JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NOS. 3 & 8 OF 1982

BEFORE: THE HON. MR. JUSTICE KERR, J.A.
THE HON. MR. JUSTICE ROSS, J.A.
THE HON. MR. JUSTICE CAMPBELL, J.A. (AG.)

BETWEEN:	ROSE HALL DEVELOPMENT LIMITED	-	FIRST DEFENDENT/ APPELLANT
A N D :	WESLEY ROBINSON	-	PLAINTIFF/RESPONDENT
A N D :	JAMAICA PUBLIC SERVICE CO. LTD.	-	SECOND DEFENDANT/ APPELLANT

Mr. R. Williams, Q.C. and Mr. Norman Wright for first defendant.

Mr. W. K. Chin-See and Miss Dorothy Lightbourne for plaintiff.

Mr. D. Muirhead and Mrs. Janet Morgan for second defendant.

November 14-18, 1983; April 12, 1984.

KERR, J.A.:

These appeals are from a judgment of Theobalds, J. on December 19, 1981, whereby judgment was entered for the plaintiff for damages against both defendants in the aggregate $103,733.82 with costs.

On February 21, 1981, the plaintiff, the driver of a tipper truck, while unloading marl on the property of the first defendant/appellant at Rose Hall, St. James, was severely injured when the truck in tipping came in contact with power lines installed and maintained by the second defendant.

The first defendant was carrying out road improvements on their private road and to that end had engaged the firm of Woon and Associates. Woon and Associates contracted with George Moore, a truck owner, to transport marl from a quarry to the site and the

plaintiff was the chauffeur of George Moore.

The plaintiff's claim against the defendants was for a breach of their statutory duty under the Occupiers' Liability Act, Section 3, and/or negligence of their servants or agents and in addition against the second defendant for breach of their statutory duty under the Electric Lighting Law and Regulations thereunder.

In their defence filed, the first defendant specifically and generally denied the allegations in the plaintiff's Statement of Claim and alleged that the accident was caused wholly or partially by the negligence of the plaintiff and in the alternative wholly or partially by the negligence or breach of statutory duty by the second defendant.

The second defendant in the defence filed, in addition to the usual denials, averred that the accident was caused wholly or in part by the negligence of the plaintiff and alternatively wholly or in part by the negligence or breach of the Occupiers' Liability Act on the part of the first defendant and further in the alternative a claim for contribution or indemnity from the first defendant.

The learned trial judge found that the road surface where the accident took place had not been raised prior to the accident, that Woon & Associates was not an independent contractor in the legal sense, that Lance Brooks, Woon's foreman gave directions to the plaintiff and that Rose Hall and Woon were in joint occupation of the site. As regards the Jamaica Public Service (J.P.S.) he found the wires were under twenty feet from the ground and were therefore in Breach of the Regulations under the Electric Lighting Act.

He apportioned liability as follows:

Plaintiff	-	25%
Woon & Associates vicariously liable	-	25%
Rose Hall	-	25%
Jamaica Public Service	-	25%

From this judgment, in addition to the appeals by the defendants, the plaintiff filed a Respondent's Notice seeking (1) to support the judgment in favour of the plaintiff on grounds additional to those of the trial judge and (2) a variation in the quantum of the award.

Before dealing with the question of liability it seems convenient to deal at the very outset with the question raised by Mr. Chin-See as to the trial judge's competence to find and apportion liability to Woon & Associates who were not a party to the action and to reduce the plaintiff's damages to that extent. Mr. Chin-See submitted that if the defendants or either of them were liable, then the Court should consider whether the plaintiff was in any way to blame and to reduce the damages in accordance with his proportion of blame.

I am in agreement with Mr. Chin-See in this. A plaintiff may proceed and recover from all or any one of joint tortfeasors. That the defendants if found liable would be joint tortfeasors is unquestioned. Accordingly, if as found by the learned trial judge, the plaintiff was contributorily negligent, it is to that extent and that extent only his damages were reducible. See Section 3(1) of the Law Reform (Contributory Negligence) Act.

Further, I accept as a correct statement of the law, the following from Clerk and Linsell - 14th Edition #119:

> "If one of a number of joint tortfeasors, or of several tortfeasors causing the same damage, is sued alone, he is liable for the whole damage, though he did but a small part of it."

He however may be entitled to contribution from the others - Lister v. Romford Ice and Cold Storage Co. Ltd. (1957) A.C. 555.

Accordingly, the learned judge erred in his finding of liability in Woon and his correspondingly reducing the plaintiff's damages.

I now turn to consider liability in relation to the parties against the background of the Grounds of Appeal and the arguments in support.

For the first appellant Mr. Williams contended that the learned trial judge erred in concluding that the defendant Rose Hall was liable under the Occupiers' Liability Act. In view of the learned trial judge's finding that the level of the road had not been raised prior to the accident, there was no evidence that the defendant was in breach of duty under the Act. Further, the trial judge found as a fact that the wires were below the height of twenty feet as required by the Electric Lighting Regulations. He submitted that the duty of control in relation to the electric lines was on the second defendant and that where a dangerous piece of equipment is owned and under the control of an Authority, then such Authority has a particular duty of care to see that no one is injured by that dangerous equipment. In the circumstances Rose Hall would not be liable because although owners of the premises they had no control over the equipment. He referred to Jones et al v. City of Calgary (1969) 3 D.L.R. p. 455.

On this point, Mr. Muirhead submitted that there was nothing in the Electric Lighting Act and the Regulations thereunder which imposed upon the second defendant a duty in relation to the wires to the exclusion of the owners and that the road being a private road, the owners are required to ensure that the conditions in the Regulations are met and that so far as regards any work undertaken by the second defendant they do so as the agent of the owner. In the course of argument he advised that the poles and lines were installed to the costs of the first defendant. The facts in Jones' case, he contended, bear no resemblance to the facts in the instant case.

The Occupiers' Liability Act - Section 3 reads:

> "(1) An occupier of premises owes the same duty (in this Act referred to as the "common duty of care") to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor by agreement or otherwise.

" (2) The common duty of care is the duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care and of want of care, which would ordinarily be looked for in such a visitor and so, in proper cases, and without prejudice to the generality of the foregoing -

(a) .....

(b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.

(6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps, if any, as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another)."

In Jones et al v. City of Calgary et al: It was held that:

"A municipality, as owner of an electric transformer installed on the premises of a shopping centre, is not the occupier of the land covered by the transformer and cannot therefore claim that it owes no duty to a boy of nine injured by contact

> "with electricity from the transformer on the ground that he is a trespasser to the land. Nor can the municipality claim that the boy is a trespasser to the transformer itself where the transformer is an alurement and its attraction to children is foreseeable. The municipality's liability must be decided in negligence and where the transformer is not adequately locked, bears no warning sign, is not surrounded by a barrier and is not adequately inspected, the municipality is in breach of duty to the boy. The boy is not guilty of contributory negligence where he accidentally put his hand in the open transformer. Nor does liability fall upon the manufacturer of the transformer simply because the locking device on the transformer was capable of being ineffectively locked with the usual type of lock used by the municipality where a normal lock would have locked it safely. Neither is the owner of the supermarket under any liability where the municipality has full control over the transformer." (Emphasis mine).

In the course of the judgment the passage from Dominion Natural Gas Co. Ltd. v. Collins (1909) A.C. p. 646 as to the peculiar duty to take care imposed on persons who install dangerous articles or equipment was quoted with approval and also the following at p. 460 from In Citizens' Light & Power Co. v. Lepitre (1898), 29 S.C.R. at p. 5:

> "This is therefore a case for the application of the principle now well established that persons dealing with dangerous things should be obliged to take the utmost care to prevent injuries being caused through their use by adopting all known devices to that end."

In dealing with the liability of the City in the Jones case, Kirby, J., after considering a number of relevant cases, held that the City was not the 'occupier' of the land covered by the transformer and, that liability must therefore be decided in negligence, independent of occupation of land but that "it cannot escape liability on the basis that it did not intentionally injure the infant plaintiff, was not aware that he was there at the time of the accident and so could not have prevented the accident from happening."

As regards the liability of the Foundation the owners of Brentwood Shopping Centre, the learned judge said:

> "The liability of Foundation was advanced on the basis that as owner of the property on which the transformer was situated, it owed a duty to the infant plaintiff as invitee, corresponding to that imputed to the City; to ensure that the transformer was properly locked, to warn of danger, to erect a barrier around the transformer and to provide adequate inspection.
>
> Foundation's position is that it was in no breach of duty to the infant plaintiff, that the transformer being the property of the City and under its exclusive control, the City had assumed whatever duty was owing by Foundation with respect to the transformer."

