he told the plaintiff, 'since we have some time lets go and cut down some old wires - that is, the old abandoned 69 KV line that was there.' They had worked on one side some five weeks before and at the other end two - three days ago. It was about two miles of wires which had been abandoned in that area - no current in the line.
>
> The plaintiff on his instructions climbed the pole and the cutter was passed up to him. He cut one wire and then positioned himself to cut a second line. 'He put up the cutter to cut the other one and this ball of fire just came down. He started to blaze, shoes, clothes everything - he slumped in his belt.' He sent up one of his men who brought down the plaintiff and he was sent off to hospital."

Here it is appropriate to state that the signed work permit was never produced and Reckord J resolved the conflict of evidence between Boswell and Miller on this issue, in favour of Miller. Boswell said the work permit for Thursday was for one side of the road; Miller said it was for the use on both sides and stated that Pumps contract included retiring dead lines. Then comes the important evidence which the learned judge accepted:

> " 'After they left for hospital I decided to track the line. I walked in some pastures following the line until I saw one leg of the old 69 KV was out of the clamp and was resting on the underbuild. The underbuild was still alive. The line was opened; One of my men went and took up back the slack wire and tie it to the top of the clamp from which it was pulled out. This was between 2 - 3 miles away from the accident.' "

It is important to deal with the failure to provide gloves or an isulated clipper as an aspect of Pumps failure to provide a safe system of work. Mr. Boswell, the resident engineer acknowledged that it was unnecessary in circumstances of the instant case and Neville McFarlane the safety environmental control engineer at Public Service, said that the manual prepared by his employers **General Safety Procedures and Safety Policy** (exhibit 7) did not require insulated equipment in the circumstances that day. No finding adverse to either party in this appeal was made on this issue in the court below and the respondent Pusey did not take part in the hearing on appeal. On the other hand, Public Service averred the following particulars of negligence against Pumps:

> "(c) doing work at a time when such work was not required to be done;
>
> (e) removing or attempting to remove the Second Defendant's dead conductor at a time when the First Defendant knew or ought to have known that underbuild was energized and when it was unsafe and dangerous so to do;"

So a finding ought to have been made. The reasonable finding would depend on whether Pumps was authorised to retire the line in the outage area on that day.

Also pertinent at this point is an explanation of the work permit which Rupert Miller signed. To reiterate, it was not produced by either side although it ought to be signed in duplicate and it seems to have been mislaid. Specimen copies however, were exhibited (exhibit 8). The resident engineer on the

project, Mr. Boswell would be described as an authorised person in exhibit 8 and Miller as a competent person. It is against this background that it is necessary to determine if Pumps was liable for breach of statutory duty in respect of the relevant regulations pursuant to the Electric Lighting Act, or alternately, the second appellant Public Service.

It is now necessary to give a pointer to these initial questions, since the evidence suggests that if protective gloves or an insulated clipper were provided for Pusey the accident might not have occurred. The overhead line was dead, that is, disconnected from any live system in the area assigned to work on that day. Pumps supervisor Miller, knew that there were retired overhead lines on which he had worked on the previous five weeks. Pumps knew that those retired lines were above the underbuild, that is lines which were energised and it follows if the retired overhead lines came in contact with the underbuild, an accident could occur. Exhibit 7 which is binding on all employees of Public Service and therefore on Boswell the resident engineer reads as follows:

> "Section E.O. 15 Stringing and Removing Wires
>
> (a) When stringing or removing wires parallel to or crossing energised circuits or apparatus, such circuits or apparatus shall be de-energised and grounded, if at all possible. When such circuits or apparatus cannot be de-energised, suitable grounds shall be installed on the wires which are being strung or removed for protection against static or induced voltage and against accidental contacts with energised circuits."[Emphasis supplied]

It should be noted that the dead wires were grounded. Then comes the proviso on gloves:

> "(b) Where the adjacent circuits or apparatus cannot be de-energised, the wire being strung or removed shall be handled with rubber gloves by all workmen handling such wires."

Boswell was an authorised person as defined in exhibit 7, while Miller the supervisor for Pumps was defined a competent person. It is important to show the supervisory role Public Service played on that day. Here is its own definition of authorised and competent person in exhibit 7:

"Authorised Person:	A competent Person possessing technical knowledge and appointed in writing by the Company to authorise and/or carry out specific work on Power Station Mechancial and/or Electrical Plant and Equipment and the Transmission/Distribution system and/or aparatus and lines. The certificate of appointment shall state the class of work the person is permitted to authorise and/or carry out, and the plant, equipment or apparatus/line or section of the system to which is applied. The certificate may also include authority to receive issue and cancel Permits-to-Work (Mechancial) and/or Sanction-for-Work/Test (Mechanical) on apparatus or Plant.
Competent Person:	A person who has sufficient technical knowledge and/or experience to enable him to accept a Permit-to-Work and avoid danger." [Emphasis supplied]

A further examination of exhibit 7 indicates the supervisory role of Boswell as an authorised person. He determined what is required for performing work in instances where the position described exhibit 7 as follows:

> "Permit-to-Work on electrical Equipment/Lines which have been de-energised, or can be made alive."

Yet another important function of Boswell was to isolate the circuit or a portion thereof. Isolation is defined as:

> "To disconnect equipment, circuit or a portion thereof such that it no longer forms part of the system."

