IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. P 041 OF 1986

BETWEEN	WINSTON PUSEY	PLAINTIFF
A N D	PUMPS & IRRIGATION LIMITED	1ST DEFENDANT
A N D	JAMAICA PUBLIC SERIVCE LIMITED	2ND DEFENDANT
A N D	GENERAL UTILITY SERVICE LIMITED	3RD DEFENDANT

Dennis Morrison & Lynden Wellesley for the Plaintiff.

Dennis Goffe & Norman Davis for 1st Defendant instructed by Myers Fletcher & Gordon.

Clifton Daley & Carol Vassell for the 2nd Defendant instructed by Daley Walker & Lee-Hing.

3rd Defendant, not appearing unrepresented.

Heard: 11/5/92, 13/5/92, 14/5/92, 15/5/92, 20/10/92 14/4/93, 15/4/93, 19/4/93, 22/4/93, 26/4/93, 27/4/93 and July 16, 1993.

Judgment

RECKORD J.

This is an action for negligence and breach of Statutory Duty arising out of injuries received by the plaintiff, an employee of the first defendant company which was contracted to the second defendant to remove electric power lines from its utility poles in the parish of St. Elizabeth. In the act of performing his duties the plaintiff came into contact with high powered lines. He received serious electrical burns on several areas of his body which led to his right hand being amputated below the elbow. The plaintiff also alleged that his employers, the first defendant, failed to provide a safe place of work and failed to take proper and effective precautions to prevent equipment from becoming being charged when persons worked thereon.

As against the second defendant, the plaintiff also alleged that this defendant as undertakers for the supply of electricity failed to ensure the safety of their sub-contractors from personal injury.

In his opening of the plaintiff's case Mr. Morrison informed the court that the action against the third defendant was not being persued and he was discontinuing same.

The Plaintiff's Case

The Jamaica Public Service Company the second defendant, is the sole supplier of electricity throughout Jamaica. In August, 1984, they contracted with the first defendant, Pumps & Irrigation Limited, for the "construction of the Spur Tree Magotty 69 KV Transmission Line and the associated Primary and Secondary Distribution Underbuilds, also the retirement of the existing 69 KV line and its associated Prmiary and Secondary Underbuilds."

Consequent on this award the work commenced early 1985 revamping the lines from Spur Tree sub-station and the Magotty Power Station in St. Elizabeth, that is, taking out the old lines and replacing them with taller poles and bigger wires. The plaintiff, a grade one electrician employed to the first defendant, was a part of the crew.

By the fateful day, 23rd October, 1985, the work had proceeded uneventfully to the District of Pak. The particular work the plaintiff was engaged in on that day was to remove electrical wires. This involved him climbing on the poles. Before doing so he had been assured by his supervisor Mr. Miller and the Jamaica Public Service personnel that the appropriate switches had been done, that is, that the lines had been opened so that no current was passing through and that it was safe for the crew to go to work on both sides of the Road. The crew applied the short and ground, as a further precautionary measure to ensure for themselves that the lines were safe.

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.

Since the incident he has suffered severe loss of amenities of life. He can no longer play dominoes, cricket, shuffle cards, tie shoe laces, bathe himself properly, wash clothes or cook for himself. He cannot do electrical work any more. He tried to mitigate his loss - got work twice - the first as a delivery man lasted for one month. He could not change tyres on the vehicle and could not continue the job. The other job as a janitor lasted for two months. He had to quit this also as some of his duties require the use of both hands. Attempts to get other jobs were without success.

He was discharged from the hospital on the 4th of February, 1986, and had to hire a maid to take care of his domestic chores - He paid her $100.00 per week until 14th November, 1987 when he migrated to United States of America. Although he lived with his mother he had to employ a helper to assist him. He paid her US$200.00 per week from then up until when he left the United States of America on the 30th of April, 1992 to attend court as a witness in this case.

His salary at the time of the accident was $400.00 per fortnight after statutory deductions. He received his salary from the first defendant up to April 1986. He has received no salary since then. His family bought him a prosthesis in the United States of America in 1986 for US$3000.00. A linesman would now earns $1500.00 to $2000.00 per week. He would now be at least a supervisor earning over $3000.00 per week.

The loss of his hand drew the attention of others - This made him feel embarassed. His whole life system has changed. Most of the time he puts the hand in his pocket to avoid attention. The scars from the burns are still visible. When the weather gets hot the scars from the burns itch - He has to use lotion or powder to soothe them.

Some five to six weeks before the incident the line which he was going to work on was cut off some miles down. It was an old line - No current was in it, new lines had been put in to take its place.