Now the Electric Lighting (Extra High Pressure Conductors) Regulations 1928 provide:

> "1. These Regulations shall apply to all Extra High Pressure Conductors, lines and apparatus used by the Jamaica Public Service Company Limited or by any other Company operating in the Island of Jamaica.
>
> .....
>
> 9. The conductors (wires) shall be carried by insulators of approved design and manufacture to which they shall be securely attached with soft drawn tie wire not smaller than No. 8 S.W.G. No Extra High Pressure Conductor shall have less than 20 feet clearance above the ground at any point in any span."

Implicit in Regulation 1 is that control over "Extra High Pressure Conductors, lines and apparatus" is placed squarely and exclusively on the Jamaica Public Service Company, who was the Company operating then and there.

Although on the facts there are clearly distinguishing features between the instant case and the Jones case, nevertheless, I am of the view that the principles relating to the duty of persons in exclusive control of the installation and maintenance of dangerous equipment are applicable to this case.

It was not within the authority or competence of Rose Hall to interfere in any way with the installations of electricity on their land and it is naive to suggest that in their installation

and maintenance of the lines, the Jamaica Public Service were the servants of the 1st defendant. They operate and act upon statutory powers and authority conferred by the Electric Lighting Act and the Regulations thereunder thereunto enabling.

The main purpose of the Occupiers' Liability Act was to provide new rules and institute a "common duty of care" by the occupier to all visitors and thereby replaced the common law rules under which the duty of the occupier of premises differed according to whether the person was an invitee or a licensee. At common law the categorising of a visitor often resulted in fine and pedantic distinctions. In that regard, the Act Section 2(3), expressly states that the rules shall apply in like manner and extent as the principles applicable at common law to an occupier and his invitees or licensee would apply.

In the instant case the first defendant Rose Hall had no control over the installation or maintenance of the electric lines nor any authority to interfere with them; there is no evidence of knowledge by Rose Hall that the lines were or likely to be lower than the Electric Lighting Regulations require and the accident was due to current operations being performed by Woon & Associates. Accordingly, I am of the view that the first defendant was not in breach of occupancy duties relative to the physical condition of the premises.

I now turn to consider whether or not the first defendant is vicariously liable in respect of injury arising from the operations taking place on those premises. Mr. Williams submitted that the learned trial judge erred in finding that Woon & Associates were not independent contractors. In reply, as well as in keeping with the Respondent's Notice, Mr. Chin-See's argument, as I understand it, was that persons carrying on work on private property are presumed to be doing so under some agency of the owner. Accordingly, unless the first defendant pleaded that such persons were trespassers or independent contractors, there can be no issue on this if agency is

established by the evidence. The plaintiff was therefore an invitee and as it behoved the occupier to take reasonable care that he was not injured whilst on the premises, it is immaterial whether the claim is in negligence or under the Occupiers' Liability Act. The first defendant not having pleaded independent contractor his argument on that regard ought not to be entertained.

As these contending submissions rest upon findings of fact, it seems convenient to refer here in some detail to the evidence and in particular such evidence as is concerned with the mechanics of the action resulting in the accident and the relevant relationship between the first defendant and the activities on the site.

The plaintiff's evidence was to the effect that on February 21, 1981, he was the driver of a Dumper truck drawing marl from Montego Bay to the road improvement site at Rose Hall. He had done five trips without mishap. It was on the sixth trip that the accident occurred. Lance Brooks was foreman on the site and he directed the plaintiff as usual where to drop his load. He manoeuvred the truck into position and began tipping. Brooks who had come to the door to hand him a ticket for a load cried out and the truck started "to blaze". Apparently the truck had come in contact with the power lines overhead. Brooks was electrocuted and the plaintiff suffered extensive injuries. Both legs had to be amputated. The plaintiff had over fourteen years experience in driving tipper trucks. In cross-examination he said that the truck he was driving that day when jacked up could not reach sixteen feet in height.

Ivan Woon's evidence was to the effect that he was the Managing Director of Woon & Associates Ltd. doing road construction work and was engaged by the second defendant to upgrade the road, filling the roadway with marl and asphalting it. The marl was transported by dump trucks, the property of George Moore and the plaintiff was the driver of one truck. Lance Brooks was employed

by the Company. His duty was to instruct drivers where to deposit the marl. In cross-examination he said he had been in the road building business for about thirty years and his Company about six years. Rose Hall people would tell him what they wanted and he would advise how best the work should be done. He attended the site observing day to day work and he it was who decided on workers to assist and he would take the decisions as to how day to day operations would go on. He had agreement with Rose Hall on specifications but as an independent contractor he built according to those specifications and he personally supervised the work. In cross-examination by the second defendant's counsel he said he took directions from Brian Smith of Rose Hall in places as to whether to widen the road nine inches to one foot so as to get proper alignment. Smith would certify if work properly done. Davis was Woon's supervisor and he was empowered to liaise with Mr. Smith and would get instructions from Smith.

Tell Hump Weitzel, the Vice-President of Rose Hall, said Brian Smith was the Company's architect and Woon and Associates (Road Contractors) were engaged to resurface the Rose Hall private road which led from the main road to the Great House. Smith and himself would measure the work and approve payments. Smith never remained on site and supervise the work. Woon advised how work was to be done and his advice was relied on.

Now with respect to Mr. Chin-See's submission that the arguments of Mr. Williams on Woon being an independent contractor should not be entertained, he was obviously unmindful of the sage advice that before treating the mote in a brother's eye one should first deal with the beam in one's own. The plaintiff in his statement of claim had pleaded in general terms that as against the first defendant "the injuries loss and damage were occasioned to the plaintiff by reason of the breach of Statutory duty under Section 3 of the Occupiers' Liability Act of 1969 and/or by reason of the negligence on the part of the defendants, their servants or agents,"

without naming such servants or agents. In the defence filed the first defendant categorically denied in the same fashion. Mr. Chin-See is now arguing that the evidence disclose that Woon and Associates were the servants of the first defendant and Brooks the sub-servant but deny Mr. Williams the right to contend that the evidence disclose that Woon and Associates were not servants of the first defendant but independent contractors as if a trial was a game of hide and seek.

In my view in support of their contention that the accident was not due to the negligence of any servant or agent, the first defendant would be entitled to rely on evidence establishing relationship inconsistent or incompatible with the relation of Master and Servants or Principal and Agent.

Turning to the learned judge's finding that Woon and Associates were not independent contractors I am of the view that such a finding is not only unreasonable but inconsistent with the evidence and particularly that of Ivan Woon, whose evidence on this aspect has not been traversed or contradicted by other evidence.

Woon and Associates are the experts in road construction. They determined how the work is to be done and they decide who are the workmen or sub-contractors to assist them in the performance of their contract. The fact that Rose Hall through its officers gave specifications or approve of the work, would not in any way affect the position of Woon and Associates as independent contractors. Brooks was a regular employee of Woon and Associates while George Moore was the general master and Woon and Associates the temporary master of the plaintiff - [see Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd. (1947) A.C. 1]. Nor can it be said that in engaging Woon and Associates Rose Hall had been negligent. On the contrary there was evidence that Woon and Associates had

previously performed satisfactorily similar work.

Accordingly, I am of the view that on general principles Woon and Associates were not servants or agents of Rose Hall and therefore Rose Hall was not vicariously liable for the negligence of the servants of Woon and Associates.

Turning to Mr. Muirhead's Grounds of Appeal the first reads:

> "The finding by the Learned Trial Judge that the level of the road in the vicinity of the accident was not raised prior to the accident was unreasonable and against the weight of the evidence."

This finding by the trial judge was amply supported by the evidence and unassailable. Mr. Muirhead then as an alternative endeavoured to show that the trial judge erred in finding that the wire had not met the required height from the ground of twenty feet as demanded by Regulation 9 of the Electric Lighting Regulations. He submitted that" To Duhaney's measurement of sixteen feet eight inches should be added the estimates as to the amount of sagging and the fact that the road had been raised after the accident.

On this aspect of the matter the plaintiff gave evidence that his truck when fully extended could not reach sixteen feet; that he satisfied himself that the ground was level before starting to tip. He was aware of the wire and that it was dangerous and he spoke to Woon. After he had checked the wire on his first trip he did not check it again. Brooks who instructed him where to drop his load was a "stern little man" and if the marl was not dropped where he instructed he would not sign the ticket for him to be paid.

