IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.CL. 1999/B-325

BETWEEN	DESMOND CLARENCE BENNETT	CLAIMANT
AND	JAMAICA PUBLIC SERVICE CO. LTD	1ST DEFENDANT
AND	DONALD CARD	2NDDEFENDANT
AND	CLARENCE BAILEY	ANCILLARY DEFENDANT

Heard: February 6,7,8,9 and 10, 2006; April 3, 2006; June 21 and July 5 and 31, 2006 and April 24, 2009

Mr. Ainsworth W. Campbell and Mr. Rudolph Francis instructed by Ainsworth W. Campbell for the Claimant
Mr. David Batts and Ms Daniella Gentles instructed by Livingston Alexander Levy for the 1st Defendant
Mr. Lowell G. Morgan instructed by Nunes, Scholefield, DeLeon & Co for the 2nd Defendant
Mrs. Jacqueline Samuels-Brown and Ms. H. Johnston for the Ancillary Defendant

Personal injury; damage by over-passing electrical wires; Claimant working on un-approved building extension; whether Owner of vacant house "occupier"; Principle of causation examined; proximate cause of injury; Whether Volenti defence available to Defendant; whether opinion evidence of non-expert witness of relevance; non-delegable duty of care of independent contractor for inherently dangerous work; proof of negligence when standards set by JBS not contravened.

ANDERSON J.

The day, Thursday April 28, 1995, began as any other day for the claimant in this matter, Mr. Desmond Bennett (the "Claimant"). He left his home and went to continue the work on which he had been engaged in up to the day before, constructing an extension to premises, a home at 23 Sherlock Crescent in Duhaney Park in the Parish of St. Andrew. How was he to have foreseen that by the end of the day his life would have been irrevocably changed by a set of circumstances which were to unfold within a matter of hours of his commencing work on the project on that day? He could not have known that as a result of an incident which occurred on that day, he would lose his two legs, have

damage to his eyes and suffer considerable pain and damage which would change his life forever.

There is little doubt that the circumstances revealed by the evidence in this case are unfortunate in the extreme and that the Claimant has suffered greatly. The question which this court has to decide is whether the Claimant has established, on a balance of probabilities, a case of negligence or breach of statutory duty against the 1st Defendant, the Jamaica Public Service Company Limited ("JPS").

The Facts from the Claimant

The facts of the particular incident giving rise to this action can be gleaned only partially from the witness statement of the Claimant. It must be recognized that the Claimant himself does not know in the sense of being aware of what was happening, what it was that caused him to suffer an electric shock. The Claimant Desmond Clarence Bennett alleges that he was working on a building at 23 Sherlock Crescent in the Parish of Saint Andrew on April 28, 1995 when he suffered electric shock injury and damage. He only knows that he was working on top of the building at 23 Sherlock Crescent where he, along with others, had been involved in extending the building. He was to cast and dress the cement works. The "labourers" had poured cement "on the roof, i.e. the decking". He said: "When I had finished the dressing about 1:30 p.m. I took up my tools consisting of a showel, (sic) a bucket and a water brush and began walking to the edge of the rood (sic) towards the ladder on the side of the roof nearest to the road i.e. Sherlock Crescent and had to walk under the wires" He says that as he was under the high tension wire, "I first heard a loud sound. Then I knew nothing more until I found myself in University Hospital of the West Indies about 11:00 p.m.". He does not say how he may have come into contact with the electric current which caused his injuries.

In terms of his witness statement, it should be noted that the Claimant says that on the morning of the incident he had been working along with the 2nd Defendant and others on the building. This statement is important because as we shall see later, the 2nd defendant specifically denies being at the premises on the morning in question. He also says that he knew on April 28 1995 that an electrician had been "electrocuted the day before i.e.

27/4/95". This is at variance with the closing submissions of his counsel who says that the claimant did not know about the situation being unsafe. I refer below the Claimant saying he was "upset about the electrician being electrocuted".

He eventually had both legs amputated above the knees, with further amputations up the thighs. He suffered burns over much of his body and had to have treatment for his eyes. He now gets around by the use of a wheel chair. He has brought an action for negligence and or breach of statutory duty arising from the accident. The Claimant's claim against the 2nd defendant was withdrawn on the 24th day of February 2004.

The Jamaica Public Service Company Limited, the 1st defendant and Donald Card a contractor and mason, the 2nd defendant were sued. The JPS was sued on the basis that the cause of the electric shock was the position of the company's un-insulated electric wire carrying current along the street. The 2nd Defendant had been the contractor who had entered into a contract with the ancillary defendant for certain extensions to be made to his home at the address of the accident. According to the pleadings, the claimant alleges the following particulars of negligence:

Particulars of Negligence of first Defendant, its servant and/or agent

a) Running the electrical cables and wires at distances from the premises (house) that was dangerous to humans including the Plaintiff.

b) allowing electrical cables and wires carrying electricity to remain installed in a position that was dangerous to humans including the Plaintiff.

c) Failing to examine and or to examine enough and or carefully enough electrical cables and wires that carried electrical currents that were:
   a) by the nature of the cables.
   b) by the location of the cables,

   dangerous to living entities including the Plaintiff.

d) Failure to observe and or to remove and or relocate electric cables and wires transferring electricity that were dangerous to living entities including the Plaintiff.

e) Failure to warn persons coming within the electrical field created by the electrical cables and electricity running through them of the danger of entering the electrical field including the Plaintiff.

f) Failing to have any or any sufficient regard for the safety of persons entering the electrical field created by the 1st defendant, its servant and or agent including the Plaintiff.

g) Failure to keep and or maintain the electrical cables and wires installed in such good satisfactory condition that they would not create a danger to persons within the environs of those cables and wires and in the electrical field including the Plaintiff.

h) Failing to anticipating and to act as if anticipated that persons including the Plaintiff would enter the electrical field created by the electrical cables installed and supplied with electricity and or through which electricity was supplied.

i) Res Ipsa Loquitur.

PARTICULARS OF STATUTORY BREACH

a) Failure to keep the electrical field within a safe distance from the building at No. 23 Sherlock Crescent in the Parish of Saint Andrew.

b) Failure to put any or any sufficient warning signs of the presence of an electrically charged field.

c) Failure to use and maintain such electrical cables and wires as were safe with the context of their use and services.

d) Res Ipsa Loquitur.

On or about the 28th day of April 1995 the Second Defendant's negligence caused the Plaintiff to go on premises to work to work at No. 23 Sherlock Crescent in the parish of Saint Andrew where he knew or ought to have known that it was dangerous to work thereby causing the Plaintiff to sustain bodily injuries and to suffer pain, damage and loss and to be put to expense.

The 1st defendant brought an ancillary claim against the Ancillary Defendant on the 22nd of March 2004 for a) negligence and or contributory negligence,

b) breach of section 7 of the Bureau of Standard Act by erecting a building too close to the 1st defendant's primary distribution

c) breach of statutory duty in not obtaining planning permission for the construction and expansion of the building(s) at 23 Sherlock Crescent, Duhaney Park, Kingston 20 in the Parish of Saint Andrew

Issues

(a) Whether the defendants or either of them is liable for injury, loss and damages suffered by reason of the Claimant coming into contact either with the energized high tension lines or the electrical field associated therewith.

(b) Whether the Claimant was wholly himself wholly responsible for the accident by reason of his own negligence or under the maxim, "*Volenti Non Fit Injuria*"

(c) Whether the Claimant was contributorily negligent and so partly responsible for the accident.

(d) Whether the Claimant was a visitor or trespasser on the premises at the time of the accident.

(e) Whether the Ancillary Defendant was negligent and or contributorily negligent and or breached statutory duty.

Evidence

Given the fact that the Claimant is unable to give direct evidence of the cause of his injury and damages, it is clearly useful and indeed, necessary to review the additional evidence, albeit circumstantial concerning the context and circumstances in which the incident occurred.

Evidence was given on behalf of the Claimant by two (2) witnesses, a Mr. Earl Parker who claimed to be an electrician and a young man, Jomo Gibbs. Mr. Parker was not a witness of fact in terms of what allegedly happened to the Claimant on the 28th April, 1995. Rather, he purported to provide opinion evidence on the behaviour of electricity and JPS procedures and processes. There is nothing in the record or in any of the bundles which indicates that this court had approved the witness, Parker, as an expert witness. Except to the limited extent of his previous employment with a contractor who had done work for JPS, which may give rise to some insight into the JPS practices, it was not immediately clear how he could assist the court. Moreover, in due course the attorneys-at-law for the 1st Defendant and the Ancillary Defendant were to elicit answers from Mr. Parker which raised serious issues of his credibility and even his knowledge about electricity in general and the practice of the JPS in particular. I advert to this later.