The plaintiff admitted he was not a licensed electrician. There were facilities in New Jersey, United States of America, for re-training physically handicapped people. He had gone there but he did not get any training. He received $7,500.00 in Jamaica from the National Insurance Scheme. The cutter he used was not insulated. He denied that the work scheduled for that day was for one side of the road only.

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 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.

"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 tied it to the top of the clamp from which it was pulled out. This was between 2 - 3 miles away from the accident." He regarded the plaintiff as a good and competent workman and he would surely be a foreman if he was still with the first defendant.

A foreman now earns $2000.00 per week.

The work that the plaintiff was engaged in was a fairly day to day rountine for the electricians - the job was in progress for 6 - 8 months and similar procedures were adopted on this day as in the past. The short and ground had been applied as an extra precaution. He had access to the lines from 8a.m. to 5p.m. He was the supervisor and was present some 5 - 6 weeks before when they did work on the lines which was out of the clamp. Before leaving the area the 69 KV wire was properly in its clamp - there was tension in the wire. One indication that the clamp on the line was working was that the line was taut - had tension.

He was trained in England as an electrician and worked all over that country and was exposed to all sorts of electrical work there for eleven years.

Under cross-examination by counsel for the second defendant, Mr. Miller said that an outage was involved that day and they were working within the area of the outage. The first defendant was an independant contractor and he was responsible for the safety of work and workmen. The conductor that fell out of the clamp was an old wire that would have been removed whenever he got clearance to do so. He had left the wires in good condition and the ends were properly clamped. He did not check the clamp physically. He agreed that the most important work he had to do that day was to install a mobile sub-station. He did not use an insulated cutter as they do not work on live lines, he had done similar up grading work for the Jamaica Public Service on the northcoast which lasted for eighteen months.

Dr. Christopher Rose, consultant orthopeadic surgeon at the University Hospital of the West Indies examined the plaintiff on the 8th May, 1992. He found hypopigmented areas situated in the right leg measuring 4 X 5cm. and on the left leg 5 X 10cm. There were also large areas of hypopigmentation along the anterior aspect of the chest. These were as a result of electrical burns. He had a below elbow amputation at the level of the mid right forearm which represented a 90% loss of the upper extremity which was equivalent to a 54% of the whole person. Total disability could be in the region of about 60% taking into account the possibility of cancer of the skin. The forearm had been fitted with a prosthesis which was designed to enable the user to assist in the holding and lifting of relatively heavy objects - without the prosthesis he would have a useless right

upper limb. It takes 15 - 20 years for symptoms of malignant degeneration to appear.

(On the application of Mr. Morrison for the plaintiff, some amendments were made to the particulars in the statement of claim).

The plaintiff was recalled for further cross-examination on the question of hiring helper abroad. The helper came on normal working days and also a few Saturdays and Sundays and she prepared his breakfast, lunch and dinner. She made his bed and kept the home clean. He lived in an apartment with his mother and adult sister and brother who all go out to work. The helper cooks dinner for them all. She started working with him from January 1988 and had worked for him continuously since then at the rate of US$200.00 per week. His mother paid the helper and with the assistance of his sister and brother they took care of the household bills.

This was the end of the plaintiff's case.

On the application of Mr. Goffe the defence of the first defendant was amended by inserting in paragraph 8, the following:-

"Failure to comply with Regulations 3 and 8 of the Electrical Lighting Regulation 1922."

The hearing was then adjourned to give the second defendant an opportunity to amend its defence, if necessary.

On the resumption, Mr. Goffe announced that he would not be calling any witnesses for the first defendant.

Second Defendant's Case

Mr. Daley then opened the case for the second defendant. The first witness was Mr. Huntley Higgins, Director of Engineering at the Jamaica Public Service. He knew of the company Pumps & Irrigation Limited and that it was an approved Jamaica Public Service contractor in the categories of sub-station and transmission lines and distribution lines. The Jamaica Public Service had rules and regulations by which the contractors are bound. A contract was entered into by the Jamaica Public Service with the first defendant regarding the distribution of electricity. He tendered a copy of the contract which was admitted in evidence it spelt out the obligations of the parties.

Mr. Neville McFarlane, the Safety and Environmental Control Engineer at

Jamaica Public Service Company said he was familiar with regulation 8 of the Electrical Lighting Regulation 1922, which required that when wires were retired they should be taken down. This would reduce the risk of inadvertent contact.. The Jamaica Public Service provided a General Safety Procedures and Safety Policy Manual which related to anyone working with Jamaica Public Service and included contractors. A copy was admitted in evidence.