Since the underbuild plays such an important role in this case, reference must be made as to how it ought to be treated so that Public Service could carry out its statutory obligation.

The following is the wording of the Permit to Work form:

> " The .... KV underbuild has also been de-energised by opening and locking"

and the subscription at the foot of the Permit-to-Work Form reads:

> " I declare with the advice of System Controller .... that the line equipment described above is safe to work on AFTER APPLYING SHORTS & GROUNDS AT/ON
>
> ALL OTHER PARTS ARE DANGEROUS
>
> The equipment is isolated in order to carry out the following work:-
>
> .....
> .....

Special Precautions & Remarks:-.....

Signed
(Authorised Person)....."

The provision in the Receipt is as follows:

"RECEIPT

I fully understand that the equipment/line, described above, is isolated and that I AM RESPONSIBLE FOR ATTACHING SHORTS AND GROUNDS, carrying out the work listed and for seeing that none of the men under my charge work or touch any other equipment/line.

Signed (Competent Person)

Time .....Date....."

Then the Clearance reads:

"CLEARANCE

I report that all work for which this Permit was issued is now suspended/completed, and that all men under my charge have been withdrawn and warned that it is no longer safe to work on the equipment/line specified on this Permit and I have removed all tools and shorts and grounds that I have used or attached.

Signed (Competent Person) .....

Time .....Date ....."

Was Pumps and Irrigation Ltd liable to the respondent Pusey for (a) breach of statutory duty and (b) negligence?

The respondent Pusey rightly recognised that breach of statutory duty was the primary claim. Against the first appellant Pumps and the second

appellant Public Service, here are their averments. Bearing in mind that the claims against the third defendant was discontinued the matter was pleaded generally thus:

> "5. The said injuries were caused by the breach of Statutory duty by the Defendants to take adequate and effective precautions for the safety of the Plaintiff while he was an employee of the 1st and 3rd Defendants and/or for negligence on the part of the three Defendants their Servants and or agents."

Then the relevant particular was stated thus:

> **"PARTICULARS OF BREACH OF DUTY OF THE FIRST AND THIRD-NAMED DEFENDANTS**
>
> (1) The said Defendants failed and/or neglected to provide a safe place of work separately and jointly."

This was really particulars of negligence. So it was inadequate as regards particulars for breach of statutory duty. That duty is imposed by the Electric Lighting Regulation 1922 on Public Service. The same error of not expressly pleading or particularising that breach of statutory duty was made in **Jamaica Public Service v Barr & ors.** SCCA 45 & 48/85 delivered 29th July 1988. On the other hand, negligence was specifically averred. I adverted to it then at p. 38 and reinforce my observations now with the authoritative principle stated by Lord Wright in **London Passenger Transport Board v Upson** [1949] AC 155 at p. 169:

> "... In the present case Asquith L.J. decided, as I understand, in favour of the respondents, not on the ground of negligence, which he did not find, but specifically on the ground of breach of

> statutory duty. There is, I think, a logical distinction which accords with what I regard as the correct view that the causes of action are different. It follows that the correct pleading would be to allege each cause of action separately so as to avoid the confusion which seems to me to have crept in at certain points of these proceedings. I have desired before I deal specifically with the regulations to make it clear how in my judgment they should be approached, and also to make it clear that a claim for their breach may stand or fall independently of a claim for negligence. There is always a danger if the claim is not sufficiently specific that the due consideration of the claim for breach of statutory duty may be prejudiced if it is confused with the claim in negligence."

On this aspect of the pleadings Pumps' averments were better drafted but they too lumped the claims of breach of statutory duty and negligence under one caption. Additionally because Regulation 6 contains a legislative reference, it is arguable that it was permissible to plead distributively. One such plea is the plea of fraud on which a verdict on negligent misstatement can be returned. But here the evidence suggests the claims are cumulative, not in the alternative. It is possible to grasp the details of breach of statutory duty from their defence. Here are the relevant parts:

> "8. This Defendant says that the Plaintiff's injuries were caused entirely by the breach of statutory duty and the negligence of the 2nd Defendant.
>
> PARTICULARS OF BREACH OF STATUTORY DUTY AND NEGLIGENCE
>
> (a) Failing to comply with Regulation 6 of the electric Lighting Regulations, 1922 which provides inter alia that every overhead line including its poles or supports shall be duly and efficiently

supervised and maintained by the owners in keeping with the requirements of the Regulations."

Then late in the day realising that the evidence permitted multiple pleas, by amendment, the following particulars were incorporated:

8 (a1) "Failing to comply with Reg. 3 & 8 of the Electric Lighting Regulations 1922."

Be it noted that these amendments are to be found in the body of the record where the application to amend was granted, but they were never incorporated and juxtaposed with the particulars. The remaining particulars were as follows:

"(b) The 2nd Defendant was occupier of the relevant poles, supports and lines and breached the duty of care owed to the Plaintiff as visitor by virtue of Section 3(2) of the Occupiers Liability Act.

(c) Failing to de-energise the line when it knew or ought to have known that the Plaintiff was going to work on it at the material time.

(d) Failing to have any or any sufficient regard for the safety of this Defendant's employees when it knew or ought to have known that in the performance by this Defendant of the said contract the employees of this Defendant would have to carry out an extra-hazardous or dangerous operation."