Ivan Woon said that trucks should be unloaded where no wires were "for safety sake" but that if the wire was the correct height tipper truck could not reach it. George Moore, plaintiff's witness, said that from his little experience of the eight ton fargo, which the plaintiff drove it would reach about

fifteen to sixteen feet when fully extended. Moore said in cross-examination that he used to drive tipper trucks. The driver could regulate the height of the tipper and need not raise it fully. A driver should first make sure the ground is level, check below as well as above for head-room and for clearance of the truck body. It was dangerous to lift the body without checking above as the risk of touching something above should always be present to mind. He had warned his drivers about operating under electric wires.

Duhaney, the Senior Government Electric Inspector who measured the wire at the splice gave expert evidence. He had known the area for over fifteen years and there were sags in the wire all the way from the main road. The poles were regular thirty foot poles and if implanted according to the relevant regulation one sixth ought to be in the ground and the wires supported by cross-arms one foot from the top of the pole. He estimated greatest sag two to three feet. He measured height from ground where the broken wire was spliced as that was the lowest point in the wire and estimate the sag as a result of the "splice" about two feet. He had given approval for relocation of the poles and communicated that approval to the second defendant by letter dated 16th of February, 1971. His Department always insisted that poles be relocated before starting road construction although there was no regulation to that effect. There was no obligation on land owner to inform him of raising of the level of private road. The poles were about two hundred and eighty feet apart and where he measured was near the centre between two poles. The damaged wire was one of four strands in the span. He did not measure the other strands.

Cecil Sproul, the Electrical Engineer for the second defendant and stationed in nearby Montego Bay, on receiving a report of the accident attended at the scene. One line had been

severed as a result of a truck coming in contact with it. At his directions the line was repaired by a splice. He was in charge of area 1965-71. He estimated wires at lowest point to be twenty-two to twenty-three feet from ground. According to him the road was built up about six feet where accident occurred.

Gladstone Lemonius, Electrical Enginner and District Manager for the parishes of Trelawny, St. James and Hanover, said the lines were in existence as far back as 1956. He had never made measurements on that span. He gave opinion as to the height of the wires, based upon the requirements as to height of poles and sag as being twenty-one to twenty-two feet.

Mr. Muirhead's contention that the learned trial judge was wrong in holding that the wires did not meet the required height of twenty feet rested in the main on the evidence of the experts. It is clear that the trial judge rejected Sproul's evidence as to the road being raised before the accident. The expert's evidence rested partly on assumptions, inter alia:

(1) That the height and planting of poles were in accordance with regulations.

(2) That there was normal sag in the span.

(3) That at the time of the accident their height above the road surface was in accordance with the regulations and had not been reduced by sinking or tilting.

(4) Duhaney's estimate of height of pole above ground based on assumption that a stamp on the pole was at a particular distance from the end.

As against that no one measured the remaining strands which were alleged to be on the same level as the damaged strand or how much lower the spliced strand was from the others. All the experts admit that with the passage of time, certain factors may cause the wires to be lower than the regular twenty feet, e.g. sinking and tilting of the poles or stretching and sagging of the wires.

In the circumstances, the learned trial judge was not obliged to accept without reservations the estimates and opinions of the expert. It was open to him on the basis of the oral testimony of the plaintiff, Ivan Woon and George Moore and considering the factors that may result in the lowering of the wires, to infer that the wires were sufficiently and appreciably below the minimum height required by the Regulations as to make the J.P.S. in breach of their Statutory duty.

I now turn to Ground 4 which reads:

> "The breach of a statutory duty as alleged did not give rise to civil liability and accordingly no cause of action would be founded thereon."

Mr. Muirhead did not press this ground but nevertheless I feel constraint to deal with it. In determining whether civil liability may be founded on a breach of statutory duty, regard must be had to the terms and tenor of the statute to ascertain whether or not there was an intention to give a civil remedy. The purpose of the requirement under the Regulations is manifest; namely to put these highly charged and dangerous wires at a height where they would not come in contact with normal and ordinary user of the road or property over which such power lines run. The Regulations were obviously made to prevent the very type of harm which in fact occurred and were designed to protect against such physical harm.

The Regulations themselves do not create a specific offence but Section 34 of the Electric Lighting Act provides:

> "Whenever under this Act, or any licence issued hereunder, the Minister is authorized to make rules or regulations he is hereby authorized to attach penalties, for the breach of such rules or regulations:
>
> Provided, that no penalty shall exceed forty dollars, and no daily penalty shall exceed ten dollars, and a daily penalty shall mean a penalty for each day on which any offence is continued

> "after conviction therefor. All penalties under this Act, or any regulation made by the Minister under this Act, or any of them, may be recovered in a summary manner before the Resident Magistrate for the parish in which the offence is committed."

Having regard to the type and extent of damage that may result and the comparatively mild sanction on criminal prosecution, and having regard to the scope and purpose of the Regulations, it would be absurd to hold that breach of the duty imposed specifically on the second defendant by the Regulations under the Electric Lighting Act, did not give rise to liability in a civil action.

Mr. Muirhead further submitted that even if the trial judge was correct in holding that there was a breach of a statutory duty giving rise to civil action, this breach did not cause or materially contribute to the injury to the plaintiff and that therefore the trial judge erred in holding the second defendant/appellant partly to blame. As he graphically put it, if power lines are lower than the regulation height, this does not mean that one could deliberately run into them and so render the J.P.S. liable. Although as I have found that on breach of this duty imposed by the Electric Lighting Regulation an action in tort lies, I decline to interpret that duty as imposing absolute liability on the second defendant. The fact that power lines are lower than required by the Regulations would not per se entitle an injured party to full damages regardless how careless he might be and the extent to which his carelessness contribute to his injury.

Accordingly, the question of contributory negligence arises for consideration. In that regard the evidence of the plaintiff's witness, George Moore is important as he described the care that a prudent tipper truck operator ought to exercise especially when working under power lines. The plaintiff was aware of the electric wires and ought to be mindful at all times of the danger if the

truck come into contact with them. Although he had checked the wires on his first trip and had made five trips before, the wires were clearly not of uniform height throughout and the marl was not deposited at the same spot on all occasions. Nor would the fact that he felt obliged to deposit the marl at the spots indicated by Brooks relieved him of his duty to take reasonable care. In the circumstances for his failure to exercise due care I would hold the plaintiff contributorily negligent to the extent of fifty percent.

The issue of the vicarious liability of Woon and Associates through Brooks and the attendant contribution to the damages awarded would be justiciable issues between the second defendant and Woon & Associates. In keeping with my decision on this point (ante) the plaintiff's damages should be reduced only by the extent of his own contributory negligence.

As regards Mr. Chin-See's plea that the damages for loss of earnings be updated to the time of trial, it is enough to say that this was not pleaded or raised before the trial judge and accordingly I am of the view that the plea ought not now to be entertained.

For the reasons herein in respect of the first defendant/appellant I would allow the appeal, set aside the judgment and enter judgment in favour of this appellant with costs here and in the Court below. With respect to the second defendant, I would dismiss the appeal and in the light of my decision as to the extent of the plaintiff's contributory negligence the total award of damages would be proportionately

reduced. The judgment against the second defendant would consequentially be varied and judgment entered for the plaintiff for $103,733.82 which amount would be fifty percent of the total damages as computed categorised and awarded by the trial judge.

CAMPBELL J.A. (AG.)

On February 21, 1971 a very serious accident occurred on a private roadway leading to the Rose Hall Great House in Montego Bay in the parish of Saint James. Mr. Wesley Robinson, the respondent herein, was seriously injured. He was employed by one Mr. George Moore of Savanna-la-mar in the parish of Westmoreland to draw marl in a Fargo eight ton tipper truck from Montego Bay and to deposit the marl on a private roadway situated on the property of Rose Hall Development Ltd. (hereafter referred to as "Rose Hall.") On the 21st February, 1971 while he was tipping the marl from the tipper truck on to the aforesaid roadway, the raised body of the tipper came into contact with overhead high tension electric power lines owned by the Jamaica Public Service Company Limited (hereafter referred to as "J.P.S.") The Respondent who was in the cab of the tipper truck regulating the jack for raising the tipper was

severely burnt. He, in consequence, suffered serious permanent disability. The respondent sued Rose Hall and J.P.S. claiming against them damages for alleged breach by them of their respective duty under section 3 of the Occupiers' Liability Act of 1969, or alternatively, for negligence on their part or on the part of their servants or agents. He further claimed against J.P.S. alone damage for breach of its statutory duty under its licence granted under the Electric Lighting Law.