Where a request is made by the contractor it is an agreement between Jamaica Public Service and the contractor as to when removal is to be done, but the obligation in the regulation is cast on the Jamaica Public Service and not the contractor. Once the permit to work had been issued the control of the section covered by the permit passed from Jamaica Public Service to the contractor. When a permit to work is given the contractor is only required to do what is on the permit and no more.

Mr. Volney Boswell, a supervisor at the Jamaica Public Service Construction Department was the engineer directed by Jamaica Public Service to be in charge of the project which started in 1984. It was a standard practice that on the day before an outage he would discuss with the contractor the activities for the day of the outage. In keeping with this practice himself and Mr. Miller, on the day before this incident, discussed plans for the following day. In order to keep the town of Black River supplied that day with electricity they had to install a mobile sub-station at the district of Tombstone, before the outage was effected. After making the necessary arrangement for the outage in the area of the accident, he issued his permit to work to Mr. Miller after being assured by his systems control that the lines in the area had been de-energised and isolated and that it was safe for the workmen for the lines to commence working. The added precaution of the short and ground was also applied. No specific work is slated in a work permit. It is issued for the section of the line to be de-energised. A general description of the work to be done is given on the permit to work. Mr. Miller did have the job of removing transformers that day but had no authority to go on pole and removed dead wires. In this area the old lines were on the left side of the road going towards Black River while the new lines were on the right. Mr. Miller was supposed to be working on the right side of the road relocating some transformers from old

to new poles. The accident occured on the left side of the road where the old lines were. The work that Mr. Miller was engaged in would not require him going over on the left side.

Mr. Boswell was not present when the plaintiff was injured but spoke to Mr. Miller about it afterwards. Mr. Miller told him that he had completed what he was instructed to do and had some time left so he decided that he would instruct his workman to go on the pole to retire some old wires using a cutter. The plaintiff was in the process of cutting the wire when there was an arching and the plaintiff became limp on the pole. He was taken down and sent off to hospital. No one is permitted to climb a Jamaica Public Service pole without permission from Jamaica Public Service and he had given no permission for anyone to climb that particular pole. The entire transmission lines were already taken out of service from sometime before but the distribution lines were only taken out to facilitate the work being done in the area.

The day following the accident Mr. Boswell said he found out how the line became energised. He along with others did a patrol along the line and discovered "that the old 69 KV line had somehow sagged to the extent that it actually came into contact with the 24 KV underbuild which, at the time of the accident, was energised at the point where it came into contact."

Mr. Miller had removed wires before but the emphasis was on getting the new lines up - the retirement of the old wires was secondary. It was not in the scope of the work for that day that men were going to retire these lines. It was a policy of the Jamaica Public Service not to use contractors to do any form of live line work.

On both sides of the road the 24 KV distribution lines in the area were de-energised while the 69 KV transmission line was physically disconnected from the sources in Magotty and Spur Tree. Some of these had already been removed by the contractor. Approximately 5 - 6 weeks before the contractor had worked on the lines where they touched. It was the responsibility of Jamaica Public Service to check and determine when lines retired that they had been properly and safely done.

The work done 5 - 6 weeks before had been checked by him and he was satisfied that it was properly done. It was the responsibility of the contractor to see that

wires remaining were left safely in place. This was the end of the case for the second defendant.

Submissions

Mr. Daley, on behalf of the second defendant, submitted that the issue between the plaintiff and the second defendant was whether the first defendant's representative Mr. Miller was instructed to work on transformers as stated by Mr. Boswell or was the work of removing dead conductors included in the work covered by the outage. Mr. Miller told plaintiff to remove wires "since we have time." Only inference to be drawn is that this was not planned. He referred to the specification under contract at paragraph 1.08 whereby the contractor undertook not to carry out any work on any poles carrying energised lines.

On page B2, the contractor took full responsibility for the safety of all site operations.

Page B7, the contractor to complete work to satisfaction of the Engineer.

Page B8, the contractor not to change the methods without the consent of the engineer.

Page B10, paragraph 19 - the contractor to take all necessary precautions for the safety of employees.

Page B11, paragraph 20 the contractor to take full responsibility for the care of the workers.

Page B12, paragraph 21 - contractor shall be solely liable for loss or injury cause by the execution of the work.

While the contractor must comply with the directions of the engineer he had total responsibility for carrying out the work of the contract. If the court finds that Mr. Boswell had instructed the contractor to remove dead lines knowing that there was inherent danger in that conductors may fall and come into contact with those lines, then these are the only circumstances in which any liability could arise on the part of the Jamaica Public Service. However, this would not relieve the contractor - it was he who had severed wires which fell out of the clamp.