Mr. Parker in his witness statement purported to give evidence as to the fact that "the sixteen feet (16 ft.) height of the wire is to lessen the electrical field in which animals are likely to be." He also said "When an electricity charged wire runs about six to eight feet

(6-8 ft.) above the surface of a roof on which a mason is working, i.e., floating concrete and electricity from that wire and in that electrical field so created, hurts and seriously burns that person the high probability is that the surrounding wires were high tension wires called '69' ". I am unsure what is the import of this bit of testimony, or indeed the meaning thereof. It was also his opinion that no such (high tension) lines should be run in a housing scheme, and where just before an electrical accident occurs, a transformer is nearby and a hissing sound is heard first before the accident, the high probability is that the transformer might have been busted and affected all the wires nearby". I do not recall the witness saying how the wires would be affected, nor whether every transformer would have the same effect regardless of the size of the area for which it was in use

It will be readily apparent that little of this evidence is of any value for two (2) reasons. Firstly, there is no evidence of any of the things which form the basis for the probability predicted by Mr. Parker, nor is there any evidence of any "hissing transformer". Certainly, Jomo Gibbs who was the closest witness to the incident, spoke of a sound of a "balloon bursting". Secondly, in any event, there is no evidence, based on Mr. Parker's limited qualifications, that he is an expert on the behaviour of electricity. In fact, in cross examination he had to admit that he did not have a licence as an electrician: He also admitted that he had made a mistake when he characterized the wires as "69", that is 69000 kilo volt lines: He also had to admit in cross examination that the 24000 kilovolt wires are normally un-insulated and are only insulated from the JPS post to the pot head at the home of the customer.

In any event, the witness confirmed visiting the location of the incident in 2005, several years after the incident. He was unable to identify any standard which supported his proposition that un-insulated wires ought not to be used in a housing scheme. Such a requirement was neither contained in the JS 21 standards of the Jamaican Bureau of Standards, nor in the JPS internal standards. It also became quite clear in cross examination that the witness was not familiar with the processes or procedures of the 1st Defendant when he sought to explain how the JPS would respond to an electrical accident. He also indicated in his witness statement that in the event of an accident

involving electrocution, there would be automatically triggered a signal at the company's central generating plant at Hunts Bay. This was denied by David Archer, a witness for the 1st defendant and the witness eventually conceded that he really was not aware of such technology.

In any event it was clear from his answers to the court that:

1) He had only been to 23 Sherlock Crescent in July 2005, almost ten (10) years after the incident;
2) He had apparently last worked as an electrician in 2002;
3) Most of his working experience had been with Cable and Wireless Jamaica Limited and occasionally with JPS and
4) The only scheme where he recalled seeing insulated transmission wires was in Westport in Portmore.

The other witness to testify on behalf of the Claimant was Jomo Gibbs, a clerk presently employed to the University Hospital of the West Indies. He was born in March 1985 and so at the time of the Claimant's "accident" was just ten (10) years old; and at the time lived at 16 Sherlock Crescent which was directly across from 23 Sherlock Crescent. According to this witness who appeared in court in answer to a witness summons, he had been ill at least on that and the previous day and had stayed home from school on the 28th as well as the 27th April, 1995. He was then a primary school student in grade III.

He said he had seen the Claimant who he knew as "Blacka", on the roof of the section being constructed: He saw them mixing and pouring cement. They were paving off the top with cement. He said two (2) of the men had trowels and a third man had a shovel. He said he saw the Claimant start to stand up and he was about two (2) feet from the wires above the house. He said he saw when the Claimant was lifted up and was dangling from the wires. He also heard a loud explosion like a balloon bursting. It is to be noted that on cross examination, Gibbs said he was also at home on the 27th April, the day before the Claimant was injured, and the day in which an electrician working on the same property had suffered electrocution. However, he said he did not see that incident.

But in his witness statement he gives a description of what took place on the 27th April. It has to be concluded that this account of what happened on April 27, 1995, is hearsay.

It is important to note that although not stated in his witness statement, in cross examination he said that there were high tension wires running over the building from front to back. There was however nothing in the evidence before me which indicated that at age ten (10) years, the witness would have known what were "high tension" wires. There were no questions asked of him which indicated that at age ten, he knew what "high tension" wires were. Indeed, even during his evidence, there was nothing to show that this was a characterization which he understood.

He also gave evidence that some time after the incident, the poles on the street were changed for higher poles, about fifty (50) feet in height. At the same time, in answer to Mrs. Samuels-Brown for the 2nd Ancillary Defendant, he agreed that the wires ran from pole to pole along the front of the houses in Sherlock Crescent.

The evidence for the 1st Defendant was given by David Archer, a maintenance engineer employed to the JPS. He intimated that he had joined JPS in January 1991 as a distribution production engineer, his primary function being to design electrical circuits to avoid damage to equipment and injury to personnel. His witness statement speaks of his having visited the premises at 23 Sherlock Crescent at about 1:00 p.m. on the 28th April, 1995 because of information which he had received. It was his evidence that he saw a gentleman working on the top of a section which was clearly an extension of the existing building. In his view, this brought the extension and the person working on it into a space less than the distance tolerances allowed for JPS lines. He said he warned the worker to stop working there as he was endangering his life. However, the individual, who he later discovered to be the Claimant, declined to follow his advice. He said he left the scene intending to get a stop order to halt the work. However, he subsequently became aware that the Claimant had been injured by being electrocuted on the site which he had visited.

In his witness statement he explained that the standard specifications which govern electrical installation in Jamaica are known as JS21. That standard prescribes the minimum clearance allowable between JPS electric lines/conductors and roofs/balconies and other parts of buildings, bridges and foliage. It was pointed out that the JPS internal standards are based on standards used in the United States of America as contained in the 1993 U.S. National Electric Safety Code (NESC), published by the Institute of electrical and Electronics Engineers, Inc. (IEEE) He stated:

> "There is a table contained in the IEEE which we use at the JPS and which is entitled: "Clearance of Wires, Conductors, Cables and Underground Rigid Line Parts Adjacent to, BUT NOT attached to buildings and other installations EXCEPT Bridges".
>
> Those standards specify that balconies and areas readily accessible to pedestrians must be at least 7.5 feet or 2.30 metres away from (in a horizontal direction) any open supply conductors (that is conductors without insulation) over 750 volts to 22,000 volts. The minimum vertical clearance over or under balconies and roofs readily accessible to pedestrians in relation to open supply conductors over 750 volts to 22,000 volts must be at least 13.5 feet or 4.1 metres. Under windy conditions when the power lines are swinging, the closest the lines should come to a building during its maximum swing is 4.5 feet or 1.5 metres (horizontal clearance)."

He pointed out that the lines at Sherlock Crescent were in fact 24,000 kilovolt lines and as such the internal standards of JPS provided that the horizontal distance/clearance between buildings and JPS electric lines/conductors must be a minimum of fifteen feet (15 ft.)". The minimum clearances in the JPS Standards are in fact greater than the clearances prescribed in either the JS 21 or the IEEE".

At paragraph 14 of his witness statement he suggested the approval process for new housing developments would have required the buildings to have complied with the specifications for tolerances from electric line/conductors of the JPS. This was only an inference that he sought to draw but of course he could not from his own knowledge say that this was so. It was his conclusion based on research that it was the building of the extension to the building which brought it within the forbidden tolerances and put the

Claimant at risk. It must be pointed out that this is a conclusion which the court itself is being asked to arrive at and so the opinion of the witness in this regard is irrelevant.

The witness does however exhibit a copy of an agreement binding upon the owner of 23 Sherlock Crescent and his successors in title which prohibits the owner from erecting or permitting the placing of an erection of any building within five feet (5 ft.) of JPS wires, poles or other apparatus. I would hold that as a public document this is admissible per se.

The witness Archer was cross examined by both the Claimant's attorney-at-law and the attorney for the Ancillary Defendant. I am unable to say that his evidence was challenged in any material particular. There were suggestions that he might have acted differently. For example the suggestion was made that if he had, in fact gone to Sherlock Crescent as he said, and which is denied by the Claimant, he could have suggested how the Claimant could have safely come down from where he was walking. He said he did not do so. It was also suggested that he could have used a special device to have turned off the power by pulling down a switch. He admitted that he did not have such a device when he went to Sherlock Crescent. In answer to counsel for the Claimant, he also pointed out that the danger from the wires was not due only to the fact that they were un-insulated, as even insulated wires have an "electrical field" which can give rise to injury.