The respondent in his particulars specifically pleaded failure to exercise reasonable care to prevent injury to him from unusual danger on the premises of which they knew or ought to have known. He also pleaded the usual particulars of negligence such as failure to take adequate precaution for his safety and in addition specifically pleaded the following as acts of negligence:

> 1 (a) Failing by lack of examination, supervision, testing or otherwise to ensure that the overhead wires were at a safe height above the ground;
>
> (b) Exposing him to danger without sufficient warning or any warning at all;
>
> (c) Failure by the second defendant to ensure that the electric wires were at the specified distance from the ground especially in view of the raising of the road below the said electric wires by two feet in height.

Rose Hall and J.P.S., in their defences each denied the allegation of breach of statutory duty under the Occupiers' Liability Act with J.P.S., additionally denying breach of any duty under the Electric Lighting Law. Each pleaded against the respondent that the accident was caused wholly or in part by his negligence, the particulars of negligence pleaded against him by Rose Hall and J.P.S., respectively were substantially the same. Thereafter, Rose Hall and J.P.S., parted company - J.P.S., joined ranks with the respondent in charging Rose Hall with breach of its common law duty of care under the Occupiers' Liability Act to the respondent. It further pleaded against Rose Hall in favour of the respondent the same acts of negligence pleaded by the respondent against both Rose Hall and itself. Further, it pleaded on behalf

of the respondent the following additional acts of negligence by Rose Hall, namely:

> "(1) Permitting, allowing or directing the plaintiff to unload the tipper truck near to or under the electric wire.
>
> (2) Failing to supervise the plaintiff adequately or at all in the unloading of the tipper truck so as to ensure his safety.
>
> (3) Raising the level of the road below the electric wire by some 2 feet in height."

Rose Hall, similarly in addition to pleading in favour of the respondent against J.P.S., the particulars of negligence, pleaded by the respondent against it and J.P.S., also charged J.P.S., with being wholly or partly to blame for the accident by breaching its duty under the Electric Lighting Law in that:

> (1) It erected the said electric wires unsafely and or failed to keep the same in a reasonably safe condition;
>
> (2) It erected the wires and or kept them too close to the ground, i.e. in a dangerous position and or unsafely;
>
> (3) It failed to insulate the said electric wires properly or at all;
>
> (4) It erected the wires which were extra high pressure conductors with less than twenty feet clearance above ground which was in breach of Regulation 9 of the Electric Lighting (Extra High Pressure Conductor) Regulations (1928)"

Issues were thus joined between the plaintiff, Rose Hall and J.P.S., on the one hand, and between Rose Hall and J.P.S., on the other. The issues which fairly arose on the pleadings appeared to be as follows:

> (1) Was J.P.S., in breach of Regulation 9 of the Electric Lighting (Extra High Pressure Conductor) Regulation and if it was in breach, was this the operative cause of the accident;

(2) Was Rose Hall also under a duty to examine supervise and test the overhead wires to ensure that they were erected and thereafter kept at a safe height that is to say at the statutory height of 20 feet at least from the roadway. If it was under such a duty, was there a breach of this duty amounting to negligence;

(3) Did Rose Hall raise the level of the roadway below the electric wires by two feet in height so creating an unusual danger to the respondent relative to the overhead electric wires;

(4) Did there exist to the knowledge of Rose Hall unusual danger on the premises either arising from the electric wires or the manner in which its road work was being conducted, independently of the alleged raising of the level of the roadway;

(5) If there was an unusual danger of which Rose Hall had knowledge, was the plaintiff warned or otherwise protected by Rose Hall against such unusual danger;

(6) Was the plaintiff wholly or partly to blame for the accident?

The issue of independent contractor as a defence was not raised expressly by Rose Hall on its pleadings because the averment by it that "at all material times the plaintiff was employed to a contractor who was doing work for it on its road" was not sufficient to raise an express defence that liability, if any, was that of an independent contractor and not liability of Rose Hall. At the same time the plaintiff did not plead specifically any person or persons who he alleged was the servant and/or agent of Rose Hall so as to compel Rose Hall to plead specifically that the alleged servant or agent was in fact an independent contractor for whose or whose servant's act it was not responsible.

Rose Hall did the best it could in the circumstances by making the averment of "servant or agent" an issue by denying specifically the allegations contained in the paragraph of the amended statement of claim which contained the words "breach of statutory duty under section 3 of the Occupiers' Liability Act of 1960 and/or by reason of the negligence on the part of the Defendants, their servants or agents." Being thus at issue, it was necessary for the respondent as part of its case to establish by evidence not only the identity of the

person or persons whom he averred were the servants or agents of Rose Hall but also to establish further that those identified persons were in fact servants or agents and not independent contractors for whose fault Rose Hall would ordinarily not be vicariously liable. Rose Hall could therefore properly rely on the evidence which showed that the person whose acts the respondent relied upon as constituting negligence was not a servant or agent of Rose Hall but was an independent contractor. This view of the matter undoubtedly explains the learned trial judge's treatment of and conclusion on the issue of independent contractor which features in this appeal.

The learned trial judge after a lengthy hearing extending over ten days delivered a short judgment which in relation to liability is set out as hereunder:

> "All the participants in this drama display a remarkable lack of care for their own personal safety and where not so applicable for the safety of their invitees or parties to whom in normal circumstances they owe a duty to take reasonable care. One such person has not been made a party to the action but in so far as I find that party vicariously liable for the acts or omissions of his servants or agents then naturally it follows that the damage ultimately awarded to the plaintiff, Mr. Wesley Robinson will be reduced accordingly. I refer, of course, to Woon and Associates, and their foreman, Mr. Lance Brooks.
>
> Although there is a very voluminous record in this case, the facts are of singular simplicity. On the evidence I make the following findings:
>
> (1) Road surface at the material point i.e. where the accident took place, was not raised prior to the accident.
>
> (2) Woon and Associates not an independent contractor in the legal sense although Mr. Ivan Woon in his evidence so described himself. He was in fact subject to directions and instructions and supervision from Brian Smith, first defendant.
>
> (3) Lance Brooks, Woon's foreman and engaged at all material times in giving directions to plaintiff as to where to deposit marl.

"(4) First defendant, Rosehall Development Limited still in occupation of site - private road leading up to their Great House.

(4) (a) Woon Associates in joint occupation with Rosehall.

(5) J.P.S. wires too low, i.e. under 20 feet in height and therefore in breach of the Regulations under Electric Lighting Act. J.P.S. liable for failing to maintain wires at correct height.

Apportion Liability as follows:

(1) Plaintiff 25% - deliberate tipping of marl under wires.

(2) Woon's foreman and therefore vicariously Woon and Associates 25%.

(3) Rosehall Development Limited 25% under Occupier's Liability Act.

(4) JPS. 25% for failing to maintain wires - breach of their statutory duty."

Against this judgment both Rose Hall and J.P.S. have appealed and the respondent has filed a respondent's notice contending that the decision of the court below should be varied.

For convenience, I will deal first with Ground 3 of Rose Hall's appeal on the determination of which also depends the fate of the respondent's contention that the learned judge's judgment should be varied to include a specific finding that Woon and Associates Limited is the servant of Rose Hall. This ground of appeal complains that the learned trial judge erred in law in finding that "Woon & Associates Limited was not an independent contractor."

The reason no doubt why Rose Hall has raised the above ground of appeal is that if Woon & Associates Limited was found to be an independent contractor, Rose Hall would be able to contend that firstly it is not liable vicariously for any negligence as Woon & Associates was not his servant, secondly in relation to occupiers' liability, its road widening operation having been entrusted to a competent and experienced independent contractor, to wit, Woon & Associates Limited, that it had discharged its common duty of care to the respondent under the Occupiers Liability Act in respect of any unusual

dangers which might arise through the road building operations which was not per se a dangerous operation.

Mr. Chin-See for the respondent supported the learned judge's finding that Woon & Associates was not an independent contractor. He further contends that the judgment should be varied to include a consequential finding that Woon & Associates Limited was the servant of Rose Hall thereby rendering the latter vicariously liable for the negligence of Lance Brooks, the foreman of Woon & Associates Limited. Mr. Chin-See's contention is thus premised on the correctness of the learned trial judge's finding that Woon & Associates was not an independent contractor in the legal sense. Mr. Chin See in this regard submitted that it is not open to Rose Hall to rely on any defence based on Woon & Associates Limited being an independent contractor because such was never pleaded. He further submitted that on the pleadings, issue was joined between three parties only, namely, the respondent. Rose Hall and J.P.S. No issue as to liability of any other person arose.