Mr. Daley submitted that a utility company, like the Jamaica Public Service is not liable for every injury caused. These undertakings were operated by licence under which rules governing the safety of the public are made. The plaintiff was

not given any permission by the second defendant to climb the pole. As a matter of prudence the contractor should have adopted additional safety precaution by using insulated pliers and gloves. The work of retiring lines was being done in stages. The work programmed for that day was the setting up of a mobile sub-station not the removal of wires. The cause of injury was not because line had slipped from the clamp but because the plaintiff had climbed a pole when not authorised to do so.

It was his submission that Regulation 8 of the Electrical Lighting Regulations was completely irrelevant to this case. There was in fact a programme for removing the wires which was formulated by the first defendant and approved by the second defendant. Even if the court accepted the evidence of Mr. Miller that he was entitled to carry out whatever work he cared under the contract, the Jamaica Public Service liability would be very nominal because the duty of the safety of his own work was by his own admission on his shoulder and contractually his is solely responsible.

Mr. Daley submitted that in the Barr's case SCCA 45 - 48/85, there was considerable more injuries than in the instant case. In this case the court should look at the possibility of the plaintiff obtaining employment. He ought not to succeed under claim for loss of future earnings. The claim for helper should be considerably reduced - it was unreasonable and was only put in to maximise damages.

On behalf of the plaintiff Mr. Morrison submitted that there was no evidence to support the second defendant's allegation that the plaintiff was contributory negligent. There was no allegation by the first defendant of any contributory negligence by the plaintiff. The plaintiff was therefore entitled to judgment of 100% of damages proved.

On the question of special damages Mr. Morrison submitted that the evidence supported the claim as amended, but was of the view that since the foreign helper did not work exclusively for the plaintiff that a reduction of say 25% would be justified.

In addition, it was open to the court to make an award for future help as up to when the plaintiff gave evidence he had an helper in the United States of America. The Plaintiff was 36 years old when he gave evidence. Based on the authorities he suggested that a multiplier of 12 would be fair at $200.00 per

per week = $10,400.00 per annum multiplied by 12 equals $124,800.00. This also should be subject to a deduction of say 25% for the reason above.

With regard to the claim for future loss of earnings Mr. Morrison submitted that it was the general level of the plaintiff's education which would determine whether in adulthood he would be able to be re-trained in such a way as to make him a valuable player in the job market. In his view it was unlikely that the plaintiff by his training to reach further than a foreman who supervises linesmen. The plaintiff had made efforts to find work but with little success. This case he said was an appropriate one for award of loss of future earnings. On the evidence of the plaintiff and Mr. Miller last year a supervisor would be paid $3000.00 per week. This amount could be used as a proper basis for the loss of future earnings. This was equivalent to $156,000.00 per year. Using a multiplier of 12, future loss would be $1,872,000.00.

For pain and suffering and loss of amenities Mr. Morrison referred the court to Exhibits 1 & 2, which were photographs of the plaintiff after his injuries - loss of 56% of the whole man together with burns. He invited the court to look at other awards found in Mrs. Khans compilation on personal injury awards. In Barr's case Vol. 3 p.89, $550,000.00 awarded in 1987 equivalent now to $2,200,000.00.

In Carlton Smith v. Jasper James Vol. 3 p.95 $180,000.00 awarded. On cost of living index for December 1992 (419.6) this equivalent to $720,000.00. To this 1% could be added to cover burns making $850,000.00 a reasonable award. Other cases referred to were Aston Fittin v. Blacks Block Factory - Khans Vol. 3 p.97 (SCCA 69/89) sum awarded $85,000.00 on December 1992, index, this equivalent to $373,000.

Winston Shaw v. Franklyn Francis - Khans Vol 3 p. 93 $125,000.00 awarded in November 1989. This equivalent to $410,000.00 on December 1992 index. Based on awards in the above cases, he asked for an award in the region of $750,000.00 to $800,000.00 for pain and suffering.

Submissions on behalf of the first defendant were made by Mr. Davis. On the question of liability he detailed factors which were not in issue the final being that the third defendant's engineer in charge of the project had previously checked and found that the removal had been done by the first defendant to the satisfaction of the second defendant.