The bravity of the amendment and the failure to arrange it in the usual manner as regards the averment of breach of statutory duty was hardly helpful to the learned judge. If there is a finding against Public Service for breach of

statutory duty these alternative pleas in negligence will not have to be considered. If it were necessary to consider them I would have found that Public Service was negligent in respect of (c) and (d).

So to appreciate the scope of the statements of claim of the respondent Pusey and the defence of the appellant Pumps, together with the legislative reference in Regulation 6, it is helpful to cite all three regulations. They read thus in the Jamaica Gazette of Thursday, March 2, 1922:

> "(3) Every overhead line shall be attached to poles or supports by suitable insulators and shall be so guarded that the wires cannot fall away from the poles or supports, or come into contact with other overhead lines. They shall not be of a less height from the ground than fifteen feet, or where they cross a street twenty feet, and in crossing a street the angle between the line and the direction of the street at the place of cross shall not be less than sixty degrees. The spans also shall be as short as possible. [Emphasis supplied]
>
> ...
>
> (6) Every overhead line including its poles or supports and all structural parts and electrical appliances and devices belonging to or connected therewith shall be, where not otherwise specified in these regulations, of such material, description and construction as may be approved by the Electrical Inspector, and shall be duly and efficiently supervised and maintained by the owners in keeping with the requirements of these regulations, and to the satisfaction of the Electrical Inspector. [Emphasis supplied]
>
> ...
>
> (8) An overhead line shall not be permitted to remain erected after it has ceased to be used for the supply of energy, unless the owners intend

> within six months again to take it into use." [Emphasis supplied]

These lines were to be retired permanently.

The legislative reference in Regulation 6 which reads:

> "... and shall be duly and efficiently supervised and maintained by the owners in keeping with the requirements of these regulations, and to the satisfaction of the electrical Inspector."

brings into play Regulation 5 and any other relevant regulation.

This Regulation reads:

> "(5) Where an overhead line is constructed, renewed or repaired so as to cross or be in close proximity to any other overhead line already existing precaution must be taken by the person constructing, renewing or repairing against the possibility of such lines coming into contact with each other by breakage or otherwise and also against a low pressure electric lighting line coming into contact with a high pressure electric line. The expense of complying with this regulation must be borne by the party constructing, renewing or repairing."

There ought to have been separate averment in respect of Regulation 3, 5 and 8, but no objection was made to the truncated amendment on appeal, so it is permissible to treat the amendment as if it were properly drafted. See section 270 Civil Procedure Code. There must also be reference to section 5 of The Electric Lighting Act. The material part reads:

> 5.-(1) The undertakers shall be subject to such regulations and conditions as may be inserted in any licence, order or special Statute, affecting their undertaking with regard to the following matters-

....

(c) the securing of the safety of the public from personal injury, or from fire or otherwise;

Then 5(2) empowers the Minister to make regulations. It states:

> "5 (2) The Minister may, from time to time, make such regulations as he may think expedient for securing the safety of the public from personal injury, or from fire or otherwise,"...

When the Act and the Regulations are considered against the evidence, the finding by Reckord J that:

> " I am not satisfied that the claim for breach of statutory duty has been substantiated"

seems odd even though the averments in respect of the regulations were not drafted with the requisite precision. The learned judge found liability for negligence with respect to both appellants. Here is his finding:

> " In the event, on the totality of the evidence I find that the injuries to the plaintiff were caused by the negligence of the first and second defendants."

To my mind, it was doubtful that Pumps was liable on the basis of breach of statutory duty imposed by paragraph 10 of the Factory Regulations 1961 as pleaded. However we must return to a further analysis of breach as regards Public Service. Further at that stage it will be necessary to examine the evidence to ascertain if the respondent Pusey had established that aspect of liability. Nevertheless, if the following passages from **Smith v Cammell Laird & Co.** [1940] AC 242 had been cited, Reckord J would not have made the above pronouncement. Here are the passages - Lord Atkin said at p. 258:

> "... The absolute duty in respect of acts and forbearances imposed by statutes for the protection of workmen is by this time a well known feature of this class of legislation. It is to be found passim in such Acts as the Coal Mines Acts, and in the Factory Acts themselves. A striking example, as was pointed out by Mr. Shawcross in his powerful reply, is to be found in the obligation to fence dangerous machinery which in the Act of 1901 is to be found in s 10. It is precisely in the absolute obligation imposed by statute to perform or forbear from performing a specified activity that a breach of statutory duty differs from the obligation imposed by common law, which is to take reasonable care to avoid injuring another."

Then Lord Wright at p. 264 said:

> "... The liabilities imposed by the Factory Act, are imposed directly as a penal measure and derivatively as a civil cause of action in favour of an injured workman to whom by construction of the common law the statutory provisions create a duty, being intended to secure the health and safety of the workpeople. They are absolute and do not depend on negligence."

Was Pumps & Irrigation Ltd liable to the respondent Pusey for negligence?