Mr. Chin-See has, in my view, overlooked the fact that Rose Hall as I have shown earlier, is not relying on a defence pleaded but on the fact that even though issues were joined between the three parties on record, the burden was on the respondent to establish affirmatively that the unidentified person or persons in the pleadings, whom he averred to be "servants or agents" of Rose Hall did in fact fall within that category. This was a live issue as Rose Hall did not admit but rather denied the relevant paragraph in the pleading which contained the averment of "servants or agents." Thus it was necessary for the learned trial judge to make a specific finding in relation to Woon & Associates Limited i e. whether it was a servant of Rose Hall or an independent contractor as a vital and necessary step in determining the nature of Rose Hall's liability if any, that is to say whether it was personal or vicarious. Admittedly there was error on the part of the learned trial judge in adjudging Woon & Associates Limited liable since it was a non-party. But the learned trial judge was not

entirely precluded from regarding Woon & Associates Limited nor from determining the status of this non-party vis-a-vis a party on the record as this was an integral and necessary step in determining the liability, if any, of a party who was before him.

Continuing with Ground 3 of Rose Hall's appeal, Mr. Williams submitted that the evidence is all one way in establishing affirmatively that Woon & Associates Limited was an independent contractor. He further submitted that the respondent who in fact called the Managing Director of Woon & Associates Limited as his witness, made no effort to establish that Woon & Associates Limited was a servant or agent of Rose Hall despite the issue of independent contractor having been raised by Mr. Ivan Woon under cross-examination on behalf of Rose Hall within the context of his receiving certain instructions from Mr. Smith who was representing Rose Hall. The relevant evidence elicited under cross-examination on behalf of Rose Hall is summarised as hereunder:

> "I had been in business up to time of accident about six years as Woon and Associates 'Road-builder'. I had been in Roadbuilder business about thirty years altogether to date. Considerable experience in field and have always been available for such work. I had done work for Rose Hall Limited before, including roadwork. They would tell me what they want me to do I would advise them how best work should be done."
> "I was requested to reconstruct the road surface."
> "I decided who I would employ to assist me. Lance Brooks would show drivers a particular spot to deposit marl. He was in control of these truck drivers. He is my foreman, took instructions from me. I would take the decisions as to how the day to day operations would go on. Rose Hall and I had an agreement with specifications as to how the road should be done and I built accordingly. I think it was just a letter giving me the specifications and as an independent contractor I went ahead and built according to these specifications."

Evidence elicited under cross-examination for J.P.S. did not in my view modify, much less erode the robust unambiguous evidence given by Mr. Ivan Woon that he was an independent contractor. This further evidence rather provided the basis on which he made his assertion that he was an

independent contractor, and explained the nature of the instructions which he received from Mr. Smith in a manner consistent with his status as an independent contractor. A summary of the relevant evidence under cross-examination for the J.P.C. is as follows:

> "I got plan and specification from Rose Hall Limited. There was a bit of widening involved."
> "C. Bryan Smith was the company architect."
> "I had no plans but a letter authorising me to proceed with work."
> "I supervise personally and Bryan Smith had to check me so I could be paid. I did take directions from him in places probably 9" or 1 ft., wider so to get proper alignment. I was widening the access road to the great house ..... A certain amount of grass verge remained because we were not able to get that 9" that Mr. Smith required. ..... There were walls on both sides of road. ..... A dry packed wall was broken down and rebuilt and it varies in distance from the road as Mr. Smith requested in the alignment. Mr. Smith gave me the letter with specifications and he gave me the alignment. There were no plans just a letter confirming that I should construct road, supply marl, two coats asphalt and tar and Smith decide if work properly done. He was there nearly every day and certified if work properly done. He would pass on instructions if I was not there. Mr. Davis was my chief supervisor and he was empowered to liase with Mr. Smith, and Mr. Davis would get instructions from Smith."

The above summary showed very clearly that the instructions and directions which Mr. Woon referred to, consisted of instructions from time to time given by Mr. Smith on the road alignment disclosed that no plan was given by Mr. Smith to Mr. Woon showing the precise alignment which should be effected. The instructions were as to what was to be done regarding the alignment not as to how they were to be implemented. There was no re-examination by the respondent to elicit that these instructions and directions went beyond specifying particular alignments.

The evidence both in chief and under cross-examination of Mr. Tell Hump Weitzel, Vice President of Rose Hall confirmed the evidence of Mr. Woon that the latter was an independent contractor and not a servant of Rose Hall. In summary his evidence as paraphrased is as under:

> "The road was being resurfaced from the main road to Great House. Woon Associates was engaged (Road Contractors). We dealt with them before. I personally once before - company a number of times before - to do work on Rosehall property. I had discussion with Mr. Woon. Mr. Bryan Smith also involved - company architect now in Hong Kong. He was involved in discussion. Mr. Woon is a road contractor. I and Mr. Smith approved payments to Woon. Smith and myself measured work. Mr. Smith liased between myself and Woon. Smith never remain on site and supervise work. I had no doubt as to Woon's competence to perform the work. Woon did advise how work to be done and 1st defendant relied on this advice and 1st defendant was guided by the advice.
> "Woon was shown the site and was told what we wanted and that was the specifications. ..... I never tell Woon what he should do or how he should do it. ..... I did not really interest myself in the work .... No one had actual control from the Rose Hall end. ..... Mr. Woon was relied on to do the job. .... We liased with with Woon as he was a good road builder. I gave Woon a contract and I would expect his crew on the site. Bryan Smith was not on the road supervising he was at the Great House and Holiday Inn most of the time. ..... It was a job contract that I gave to Woon to be paid for when completed. ..... I got a report as General Manager that a man had died. I requested no report. I had no investigation done. I went, looked, saw Woon, spoke to him, expressed sympathy. They were not my employees but outside contractors. We not interested in who Woon hired to assist him nor were we engaged in the supervision of the persons carrying on the work."

In my view, all the pieces of evidence point to an absence of control and/or supervision exercised over Woon & Associates Limited by Rose Hall. All that Rose Hall did was to modify its specfications as to alignment from time to time, measure the work done by Woon and Associates Limited and make payment if the work was done satisfactorily.

On the totality of the evidence there can be no doubt that Woon & Associates Limited was an independent contractor. In this regard there is the further evidence on record that the person with whom Rose Hall contracted was a limited liability company namely Woon & Associates Limited carrying on its own business. The status of a servant could hardly be ascribed to Woon & Associates Limited in such circumstances. Mr. Ivan Woon as managing director was the servant of the company and not of Rose Hall. The company, it was, that employed Mr. Davis as chief supervisor and Mr. Lance Brooks (deceased) as foreman. I am therefore satisfied that the learned trial judge erred in

law and on the facts in finding that Woon & Associates Limited was not an independent contractor. The evidence overwhelmingly supported a clear finding that it was an independent contractor.

This conclusion on Ground 3 of Rose Hall's appeal automatically forecloses the application for variations of the learned trial judge's judgment sought by the respondent in paragraphs (a), (b) and (c) of his notice as also the grounds stated in the notice in support of the said variations.

Before returning to the other grounds of appeal argued on behalf of Rose Hall, it will be convenient to consider Ground 1 of the appeal of J.P.S. because whereas J.P.S. seeks to upset a finding of the learned trial judge which could be embarassing if not prejudicial to its position, Rose Hall relies on this finding as a vital prop in Ground 1 of its appeal. Thus it is not only convenient but desirable that a conclusion should be reached on this ground of appeal which is as hereunder, namely:

> "The finding by the learned trial judge that the level of the road in the vicinity of the accident was not raised prior to the accident was unreasonable and against the weight of the evidence."

It will be recalled that the respondent had averred in his particulars of negligence against Rose Hall and J.P.S. the following:

> "Failing to ensure that the overhead wires were at a safe height above the ground."

The respondent had further averred against J.P.S. alone that it had failed to ensure that the electric wires were at the specified distance from the ground especially in view of the raising of the level of the road below the said electric wires by two feet.

Implied in this averment was an assertion by the respondent that it was Rose Hall who had raised the level of the road. J.P.S. expressly averred this fact against Rose Hall as constituting one of the latter's breaches of its common duty of care to the respondent under the Occupiers' Liability Act by creating thereby an unusual danger without giving the respondent adequate warning thereof.

The evidence on record established that the road level had not been raised prior to the accident. This evidence was given by the respondent himself and by Mr. Ivan Woon.

(a) The respondent said that from Observation the height of the road had not been raised. This obviously would have been prior to the accident.