What, he asked was the proximate cause of the injury in this case. He submitted that the effective cause was that the old 69 KV line came into contact with 24 KV and that whoever was responsible for this was the party liable to the plaintiff. Reference was made to the case of Westwood & Another v. Post Office (1974) A/C page 1. In the instant case there was no prohibition - the plaintiff was working in an area he contracted to work. In assessing the effective cause the court must bear in mind that Jamaica Public Service is the sole distributor having absolute control over a dangerous utility - a heavy duty of care - See Judgment of Wright J.A. in SCCA No.45 & 48/85 - JPS v. Barr and Judgment of Downer J.A. on the Rylands v. Fletcher rule.

See also Charlesworth on personal negligence 7th Edition at p.909.

Under Regulation 8 of the 1922 Regulations the Jamaica Public Service was under obligation to take down the old 69 KV lines - Jamaica Public Service can't delegate its statutory obligations - See Judgment of Kerr J.A. in the Barr case at page 17. See also pages 37 & 38. Who is responsible for the remaining old 69 KV lines to remain in safe condition and not a source of danger? The fact that the second defendant had checked work of the first defendant 5 - 6 weeks before and found it satisfactory operates in law to free the first defendant of liability in relation to this and conclusive of the fact that the first defendant had left the line in safe condition - See Bucknor v. Ashby (1940) 1KB 321 at 334.

As far as the facts and the law go, Mr. Davis submitted that the first defendant was not liable. Its work had been passed by the second defendant and it was entitled to think that its responsibility would cease. Thereafter whose responsibility it was to monitor the lines to see that it was not a source of danger? Mr. Boswell said in evidence it was his. He referred to Clause 13(2) of the conditions of contract. There was no evidence of any neglect by the first defendant in removing the wires. There was no evidence that if the wire sagged or slipped out of the clamp it could only be because of failure to clamp. Therefore any finding that it was so caused would be based on conjecture and speculation and not based on the evidence. In fact it would be contrary to the evidence and the legal principles applicable to the evidence - see Regulation 3 of the 1922 Regulations - The onus on the Jamaica Public Service. In the light of the second

defendant's failure to plead this and in the light of all factual indications pointing to a satisfactory job, the Jamaica Public Service ought to be found to be the cause of the source of danger occasioned by the 69 KV coming into contact with the 24 KV line.

The crux of the second defendant's defence was that the plaintiff was doing work which was unauthorised at a place where he ought not to have been - It was not the second defendant's case that the first defendant was negligent when work was done 5 - 6 weeks before some two miles away. Mr. Boswell had said it was his responsibility to monitor the old 69 KV lines which were to be retired.

Mr. Davis submitted that the evidence pointed to the fact that the plaintiff was authorised to be in the area where he was working - he was no trepasser. Based on Mr. Miller's evidence the plaintiff was authorised to do the work that was being done. Under specification of contract clause 1.07 the contractor had discretion to arrange the order of the works.

The Jamaica Public Service was under a duty to ensure that lines did not come into contact with each other. In dealing with ultra hazardous activity one cannot divest one's self of liability by delegating ones responsibility to a contractor See Honeywell v. Stein & Larkling Bros (1934) KB 191.

The permit to work amounted to a warranty that the lines were dead and both parties regarded that this was an area that was safe.

There was nothing from the evidence in the plaintiff's case to support his allegations that first defendant made place of work unsafe.

The Factories Regulation did not apply therefore this claim was misconstrued.

No adverse inference can be drawn from the fact that first defendant gave no evidence.

Mr. Davis submitted that clause under the Res Ipsa Loquitur principle only applied when the defendant had the res under his exclusive control. See Esson v. London & NE Railway Co. (1944) 2 AER 425. The control of the wires rested solely with the second defendant Jamaica Public Service.

On the question of damages Mr. Davis said that the sum suggested for pain and suffering was not unreasonable. He found that under the claim for future help the multiplier of 12 was too high and suggested a figure of 10. As helper engaged in working for entire household there should be a reduction of 50% instead of 25% as suggested by Mr. Morrison. On the claim for loss of future earnings the

appropriate multiplicand should be in the range of $2000 - $2500. not $3000 suggested by Mr. Morrison. If $2250 is used this would attract income tax of 1/3. However on plaintiff's evidence, there is a real prospect of training and alternative employment in the United States of America which had resources and commitment to handicap people and he was lined up for that training. Appropriate downward adjustment should therefore be made to the multiplier and suggested 5. The figure should then read $2250 X 52 = $117,000.00. This reduced by $14,500.00 for tax free allowance - balance $102,500.00 - Deduct 1/3 for tax ($34,166.00) - balance $68,334.00 X 5 = $341,670.00.

