[2012] JMSC Civ.186

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2005 HCV 2970

BETWEEN	**ANTHONY MARTIN**	**CLAIMANT**
A N D	**ERIC BUCKNOR**	**1ST DEFENDANT**
A N D	**JAMAICA PUBLIC SERVICE CO. LTD.**	**2ND DEFENDANT**

Mr. Rudolph Smellie instructed by Daley, Thwaites & Co. for the Claimant.

Mr. Garth Lyttle for the 1st Defendant.

Mr. Stuart Stimpson and Noelle Walker instructed by Hart, Muirhead and Fatta for the 2nd Defendant.

HEARD: November 26, 27 & December 20, 2012

Negligence – Foreseeability – Occupier's Liability – Breach of statutory duty – Volenti non fit injuria – Distinction between visitor and trespasser.

ANDERSON, J.

[1] This Claim has arisen out a very unfortunate occurrence, wherein the Claimant, whilst conducting the painting of a portion of the outside of a building using a paint roller the handle of which is made of metal (aluminium), suffered 'shock', which caused him serious injuries all of which need not be noted for present purposes, but in particular, the amputation of his right arm, below his elbow and severe damage to his left arm and hand, to the extent whereby he has no, 'sensation' in the palm of that hand and the fingers of that hand cannot be fully stretched out. That unfortunate incident occurred on December 23, 2003.

[2] Arising from that incident, the Claimant, in 2005, filed this Claim in which he has named as Defendants, the owner of the building – this being the same person who had engaged his services to pain portions of the same, namely, the First Defendant and the Jamaica Public Company Limited as the Second Defendant.

[3] There is dispute as between the Claimant and the First Defendant, as to whether or not the Claimant's painting services were being utilized for the First Defendant's benefit, whilst the Claimant was an employee or an independent contractor in that regard. The Claimant has contended that at the material time, he was an employee, whereas, on the other hand, the First Defendant has contended that at that time, the Claimant was an independent contractor whose services had been engaged to do painting work for the First Defendant. The resolution of this aspect of the dispute as between the Claimant and the First Defendant will, be central to resolving the Claim between those parties.

[4] As far as the Second Defendant is concerned, there is no dispute that at the material time, they would not and could not have known of the work that the Claimant was then engaged in, nor would they have been in a position to have known what tools he would have been using to conduct that work. Additionally, evidence at trial has been led by the second Defendant and uncontradicted, either by the Claimant or anyone else who testified at trial, that at the material time, there were Jamaica Public Service Company Limited low and high tension wires running in close proximity to the portion of the building which the Claimant had been working on painting, when he was electrocuted and also, there were telephone wires also in close proximity to that precise location at the material time. Furthermore, evidence was also led by the Second Defendant at trial, through its only witness called thereat, namely – Otony Williams, that none of the poles shown in the photograph which was taken of the relevant scene not long after the Claimant's injuries had occurred and which the Claimant accepted in his evidence under cross-examination, as showing how the relevant area and building looked on the day when he was electrocuted and also showing light poles located in the

immediate vicinity of the relevant building that were not leaning in any way, nor showing that there were any wires loosely hanging or in other words, dangling, from any of those light poles. That photograph, along with other photographs, were admitted into evidence at trial, as exhibits. The Claimant, in his evidence under cross-examination, also accepted, even without reference to any photograph exhibit of the relevant scene, that there were no dangling wires and no leaning poles in the area where he had been working when he was electrocuted.

[5] This Court will, having regard to the admitted facts surrounding the Claimant's Claim against the Second Defendant, firstly address that Claim.

[6] In respect thereof, the Claimant has alleged that the Second Defendant was negligent in several respects. The particulars as specified, are as follows:

(a) Running the electrical wires and/or cables at a distance from the premises that was manifestly dangerous to humans, the Claimant in particular.

(b) Allowing the electrical cables and/or wires carrying electricity to remain installed in a position that it knew or ought to have known was dangerous to human life.

(c) Failing to examine and/or to examine carefully enough the electrical cables and/or wires that carried the electrical current to ensure that they were safe for the purposes for which they were being used.