(b) Mr. Ivan Woon said that at the section where the accident occurred the road had been raised a foot but this was done after the accident; the 16 ft. 0" measurement of the height of the electric wire from the roadway which he witnessed some days after the accident, was from the finished road to the underside of the wire.

The only discordant bit of evidence was the exaggerated and improbable evidence given by Mr. Cecil Sproul, electrical engineer employed by J.P.S. who said that he visited the scene of the accident the very day of the occurrence and he observed that the road level was built up to about six feet.

The evidence was thus clearly in favour of a finding that the road had not been raised at the time of the accident. The learned trial judge having seen the witnesses and assessed their credibility could properly on this evidence have come to the conclusion to which he did. Such conclusion contrary to being unreasonable, was manifestly reasonable and consistent with the weight of the evidence. The learned trial judge must have rejected, rightly in my view, the evidence of Mr. Cecil Sproul as not creditworthy. There is no merit in this ground of appeal of the J.P.S., the same is accordingly dismissed.

I now return to Ground 1 of the appeal of Rose Hall. This is to the effect that since the only allegation against it under the Occupiers' Liability Act was that it had raised the level of the access road by between one to two feet which the learned trial judge had found not to have been raised prior to the accident, and since no evidence or no sufficient evidence of any breach of duty under the Act had been brought home to it, the learned trial judge erred in law in concluding that it was in breach of its duty under the said Act.

It is quite true that the respondent had impliedly averred and J.P.S. had expressly averred as a breach of Rose Hall's duty under the Occupiers' Liability Act the raising of the level of the road under the electric power lines prior to the accident and that the learned trial judge had found that this was not so. It is equally true that the learned trial judge concluded that Rose Hall was liable under the Occupiers' Liability Act because it and Woon & Associates Limited were in joint occupation of the roadway where the accident occurred.

However, since the respondent and for that matter J.P.S., did not aver the raising of the road level as the only breach of duty of Rose Hall under the Occupiers' Liability Act and since the learned trial judge did not make any finding as to specific breaches on which his conclusion rested, it is necessary to consider whether the evidence disclosed breaches encompassed in the other particulars averred by the respondent and J.P.S.

Mr. Williams submitted that there was no breach of duty under the Act. He opined that on the facts of the case the only duty, if any, which could have been cast on Rose Hall would be that occasioned by the electric wires being too low to the ground, if such they were, so creating a danger against which, and subject to qualifications, Rose Hall would be required to exercise reasonable care that the respondent, as a visitor, was not exposed to harm or injury.

Mr. Williams referred us to Charlesworth on Negligence (5th Edition) paragraphs 333 - 336 at pages 218 - 221 where the distinguished author gave an exposition on the Occupiers' Liability Act 1957 (U.K.) in relation to which our Occupiers Liability Act 1969 is in pari materia. The principles extracted from these paragraphs may be stated briefly as follows:

(a) Only the occupier of premises has the statutory duty of care, under the Occupiers' Liability Act, to his visitors be they invitees or licensees.

(b) Two or more persons may be in occupation of premises at the same time, each on a separate and independent basis (see Fisher v. C.H.T. Ltd (1966) 2 Q.B. 475 where it was held that the proprietor of a club as well as the manager of a restaurant on the club premises were the occupiers of the restaurant for the purpose of the act. In such circumstances each occupier owes independently of the other, the statutory duty of care under the Act.

(c) The duty of care owed to visitors is the 'common duty of care' which is defined as a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. The relevant circumstances for the purpose of this duty of care include the degree of care and want of care which would ordinarily be looked for in the visitor. Thus a stevedore would be expected to look for and guard against slipping on oily patches on a ship, as such the occupier would not be liable for his injury caused thereby.

(d) The duty of care owed to visitors by the occupier is in relation to dangers due to the physical state of the premises or to things done or omitted to be done by himself and others for whose conduct he is under a common law liability.

(e) The occupier may be held not to be under any duty of care to a visitor due to the fact that the danger to which the visitor is exposed on the premises is one which he by virtue of his calling will appreciate and guard against as special risks incident to his said calling, provided the occupier leaves him free to guard himself against the same.

(f) Where the danger has been created by an independent contractor who had done work on the premises, the occupier is not liable to a visitor who is injured thereby, unless he knew of the danger so created. He would have discharged his duty under the Act once he had satisfied himself of the independent contractor's competence.

In the light of the principles stated above in particular paragraph (f) in my view even if liability is considered on the footing that J.P.S. had merely acted as agent of Rose Hall in erecting the overhead electric wiring as argued by Mr. Muirhead, nonetheless Rose Hall as occupier of the premises would have discharged its common duty of care to the respondent

since it had engaged J.P.S. a competent independent electrical contractor to do the electrical works see Green v. Fibre Glass Ltd (1958) 2 Q.B. 245. Rose Hall would therefore only be in breach of its duty under the Occupiers' Liability Act if it had knowledge of some defect in the electrical wiring for example, abnormal sagging, creating an unusual danger and had failed, by warning or other reasonable means, to safeguard the respondent against injury from such danger. No liability could arise from any breach of duty on this ground.

The evidence did not disclose any obvious sagging of the wires. The evidence of the respondent himself was that -

> "At all times the wire was stiff to me it did not have any loop to me."

Mr. Ivan Woon's evidence was in similar vein though less positive. It was stated thus:

> "I did not take any extra notice of the wires but I saw them there. I know that they were there before. I don't remember seeing them sagging."

Mr. Chin-See in his submission relative to this ground of appeal challenged the substance of Mr. Williams' submission which was that the learned trial judge having attributed liability to Rose Hall solely on the ground of breach of duty under the Occupiers' Liability Act such Liability could relate only to the condition of the electric wire because the learned trial judge had already found that the roadway under the electric wire had not been raised prior to the accident. Mr. Chin-See in his submission stated that it mattered not whether Rose Hall's liability was based on negligence of Woon as its servant or agent or under the Occupier's Liability Act in its engagement of Woon as an independent contractor because the standard of care was the same in either case namely the "common duty of care." In this, Mr. Chin-See is correct in so far as he is dealing with the standard of the duty imposed, but it would still be necessary to ascertain the scope of the duty under the Act relative to an independent contractor to ascertain if Rose Hall was in breach of any duty.

As I pointed out above, an occupier is only liable for firstly the dangerous physical condition of the premises, i.e., its static condition, and secondly for dangers arising from things done or omitted to be done on

the premises by himself and others for whose conduct he is under a common law liability.

In so far as the respondent's injury arose out of current operations which were being conducted on the premises not by Rose Hall itself, the latter's liability in negligence or alternatively under the Occupiers' Liability Act would depend on either Woon & Associates Limited being found to be the servant of Rose Hall or the latter being found negligent in engaging the former as an independent contractor. Since Woon & Associates Limited has been determined by me to be an independent contractor Rose Hall would not be liable vicariously for its acts and or omission as servant or agent in carrying out the road surfacing and road widening operations. There still remains however the question of liability under the Occupier's Liability Act for an independent contractor quoad an invitee.

The learned trial judge having found, rightly in my view, that Woon & Associates Limited with Rose Hall was in joint occupation of the roadway, the former would itself be equally under the common duty of care as an occupier. At the same time Woon & Associates Limited could also be designated an "invitee" of Rose Hall conjointly with its status as an occupier vis-a-vis the respondent. Thus Rose Hall could be in breach of its duty under the Occupiers' Liability Act if it permitted Woon & Associates Limited as its invitee to carry on an operation on the roadway within the limits of its invitation, which was dangerous and which Rose Hall should have foreseen would cause the damage to the respondent another invitee which in fact occurred. This appeared to have been the basis on which a club proprietor was held liable to an invitee who suffered shock from energised wires while on the club premises. See Fisher v. C.H.T. Limited & Anor. No. 2 (1966) 2 Q.B. 475. In that case the club proprietor had transferred the operation of a restaurant in the club premises to a licensee. The latter in the course of redecorating and refurbishing the restaurant engaged a plastering firm to replaster the ceiling. While this was being done by Mr. Fisher a servant of the plastering firm, an electrician engaged by the

licensee was simultaneously, to the knowledge of the club proprietor's maintenance man, carrying out electrical operations in the restaurant area. The electrician in the course of his operation turned on the switches which caused Mr. Fisher the servant of the plasterer to receive a shock resulting in his falling and injuring himself. The Court of Appeal unanimously held that both the club proprietor and the licensee of the restaurant were occupiers owing to Mr. Fisher the common duty of care. The club proprietor was in breach of his duty because he had knowledge through its maintenance man who knew all about the electrical fittings and the location of the switches, that a dangerous operation namely electrical operation was being lawfully undertaken by its licensee simultaneously with the plastering operation by the plasterer's servant who was lawfully on the premises. With this knowledge the club proprietor must have reasonably foreseen that damage of the kind which resulted could be suffered through the unusual danger created by the electrical operation.