In reply, Mr. Daley submitted that neither Ryland v. Fletcher nor absolute liability was pleaded in the case and these rules ought not to be applied. The second defendant was operating under a licence. The allegation of negligence and breach of statutory duty have not been founded in this case.

Findings

The following are not in dispute-

That the plaintiff was employed as an electrician with the first defendant which had a contract with the second defendant to, inter alia, revamp old electrical lines between Spur Tree and Magotty and replace them with new lines;

That in accordance with a settled and agreed course of conduct the first defendant had applied for and granted an 'outage' by the second defendant for the area where work was being done on the date of this accident;

That the outage granted for that area on that day was in respect of the 24 KV distribution lines;

That some 5 - 6 weeks prior to the accident the old 69 KV transmission lines had been isolated and partially retired, the remaining portion to be retired at some convenient time agreed by the parties;

That before the plaintiff started working that day he had been assured by both his supervisor and the Jamaica Public Service engineer that the area was safe to work.

That the plaintiff received his injuries within the area for which the outage was granted;

That the first defendant applying the same procedure and applying similar

safety measures had removed and replaced several miles of wires in keeping within the terms of its contract.

There was no agreement in court between the first and second defendant as to what specific work the first defendant had to do that day. The 'permit to work' form issued by second defendant to the first defendant was not produced to the court and no satisfactory reason given for its non-production. The first defendant maintained that once it had been given an outage for an area it was free to carry out whatever work was required under the contract within that specified area. The second defendant denied that this was so and said the first defendant was only entitled to do what was agreed upon which was set out in the permit to work. The first defendant claimed it was obliged under the contract to remove the line that were isolated within the area where there was the outage and was so engaged when the plaintiff was injured. The second defendant said there was no agreement for the particular pole to be climbed on that day to remove wires and that this was not in the permit to work.

It is noted that when the pleadings were closed that there was no allegation that the plaintiff had been contributory negligent. It was not until the trial had started that an application was made by the second defendant to amend its defence alleging negligence on the part of the plaintiff.

The second defendant claims that the proximate cause of the plaintiff's injury was because he climbed a pole when he had no authority to do so. The first defendant claims that the old retired 69 KV wires came in contact with the live 24 KV wires and whoever was responsible for this was the party liable.

The outage was not granted that day in order to install a mobile sub-station. It is clear from the evidence that the outage was granted to enable the contractor, the first defendant, to carry out its obligations under the contract. The sub-station was just to enable the town of Black River to be supplied with electricity while the first defendant did its job. Otherwise Black River would have been without electricity for the entire day. The first defendant's main duty under its contract was to remove existing transmission and distribution lines and replace same. In so doing other users of electricity would naturally be affected. Every effort had to be made to avoid inconvenience to other areas.

The Jamaica Public Service, is the sole distributor of electricity - it operates under a licence - it owes a common duty of care to ensure safety of the public in general and a very high duty of care to its employees including independent contractors working on its system. It was Mr. Boswell's evidence that at the end of each day it was his duty to check on the work done by the first defendant and to ensure that it was properly done. In the area where the wire had slipped from the clamp he was present some 5 - 6 weeks before and saw workman of the first defendant removed sections of the old abandoned 69 KV wires leaving another section to be removed subsequently. He was present and saw the workman put the remaining section in clamps and he was satisfied that it was properly done.

It was the evidence of the plaintiff, the first defendant and the second defendant that everything was done that ought to have been done to ensure that the outage area was safe to work. The old 69 KV lines were abandoned and disconnected from the system and were being removed in stages; the 24 KV lines had been temporarily de-energised that morning within the area of the outage; the short and ground had been applied and systems control had given the go ahead that it was safe for the workmen to proceed on their assignment. Mr. Boswell himself admitted that it was unnecessary for a workman in those circumstances to use rubber or insulated clippers. Mr. Boswell himself admitted that in issuing his "permit to work," form, the work to be done was not specifically set out but only in general terms. Mr. Boswell himself admitted that it was the Jamaica Public Service responsibility to monitor its lines to ensure that it was not a source of danger. Although Jamaica Public Service liability is not an absolute one, when a workman who is not a trespasser and who is not negligent gets injured at the work place in the manner that the plaintiff was injured who is to be blamed? See Westwood & Another v. Post Office (1974) A/C p.1.