(d) Failing to observe and/or to remove and/or to relocate the said electrical wires and/or cables which were placed and/or located in a dangerous position.

(e) Failing to warn the Claimant of the danger of coming into contact with the said electrical wires and/or cables.

(f) Failing to keep and/or maintain the said electrical wires and/or cables in a good and satisfactory condition so that they would not create a danger to persons entering their environs, the Claimant in particular.'

[7] It is very clear, from the Particulars of Negligence as pleaded in relation to the Second Defendant, that there are aspects thereof which simply could not have been

proven, based on the evidence as presented in this Claim and also based on the other Particulars of Claim as are being relied on by the Claimant.

[8] Thus, for instance, the allegation that there was a failure to warn the Claimant of the danger of coming into contact with the electrical wires or cables, as being an aspect of the Second Defendant's negligence, has definitely not been proven and could not have been proven, since it is not at all the Claimant's case, that the Second Defendant knew of, or could have, or should have known that he (the Claimant) was going to have been working on the relevant building, as, when and how he did. In the absence of proof of that, the Second Defendant could not be negligent for having failed to warn the Claimant of anything whatsoever. One cannot reasonably be expected to warn someone not to do something dangerous, if one does not know that such other person is proposing to and/or about to, engage in a task that is dangerous.

[9] As far as the alleged failure of the Second Defendant to maintain the relevant electrical wires in a good and satisfactory condition, so that they would not create a danger to persons entering their environs and the Claimant in particular, no evidence whatsoever has been led by the Claimant in proof of this assertion. In fact, the evidence as given by himself and others, that there were no hanging wires or leaning poles, suggests to the contrary. Once again therefore, this is another allegation of negligence in relation to the Second Defendant, which the Claimant has wholly failed to prove.

[10] As for the allegation that the Second Defendant failed to examine and/or examine carefully enough, the electrical cables and/or wires that carried the electrical current, to ensure that they were safe for the purposes for which they were being used, once again also, the Claimant has failed to prove this assertion. No evidence whatsoever was led by the Claimant in proof thereof. It is the Claimant that had cast on his shoulders, the burden of proof in this case. He could have proven it either through the evidence as called during the presentation of his case to the Court, or through the presentation of the Defendants' evidence to the Court, or perhaps even, as sometimes

occurs, through a combination of both. The Claimant though, in the case at hand, did not through his trial Attorney, even so much as put this assertion, during cross-examination, to the only witness that was called upon to testify by the Second Defendant, that being – Mr. Otony Williams, who is a Claims investigator for the Second Defendant. There could have been no more appropriate person in this particular case, to have put that assertion to, so as to give the Second Defendant an opportunity to respond to same, in evidence. The failure by the Claimant so to have so done, is accepted by this Court as having arisen because it is no doubt recognized that such assertion is worthy of no merit whatsoever. In any event, even if it were to have been worthy of merit, the Claimant has wholly failed to prove it.

[11] The remaining Particulars of Negligence as asserted by the Claimant in relation to the Second Defendant, all essentially pertain to having the electrical wires and/or cables in a position and at a distance from the relevant premises, such that they were dangerous to humans and/or, the Claimant in particular, as also, in light thereof, the failure of the Second Defendant to remove or relocate the said wires and/or cables.

[12] In that regard, it is to be carefully noted that the Claimant, while under cross-examination by the First Defendant's counsel, admitted that he did not in fact know what the metal paint pole had come into contact with, thereby having caused him to have been 'shocked' and suffered resultant injuries. In terms thereof, he stated that his previous Attorney had written down things in his witness statement and told him that he had to sign the statement, since otherwise he would not have any case. He therefore, in that context, just signed to the statement, as his previous lawyer had told him to do. He did this he said, even though he really could not remember some of the assertions that he made in his witness statement.

[13] Further on during the trial, under re-examination, the Claimant was permitted by this Court, to give evidence as to what were the things written down in his witness statement, which he really did not recall and his answer to that was that he really did not

recall or know which wire his metal paint roller pole had come into contact with, immediately prior to his having been shocked.