Archer also gave general testimony as to the JPS practices for inspection of lines and replacement of equipment. But in my respectful view, those views do not assist the court in determining the issues raised by the Claimant's claim.

The other witness called by the 1st Defendant was Mr. Donald Card, who had been initially the 2nd defendant but against whom the Claimant had discontinued its case. Mr. Card, a resident of 36 Sherlock Crescent, Duhaney Park, was the contractor on the extension to the building where the Claimant was injured. In his witness statement, he acknowledged that he was hired to make additions to the front of a two-storey house at 23 Sherlock Crescent by constructing a garage on the first floor and a room on the second

floor. According to his account, the Claimant was not employed to him but would work along with him whenever he got jobs.

He said that the Claimant, himself and two (2) of his sons had been working on the building for about four (4) weeks before the 28th April. They had "boarded up the decking for the second storey of the building and steeled it off. The next step was for the concrete to be poured but we could not do that until after the electrician had completed his work which was to have been completed by the 28th April, 1995. On the 27th day of April, 1995 I was on the road outside the premises at 23 Sherlock Crescent with Blacka. The electrician was working on the wooden decking of the house. Suddenly I looked up to where the electrician was working and saw that he had caught fire. Blacka and I ran up there and took him off the building. After what had happened to the electrician, Blacka and I decided not to go back on the job. We then left the premises and went to our homes".

It was his evidence that on the following day, the Claimant had come to his house in the morning and sought to persuade him to return to the job. He refused and Blacka then left his house and went to the building site. Critically he said:

> "The power lines ran on a pole in the front of the premises at 23 Sherlock Crescent. The power lines were a little distance from the building. The lines did not rest on the building. The addition to the building that I was constructing moved the building forward and raised the roof closer to the wires".

He did give an account of what his information was about the day of Bennett's injury but since it was clearly hearsay, I need not repeat it here. In cross examination, Mr. Card also said that on the 27th April, the only people who were there were the electrician, the Claimant and himself. He said that he and Mr. Bennett saw a man catch fire on the house top. Card said that the Claimant and his son Devon did steel work on the construction, a fact which the Claimant denies. The Claimant also denied this witness' account of them both assisting the electrician from the roof on the 27th April when he was burnt by electricity.

Another fact on which this witness differed from the Claimant in his account was in relation to whether Card had been at the premises at Sherlock Crescent on the 28th. The Claimant said that Card came to the site but the witness said that when the Claimant came to his house that morning, he re-iterated his decision of the previous day that he would not be going back. He said he kept to his word, and having left his home at around 7:30 a.m. on that fateful day, was not aware of Claimant's misfortune until much later in the day. The Claimant having closed its case after the evidence of the Claimant, Mr. Parker and Jomo Gibbs had been taken, the 1st Defendant closed its case after the evidence of David Archer, Mr. Card and Errol Bennett, the administrator of the Building and Town Planning Committee of the Kingston and St. Andrew Corporation (KSAC). This latter witness gave un-contradicted evidence that his research uncovered no record of any application having been lodged with the corporation in respect of any extension to the house at 23 Sherlock Crescent.

He testified as to the procedure to the followed by any person seeking to make alterations to a building in the corporate area: He said having checked the records of his department, he could say that no application had been made or approval given for the extension which was in progress at 23 Sherlock Crescent. He conceded in answer to Mrs. Samuels-Brown, that the records of his department may not be perfect, and that there are known cases of irregularities within the Building Department at the KSAC. However, there was no suggestion that the Ancillary Defendant had made such an application for approval of the extension to his building.

After the close of the 1st Defendant's case, Mrs. Samuels-Brown then decided that the Ancillary defendant would elect not to call and evidence on his behalf and would rest on her submissions.

An application by Claimant's counsel to have the witness statement of the Ancillary defendant put in as a hearsay document was opposed on the basis that this was a statement which had been provided in relation to the issues between the 1st defendant

and, in any event, the claimant had already closed his case. The application was ultimately refused.

SUBMISSIONS

First Defendant's Counsel

Mr. Batts, the Attorney-at-Law for the 1st Defendant submitted that the 1st defendant should succeed on the basis that the claimant had failed to establish liability of the part of the 1st defendant. He framed the issue, on the pleadings, for consideration by the court in this way:

> Did the 1st Defendant negligently erect poles which carried electric wires too close to the building at 23 Sherlock Crescent in the Parish of St. Andrew?

It was, he said, manifest from the Claimant's particulars of claim as set out above that that was the issue. The particulars of negligence alleged in the particulars of claim and which are set out above, make various averments about the running of electrical cables, their relative position, etc. all in relation to the premises at 23 Sherlock Crescent. He submitted that based on the evidence which had been led before the court, it was clear that JPS did not erect poles or hang wires that were too close to the building. In fact, it is also clear that the Defendant did not allow poles and wires to "remain" too close to the building. Rather, it was the uncontroverted evidence he said, that it was the extension being done to the premises in question which had moved the existing building outwards by some 13 feet and upwards by about 16 feet which had given rise to the Claimant being put in the danger in which he found himself. Indeed, his view was that the Claimant had virtually admitted that it was this construction which had brought him close to the defendant's poles and wires. The un-contradicted evidence of the standards which were observed by the 1st Defendant had been given by David Archer. It was clear from that evidence that the 1st Defendant could establish that prior to the construction; its poles and wires were safely some distance away from the building. On that basis alone he submitted that the Claimant should be non-suited. The case, he said, had not been made out by the Claimant. This was particularly to be borne in mind when one considered that

the period over which the alternation was being done was a period of approximately three (3) weeks. It was also his submission that the Claimant had failed also to establish any causative relationship between any act or omission or omission of the defendant and the injury suffered by the claimant.

Causation

It is trite that in cases of alleged negligence the claimant must not only show a duty of care, a breach of that duty and damages, but must also show that there is causation. In some cases, this may be expressed by saying that the damage must not be too remote. {See the cases of ***Re Polemis & Furniss, Withy & Co Ltd [*, [1921] 3 K.B. 560** the famous United Kingdom tort case on causation and remoteness. There the Court of Appeal had held that a defendant could be held liable for all consequences flowing from the wrongful conduct regardless of how unforeseeable. This decision was subsequently disapproved of, and its test replaced, in the later decision of the Privy Council in **Overseas Tankship (U.K.) Ltd. v. Morts Dock and Engineering Co. Ltd. [1961] 1 All E.R. 404 (P.C.)**. (The Wagon Mound No: 1)}

In relation to the question of causation, counsel pointed out the fact on the evidence which had been heard, the construction which was in progress had proceeded without planning approval. Had this been sought, it is likely that the likely danger would have been realized. Secondly, the Claimant had himself been a witness to an electrical burning incident on the day prior to his incident. He was there when the electrician was burnt and observed the removal of the electrician from the roof. In fact, it was the evidence of Mr. Card, previously the second Defendant in this matter that he, Mr. Card, and the Claimant had both helped to remove the electrician from the roof of the building where he had been injured. It was his submission that the evidence from Card should be believed. He also submitted that there was clear evidence also from Mr. Card that he along with the other persons who were working on the building on the 27th April when the electrician had his accident had all decided that they would do no more work on that building as it was manifestly unsafe. It was Mr. Batts' submission that the evidence of Mr. Card should be put preferred to the evidence of the claimant. Mr. Card had no interest long having

ceased being a defendant on this matter. He posed the question in this way, "Why should Mr. Card's evidence not be believed, why was he not at work?" The answer, he submitted, must have been that they had all seen what had happened the day before.

It was counsel's further submission that, with respect to the evidence of Mr. Errol Parker who purported to be an expert witness, that evidence had been discredited and was of little value. It was clear that he was quite unfamiliar with any of the codes under which the JPS operated. Further, he was not a licensed electrician or electricity worker. It was his own evidence that he now does more upholstering and had done more work for Cable & Wireless Jamaica than electrical work with JPS over the period of his working life. He had admitted in cross examination that when he went back to the premises, the lines went from pole to pole over the addition and not from front to back. The Claimant had said that the wires ran partially over the addition and part over the old structure.

Counsel also submitted that in so far as the evidence of Jomo Gibbs was concerned, it was unreliable. Gibbs was a mere ten (10) years old at the time and although he testified that there were high tension wires there was no evidence led as a foundation to indicate that he was aware of what high tension wires were at that time when he was that young. There was also a factual inconsistency between the evidence of Gibbs and that of the claimant. Mr. Gibbs said that the Claimant was on the old roof when the incident occurred. This differs from the claimant's own case where he said he was on the newly constructed roof when the incident took place.