The plaintiff must prove his case on a balance of probabilities. His witness Mr. Miller after the accident traced the lines some 2 - 3 miles away and discovered that 'one leg' of the old retired 69 KV line which his team had worked on 5 - 6 weeks before had slipped from the clamp and was touching the live 24 KV lines below causing the old abandoned 69 KV line to be energised. This line according to the evidence of the plaintiff, Mr. Miller and Mr. Boswell had been partially retired, de-energised and taken out of service and only waiting to be removed from

the poles. Mr. Boswell traced the lines the day following the accident and found "that the old 69 KV line had some how sagged to the extent that it came into contact with the 24 KV.." The very afternoon of the accident Mr. Miller had his men do remedial work and corrected the fault he found. For this reason the account given by Mr. Miller is preferred to that given by Mr. Boswell.

If Mr. Miller's version is the truth, and I can find no reason for not accepting it, how did the line slip from the clamp? No evidence was before the court that there was any defect in the clamp or any defect in the line that caused 'one leg' to slip. There was no evidence from which it could even be inferred that either the clamp or the line was defective. In fact the evidence was that after the first defendant had finished its work the lines were taut, they had tension in them indicating that they were securely clamped. It appears that no formal inspection was done after the accident to determine what caused the line to slip. Was it a latent defect in either or both of them; the act of stranger or the act of God? The area where the lines came into contact is not where the public had easy access. It was somewhere cross-country over pasture lands. Notwithstanding 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.

After the work on the line had been completed by the first defendant, the second defendant had inspected and approved it as having been done to its satisfaction. Although the first defendant/would be liable as an independent contractor for work done negligently by its own workmen, it would be entitled to feel relieved of responsibility after the job was inspected and passed by a competent engineer. See the judgment of Atkinson J. in Bucknor v. Ashby and Horner, Limited (1940) at page 334.

Under Regulation 8 of the Electrical Lighting Regulations

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

There was no evidence that these lines were ever to be put in use again and therefore the Jamaica Public Service was under a Statutory Duty to remove them

within a reasonable time after they were taken out of service. These were the very lines the plaintiff was removing when he received his injuries.

Under the conditions of the contract page B 7, para. 13,

> "the contractor is required to complete and maintain the works in strict accordance with the contract to the satisfaction of the engineer..."

From the evidence the relationship between the first defendant's supervisor and the second defendant's engineer seemed to have been very good. There is no evidence of complaint by the engineer about the execution of the contract by the contractor. The contractor seemed to have been performing within the terms of his contract. There was no adverse report about his job. When Mr. Boswell made his official report of the accident he admitted that he never indicated in his report that the first defendant was to be blamed for the accident. In fact, he never indicated who was to be blamed. It is only since the defence was amended during this trial that the second defendant is claiming that the accident was through the negligence of either the plaintiff or the first defendant. This is after both the plaintiff and the first defendant had closed their cases. When the defence to the claim was filed all the second defendant did was to deny the allegations of negligence on its part. It never pointed its finger at anyone then. How come it is only at this late stage that it is casting blame. Is this an after-thought?

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, (d) 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 bourne 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 cause or contributed to the injuries, loss and damages to the plaintiff.

What then was the proximate cause of the accident? It surely is not as the second defendant claims. It is clear on the totality of the evidence, and I so find, that this 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 energised 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 injuries.

In the absence of evidence that either the clamp or the wires had any defect, the court is entitled to infer that they were reasonably satisfactory for the purpose for which they were manufactured. There was also absence of evidence of any natural disaster at the relevant time which could possibly have caused the wire to slip. The first defendant admitted that its workmen had retired a portion of the wire in the area some 5 to 6 weeks before and had securely clamped the remaining portion with a view to returning at a later date to remove same. The Jamaica Public Service engineer was present and expressed satisfaction with the job done. From all appearances the work was properly done, but was it?

In Bucknor v. Ashby & Horner, Limited (supra) at p. 335 Lord Goddard in the Court of Appeal had this to say:-

> "In the case of a danger concealed from the occupiers of premises and their licenses, for instance, in the case of a balcony which a builder has been employed to repair, the fact that the work had been approved would not exonerate the contractor if it were badly done, the defect not being apparent."

Applying the above to the instant case, 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 inescapable 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.

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.

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

How should liability be apportioned? "Jamaica Public Service is the sole undertaker having absolute control of a dangerous utility and concomitant with that a very high duty of care to anyone who would be likely to suffer injury resulting from breach of such duty of care" per Wright J.A. in SCCA Nos. 45 and 48/85 - JPS Co. Ltd v. Winston Barr & Others.

Bearing in mind the requirement to be just and equitable, "I think that a true test for apportionment must take into account the very high degree of care imposed on a public utility company. The factor to be taken into account is what was done towards carrying out their duty" - per Downer J.A. in the same case. Should proportions be assessed by reference to the extent to which the negligent acts of the parties caused the damage, or should the division depend on the relative blameworthiness of the parties?