[14] Also, during cross-examination by First Defendant's counsel, the Claimant stated that his back was turned, immediately before he was shocked. That is no doubt why he would not have been a position to have know which wire his metal paint roller pole came into contact with, immediately prior to his having been shocked.

[15] There was evidence given at the trial, by the Second Defendant's only witness – Mr. Otony Williams, that there were Jamaica Public Service Company Limited high tension and low tension wires and also telephone wires running the light poles, in the immediate vicinity of where the Claimant had been working at the material time. No expert evidence was led by the Claimant at trial. Thus, this Court does not know and ought not to be expected to speculate, as to whether or not, if a person were to come into contact with a telephone wire/cable with a metal pole then in one's hand, that person could thereby suffer the type of injuries which the Claimant suffered in this particular case. Evidence from an expert ought to have been led before this Court by the Claimant, in that regard.

[16] There is though, before this Court as evidence in this case, an expert report. The expert who prepared and submitted that report to this Court is Mr. Solomon Burchell, who was at the time when he did same, a government electrical inspector. That report was, by consent of all parties, as was expressed through their counsel and to this Court at trial, not called upon to give oral evidence at trial. Accordingly, his evidence was not cross-examined upon. The parties are to be commended for this approach, as it is not only one which saves time and costs, but is an approach which should, in most cases, be adopted by parties. It ought to be the exception, rather than the rule, that this Court should require oral evidence of an expert witness to be given. This is why such detailed requirements must be followed by an expert if his or her expert report is to be sought to be admitted as evidence at trial and this is also why the parties are permitted to pose written questions to the expert witness and why, in that event, the expert witness must

then answer those questions, prior to trial. Rule 32.7 of the Civil Procedure Rules (CPR) allows this Court to permit oral evidence of an expert to be given, otherwise, the expert's report shall stand as his or her evidence at trial. The allowance by this Court, of a witness to give oral evidence at trial, clearly therefore, is to be taken as being the exception, rather than the rule. See in that regard, a recent Judgment of mine on several issues pertaining to matters as regards the evidence of expert witnesses – Claim No. 2009 HCV02426 – **Rowan Mullings and Joan Allen and Louise Thompson**.

[17] This Court has carefully considered all pertinent matters arising from the expert report evidence as was given in this case and presented to this Court during and as part and parcel of the First Defendant's case. Having carefully considered the same, this Court takes the view that it is of very limited assistance to this Court, either in terms of casting doubt on the Claimant's Claim, or in terms of assisting in proving the Claimant's Claim. This is primarily because much of the contents of Mr. Burchell's report constitutes information derived from the Claimant and the First Defendant respectively, rather than solely from his own observations of both the scene and of the Claimant and of the painting pole which the Claimant was undoubtedly using when he got 'shocked.' What is usefully derived from Mr. Burchell's report though, is that,

> *'An inspection of the painting pole revealed burn marks at the point where Mr. Martin's hands were and at the point of contact of the pole with the power lines.'*

The power lines being referred to in that regard, appear to be the Jamaica Public Service Company Limited's overhead power lines. The information though, as to whose power lines the Claimant's painting pole came into contact with at the material time, appears to be a conclusion drawn by the expert based on what he was told either or both by the Claimant and the First Defendant. Furthermore, the expert did not, in his report, specify whether those Jamaica Public Service Company Limited overhead power lines were or were not , high tension power lines, or whether any difference to the outcome experienced by the Claimant, would have arisen if the Claimant's painting pole

at the time, had come into contact with low tension rather than high tension Jamaica Public Service Company Limited wires, or with telephone wires, which according to evidence presented to this court by Mr. Otony Williams, were in the immediate vicinity of the First Defendant's building at the material time. Added to his failure to explain and/or proffer an opinion on any of those important things to this Court is the disadvantage, on the particular facts of this particular case that he was not called upon to provide oral testimony to this Court and worse yet, no questions were posed to him by either party, in an effort to obtain more useful information from him, as regards maters pertinent to this Claim.