The basic charge relied on by the respondent Pusey against Pumps was that they failed to provide a safe system of work. I have already adverted to his averment in paragraph 5 of his plea and shown that it was in substance a particular of negligence although breach of statutory duty was mentioned and particularized as regards the Factories Regulations 1961. This plea was continued thus:

> 5(2) The said Defendants failed and/or neglected to take proper and effective precautions to prevent any conductor or equipment from being

> accidentally or inadvertently electrically charged when persons are working thereon contrary to Regulation 10 of the Factories Regulations 1961.
>
> Further or in the alternative the said injuries were caused by the negligence on the part of either or all three Defendants their servants and/or agents."

This particular formed no part of the submissions on behalf of Pusey in the court below or on appeal. Perhaps it was realised that even the extended meaning of Factory in section 2(1)(a)(b); 2(1)(xvii) of the Factories Act would not apply to the facts of this case. Then the pleader averred the following further particulars of negligence:

> "5(a)(1). The said Defendants failed to take any or any sufficient precautions to ensure that the place of work was reasonably safe and free from dangers to the Plaintiff in the execution of the Plaintiff's duties.
>
> (2) The said defendants failed to take all reasonable and effective measures to prevent the Plaintiff in the use of tools and equipment from coming into contact with high tension electrically charged wires.
>
> (3) The said Defendants failed to take all reasonable and effective measures to ensure that there was no risk of injuries arising from loosely hung electrically charged wires.
>
> (4) The said Defendants failed to take adequate measures to prevent the lines on which the Plaintiff was working from becoming electrically charged thus a danger to the Plaintiff."

With appropriate amendments to reflect strict liability, particulars (3) and (4) ought properly to have been pleaded, by Pusey as breaches of electric lighting regulations 3 and 8 by the appellant Public Service. The amendments, had they been made, would have had no relevance in imposing a liability on Pumps. The respondent Pusey benefited from Pumps' pleadings against Public Service for breach of statutory duty. His purported pleas for breach of statutory duty were in substance pleas for negligence.

The accepted test for an employer's failure to provide a safe system of work may be gathered from two statements of Lord Keith's' speech in **Cavanagh v Ulster Weaving Co. Ltd.** [1960] AC 145 at p. 165 and 166:

> "... 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."

Further on page 166 he reiterated the principle thus:

> "... Lord Dunedin cannot, in my opinion, have intended to depart from or modify the fundamental principle that an employer is bound to take reasonable care for the safety of his workmen, and in every case the question is whether the circumstances are such as to entitle judge or jury to say that there has or has not been a failure to exercise such reasonable care."

As for Pumps' pleaded defence, they denied the allegation of the respondent Pusey and in paragraph 8 they averred that Pusey's injuries were caused by the breach of statutory duty and negligence of Public Service. At this stage, it is appropriate to examine the evidence in relation to the

respondent Pusey's claims for failure to provide a safe system of work and the denial of Pumps in respect of this claim.

What was the nature of the evidence of Rupert Miller, the employee of Pumps who supervised Pusey? Some aspects are so important that it is pertinent to cite directly from his evidence. Here is how Miller describes the system of work:

> " The J.P.S. Supervisor would inspect my crew and see if we have enough workers to carry out the function for the day. After he is satisfied we can take out the line - he in turn would call to his switching people by radio at Spur Tree Sub-station and Maggotty Station both ends of the line.
>
> After they are told we are ready they would radio back to him that the line is dead. J.P.S. Supervisor would instruct me to go ahead and put on my short and ground - 3 clamps would be attached to the line we going to work on and connect them down to the earth rod - that would give us all safety we need in case current is switched on back - the men working on the other side would be safe. Possible the wires would be burn up. After we put on short and ground the J.P.S. then provide us with a work permit which I had to sign assigning me to work there for the day. After signing permit the J.P.S. Supervisor would call back to his switching people telling them that the short and ground have been applied and that work permit giving number had been signed and from then on we proceed to work for the day. This procedure was carried out on that day."

The evidence will reveal that in addition to the work permit forms Boswell gave oral instructions as to the work to be carried out each day. Here is an example of the nature of the oral instructions:

> " When I go to an area to work Mr. Boswell does not tell me what and what I must do - we agree on an area."

Then he recounted how Pusey came to be working on the 69 K V wires that day.

> " From where we open the jumper that is where current cut off, we were working about 4 - 5 poles down.
>
> Power was in the underbuilds (sic) behind us - above was the abandoned KV69. There were 2 poles facing each other across the road from each other. Facing Black River, the right hand side had the new poles - we working on the new construction that day. Pusey finished work on the new construction and came off that pole. I said to him, 'could you go up on the old pole and cut down some of the old wires?' When Pusey go up on the old pole he hooked up his hand line and called for the cutter. I said to Pusey on the pole to position himself properly which he did. The cutter went up and he cut one wire - it is not too clear if he cut No. 2 wire. Not too clear if is No. 2 or 3 wire had the current in."

It is important to note that he acknowledged that he knew that power was in the underbuild behind them and above the underbuild was the abandoned KV69 line. Then to reiterate this aspect of the evidence was crucial.

> " After they left for hospital I decided to track the line. I walked in some pastures following the line until I saw one leg of the old 69KV was out of the clamp and was resting on the underbuild - the underbuild was still alive - the line was opened.

> One of my men went and hook up back that slack wire and tied it to the top of the clamp from which it was pulled out - this was between 2 - 3 miles away from the accident behind, going back to Spur Tree end in the pastures.
>
> About 4 - 5 weeks before accident I had done some work on the line at the end where the wire touched the other."