Having heard and seen this witness and observed his demeanour, I accept the submission that young Gibbs is not a witness on whom great store should be placed. It was also quite clear that he had some difficulty estimating distances and so the evidence that he gave was inconsistent. It was on that basis of the witness' apparent unreliability that Mr. Batts urged the court to the view that where there was any inconsistency between the evidence of Mr. Gibbs and the evidence of any other party, the other evidence should be preferred. In any, event the evidence of Jomo Gibbs does not point to the JPS as the cause of the Claimant's misfortune for he does not know what caused the Claimant to catch fire.

In a brief reference to the submissions of the attorney for the ancillary defendant/third party, counsel stated that the attorney for Mr. Bailey had suggested that other houses on the street had additions which were similar to the one being done on number 23. It was his view that, notwithstanding such additions, there was no direct evidence as to the precise scope and dimensions of those additions. In any event, that there may have been an illegal or even legal construction by others, (and there is no evidence whether the other additions were sanctioned) cannot help the Claimant prove the averments in *his* pleadings. On the Claimant's own case, there is no specific allegation that the other persons on the street had done precisely the same thing that was being done at number 23 Sherlock Crescent. In any event, the fact that other buildings were close to JPS line those breaches, if they were, did not cause the claimant to be injured in the way he was. The Claimant was on the building which was being extended. Mr. Batts also submitted that the cases established that causation must be determined factually by examining and adverting to the evidence "judicially". He asked the question: "Can it be said that JPS caused Mr. Bennett to be burned at number 23 Sherlock Crescent"? The Claimant was aware of the danger. He had been warned not to return, and on Card's evidence at least, had been a party to a decision not to do so. It was, in his view quite preposterous to blame the 1st Defendant for his injuries. In particular, the Claimant is unable to establish negligence. It was submitted that JPS had no special duty of care to the Claimant in that this was not a case where a purportedly de-energized line is actually found on examination to be energized. Even if there was some special duty, there is no evidence of any breach.

But it was on causation that Mr. Batts focused and he said the claimant had failed to show that any breach of duty caused the damage which he had suffered. Nor could it be shown that any such breach caused the Claimant to keep working on the roof in the circumstances he did, cognizant as he must have been, of the danger. The Court should accept as true the evidence of David Archer that on the 28th April 1995, he had visited the premises at 23 Sherlock Crescent and had spoken to someone advising him to come off the roof because of the danger and that person had refused is to be believed. It is true that

this exchange was denied by the claimant but Mr. Archer further gave evidence that he visited the claimant in hospital recognized him as the person to whom he had spoken on the 28th when the incident occurred. In those circumstances, it was his submission that the JPS through its representative, Mr. Archer, had acted reasonably and there is no evidence, apart from the Claimant's, to contradict his evidence. The duties of the 1st Defendant, if any, owed to the Claimant, had been discharged by Archer by the warnings given the Claimant, from the knowledge of the incident of the previous day and the Claimant's voluntary assumption of the risk, in the face of by the decision taken by Mr. Card and the others. It was submitted that the injury and damage if any suffered by the Claimant was caused by his own actions. He was the author of his own misfortune and the first Defendant ought not to be held liable for any damages arising therefrom.

It should also be noted that the attorney-at-law for the Claimant in his submissions had made references to the fact that, if indeed David Archer had gone to the premises on the 28th as he alleged, he had made no effort or attempt to point out to the Claimant a safe way of coming down from the roof and avoiding the close proximity to the wires at the side of the house to which the wire was being leaned. However, as Mr. Batts has pointed out the allegations of negligence here are in relation to the placing of the poles and the lines on Sherlock Crescent by the 1st Defendant. *There is no pleading anywhere of any vicarious liability on the part of any servant and/or agent of the 1st Defendant in relation to any acts or omissions on the 28th April, 1995.* It is clear, on his submissions and on reviewing the pleadings, that there can be no finding of liability based upon the acts or omissions of some party who may or may not have been an agent or servant of the 1st Defendant.

In relation to the issue of causation, Mr. Batts referred to the following cases:

Galoo Ltd. v Bright Grahame Murray 1994 1WLR 1360 at page 1375A: There Glidewell L.J. said that the answer to the question: "How does the court decide whether the breach of duty was the cause of the loss or merely the occasion for the loss?" was:

"*by the application of the court's common sense*"

In **Wright v Lodge 1993 4 ALL ER 299** at page 307F the view was also expressed that not every cause 'without which'— 'but for'— an accident would not have occurred, is a relevant cause in law. Causation in complex cases should be decided by invoking at least a degree of common sense.

Stapley v Gypsum Mines Ltd. 1953 AC 663 at page 681 per Lord Reid. In that case his Lordship in the course of his judgment stated the following.

> "The question must be determined by applying common sense to the facts of each particular case. One may find that as a matter of history several people have been at fault and that if any one of them had acted properly the accident would not have happened but that does not mean that the accident must be regarded as having been caused by the fault of all of them. One must discriminate between those faults which must be discarded as being too remote and those which must not. Sometimes it is proper to discard all but one and regard that one as the sole cause but in other cases, it is proper to regard two or more as having jointly caused the accident."

In a recent case, **St. George v Home Office (2008) EWCA Civil 1068**, this principle adumbrated by Lord Reid, was described as "Causal Potency". This view of causation is referred to as the "but-for" principle of causation, but this may be an over-simplification. Robert Akenhead J. in delivering a paper at the TeCSA/TECBAR Conference on January 28, 2008 entitled "Presenting Evidence of Causation: How to fail" dwelt on the theme of the common sense approach to causation. He stated:

> Other cases have supported the common sense dictum of Glidewell LJ in **Galoo**. For instance in the **Sivand** [1998 1 WLR 97, Evans LJ said that, although causation is a mixed question of fact and law, "the factual question is answered by applying the test of common sense" (page 101). He did qualify this at page 102:
>
> > *"The reference to commonsense must be accompanied by a reminder that this is not a subjective sense, which would be an unreliable guide. It implies a full knowledge of the material facts and that the question is answered in accordance with the thinking processes of a normal person. The reference to "material "facts means that some mental process of selection is required. It is not enough, in my judgment, to specify "common sense" standards without identifying the reasoning involved"*

Another judge has said:

> "As the editor of McGregor on Damages (17th edition 2003) says at 6-126, this "common sense" approach does not necessarily assist with an analysis of the authorities. This is essentially because there are so many difficult and different factual permutations which the authorities deal with. Ultimately all judges should apply common sense in the application of the law to the facts but one must be cautious about applying subjective common sense. In applying common sense one must apply basic objective logic as a part of the exercise." (**AXA Insurance PLC v Cunningham Lindsey United Kingdom** [2007] EWHC 3023 (TCC))

Mr. Batts submitted with respect to the question of vicarious liability impliedly raised by the Ancillary defendant in discussing the conduct of David Archer and a failure to get a stop order quickly, that it should be remembered that Mr. Archer had tried to convince the Claimant to come down from the roof where he perceived that there was a danger. He said that having left the site upon his failure so to convince the claimant, he was intent upon seeking a stop order to prevent the construction going ahead because of the danger he apprehended. The option which had been suggested in the cross-examination of Mr. Archer by counsel for the Claimant, was that he could have used the appropriate JPS processes to have switched off the power to the entire area. Based upon what the witness Archer had said however, this would have inconvenienced a substantial number of customers. Mr. Batts questioned whether it would be justifiable to inconvenience a whole neighbourhood because one person chose to disobey what were palpably reasonable instructions to avoid putting himself at risk. In any event, as noted by counsel, Mr. Archer's actions or omissions are not the subject of these proceedings. There are no issues here of liability with respect to two employees who have voluntarily undertaken a risk as happened in **Imperial Chemical Industries Ltd v Shatwell, [1963] AC 656**

In further support of the principles of law on which he had submitted above, Mr. Batts also cited the following authorities:

In **Rushton v Turner Brothers Asbestos Co. Ltd. 1960 1 WLR page 96**, the court held that notwithstanding that the defendants were in breach of section 14 (1) of the Factories Acts, since the plaintiff's deliberate act of folly was the operative and effective cause of

his injury, the defendants were not liable therefore. In **Wright v Lodge 1993 4 All ER page 299**, it was held that although a driver, the Respondent, had been negligent in not removing her stalled car from the carriageway to the verge, the sole cause of the lorry ending up on the opposite carriageway and the driver's consequent death and injuries was the appellant's reckless driving which was the only relevant legal cause of that event. In **Stapley v Gypsum Mines Ltd. 1953 AC 663**, the negligence of one of two equal mining workers, which was partly responsible for the death of the other was imputed to the employer, so that the employer was liable, although the deceased was partly responsible for his own demise.