[18] What this Court is satisfied of though, from the report of the expert, is that the injuries to the Claimant were caused when his painting pole come into contact with one of the lines carrying electrical power as existed, at the material time, in the immediate vicinity of where the Claimant was then working. Information derived, through interviews with the Claimant and the First Defendant in that regard certainly could not at all have assisted the expert, nor this Court, in determining precisely which of those lines carrying electrical power, the Claimant's painting pole came into contact with, thereby having acted as a conductor and causing the Claimant to have suffered serious injuries.

[19] Any information as may have been derived from the Claimant or the First Defendant as to which of the lines carrying electrical power to the relevant premises at the material time, was the one or were the ones that the Claimant's painting pole then come into contact with, is of absolutely no evidentiary value to this Court. This is because, firstly, such evidence is not admissible in proof of anything, as it constitutes previous consistent statements from the parties to the Court dispute. See **Corke v Corke and Cook** – [1958] P 93. Even more importantly though, it cannot prove anything, because, the Claimant has made it very clear to this Court in his heavily challenged evidence which was presented to this Court by him in person, that he does not know what it was that his painting pole came into contact with just before he got shocked, as his back was then turned away and thus, he did not see that contact occur.

I am somewhat paraphrasing his evidence in that important respect, but that was indeed, the essence of his evidence thereon.

[20] Whilst therefore, there does exist evidence from the expert, to suggest and which this Court does accept, that the Claimant did, at the material time, suffer the injuries which he then received, as a consequence of electrical shock, what is uncertain in this Court's mind, is exactly whose electrical wires caused that shock. Was it a telephone company's wires that caused that shock, or was it the Jamaica Public Service Company Limited's wires that caused same? The failure to prove same is, in the circumstances, fatal to the Claimant's case.

[21] For the sake of completeness on the point of whose electrical wires the Claimant's painting pole came into contact with at the material time, thereby having caused injury to the Claimant, this Court must make it clear, firstly, that nowhere in the Claimant's Particulars of Claim, is it specifically alleged that at the material time, the Claimant's injuries were caused as a consequence of his painting pole having come into contact with one of the Second Defendant's power lines. Furthermore, even in the Claimant's first witness statement as filed in respect of this Claim, no specific allegation is made in that respect. The same is true for his further, or second witness statement. Perhaps more poignantly though, is that which is contained in the Claimant's additional, or third witness statement, wherein he stated,

> *'In preparing for this trial, it is now clear to me that I most probably got injured on the 23rd day of December, 2003 when my pole come in contact with the Jamaica Public Service Company power lines overhead, that the statements in Answers to Request for Information filed on December 18, 2006 and on August 13, 2008 that contact was made with a pigtail cluster of electrical wires at the apex of the building were probably not correct, and that the mistake came about because of the fact that, at the time of the accident, I was not totally sure as to how I got shocked, and because of the suggestions being put to me by my lawyer at the time when the said answers were being given, which served to confuse the issue and put in my mind the said erroneous idea.'*

[22] The aforementioned statement was, just as were the other two witness statements of his, accepted as the Claimant's evidence-in-chief. Under cross examination by the First Defendant's counsel, the Claimant confirmed that he did not know how he got 'shocked' and of course, it follows from this, that his assertion in the third witness statement of his, that he, 'most probably got injured when his pole came contact with the Jamaica Public Service Company power lines overhead, is clearly not an assertion, which this Court can accept, since, if the Claimant does not know he got 'shocked', then on what basis, can he expect this Court to accept his assertion that he most probably got injured when his pole came in contact with Jamaica Public Service Company Limited's overhead power lines? It seems to this Court, that such assertion was made as a consequence of the conclusions drawn by the Court appointed expert and interestingly enough, as already stated, it appears to this Court that the conclusions of the expert were derived from interviews which he conducted with the Claimant and the First Defendant respectively – neither of such persons being persons who were either, at the precise moment in time, just prior to the accident's occurrence, in a position to have seen exactly what caused the accident, nor did see what in fact caused the accident.