I must now consider whether a dangerous operation was being undertaken by Woon & Associates Limited, injury arising out of which, would render Rose Hall in breach of its duty under the Occupiers' Liability Act.

The evidence discloses that the private access road to the Great House was being resurfaced and widened in areas to secure desired alignment. In the course of this activity tipper trucks were used on the access road and marl was dumped from these trucks on to the right hand side of the road. This was the side on which the electrical wires ran overhead. Though the marl was being dumped on the side of the road where the electric wires extended, this was not an inherently dangerous operation. Equally it did not create unusual dangers at least to persons of the class to which the respondent belonged. In permitting Woon & Associates Limited to execute its work prior to the relocation of the electric poles and to have marl dumped on the side of the road where the electric wires extended overhead was equally not in the circumstances an inherently dangerous operation such that Rose Hall must have reasonably foreseen the likelihood of the respondent being injured through contact of his tipper truck with the overhead wires.

Further the respondent was an experienced tipper truck operator always alive to the dangers of overhead electric wires which were special risks ordinarily incidental to his calling. This was an important circumstance which Rose Hall could rely upon in showing that in the existing circumstances the operation of Woon & Associates Limited was not a dangerous one to persons likely to be affected. Rose Hall was thus not in breach of duty in not having the electric poles relocated prior to the commencement of work by Woon & Associates Limited nor was it in breach of duty in not warning the respondent of the existence of the overhead electric wires since the respondent was fully aware of their existence and of the consequence of contact with them.

Mr. Williams finally submitted that Rose Hall was not in breach of duty under the Occupiers' Liability Act in not taking steps to ensure that the overhead energised wires were kept at or above the statutory height of 20 feet from the ground. The basis of this submission is that Rose Hall albeit the occupier of the premises over which the electric wires extended was neither the owner of the electric wires nor in control thereof. He submitted that it was the owner of the electric wires, as of any other electric installation on premises, who, having exclusive control over the same had duties in relation thereto and not the owner or occupier of the premises. For this proposition he cited as persuasive authority Jones et al v. City of Calgary et al (1960) 3 D.L.R. 455. That case was decided on its own facts. However, it shed light on the approach in determining how the owner/controller of a thing dangerous in itself may alone be under the duty to maintain it in safety even though it is installed on premises not in its occupation.

In that case the defendant a municipality owned an electrical transformer which, in exercise of powers conferred by statutory rules and regulation it installed on premises in the occupation of Foundation Properties Limited.

The box containing the transformer was green in colour and on the evidence which was accepted, resembled a mailbox. The door of the box was slightly open but not sufficiently for anyone to see what was inside. The infant plaintiff was injured when his hand slid into the opening in the door while he was playing with the box. The box had no barrier around it nor was any warning sign of danger erected in the precints thereof or at all. In an action brought by the infant plaintiff against the Municipality and Foundation Properties Limited, it was held that the Municipality was the owner of the transformer. It had exclusive access to it and sole responsibility for its installation, care and maintenance. Foundation Properties Limited on the other hand was held not liable for any breach of duty of care as owner occupier of the property on which the transformer was situated because the Municipality as a matter of policy formally assumed sole responsibility for the transformer and by denying access to it by any one other than City employees, precluded Foundation Properties Limited from discharging any duty it owed as owner of the property on which the said transformer was placed.

Mr. Muirhead for J.P.S. submitted that Mr. Williams' submission and reliance on the above case was predicated on the hypothesis that the poles and electric wires were the property of J.P.S. which was not so. Secondly even if J.P.S. is the owner of the wires, there is, he says, nothing in the Electric Lighting (Extra High Pressure Conductors) Regulations (1928) (hereafter called the Regulations) which imposed duties of maintenance on the J.P.S. to the exclusion of Rose Hall the owner of the property over which the electric lines passed. In this regard he submitted that the exclusive duties under the Regulations fell on the J.P.S. only in relation to a public road. Since the road in question was a private road, it was Rose Hall either on the basis of ownership of the poles and of the electric wires or as occupier of the road over which the wires extended who was required to ensure that the conditions in the Regulations were met. J.P.S., he says, in undertaking the work of installation did so solely as agents of the owner.

Mr. Muirhead's submission on ownership of the electric poles and wires and particularly in relation to the duty of maintenance is diametrically at variance with the evidence called by J.P.S. itself. Excerpts from the evidence are as hereunder:

(a) Mr. Duhaney the Senior Government Electrical Inspector said thus:

> "Wires into Rosehall are high voltage wires i.e., extra high pressure conductors. These were on a flat construction i.e., the four wires were on the same level on a cross assembly. Wires of this nature should not be less than 2[illegible] feet above ground - this is a Regulation under the Electrical Lighting Law and is imposed on J.P.S.,Co. It is not my responsibility to check that this regulation is in force. Once I have passed an installation my responsibility ends, but if in travelling I see any undue collapse I bring same to the attention of party responsible."

> "High voltage wires quite dangerous. Regulations for protection of public. Maintenance is done by J.P.S. and I don't know anything about that."

(b) Mr. Cecil Sproul Electrical Engineer of J.P.S. said

> "I notice a tipper truck had been building up road under our lines and the body of the tipper came in contact with the lines."

> "I got workmen on the scene to repair damage."

> "First went MoBay 1965 and in area between 1965 - 1[illegible]1. I was in charge of construction and maintenance in area over these years."

> "Originally before energizing we have to get lines inspected by Government Electrical Inspector who then gives up a certificate that the line complies with the Regulations. These lines were energized."

> "Prior to 21/2/[illegible]1, I last visit that road 2 - 3 months before. This was part of my duty - to drive around and look at wires in Trelawny, St. James and Hanover."

> "Each supervisor is supposed to inspect on an Island-wide basis."

> "At times we check pole feet for rotting. Wires usually inspected about twice a year. There is no regulation. I know of no law requiring; it is my duty as supervisor to see that the lines are

> "in proper condition - poles erect, insulators not broken and wires properly attached. High tension wires must be a minimum of 2[illegible] ft. from ground at construction and there is a duty on me to see that 2[illegible] ft. is maintained."

(c) Gladstone Lemonius Electrical Engineer and District Manager of J.P.S. said thus:

> "My duties - I am responsible for all aspects of the company's operations in that area. That includes maintenance of high tension wires. Our men would drive along and see the conditions and note anything that requires attention and have it dealt with. I think I said my company had a duty to maintain a 2[illegible] ft. minumum."

Regulations 1, 9 and 11 of the Regulations are consistent with the evidence detailed above and state in mandatory terms that the duty of both installation and maintenance of extra High Pressure conductors is on the J.P.S. The duty is not confined to any prescribed area as for example a public road. The Regulations read as follows:

> "1. These Regulations may be cited as the Electric Lighting (Extra High Pressure Conductors) Regulations, 1928 and shall apply to all extra high pressure conductors, lines and apparatus used by Jamaica Public Service Company Limited or by any other company operating in the Island of Jamaica."
>
> 9. The conductors (wires) shall be carried by insulators of approved design and manufacture to which they shall be securely attached with soft drawn tie wire not smaller than No. 8 S.W.G. No extra high pressure conductor shall have less than 20 feet clearance above ground at any point in any span."
>
> 11. The whole of the works shall be executed with the best materials and workmanship and with consumate care in every detail so as to insure stability and usefulness for the intended purpose, viz the distribution of electricity for light and power and shall thereafter be continuously maintained in perfect order and condition to the satisfaction of the Electrical Inspector hereinafter mentioned."

In my view the above regulations make clear that with regard to the installation and maintenance of the electric wires at the correct height and in proper condition the duty fell squarely on J.P.S. and not on Rose Hall. The latter as occupier would therefore be in breach of its duty under

the Occupiers Liability Act only if it saw such considerable sag in the electric wires as manifestly created an unusual danger on its premises and with this knowledge it failed to take steps which in all the circumstance are reasonable to safe guard its invitees from the unusual danger so existing.

Ground 1 of Rose Hall's appeal accordingly succeeds. Grounds 2 and 4 are now of academic interest only to Rose Hall and will be considered within the context of the other grounds of appeal of J.P.S.