In determining whether Pumps was negligent, it is important to determine if they were conscious that an accident could occur, having regard to the circumstances that day. Here is a reply given by Miller who was called by the respondent Pusey. He was replying to counsel cross examining on behalf of Pumps:

> " It was J.P.S. decision to energize up to the dead end pole rather than de-energised the whole line so as to allow the work to proceed. Had the whole line been de-energized Pusey would not have been injured."

So this is a precaution the employer could have taken by requesting J.P.S. to de-energize the whole line. There was no evidence that they did and this was their fault in not providing a safe system of work.

To counsel for Public Service, Miller made even more important admissions. He acknowledged that:

> " My contract was to remove the entire line - whatever wires were left were to be left in a stable condition."

It was Miller who had worked on the wires 2 - 3 miles away which caused the accident. He admitted that he had not checked the clamps. Here is how the evidence emerged:

> "Q. In your supervising work did you regard it as your responsibility that remaining conductors were in stable condition?
>
> A. I left them in a stable condition. I regard it as my responsibility to leave them in stable condition. It is not my responsibility to ensure that they remain in stable condition after I leave.
>
> Mr. Boswell will tell me where to work on an outage day. I can work free in an area where no outage is required. I can't tell him where to give an outage. 5 - 6 weeks before I had left those wires in good condition. The ends were properly clamped - the tension was there. I never checked the bolts that hold the clamp."

Under further cross examination Miller admitted again that he knew that the current was in the underbuild:

> "I know on the date of the incident that the underbuild had in current in that area. I regard safety on the job as my responsibility."

Miller admitted that if Pusey had been given an insulated cutter the accident would not have occurred, but that such insulated cutter was not necessary if work was being done on dead lines. Insofar as the lines could have been electrified as they were on that day, this was a further fault on the part of Pumps to provide a safe system of work.

On the basis of this evidence which the learned judge accepted, he rightly found Pumps partly negligent in failing to provide a safe system of work in accordance with the test laid down in **Cavanagh** (supra). Whether it ought to have been as high as 50% must be resolved later.

Was Public Service liable on the basis of breach of statutory duty?

Perhaps a good starting point is to clear up a misconception about **Barrs'** case (supra) which was referred to frequently in argument. Breach of statutory duty was never pleaded in that case although the Electric Lighting Regulations 1922 were introduced at the hearing of the appeal. Consequently, the case against Public Service could not be presented on the basis of strict liability. Once this is grasped, we can now examine the legislative scheme which enacts the provision for breach of statutory duty.

Section 5 of The Electric Lighting Act stipulates that the regulations in issue are for "the securing of the safety of the public from personal injury, or from fire or otherwise". "Public" in the context of breach of statutory duty must include workmen employed to the contractor to Public Service. If it did not, it would make nonsense of the common law definition of neighbour as defined in this area of tort law. Furthermore, it conforms to the dictionary meaning of public as a part or section of the community grouped because of common interest activity, etc. example the racing public: Collins English Dictionary There can be no doubt that Pusey has a cause of action for breach of statutory

duty. This is confirmed by Electric Lighting Regulations paragraph 47. It reads:

> "(47) If any licensee under the Electric Lighting Laws makes wilful default in complying with any of the preceding regulations, he shall, subject to the provisions of his license, be liable on conviction to a penalty not exceeding Five Pounds for every such default, and to a daily penalty not exceeding One Pound in respect thereof until rectified: the same to be recovered and enforced by summary process before the Resident Magistrate of the parish. The recovery of a penalty under these regulations shall not affect the liability of the licensee to make compensation in respect of any damage or injury which may be caused by reason of the default."

Further the breach has caused him injury. Nonetheless, it is important to cite the well known passage from Lord Kinnear's judgment in **Black v Fife Coal Co Ltd** [1912] AC 149 at 165. It was cited with approval by Lord Simonds in **Cutler v Wandsworth Stadium LD.** [1949] AC 398 at p. 407 thus:

> "... I cannot state that proposition more happily, or indeed more favourably to the appellant, than in the words of Lord Kinnear in **Black v. Fife Coal Co. Ltd.** [1912] A.C. 149, 165: 'If the duty be established, I do not think there is any serious question as to the civil liability. There is no reasonable ground for maintaining that a proceeding by way of penalty is the only remedy allowed by the statute. The principle explained by Lord Cairns in **Atkinson v. Newcastle Waterworks Co.** [1877] 2 Ex D. 441, 448 and by Lord Herschell in **Cowley v Newmarket Local Board** [1892] AC 345, 352 solves the question. We are to consider the scope and purpose of the statute and in particular for whose benefit it is intended. Now the object of the present statute is plain. It was intended to compel mine owners to

> make due provision for the safety of the men working in their mines, and the persons for whose benefit all these rules are to be enforced are the persons exposed to danger. But when a duty of this kind is imposed for the benefit of particular persons, there arises at common law a correlative right in those persons who may be injured by its contravention.' "

It is now necessary to construe the regulations previously cited, bearing in mind "they were promulgated for the safety of the public from personal injury or from fire or otherwise."