[23] Apart from all of that which has been set out in some detail in paragraphs 4 – 22 of this Judgment, there are other equally compelling reasons, why the Claimant's Claim as against the Second Defendant, must fail. These other reasons center around the issue of foreseeability.

[24] In the celebrated case of **Donoghue v Stevenson,** *[1932] A.C. 562, at p. 580.* Ld. Atkin stated as follows:

> *'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law, is my neighbour? The answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question.'*

As has been clearly stated by Ld. Russell of Killowen in **Bourhill v Young** [1943] 1A.C. 92, app. 101-102,

> *'In considering whether a person owes to another a duty a breach of which will render him liable to that other in damages for negligence, it is material to consider what the defendant ought to have contemplated as a reasonable man. This consideration may play a double role. It is relevant in cases of admitted negligence (where the duty and breach are admitted) to the question of remoteness of damage, that is, to the question of compensation not to culpability, but is also relevant in testing the existence of a duty as the foundation of the alleged negligence, that is, to the question of culpability not to compensation…. A man is not liable for negligence in the air. The liability only arises where there is a duty to take care and where failure in that duty has caused damage. See per Ld. McMillan in **Donoghue v Stevenson** [1932] A.C. 562, at p. 618. In my opinion, such a duty only arises towards those individuals of whom it may be reasonably anticipated that they will be affected by the alleged breach.'*

[25] Ever since the Judgment of the Hose of Lords was rendered in **Bourhill v Young** (op. cit.). the decision of England's Court of Appeal in the case – **Re Polemis and Furness, Withy and Co. Ltd.** [1921] 3 K.B. 560, where the only issue was damages and it was held by that Court that the Defendant was responsible for all the consequences of his negligent act which constituted direct consequences of that act, whether such consequence were reasonably foreseeable or not, has been standing on shaky ground. In the **Bourhill v Young** case**,** the House of Lords, earlier decision in **Re Polemis** (op. cit.) was distinguished, as distinct from being over- ruled. In the Privy Council case of **Oversees Tankship (U.K.) Ltd. and Morts Dock & Engineering Co. Ltd**. (The Wagon Mound No. 1) [1961] A.C. 388, the Privy Council expressly stated that the decision of the **House of Lords in Re: Polemis**, 'is not good law.' (See at p. 422, per Viscount Simonds – who delivered their Lordships' Judgment in that case). On the other hand, the aforementioned dicta of Ld. Russell of Killowen in **Bourhill v Young**, was expressly approved of by the Privy Council, just as was the dicta of Denning L.J. in **King v Phillips** [1953] 1 Q.B. 429, at p.441.

[26] In determining that which is reasonable, one must have regard at all times, not only to the extent of the risk, since of course, the greater the risk, will be the more foreseeable that such risk is. Some risks though, are inherent in every human and commercial activity and even robotic or mechanical activity for that matter. A reasonable person therefore, must always measure the extent of the risk against the measures necessary to eliminate that risk. Thus, where there exists a valid reason for doing so, a reasonable man can reasonably be expected to neglect a risk of small magnitude. This might arise in circumstances wherein it would involve considerable expense to eliminate the risk. See **Overseas Tankship (U.K.) Ltd. & The Miller Steamship Co. Pty. & Anor.** (The Wagon Mound No. 2) – [1966) 3 W.L.R. 498. It equally could arise in a situation whereby, to take all steps to eliminate that risk may very well result in a cessation of ordinary and typical human activity in a particular community. See: **Bolton v Stone** [1951] A.C. 850. It also could arise in a situation whereby, to altogether eliminate that very limited risk, would result in considerable difficulty and inconvenience overall, when considered in the relevant context. See: **Latimer v A.E.C. Ltd.** [1953] 1 A.C. 643.