In summary, Mr. Batts submitted that that as Lord Asquith in **Stapley,** had stated, the claimant's conduct, "crossed the legal Rubicon" and was the sole cause of his injury. He submitted that this was not a case as in the **Stapley** or **Imperial Chemicals** cases where there was a co-employee who shared responsibility for the act of negligence. The Claimant, Mr. Bennett in this case stands alone and as a matter of law, he was the sole author of his own misfortune.

In the event the court did agree with his submissions on the issue of liability and that the 1st defendant should not be held liable for the injury and loss of the Claimant Mr. Batts further submitted that the 1st defendant should be entitled to be indemnified and be given contribution to any damages that it may be required to pay. It was the core of his submission, in this regard, that the unapproved and therefore illegal extension of the building at 23 Sherlock Crescent was the proximate cause which brought the claimant within what seems to have been, the electrical field of the 24,000 kv un-insulated wires. If that submission were accepted, it must give rise to a right of indemnification or contribution by the ancillary defendant. Further, and in any event, there was an easement endorsed upon the title giving rise to a way leave over the Ancillary defendant's property. The extension constituted a breach of that easement and for that reason, the 1st defendant, if found liable, should be indemnified or at least, secure contribution.

The Ancillary Defendant

Mrs. Samuels-Brown, counsel for the Ancillary Defendant, adopted the submissions of the 1st defendant with respect to the issue of the claimant being the author of his own misfortune. She was of the view that there had been sufficient evidence adduced to confirm that the claimant had had adequate notice and had voluntarily assumed the risk of the injuries which he eventually suffered. Counsel summed up the position thusly:

> In summary we submit that the Claimant could not but be aware that a dangerous situation had arisen from April 27, 1995 the day before the accident. The accident on April 27 was a most eloquent and forceful warning of danger. The Claimant ought, by this very fact to have been put on his enquiry. Then there is the evidence which we ask the court to accept that Donald Card specifically warned him and indeed instructed him not to go back on the building.

If however, the court did find for the claimant, it was the submission of counsel that, the Ancillary defendant should not be asked to make any contribution. Her basic premise was that, even if he were the owner of the property of which there is evidence, he was not an occupier. Further, in her submission, the evidence suggested that the claimant was an employee of the 2nd defendant who was no longer a party, and the 2nd defendant was an independent contractor. There was accordingly, no duty of care owed by Mr. Clarence Bailey to the employee of his independent contractor. It was also suggested that in any event, there was no evidence that Bailey dictated or controlled the methodology or the execution of the extension, further evidence that Card was an independent contractor.

It was further submitted that by its inaction "in the face of the long standing and numerous extensions they (that is the 1st defendant) lulled those responsible for the works at 23 Sherlock Crescent into believing it was safe to proceed as they did. In these circumstances the First Defendant could not properly claim indemnity or contribution from the Ancillary Defendant.

It should be noted that as ingenious as this submission may sound, there is no evidence of "long standing numerous extensions" on Sherlock. No one gave any evidence as to how

many houses were on that street, or how many of that number had been extended, or in what manner or over what period. Were the dimensions all the same as that being done on number 23? The question also arises whether, if an initial house on another street within the community was being altered in the same circumstances as obtained here, and there was a similar incident, would the duty also extend to the proprietor of that property? How wide would the duty be? Would it extend to all properties where the building was initially compliant with the JS 21 or JPS standards? Would such a duty be enforceable Island wide? It was also submitted that the 1st defendant had become aware of the danger by the 27th April, 1995 and could have acted to avoid further risk. However, it is not at all clear from the evidence of David Archer that he did in fact learn of the initial accident on the 27th April.

She was also critical of the fact that Mr. Archer had not used more rapid means of communication to convey the urgency of the situation he had noticed on April 28, when he said he visited the property. She suggested that he could have telephoned. It should, however, be remembered that 1995, was before the coming into force of the Telecommunications Act and the liberalizing of the sector, and well before the mobile telephone had reached the level of ubiquity that it has at present.

Counsel cited the case of **Jamaica Public Service Company Ltd. v Winston Barr et al [1988] 25 JLR 326** as being authority for the proposition that where the independent negligence of the 1st defendant has been established, it was not entitled to a contractual indemnity. There, the Claimant a workman on a construction project had been injured when he came into contact with electricity supplied by the Jamaica Public Service Co. Ltd (hereinafter JPS). He sued JPS and JPS succeeded in joining in the action, the registered owners of the land as third parties. The court held that (a) the third parties had not been in possession of the property and (b) were not employers of the Claimant and so were not liable in tort. The court also held that the JPS knew of the work to be undertaken and was therefore put on enquiry or ought to have taken the appropriate precautionary steps. In failing to do so it was guilty of independent negligence and liable to the Plaintiff. She also submitted that the "independent negligence" of the 1st defendant

would make irrelevant, the breach of the way leave agreement by the Ancillary defendant. It was also submitted that in any event, Mr. Bailey was not an occupier as the house was vacant at the time of the incident.

This characterization ignores the broad definition of "occupier" which is apparent from many cases including **Fisher v C.H.T. Ltd. and Ors [1966] 2 QBD 475.** If it were necessary, I would be prepared to hold that the Ancillary defendant was an occupier for the purposes of an action for Occupier's liability. See the judgment of Clarke J. in the unreported case of **C.L. F 202 of 1993, Fisher, Administrator General of Jamaica v Winston Atkinson, Stephenson, Stone, H. Wisdom (General Contractors) Ltd. and The Jamaica Public Service Company Ltd; (Consolidated with) C.L. R 249 of 1993 Robinson and Atkinson v Stephenson, Stone, H. Wisdom (General Contractors) Ltd. and The Jamaica Public Service Company Ltd.** I would also be prepared to hold that the instant case is distinguishable from the **Winston Barr** case on its facts. The Ancillary defendant here would, in my view be an occupier, and there was no evidence of a similar notice to the 1st defendant as was available in the Barr case.

I should note with approval the dicta in Clarke J's judgment in the case cited above, that he accepted evidence that in the industry, it is the owner/occupier of the construction site that is responsible for ensuring that wires with electricity are de-energized during the currency of the work. That person, in this scenario, would have been the Ancillary defendant and/or the 2nd defendant.

Having outlined the main submissions for the other parties of the dramatis personae, I consider below the submissions by the claimant and, since it is the claimant which is to prove his case on a balance of probabilities, I shall comment upon the submissions and then, finally, consider whether the claimant has established his case.

Submissions by Counsel for the Claimant

Mr. Campbell, for the claimant, starts his submissions with the startling proposition:

> "Undergirding this claim is the Rule in **Rylands v Fletcher**: The House of Lords in that case said:
>
> > Whosoever brings on his land for his own use anything that injures someone or is likely to injure someone must keep it at his peril and if he fails to do so he must suffer the consequence and this is whether that thing be animal, filth or electricity"

I take that to mean that the foundation upon which the claimant builds the superstructure of his case, is that famous decision. There is all the difference between actions in negligence and actions in nuisance, of which **Rylands v Fletcher [1868] UKHL 1** is properly considered a part. I shall advert to a few propositions of the claimant's submissions to suggest that there are some profound misconceptions which bedevil this suit. Thus for example, in referring to the purported visit by the witness Archer to the premises, counsel states:

> "At the time Archer went there the Claimant was imperiled on the roof, warning him then was of no avail. The witness has not shown that if the claimant had immediately obeyed his direction that the claimant would have avoided injury. There was only one path he said under cross examination by which the claimant could have escaped. He did not advise the claimant to take that path".

But unless there is a duty so to do, and it is not pleaded, how has the burden of proving that he did point out a way of escape, shifted to the 1st defendant? Archer, is not sued but is a mere witness and there is no averment nor any amendment to any pleadings to say that he was the servant or agent of the 1st defendant, and so able to bind the 1st defendant vicariously, at the time when he purported to warn the claimant of his danger. In any event, the case of negligence is not about failing to advise the Claimant how to get out of a danger in which he had placed himself. It is about the placement of poles and wires.