Firstly, there is regulation (3) which makes it obligatory for overhead wires "... be so grounded that the wires cannot fall away from the poles or supports or come into contact with other overhead wires." Despite Mr Daley's submission that there was no evidence of any breach of the regulation, I would have thought it was a clear case where applying this regulation, Public Service was in breach. Miller's evidence is unchallenged as the lines fell on the underbuild and thus were energized.

Secondly, regulation 5 comes into play as the evidence is clear that lines were being removed by Public Service though they contracted Pumps. Detailed supervision was provided by Public Service resident engineer, Boswell . The retired wire came into contact with underbuild while lines were being removed. This was the type of accident for which Public Service was liable. Thirdly, regulation 6 is crucial. Overhead lines ought to have been duly and efficiently supervised and maintained by Public Service. Miller did not check the clamps and there was no evidence that Boswell the resident

engineer did anything in relation to the duty of efficiently supervising and maintaining the overhead lines in keeping with the regulations.

Fourthly, regulation 8 is a mandatory requirement imposed on Public Service not to permit overhead lines to remain erected after they have ceased to supply energy unless its owner intends within six months to take it into use. The clear evidence in this case is that retired 69 KV lines were permitted to remain erected for 5 - 6 weeks although they were not intended to take them into use again.

To my mind, there can be no doubt that it was established by evidence that Public Service was in breach of the regulations cited and that as a result of those breaches, Pusey was injured. Further, both the liability in negligence against Pumps and the liability against Public Service for breach of statutory duty emerged from the evidence of Miller.

Are there authorities which suggest that the regulations imposed strict liability?

In **Caswell v Powell Duffryn Associated Collieries Ltd** [1940] AC 152 at 177-178 Lord Wright had this to say in construing The Coal Mines Act:

> " I do not think that an action for breach of a statutory duty such as that in question is completely or accurately described as an action in negligence. It is a common law action based on the purpose of the statute to protect the workman, and belongs to the category often described as that of cases of strict or absolute liability. At the same time it resembles actions in negligence in that the claim is based on a breach of a duty to take care for the safety of the workman. The cause of action is sometimes described as statutory negligence and it is said that negligence

> is conclusively presumed. Thus in **Lochgelly Iron and Coal Co. Ltd. v. M'Mullan** [1934] AC 1, it was held that a breach of the statutory duty constituted personal negligence or willful act of the employer within s. 29, sub-s. 1, of the Workmen's Compensation Act, 1925."

This trend was continued in **Galashiels Gas Co LD v O'Donnell or Millar** [1949] AC 275 at 283 Lord Morton had this to say of the Factories Act:

> "Your Lordships were not referred to any decision on this particular sub-section, but there are other statutory provisions for the protection of workmen which have been held to impose an absolute and continuing obligation upon employers. See for instance: **Smith v Cammell Laird & Co Ltd** [1940] A.C. 242; **Riddell v Reid** [1943] A.C. 1; **Carroll v Andrew Barclay & Sons Ld.** [1948] AC 477. In the last-mentioned case this House had to decide a question as to the nature of the fencing which was required under s. 13, sub-s 1, of the Factories Act, 1937, but no member of the House doubted that the obligation as to fencing was absolute and continuous. Lord Normand observed Ibid 487 [1948] AC 477 :
>
> > 'The sub-section imposes an absolute obligation in the sense that the obligation, whatever its meaning and effect, must be actually fulfilled and not merely that the occupier of the factory must do his best to fulfil it.' "

Mr. Daley for Public Service submitted that Pusey had not proved breach of statutory duty. Here is how Lord McDermott at p. 287 in the above case answered a similar submission:

> " I turn now to the second question. Did the respondent prove the breach alleged? The point made against her was that she had failed to do so because the cause of the failure in the lift mechanism had not been discovered and remains a mystery. In my opinion this point has no

> substance. There was abundant proof that the mechanism had failed and that that failure resulted in the death of the respondent's husband. Once the absolute nature of the duty imposed by the statute is established, that is proof enough. The obligation was to have the lift 'in efficient working order' at the time of the accident, as well as at other times, and the breach of that obligation has been clearly shown."

Lord Reid at the close of his speech at p. 292 explained the nature of the duty in instances of strict liability thus:

> "...The obligation of the appellants was that which is expressed in the Act - to maintain the hoist in efficient working order. That is the particular thing which they were under a duty to do. How they did it or how they failed to do it was their concern. It was not the concern of the workman and is not the concern of the respondent."

Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615 cited by Mr. Daley is also helpful. Lord Reid had this to say at p. 618:

> " The only authority cited by the Court of Appeal in **Vyner v. Waldenberg Bros., Ltd.** [1945] 2 All ER 547; [1946] K.B 50 for their statement of the law is a passage from the judgment of Lord Goddard in the Court of Appeal in **Lee v Nursery Furnishings, Ltd** [1945] 1 All ER 387 at p. 390, 172 LT 285; 2nd Digest Supp.:
>
> > ' In the first place I think one may say this, that where you find there has been a breach of one of these safety regulations and where you find that the accident complained of is the very class of accident that the regulations are designed to prevent, a court should certainly not be astute to find that the breach of the regulation was not connected with the accident, was not the cause of the accident.'

> I agree. A court should not be astute to find against either party, but should apply the ordinary standards. I cannot see, in what Lord Goddard said, any suggestion that the ordinary onus of proof is to be shifted."