[27] Foreseeability, as aforementioned, does not only relate to an important issue to be considered by a Court in determining whether liability exists but also in determining whether the precise type of damage or injury suffered by a Claimant, is such as would have been reasonably foreseeable in the circumstances of that particular case. It is very, clearly the law now, that in Order to determine liability in a Claim for damages for negligence, this Court would have to conclude that not only did the Defendant fail to take reasonable care to avoid injuring his 'neighbour' but also that the precise concatenation of circumstances which resulted in injury to the Defendant's neighbour, were such as to have been reasonably foreseeable. See in this regard: **Hughes v Lord Advocate** [1963] A.C. 83 (H.L.) and **Jolly v Sutton London Borough Council** [1998] 1 W.L.R 1546 (C.A.) and **Overseas Tankship (U.K.) Ltd. & The Miller Steamship Co. Pty and Anor.** (op.cit**)**.

[28] Applying all of the aforementioned dicta and caselaw as regards foreseeability to the adjudication of this Claim, it is apparent, that the Second Defendant cannot and should not, be held liable. This is because, the Second Defendant, firstly, would not have known and did not know and had no reason to have known, that the Claimant would have been working in the relevant location at the relevant time. Considered in that context, is the Second Defendant to be expected to cause severe inconvenience to an entire segment of a community by cutting off electricity supply to that community, so as to protect the Claimant, who was working, at the material time, in a dangerous manner, while in that community? This Court does not think that such action could possibly have been that which the Second Defendant ought reasonably to have been expected to have taken, particularly in circumstances wherein they would not have known of, and did not know of any risk of any injury from electric shock, as regards the Claimant in this Claim, before this Court.

[29] If electrical wires were hanging down or poles were leaning due to neglect of the Second Defendant, then the situation could very well have been materially different, insofar as the suggested liability of the Second Defendant is concerned. There is in this Claim however, no evidence whatsoever of such.

[30] In this Judgment, this Court has earlier stated that there exists no evidence that it was contact with electrical wires which the Second Defendant has responsibility for, that resulted in the Claimant's injuries. (See paragraphs 14 - 22 of this Judgment in that regard). There also exists no sufficient evidence on this whatsoever, from which it could be inferred by this Court, that the Claimant has proven, on a balance of probabilities, that the electrical cables/wires carrying electricity to the premises of the First Defendant, were installed in a position that was dangerous to human life. This is not something which this Court ought to be expected to presume. To the contrary, it was an aspect of the Claimant's Claim which ought to have been proven. The Claimant has fallen woefully short of proving same. Equally too, the Claimant has not led any evidence whatsoever, in support of his assertion as per one of his Particulars of Negligence, that the Second Defendant, failed to examine or examine carefully enough, the electrical

cables and/or wires that carried the electrical current, to ensure that they were safe for the purposes for which they were being used.

[31] It must be remembered also, though, that in terms of foreseeability, the precise concatenation of circumstances which resulted in the injury of the Claimant in this Claim, would have had to have been one which was reasonably foreseeable to the Second Defendant in order for the Second Defendant to be held liable, if this Claimant were also to determine, that the Second Defendant had failed to take reasonable steps or measures to avoid the occurrence of that result. It is thus, not only the foreseeability of injury to the Claimant which must be proven, if the Claimant is to succeed in proving his Claim in negligence as against the Second Defendant, but also, foreseeability of injury having occurred in the precise manner in which it did occur to the Claimant in this Claim. In this Court's view, the Claimant has failed to prove both of these aspects of foreseeability, in the particular circumstances of this particular case. To this Claimant's mind, the risk of injury having occurred, in the unfortunate manner in which it undoubtedly did, to the Claimant herein, was negligible, if existent at all. When that is balanced against the measures that would have had to have been taken, if that risk were to have been eliminated altogether, it is palpably clear to this Court, that it was a risk which, even if existent in any respect, could have been disregarded by the Second Defendant altogether. In any event though, on this Claim, the Claimant has failed to prove to this Court's satisfaction, on a balance of probabilities, that the Second Defendant ought to have recognized that there was such risk, or in other that, as suggested in the Particulars of Negligence, the electrical wires were placed in a position that was **manifestly dangerous to human life.** The Claimant has also failed to prove that the measures necessary to eliminate such risk to human life as he claims to exist, arising from where the relevant electrical wires were located at the material time, were such that any reasonable person would have taken such measures as a matter of course, in all circumstances, bearing in mind that the Second Defendant did not even know that the Claimant had been working, much less working where and with the tools which he was working with on the relevant occasion. It was not for the Second Defendant to prove this. To the contrary, the Claimant bore the burden of proof in that

regard, throughout the trial of this Claim and as earlier mentioned and now reiterated at this juncture, only for the purpose of emphasis herein, he has fallen woefully short in that regard.