Claimant's attorney then tackles, what he refers to as the implements he refers to as "switch sticks". He wonders why the witness Archer did not take such implements with him when he allegedly visited the property on the 28th of April, 1995. There is, however, no evidence from the claimant which is credible that Archer had access to switch sticks and that he could have taken them with him, or that it was reasonably foreseeable that it would have been needed. The evidence of Parker, with respect to the use of such "switch

sticks" is, in my view, not to be relied upon. With respect to this "switch sticks" issue, I would only note that it is still the law that **Donoghue v Stevenson [1932] AC 562** defines the existence of a duty, and that it is to be defined in terms of whether the act or omission being called into question, has arisen in circumstances in which there is a duty, that is where damage is reasonably foreseeable from the commission of the act or the omission in question. I should note en passant, that that position is not changed by a case to which I shall now refer. ***Caparo Industries plc v Dickman [1990] 2 AC 605*** is now widely regarded as the leading case on the test for the duty of care in negligence in the English law of tort, seeking to refine the principles adumbrated in Donoghue. There, the House of Lords established what is known as the "three-fold test", which is that for one party to owe a duty of care to another, the following must be established:

- harm must be a "reasonably foreseeable" result of the defendant's conduct
- a relationship of "proximity" between the defendant and the claimant
- it must be "fair, just and reasonable" to impose liability.

Claimant's counsel also asserts that the claimant knew nothing about any danger on the 28th April which is why he had gone back to work on that day. Yet the claimant himself says that he was "upset about the electrician being electrocuted" and this must have been on the 27th April. The claimant also re-states the proposition that even Card's house had an extension and several houses went out even further than Card's. Notwithstanding this assertion, there was no evidence led of any measurements taken or even estimated measurements, of any premises other than the Ancillary defendant's. But more importantly, the question arises whether the existence of other extensions provides a sword on which the claimant may hang his action. (See my comparison below with persons illegally attaching to the JPS Grid without paying for supplies)

Much of the claimant's submissions, focus on a rehearsing of the evidence which I have set out above. (Indeed, I do not recall, apart from submissions on **Rylands v Fletcher** which was the subject of supplementary submissions by the Claimant, but which I have already opined is not applicable, any authority cited apart from those in relation to damages). In that context, counsel invites the court to draw inferences favourable to the claimant. It is instructive that the only suggestion as to the probable cause of the

claimant's injury was from the witness Parker and it was a mere expression of opinion as to a possible explanation. I have already indicated my view as to how this witness is to be treated. It is difficult to see how the opinion evidence of Mr. Parker can be given any weight where there is little before the court that shows that he is qualified to give such opinions.

Court's Reasoning

There is, with respect, a dearth of legal propositions to ground the elements of negligence; namely, the existence of a duty, the breach thereof and damages flowing therefrom, which are reasonably foreseeable. I believe that it is instructive to look again at the particulars of negligence and particulars of breach of statutory duty, averred by the claimant and, for ease of reference, I set these out again below.

Particulars of Negligence of first Defendant, its servant and/or agent

a) Running the electrical cables and wires at distances from the premises (house) that was dangerous to humans including the Plaintiff.

b) allowing electrical cables and wires carrying electricity to remain installed in a position that was dangerous to humans including the Plaintiff.

c) Failing to examine and or to examine enough and or carefully enough electrical cables and wires that carried electrical currents that were:
    a) by the nature of the cables.
    b) by the location of the cables,
dangerous to living entities including the Plaintiff.

d) Failure to observe and or to remove and or relocate electric cables and wires transferring electricity that were dangerous to living entities including the Plaintiff.

e) Failure to warn persons coming within the electrical field created by the electrical cables and electricity running through them of the danger of entering the electrical field including the Plaintiff.

f) Failing to have any or any sufficient regard for the safety of persons entering the electrical field created by the 1st defendant, its servant and or agent including the Plaintiff.

g) Failure to keep and or maintain the electrical cables and wires installed in such good satisfactory condition that they would not create a danger to persons within the environs of those cables and wires and in the electrical field including the Plaintiff.

h) Failing to anticipating and to act as if anticipated that persons including the Plaintiff would enter the electrical field created by the electrical cables installed and supplied with electricity and or through which electricity was supplied.

i) Res Ipsa Loquitur.

PARTICULARS OF STATUTORY BREACH

a) Failure to keep the electrical field within a safe distance from the building at No. 23 Sherlock Crescent in the Parish of Saint Andrew.
b) Failure to put any or any sufficient warning signs of the presence of an electrically charged field.
c) Failure to use and maintain such electrical cables and wires as were safe with the context of their use and services.
d) Res Ipsa Loquitur.

On or about the 28th day of April 1995 the Second Defendant's negligence caused the Plaintiff to go on premises to work to work at No. 23 Sherlock Crescent in the parish of Saint Andrew where he knew or ought to have known that it was dangerous to work thereby causing the Plaintiff to sustain bodily injuries and to suffer pain, damage and loss and to be put to expense.

I merely note in passing that the closing paragraph above blames the 2nd defendant's negligence as being the cause of the Claimant going to work on the building on April 28, "where he knew or ought to have known that it was dangerous to work, thereby causing the plaintiff to suffer pain damage and loss and to be put to expense". I understand from the above averments in the particulars of negligence, that the 1st defendant owed a duty of care in its transmission and distribution of a dangerous commodity, electricity; and that since the claimant was injured by electricity, whether from direct contact or from being caught in an electrical field is not clearly asserted, ergo, it failed in that duty. But the closing paragraph then seems to shift the duty, negligence and breach to the second defendant, albeit after setting out particulars of breach of statutory duty. I should mention here as well, that there is no claim against the 2nd defendant that he provided an unsafe place of work for the claimant.

The response of the 1st defendant to the assertion of duty and breach, is to lead evidence that under the terms of its licence it provided electricity and it did so subject to standards which are set by the Jamaican Government through the Jamaican Bureau of Standards and the even higher standards which were in use internally and which are based upon internationally accepted standards. It seems to me that this now raises an evidential issue to which the claimant must respond, not with, "Well, I got electrocuted anyway, so the

duty is breached", but rather with some evidence to show why the standards would be inadequate, absent the construction which brought the building lower than the minimum tolerances as set out in those standards. Regrettably, the claimant does not respond to this but says, as is his right, "Res ipsa loquitor".

But consider a hypothetical situation. There is an area of the country that is notorious for the number of persons stealing electricity by throwing up wires onto the un-insulated JPS wires. The JPS is aware of this but has not been able to prevent this despite its best efforts which are generally limited to warning residents of the danger of the practice. An individual in so doing is electrocuted and severely injured or is killed. He (or his estate) sues the 1st defendant. Is the conclusion to be drawn from this fact pattern that the JPS is to be held liable because it knew that this was the practice in that particular area of the country but did not do enough to stop the practice? And, in the event that there are several illegal building extensions in Sherlock Crescent, does that, ipso facto, raise the level of the 1st defendant's duty in relation to a worker on an extension to a property, which extension is not within its knowledge? (See **Winston Barr**) In any event, I am unsure how res ipsa loquitur is of assistance here to the claimant without more.

It will be recalled that the second leg of the claim is for breach of statutory duty. There is not a single mention of any statute in claimant's counsel's closing submissions. What is the court to make of this? What statute, imposing what duty, has been breached? Here again, in the particulars of breach of statutory duty, the claimant asserts, "res ipsa loquitur". Ought the court to assume that it must be the Electric Lighting Act, and if so which particular duties are at issue? It is not clear to me how res ipsa applies to an undefined breach of duty in an unidentified section of an un-named statute. Is it the Occupier's Liability Act?

The remainder of the submissions from the claimant's attorney is related to damages, but before I need to deal with that, I must determine whether there is any liability that attaches.

The positions for each defendant are considered separately.

Jamaica Public Service (JPS) the 1st Defendant

There were no pleadings, nor could there have been, that the JPS erected the power lines that were to close too the original building situated at 23 Sherlock Crescent in the Parish of Saint Andrew. The court can take judicial notice of the fact that in developments of housing schemes in Jamaica, the developer is obliged to put in the relevant infrastructure such as roads, water, electricity distribution, before the homes are allowed to be constructed. I accept the evidence that the power lines in the proximity of the original building ran by way of posts fitted with 8 foot wide cross bars. Further there was no evidence to suggest that the power lines were, on the 28th April 1995, below the minimum standard clearance vertically between roofs or building and electric lines/ conductors which are to be at least 2.5 meters or 8.2 feet. The minimum clearance horizontally between buildings/ balconies and insulated electric lines/ conductors is to be at least 1.25 meters or 4.1 feet. No evidence was led that there were any breaches of those standards. This must therefore place a greater burden upon the claimant to show why they were inadequate, and the fact that he did get injured is not, *per se*, evidence of that fact. Such evidence would be that the poles and the lines were installed contrary to the **Jamaica Standard Specification for Electrical Installations known as JS 21** or that the lines were of the wrong height or were sagging, but there was no such evidence.