I now turn to Grounds 2, and 5 of the appeal of J.P.S. They read as follows:

> "2. That the Learned Trial Judge was in error when he found that the Plaintiff was not solely to blame for the accident and resultant injuries as the Plaintiff was the author of his own injuries and thus Appellant was not to blame in any way.
>
> 5. The Learned Trial Judge was in error in finding this Appellant partly to blame in that he was wrong in holding that there was a breach of statutory duty and even if he was correct such breach did not cause or materially contribute to his injury."

Ground 2 of the appeal of J.P.S. is in substance the same as Ground 2 of Rose Hall's appeal only that in the latter the wording is that the learned trial judge erred in adjudging that the plaintiff was only 25% to blame.

With regard to this ground of appeal, Mr. Chin-See in his respondent's notice claimed, to the contrary, that the 'contribution of 25% awarded against the plaintiff should be set aside or reduced" because "no evidence was adduced which could support the finding that the plaintiff/respondent was negligent in any way, or if negligent, to the extent as found by the learned trial judge."

Mr. Muirhead's submissions in relation to grounds 2 and 5 are predicated on the premise that the electric wires, were prior to the commencement of the operation on the road, at a height of at least 20 feet from the ground. Thus if there was an accident resulting from contact of the tipper truck with the electric wires the cause thereof as between the respondent and J.P.S.

must be attributed solely to the former.

The learned trial judge made specific findings against J.P.S. that firstly the electric wires were less than 20 feet. in height from the ground. Secondly that J.P.S had failed to maintain the wires at the correct height and thirdly these constituted breaches by J.P.S. of the Regulation for which it was liable to the respondent.

Dealing with the finding on the height of the electric wires from the road, there was certainly ample evidence to support the learned trial judge's finding. Contrasted with the evidence of Mr. Lawrence Duhaney and Mr. Cecil Sproul that from visual observation prior to the date of the accident the wires appeared to be at the minimum statutory height at least throughout its span were these vital peices of evidence namely:

> "(1) The single damaged strand of wire was repaired by the insertion of 2 feet of splicing. This splicing was not midway in the span of 200 feet between poles but approximately 100 feet from one pole.
>
> (2) The consequential effect of the splicing was that this strand sagged from the other strands by one foot. This was the evidence of both Mr. Duhaney and Mr. Sproul.
>
> (3) The measured height of the damaged strand of wire from the ground which had been raised by one foot subsequent to the accident but prior to the measurement was 16 feet 8".
>
> (4) The height of this wire at the centre of the span according to Mr. Sproul was 16 feet and at the pole 18 feet. This he said was as a result of the raising of the road by about 6 feet which he observed on the very day of the accident."

From the above uncontroverted evidence considered within the context of the finding of the learned trial judge, as confirmed in this appeal, that the road level, though admittedly raised by one foot, had not been raised prior to the accident, the inference appears irresistible that the electrical wires prior to the accident were at a height of only 18 feet 8 inches at the point of the accident and were thus much lower than the statutory height of 20 feet. This inference results from simply adding the one foot sagging due to the splicing and the one foot rise in the road level to the actually measured height of the

damaged wire to arrive at what would have been its height above ground but for the splicing and the raising of the ground at the time of the measurement. This height would equally be the pre-accident height of the other three undamaged strands from the ground. Thus the learned judge was quite justified in finding that J.P.S. was in breach of its statutory duties under the Regulations.

However, having regard to the second limb of Ground 5 of the appeal, the finding of the learned trial judge that there was a breach of the Regulations in the manner stated by him would not conclude the matter. The further submission of Mr. Muirhead is that even if there was a breach of the Regulations this did not cause or materially contribute to the respondent's injury. Ground 2 of the appeal takes up the cudgel from here by throwing sole liability for the accident on the plaintiff/respondent.

Developing his submission on Ground 2 Mr. Muirhead argued that the proximate cause of the accident was not the breach of Regulations by J.P.S. but the deliberate tipping of the marl under the wires by the respondent. The evidence revealed that the respondent was an experienced tipper truck driver. He stated in evidence that as a tipper operator he knew it was dangerous for the body of the tipper truck to touch overhead electric wires and that he could see the electric wires with his own eyes. He stated further that each day as he jumps in the dumper he takes special care about electric wires. He knew he was under the electric wires. His only explanation for tipping under the wires despite knowledge of the risks involved was firstly that having tipped safely on his five previous trips he felt safe that his truck could not touch the wire and secondly he tipped where Lance Brooks the foreman of Woon & Associates Limited directed him to tip because if he refused or neglected to tip where the foreman directed, the latter would refuse to pay as he was a stern little man.

Mr. Chin-See, however, submits in effect that the respondent was not negligent since he felt certain that the tipper of his truck could not, when elevated reach 18 feet. He however, had never at any time measured the height which the tipper could reach, nor as would appear, did he take into

account the elevation of the tipper in its horizontal position resulting from the height of the chasis from the ground.

The evidence clearly revealed a total disregard by the respondent for his own safety. But for the fact that J.P.S. was simultaneously in breach of the Regulations in circumstances where it cannot be stated affirmatively that is breach in all reasonable probability did not contribute to the accident, I would have found it extremely difficult if not impossible not to find the respondent vis-a-vis J.P.S. solely to blame and not merely 25% to blame as found by the learned trial judge. However, the evidence of the respondent on the height which his tipper can attain is one of estimation not of actual measurement. Thus his estimation may be out by a foot or so without his evidence being necessarily discredited. The breach by J.P.S. of the Regulations in having the electric wires at a height of less than 20 feet from the roadway would have contributed materially to the accident which undoubtedly was also due to negligence of the respondent. Thus it cannot be said that in this state of the evidence the respondent was solely to blame for his injury or that J.P.S. did not by its breach of the Regulations contribute materially to the injury.

I must now consider Ground 3 of the appeal of J.P.S. in conjunction with paragraph (d) of the respondent's notice. The substance of Ground 3 is that alternatively even if the respondent is not adjudged wholly to blame, nevertheless, the finding of the learned trial judge of 25% blame worthiness on the part of J.P.S. is too high in the circumstances and ought to be reduced. To the contrary as stated earlier, the respondent contends that the 25% blameworthiness attributed to him should be set aside or reduced.

The significance of the learned trial judge's apportionment is that he in effect was saying that all the parties including J.P.S. and the respondent were equally to blame. Thus as between J.P.S. and the respondent he was saying in effect that neither is less blameworthy. This view is undoubtedly justified on the evidence. In the result and having regard to

to the success of Rose Hall on appeal and the error in apportioning liability to a non-party namely Woon & Associates Limited, the learned trial judge's apportionment of liability will be varied to attribute 50% liability to the respondent and 50% to J.P.S.

The respondent by his respondent's notice complains that the damages awarded by the learned trial judge was inordinately low. He accordingly asks that we award such damages as befits the case. In argument before us, Mr. Chin-See conceded that a multiplier of 4 or 5 would be reasonable. Thus since the learned trial judge had correctly used a multiplier of 5 but erroneously in relation to the total figure for general damage resulting in the inflation of general damages there could be no merit in Mr. Chin-See's submission as to general damage. He accordingly abandoned this aspect of the appeal.

With regard to special damages however, he contended that in addition to the figure of $6,600 claimed as special damage which included loss of earnings to the date of the writ with a further sum for continuing loss of earnings from the date of the writ to date of judgment should have been awarded. Both Mr. Williams and Mr. Muirhead submitted that the respondent should have sought and secured an amendment of his pleading to claim this further sum as special damage. With these submissions I am in entire agreement. Special damage must be specifically pleaded and proved. The learned trial judge cannot be in error in not awarding more than the sum actually pleaded, qualified and proved. There cannot be an appeal from the learned trial judge's award for special damage where no additional sum was expressly claimed and refused.

In conclusion the appeal of Rose Hall Development Limited succeeds. The judgment against it is set aside and judgment in its favour entered against the plaintiff/respondent. The appeal by Jamaica Public

Service Company Limited is dismissed as to Grounds 1, 3 and 5. Ground 4 was not argued and so stands abandoned. Ground 2 partially succeeds to the extent that the respondent even though not adjudged solely to blame as sought in the appeal is adjudged 50% and not 25% contributorily negligent. The respondent's notice is dismissed. The judgment of the learned trial judge is accordingly varied by reducing the judgment of $156,600 in favour of the respondent by 50% being the extent to which he is contributorily negligent.

ROSS J.A.

I have read the judgment of Campbell J.A. (Ag.) and I am in agreement with his reasoning and his conclusion.