On the basis of the approach outlined in these authorities, I find that Pusey proved that Public Service was in breach of the regulations and that was the main cause of his injuries.

> **Was Reckord's J 50/50 apportionment "just or equitable" pursuant to section 3(2) of the Law Reform (Tortfeasers) Act?**

Reckord J approached the issue of apportionment on the basis that both parties were liable in negligence. That was the wrong approach. Breach of statutory duty imposes strict liability and therefore Public Service must bear the major share of the blame as they were in breach of the regulations. The common law also imposes a high degree of care on an employer to provide a safe system of work. So Pumps must also bear a share of the blame. They knew that there was current in the overhead underbuild and that if the dead wire came in contact with Pusey, he would be injured as he was not provided with gloves or insulated cutters. But this breach bears no comparison to that of Public Service who left the overhead wire in place for 5-6 weeks when they had no intention to reconnect it.

Public Service in its defence made this claim which was partly justified:

> "7. Further or in the alternative the alleged injuries loss and damage to the Plaintiff were caused entirely or contributed to by the negligence of the First and/or Third Defendant.

...

> e) removing or attempting to remove the Second Defendant's dead conductor at a time when the First Defendant knew or ought to have known that underbuild was energized and when it was unsafe and dangerous so to do;"

There is another defence put forward by Public Service which must now be considered. It reads thus:

> "6. In further answer to the matters alleged in paragraphs 3 - 5 of the Statement of Claim the Second named Defendant says that the First named Defendant was an independent contractor employed by it to carry out certain works on a 69 KV circuit as part of a transmission line rebuilding programme and the Plaintiff was injured in the course of execution of the said work as a servant of the independent contractor without any default on the part of the Second Defendant, its servants or agents."

Then 6A reads:

> "6A. The said works involved inter alia the retirement of certain overhead lines which were being retired by the First Defendant under its contract with the Second Defendant and the Second Defendant took all necessary steps on its part to be performed to have the said lines retired expeditiously and in conformity with regulations and without any negligence on its part. The second Defendant was not in breach of any statutory duties as alleged or at all."

The short answer is that when an absolute liability is imposed by statute upon an individual or class of individuals, the performance of it cannot be delegated to an independent contractor to enable liability to be evaded. See

The Pass of Ballater [1942] p, 112, 117 **Salmond on Torts** [1965] 14th edition p. 691. Further, Public Service claimed an indemnity from Pumps thus:

> "3. The conditions of the said contract provides, inter alia:
> Paragraph 21 - INSURANCE
>
> > 1) 'The Contractor shall be solely liable for and shall indemnify the Employer in respect of and shall insure against any liability loss, claim or proceedings whatsoever, arising under any statute or at common law in respect of personal injury to or the death of any person whomsoever arising out of or in the course of or caused by the execution of the Works unless due to any act or neglect of the Employer or of any person for whom the Employer is responsible.' "

It is difficult to see how Pusey's claim could be avoided by Public Service when there was finding that it was in breach of its statutory obligations. The indemnity did not cover "any act or neglect of the employer". This approach in construing the indemnity clause finds support in the following passage from **AMF International Ltd v Magnet Bowling Ltd and another** [1968] 2 All ER 789 where Mocatta J said at 812:

> "The Court of Appeal unanimously rejected this claim of Shell. Sellers, LJ said:
>
> > ' It is well established that indemnity will not lie in respect of loss due to a person's own negligence or that of his servants unless adequate and clear words are used or unless the indemnity could have no reasonable meaning or application unless so applied. The words used in this contract do not in terms refer to negligence on the part of Shell or their servants but to all claims arising out of the

> operations. 'All claims' gives a wide cover, but I am satisfied that claims might arise creating liability on Shell quite apart from liability for their own or their servants' carelessness. In the course of Whessoe's work on Shell's site there might arise a direct liability of Shell to a contractor's servant or to a third party due to acts of Whessoe putting Shell either into a breach of statutory duty which fell on them or of a common law duty.'

Sellers, L.J., concluded:

> ' Therefore applying the law which the learned judge invoked I would uphold the view that the indemnity under cl. 3 is inadequate to embrace the claim which Shell make in this case where their liability has been brought about by their own failure in respect of the claim.'

Devlin, L.J., said:

> ' It is now well established that if a person obtains an indemnity against the consequences of certain acts, the indemnity is not to be construed so as to include the consequences of his own negligence unless those consequences are covered either expressly or by necessary implication. They are covered by necessary implication if there is no other subject-matter on which the indemnity could operate. Like most rules of construction, this one depends upon the presumed intention of the parties.' "

An important issue was whether Pumps was authorised that day to remove abandoned lines as they had a discretion as to how to deploy workmen in the area detailed to them by the resident engineer, Mr. Boswell on that day. Or was it that they had to have specific authorisation from Boswell to send Pusey to remove the abandoned wire. Reckord J resolved the issue thus:

> " It was a term of the contract under the heading of specification, page F 1, paragraph 1.07, that 'the contractor is free to arrange the order of the work to benefit from the most economical development of plant, equipment and labour and to suit the method of construction adopted.'
>
> Under paragraph 1.08 (c) the project, shall be under the charge and control of the contractor and 'during such period of control by the contractor all risks in connection with the construction of the project and the materials to be used therein should be borne by the contractor.'
>
> I accept the evidence of Mr. Miller that among his job for that day was the cutting out of old abandoned 69 KV transmission wires within the area given for the outage. In keeping with the procedures adopted in the past, when he was given the permit to work form, this was a certification by the Jamaica Public Service engineer that it was safe to work in the area covered by the permit.
>
> Acting on this, he instructed the plaintiff to remove the abandoned wires as he had no reason to believe that they had been energised from any source outside of the area of outage. In so far as the activities by the plaintiff and the first defendant within the outage area on that day are concerned, there is no evidence to support the allegation of the second defendant that it was through the negligence of either of them which caused or contributed to the injuries, loss and damages to the plaintiff."