Section 5 of the Electric Lighting Act does impose a duty to exercise due and reasonable care on the public utility company to secure the public from personal injury. See the aforementioned **Jamaica Public Service Company Limited v Winston Barr and Others** (unreported) Supreme Court Civil Appeal Nos. 45 and 48/85 at page 41 per Downer J.A.

The evidence that is not contradicted is that the extension of the building had brought it within distances that were less than the tolerances mandated in the appropriate standards and perhaps a distance of less than 5 feet both horizontal and vertical of the building. I accept that in addition, there may well have been construction steel protruding vertically

out of concrete blocks as is often the case when an upper floor is being put on and while only the floor of that upper story has been cast. Such was the position of the extension on April 28, 1995, according to the evidence of the Claimant. He said he did casting on that morning. If this was the case, as steel is a conductor of electricity, there was the imminent danger of an electrical accident.

Although the claimant has framed his case in negligence, he has asserted that **Rylands v Fletcher**, which really is about nuisance, is that which undergirds his case. The citation by counsel above speaks of the tortfeasor bringing something dangerous on to "his land", the escape from which gives rise to damage. It is not clear to me how that doctrine applies to the instant case where the land over which the lines were run was the Ancillary defendant's.

I have in some preceding paragraphs dealt with the concept of causation. Having set out the approach to that principle, it is not clear to me what the common sense application of that theory of causation the claimant is advancing here. Nor am I satisfied that the claimant has demonstrated the precise breach which it is alleged caused the injury. If one looks at the particulars of negligence pleaded above, it all relates to the positioning of the wires and the posts. The court is asked to infer that since the posts were moved at some time after the accident that is an implied admission of liability by the 1st defendant. I think not. While there are cases where subsequent behaviour may go towards establishing the commission of a tort, it is equally clear that that subsequent behaviour must show a clear connection with the tort. It is, in my view, something of which the court may take judicial notice, that there have been in recent years in Jamaica, a large scale replacement of electricity poles throughout the Island.

In so far as the necessary element of causation is concerned, I am prepared to hold that the claimant has failed to establish causation, a necessary ingredient of success. It is my opinion that the proximate cause of the accident lay in the faulty system of work employed by the Claimant while in close proximate to power lines as well as in the failure to request JPS to de-energize the power lines. It may be sufficient to dispose of

this matter by holding that the 1st defendant has shown that the loss and damage was caused by "the conscious act of another's volition" (**see Dominion National Gas Company v Collins [1908-10] Al ER. Rep. 61 and 65** per Lord Dunedin).

There is no evidence that JPS knew of the particular construction and were requested to de-energize or re-locate the power lines as in **Winston Barr**. While it was suggested that the 1st defendant ought to be aware of the said construction because of the hazard patrols along public streets, it is to be observed that the contention that JPS ought to be aware of the construction prior to the accident cannot be sustained. I accept the evidence of David Archer for the 1st defendant that when it was brought to his attention, he took steps to convince the Claimant to stop working and leave the site but he kept on working and said that he knew what he was doing. The evidence led by the claimant regrettably falls short of establishing, on a balance of probabilities, that the 1st defendant had breached its duty to exercise due and reasonable care to secure the Claimant as a member of the public from personal injury when this enormously tragic accident occurred on the work site.

Donald Card (2nd Defendant)

The claim against the 2nd defendant was withdrawn on the 24th day of February 2004 by the Claimant. His position is now academic, except that his testimony is relevant and valuable.

Clarence Bailey (Ancillary Defendant)

The claim against the Ancillary Defendant is made by the 1st defendant JPS for contribution and/or an indemnity in relation to any damages which may be awarded against them arising out of the incident which occurred on the 28th day of April 1995 at 23 Sherlock Crescent, Duhaney Park, Kingston 20 in the Parish of Saint Andrew owned and/or occupied by the Ancillary Defendant.

It is based on the Occupiers Liability Act (OLA), the general law of negligence and section 7 of the Bureau of Standards Act under which The Standards (Declaration of Standard Specification) (Electrical Installations) Notice 1991 was, on the evidence I accept, breached by the erection of a building too close to the 1st defendant's primary distribution lines. The OLA provides that the occupiers of a work site owed visitors the common duty of care "in respect of damages due to the state of the premises or to things done or omitted to be done on them". If the ancillary defendant was an "occupier" this would seem to impose upon him the duties contemplated by the OLA.

The test of who is an occupier of a premises is whether a person has a sufficient degree of control with, and arising from his presence in, or use of, or activity, the premises to ensure their safety and to appreciate that a failure on his part to use care may result in injury to a person lawfully coming on to them: see **Wheat v E. Lacon & Co Ltd [1966] A.C. 552** at pg.577-579 per Lord Denning.

Two or more persons may be occupiers of the same premises, each under a duty to use such care as is reasonable in relation to his degree of control: (See **Halsbury's Laws of England, Fourth Ed. Vol. 33 paragraph 630.** See also **Fisher v C.H.T Ltd. And Others** [1966] 2Q.B.475 also **AMF International Ltd v Magnet Banking Ltd [1968] 2 All E.R. 789**

It would be ordinarily reasonable to expect an occupier of premises having engaged a contractor whom he has reasonable grounds for regarding as competent to supervise the contactors activity to ensure that that he would discharge his duty to observe a safe system of work. Further in special circumstances where the occupier knew or ought to have known that an unsafe system of work was being used it might be reasonable for the occupier to have taken steps to see that the system was made safe. See **Ferguson v Walsh [1987] All E.R. 777** at 783 per Lord Keith.

The Ancillary Defendant was at the 28th day of April 1995 the owner of 23 Sherlock Crescent, Duhaney Park, Kingston 20 in the Parish of Saint Andrew. The owner,

although counsel decided not to call him, had by way of his witness statement which was before the court said that he had employed the 2nd defendant as an independent contractor and that the 2nd defendant was an occupier of the said premises. This was corroborated by the 2nd defendant. As an Occupier, *as well as an independent contractor*, the 2nd defendant "employed" the Claimant as an independent contractor. There is authority for the proposition that where an independent contractor is dealing with a situation which is inherently dangerous, he cannot delegate his duty of care and he has a duty "to take care". (See the judgment of the late Clarke J, in **Fisher and Anor v Atkinson and Others CL F202 of 1993 and Robinson and Anor v Stephenson and Ors CL R 249 0f 1993** to which reference is made below.) In this regard, it seems to me that if the 1st defendant were liable, the second defendant, who in the submission of counsel for the Ancillary defendant was an independent contractor, would be liable to share in contributing to the damages of the Claimant, both also being occupiers. Were it my finding that the 1st defendant was liable to the claimant, I would also have been prepared to hold that the Ancillary defendant would not so easily avoid his obligation under the way leave agreement, and would himself have been liable for a major contribution towards the considerable damages that would flow.

I am extremely indebted to and greatly strengthened in my views set out in the last preceding paragraph above by the judgment of the late Neville Clarke J. in the consolidated action **C.L. F 202 of 1993, Fisher, Administrator General of Jamaica v Winston Atkinson, Stephenson, Stone, H. Wisdom (General Contractors) Ltd. and The Jamaica Public Service Company Ltd; (Consolidated with) C.L. R 249 of 1993 Robinson and Atkinson v Stephenson, Stone, H. Wisdom (General Contractors) Ltd. and The Jamaica Public Service Company Ltd.** I adopt the well reasoned argument set out therein, and because I can hardly improve upon the erstwhile judge's impeccable reasoning, I set these out, *in extensu* below, sections of that judgment.

In that case, St. George's College was the owner of the building which was being worked on. Wisdom, the 4th defendants were independent contractors who employed Burke (a steel worker) also an independent contractor and Burke employed in turn, Robinson who

was also an independent contractor who was also a steel worker who assisted Burke on his various jobs. Burke was passing 30 foot long steel bars to Robinson in close proximity to un-sheathed JPS high tension wires when the bars came into contact with the wires Burke was electrocuted and Robinson severely injured in the electrical accident. Despite the plea by a well-known St. George's College alum and attorney at law for the College, that they should not be held liable under the Occupiers Liability Act because of the mitigating provisions of Section 3(6) of the Act, nor for negligence, Clarke J. found against the school.