The conclusion to be drawn from the decided cases is that the degree of blameworthiness is the most important factor.

As already indicated the cause of the wire slipped from the clamp was due to negligent workmanship by the first defendant. This defendant should therefore bear the major responsibility. However, having regard to the very high duty of care placed on the second defendant I am of the view that it would be just and equitable for both defendants to share the blame equally.

Damages

Admittedly, the plaintiff suffered severe injuries - He has lost his right hand and has hypopigmented areas on his body caused by electrical burns.

Under the heading of special damages the following were agreed on:-

Loss of Clothes (pants, merino & shirt)	$ 130.00
Cost of photograph	$ 200.00
There was evidence from the plaintiff in support of the following claims	
Loss of earning from 30/4/86 - 14/5/92 - 314 weeks @ $200.00 per week	$62,800.00
Amount for attendant (In Jamaica) from 4th February, 1986 to 14th November, 1987 90 weeks @ $100.00 per week.	$ 9,000.00
	$72,130.00
Amount for attendant (abroad) from 14/11/87 to 14/5/92 234 weeks @ US $200.00 per week	US $46,800.00
Cost of prosthesis	US $ 3,000.00

Claims for costs of medical certificates and costs of surgery were not pursued.

In view of the evidence of the plaintiff that his helper in the United States of America also did household work for three other adults in the house, the sum claimed is being reduced by 50% as she was not working exclusively with the plaintiff. Therefore this claim is being assessed at US $23,400.00. The other claims are awarded as claimed.

No award is being made for future helper to the plaintiff as after all this long period of time the plaintiff ought to be reasonably able to take care of himself.

With regard to future loss of earnings, there was evidence that the plaintiff made efforts to secure employment but with little success. He is a resident of the United States of America and been in discussions with an organization which looks about the retraining of handicapped persons. There is some prospect of being retrained and employed sometime in the future. He was unemployed up to when he testified.

He is not totally incapacitated. At least he would be a foreman now earning between $2000 0 $2500 per week on the evidence of Mr. Miller. The plaintiff was 35 years of age when he testified. I think a multiplier of 10 would be appropriate with an average weekly salary of $2,250. The annual income would therefore be $2,250 X 52 = $117,000. Deduct $14,500 being amount free from tax. Amount to be taxed = $102,500. Deduct ¼ of this amount for tax - $102,500 - $25,625

= $76,875.00 plus non-taxable sum of $14,500 making $91,375 X 10 = $913,750. This should be scaled down by 30% for contingencies thereby producing $639,685.00. The practise of further discounting for immediacy of payment is well recognised. I would make the final figure $550,000.00.

Pain & Suffering and Loss of Amenities

Under this heading the court looked at several cases referred to in Mrs. Khan's book on personal injury awards.

In Carlton Smith v. Jasper James at page 95 - Vol. 3, an award of $150,000 was made on the 25th of October, 1988, for injuries arising out of a motor vehicle accident wherein the plaintiff lost his right upper arm resulting ina 60% loss of the whole man. Due to inflation this amount would be equivalent to $753,025.93 using the April, 1993, Consumers Prices Index of 435.5. The plaintiff suffered burns to other parts of his body and this should be provided for in the assessment. Accordingly, the award under this heading is for the sum of $800,000.00.

To summarise, there should be judgment for the plaintiff against the first and second defendants equally with damages assessed as follows:-

Special Damages JA $72,130.00
US $26,400.00

This will bear interest @ 3% per annum from the 23rd of October, 1985 to date of judgment.

General Damages - Future loss of earning $550,000.

Pain and suffering & loss of Amenities ------- $800,000 with interest on this sum @ 3% per annum from the date of the service of the writ to the date of judgment.

Costs to the plaintiff to be taxed if not agreed

Cases referred to
1. Carlton Smith v. Jasper James - Khans Vol 3 p. 95
2. Aston Fatten v. Blacks Block Factory - Khans Vol 1 p 97 (SCCA 69/89)
3. Winston Shaw v. Frankligh Francis - Khans Vol 3 p 93
4. Westwood & Another v Post Office (1974) AC 1
5. JPS v. Barr SCCA 45 & 46/85
6. Buckner v. Ashby (1940) 1 KB 321
7. Honeywell v. Stein & Lambeth Bros (1934) KB 191
8. Esson v. London & NE Railway Co. (1947) 2 All ER 425