This resolution was reasonable, having regard to Boswell's evidence that:

> "... It would be my responsibility to check and determine when lines retired that they have been properly and safely been done. At the end of each day of an outage I would go through to ensure that everything is in order before the line is energized."

Neither side produced that work permit for that day. So the standard forms indicated earlier which would have been conclusive in determining whether Miller instructed Pusey to do unauthorised work, are of little assistance. They demonstrated what Public Service expected, not what happened in reality. That reality, the learned judge might have added includes Boswell's oral instructions to Miller as to the work permissible in the outage area.

Boswell, in a crucial passage in his evidence in chief said:

> "Q. Has contractor the authority to do work not specified in the Work Permit?
>
> A. No specific work is stated in the permit. The Permit is issued for the section of the line to be de-energized.
>
> **To Court** - We would not give any detail of the work to be done and we would just give a general description example to plant poles.
>
> **Examination (cont'd)**
>
> **Q.** Mr. Miller said I have the job of removing transformers that day -
>
> Is that correct?
>
> **To Court** - Mr. Miller did have job of removing transformers that day.
>
> **Q.** Did Mr. Miller have authority to go on poles and remove dead wires that day?
>
> **A.** No Sir."

Then there is another passage which is illustrative of the joint liability of Pumps and Public Service. Boswell said:

> " The old 69KV transmission line was physically disconnected from the source Magotty to Spur Tree. Some of the spans between Magotty and Spur Tree had been removed. Not-withstanding the fact that the old 69KV lines had been physically disconnected, the contractor would still have reason to fear. This is because both 69 and 24KV current were still physically on the same pole - a section of that particular 24KV was energized on the day in question. If one had started to do retirement of old 69KV we would have opened a switch further back to the Spur Tree source. This would have affected more customers."

There was no re-examination to clear up these ambiguities. When it is recognised that it was part of Pumps' contract to remove retired lines, the learned judge resolved the conflict in view of the credibility of the rival accounts of Miller and Boswell, then this court will affirm his finding that Miller was authorised to do work pertaining to his contract in the area assigned on that day.

Where I take issue is whether the apportionment of 50/50 was correct in the circumstances of this case. Pumps' duty was to provide a safe system of work. There was outage in the area but Pumps knew that the underbuild had current, and that even though the retired lines were clamped by them and inspected by Boswell they ought to have foreseen that it could have fallen on the underbuild. That was the measure of their responsibility and I find them 25% at fault.

The major responsibility was on Public Service to have retired lines removed as the regulations ordained. They had the statutory responsibility that:

> "the wires cannot fall away from the poles or support or come in contact with other overhead lines"

and they knew that overhead lines were being removed. Those mandatory statutory duties made them bear the greater responsibility. In the light of their failure to comply with the law, I find that they are 75% liable.

Conclusion

In view of my findings on apportionment, Pumps has succeeded in part on appeal. So I would set aside the order on apportionment of the court below and make the apportionment 75% Public Service and 25% Pumps as the "just and equitable" apportionment. As regards costs, Public Service must pay Pumps half of their costs of the appeal.

PATTERSON JA

I have had the advantage of reading the judgments of the learned President and Downer JA. They have dealt with the relevant issues in this appeal, and I agree with their conclusion that both Pumps and Jamaica Public Service are liable in damages to the respondent Winston Pusey and that the learned trial judge fell in error in his apportionment of liability. I too would order that the apportionment of liability be:

75% against the Jamaica Public Service Company Limited

25% against Pumps & Irrigation Limited

Jamaica Public Service to pay half costs of appeal to be taxed if not agreed.

Cases referred to:

(1) Jamaica Public Service Co Ltd v Pumps & Irrigation SCCA 45 & 46/87 — 29/7/88

(2) London Passenger Transport Board v Upson [1949] AC 155

(3) Smith v Cammell Laird & Co [1940] AC 242

(4) Cavanagh v Ulster Weaving Co Ltd [1960] AC 145

(5) Black v Fife Coal Co Ltd [1912] AC 149

(6) Cutler v Wandsworth Stadium Ltd [1949] AC [illegible]

(7) Crown v Powell Duffryn Associated Collieries Ltd [1940] AC 152

(8) Garrard v Gas Co Ltd v O'Donnell or Milburn [1949] AC 215

(9) Bonnington Castings Ltd v Wardlaw [1956] 1 All ER 615

(10) The Parlement Belge [1942] P 112

(11) AMF International Ltd v Magnet Bowling Ltd and another [1968] 2 All ER 789.