> The responsibility of St. Georges's College for seeing to the de-energising of the power lines was in any event, as Mr. Henry submitted, non-delegable because the steel work on all accounts was extra hazardous involving, as it did, performance in close proximity to energized power lines. The general principle governing "extra-hazardous and dangerous" operations was long ago authoritatively enunciated thus:
>
> > "Even of those it may be predicated that, if carefully and skillfully performed, no harm will follow; as instances of such operations may be given removing support from adjoining houses, doing dangerous work on the highway, or creating fire or explosion: hence it may be said, in one sense, that such operations are not necessarily attended with risk. But the rule of liability for independent contractors' acts attaches to those operations, because they are inherently dangerous, and hence are done at the principal employer's peril": **Honeywill and Stein Ltd. v Larkin Bros. Ltd. [1934] 1 K.B. 191** at 200, per Slesser L.J.
>
> And it is to be observed that the non-delegable duty is "a duty not merely to take care, but to provide that care is taken", so that if care is not taken, as is the case of the independent contractors in the case before me, the duty is broken: see the case of **Ballater [1942] P.112 at 117**.

The main contractors (the fourth defendants)

At the trial fourth defendants (Wisdom) were absent and were unrepresented. They, as well as St. George's College were, as I have already found, occupiers of the work site. So the common duty of care was owed to the visitors, Burke and Robinson, not only by St. George's College but by the fourth defendants as well. Their work of construction brought the north western section of the addition to the Butler Building close to the power line. As the main contractors on the site they had a duty to take special precautions for the safety of personnel on the site,

particularly having regard to the proximity of the work to the energized power line. Yet in point of fact they warned neither Burke nor Robinson of the danger posed by the closeness of the energized power lines and provided no safety equipment. As contract with theses power lines was reasonable foreseeable, their failure to take reasonable steps to prevent this occurring is, in my judgment, a breach of their duty of care. They as joint tortfeasors with St. George's College must share in the liability for the injury to Robinson and the electrocution of Burke who, as I will show, was partly responsible for the accident.

Jamaica Public Service Company Limited (the fifth defendants)

The plaintiff alleges that the defendants, the public utility company must also share in the liability for the accident and the consequential damage. They plead the following particulars of negligence:

> (a) causing or permitting its strands of electrically charged wires to run over and across the said building when it knew or ought to have known that the said wires could come into contact with members of the public.
>
> (b) causing or permitting the said strands of electrically charged wires to run over and across the said building so that they could easily and inadvertently come in contact with the plaintiff who the said Defendant, their servants and/or agents knew or ought to have known was working on the said building at all material times.
>
> (c) Failing and/or neglecting to take any or any adequate steps to prevent the strands of high tension electrically charged wires from being or becoming a danger to the deceased or anyone who was working on the building at all material times.
>
> (d) the plaintiff(s) will further rely upon the doctrine of res ipsa loquitur."

They plead the following particulars of breach of statutory duty:

> "(a) Failing and/or neglecting to serve the safety of the public from personal injury contrary to Section 5 of the Electric Lighting Act.
>
> (b) Failing and/or neglecting to lay, place or carry over such supply lines posts and apparatus as are necessary or convenient for the safe and efficient supply of electricity contrary to Section 36 of the Electric Lighting Act.

(c) Failing to de-energise or insulate the said electricity lines when it knew or ought to have known that construction work was being carried on the vicinity of the said line.

(d) Failing to ensure that the clearance above ground at any point in the span of the electric wires near to and/or in the vicinity of the building was not less than twenty (20) feet contrary to the Electric Lightning (Extra High Pressure conductors) Regulations 1928.

These particulars were denied by the fifth defendants.

In my judgment there is no evidence to support any of these allegations. It is true that the tragedy happened when a steel rod which Burke and Robinson were handling came into contact with live electric wires placed by the fifth defendants. And while (sic) Section 5 of the Electric Lighting Act imposes a duty on the public utility company to secure the public from personal injury, the duty to exercise due and reasonable care: see **Jamaica Public Service Company Limited v Winston Barr and Others (unreported) Supreme Court Civil Appeal Nos. 45 and 48/85 at page 41 per Downer J.A.** *There is no evidence to suggest that the power lines were below 20 feet from above the ground contrary to the Electric Lightning (Extra High Pressure Conductors) Regulations 1928. While there is no doubt that the power lines ran by way of posts fitted with 5 foot cross bars there is no evidence to suggest that the lines were of the wrong height or were sagging, in breach of the Regulations. There is no pleading that the fifth defendants erected the power lines too close to the original building and there is no evidence to suggest this. Indeed, I accept the evidence of the architect, Mr. Kirkwood, who visited the site many times, before during and after construction, that the power lines were about 30 feet away from the closest point on the original building. So, contrary to the plaintiffs' pleading, not only did the power lines not run over or across the building as indicated in evidence by Robinson himself, but as Ms. Mangatal has pointed out, it is clear on the evidence that it was the expansion that brought the north western part of the building, i.e. on the top of the "T" closest to the public utility company's power lines, within at the most 10 to 12 feet.* (My Emphasis)

In my judgment, the proximate cause of the accident lay in the faulty system of work employed by the main contractors and also by the deceased sub-contractor Burke, which included the manual lifting of and passing of 30 feet steel bars in close proximity to power lines as well as in the failure to request the fifth defendants to de-energise same. So it is plain that the fifth defendants have shown that the loss and damage was caused by "the conscious act of another's volition": see **Dominion National Gas company v Collins [1908-10] All E.R. Rep. 61 and 65 per Lord Dunedin**.

> Furthermore there is no evidence that they knew of the construction; and in point of fact, they were not requested to de-energise or relocate the said lines. **Barr's** case (supra) is, therefore, clearly distinguishable. There, the utility company not only knew of the construction and request to de-energise, but they had that knowledge one year prior to the injury to Barr. And it is not to be forgotten that in the case before me, although the building contract was entered into between St. George's College and the fourth defendants in June 1992, construction work had only been taking place for about 3 months before the accident.

I note in particular the three succeeding paragraphs which, if the names were changed, would be equally applicable to the submissions made in the instant matter.

> Nevertheless, Mr. Henry submitted that the fifth defendants ought to have been aware of the said construction work. The construction had been going on for over three months. It was of some significance in terms of size and the location of the construction site should be noted. There was a failure to know of the work carried out in close proximity to their power lines and such failure was not consistent with due care on their part in respect of the interest of members of the public to be affected.
>
> It is to be observed, however, that the construction work was being carried out on the compound of St. George's College away from the main road or its vicinity, there being no evidence that the construction work being carried out was public and conspicuous. There would, therefore, be no basis for saying that the fifth defendants were put on an enquiry. True, they made hazard patrols along the public streets to detect faults in the functioning of their system. Yet they were not in my opinion, obliged (in the absence of actual knowledge of the construction or any request to de-energise) to enter private premises to see or examine the state of activity in relation to their power line installed on the premises. The contention that they ought to have been aware of the construction prior to the accident cannot, therefore, be sustained.
>
> So, in the result, their duty to exercise due and reasonable care to secure Burke and Robinson as members of the public from personal injury was not broken when the tragic accident occurred on the work site. There is therefore, no liability on their part for the loss and damage arising from the accident.

I hold that this reasoning is dispositive of the case and I award judgment for the 1st defendant against the claimant. For completeness, I set out herewith the answers to the issues posed above at pages 4-5 of this judgment, in light of my findings.

Issue (a): The suit having been discontinued against the 2nd defendant, I hold that the 1st defendant is not liable to the claimant either in negligence or for breach of statutory duty.
Issue (b): The claimant voluntarily undertook the risk of injury and loss despite his being aware of the unsafe circumstances caused by the extension of the building bringing him within the risk of danger.
Issue (c): See (b) above.
Issue (d): The claimant was properly a visitor within the meaning of that term in the Occupier's Liability Act.
Issue (e): In light of my holding in relation to the 1st defendant on liability, I make no finding of liability against the ancillary defendant though I have elsewhere opined as to what my view would have been had I found the 1st defendant liable.

There are of course issues of costs as between the 1st defendant and the Ancillary defendant and indeed these may also involve the claimant. I will invite counsel on all sides to make brief written submissions within seven days on the question of costs and I will rule at that time, whether or not I have received those submissions

ROY K. ANDERSON
PUISNE JUDGE
APRIL 24, 2009