[32] The Claimant has, it is to be noted thought, sought to rely on the well-established doctrine of Res Ipsa Loquitur, this being, to put it at its simplest, that the facts speak for themselves.

[33] In order for that doctrine to be applicable, three things must be shown by the Claimant. Once each of these things are on the evidence presented to the trial Court, shown to the court's satisfaction, to be applicable to a particular Case/Claim, then, but only then, will an evidentiary burden rest on the Defendant's shoulders to show that he has not been negligent.

[34] The three things that must be shown by a Claimant, in order to rely on the doctrine of Res Ipsa Loquitur, in a Claim alleging negligence, are that:

1. The incident of which complaint is made by the Claimant in his Claim is one that could not have happened without the negligence of the Defendant;

2. That the thing which inflicted the Claimant's damage was under the sole control of the Defendant, or of the Defendant's servants or agents;

3. There must be no evidence as to how or why the occurrence which the Claimant has made complaint against the Defendant in his Claim, occurred.

[35] In the matter at hand, of those three conditions, only one has been satisfied that being the third one listed above as number 3. As regards the second of those three conditions, listed above as – 2 , there is no evidence as to which entity's electrical wires or telephone wires, which undoubtedly also convey electrical current, caused the Claimant, by his having apparently come into contact with one or more of those wires, to thereby suffer injuries. The evidence from the expert is not useful in that regard, since, as earlier mentioned in this judgment, that expert has not, in reality, provided any opinion solely derived from his own knowledge, training and experience, in that regard,

but instead, relied in that regard, on what he was told by the Claimant, this in terms of what exactly it was that the Claimant's metal painting pole had come in contact with at the material time. The Claimant did not know then and does not even now know, as a matter of his own personal knowledge, what exactly it was that his metal painting pole came in contact with at the relevant time, thereby having occasioned his injuries. In fact, if the Claimant does know this and/or if the same had been satisfactorily proven by the Claimant, then this would inevitably mean that the Claimant would then have failed to satisfy the third of the three listed conditions, for the application of the doctrine, since then there would exist evidence, from the Claimant and the expert, from which this Court could and would know, exactly why and how the Claimant's unfortunate injuries occurred.

[36] Furthermore, since the Claimant does not know which of the relevant wires that were hung on poles nearby the First Defendant's premises at the material time, his painting pole came into contact with, it is pellucid, that the Claimant has not proven, to this Court's satisfaction, that the thing which inflicted the damage to the Claimant was under the sole management and control either of the Defendant or any of the Defendant's servants or agents.

[37] In any event though, the unfortunate incident endured by the Claimant, is not one which could not have happened without there having been some negligence on the Defendant's part. For a helpful guide as to the law vis-à-vis the doctrine of Res Ipsa Loquitur, See **Clerk and Lindsell on Tort, 16th ed**. (1989), paras. 10-135 to 10-141.

[38] The Claimant's Claim in negligence, as against the Second Defendant, therefore fails and Judgment will be awarded in the Second Defendant's favour, in respect thereof. It follows from this, that the Second Defendant's Ancillary Claim against the First Defendant, by virtue of which, the Second Defendant only sought to indemnify itself, in the event that this Court had determined them to be liable to the Claimant must also fail and Judgment will be awarded in favour of the First Defendant in respect of that Claim.

[39] The Claimant has also made Claim against the Second Defendant, for damages for breach of statutory duty, this in respect of Regulation 6 of the Electricity Lighting Regulations. That regulation, which was made pursuant to the Electric Lighting Law, 1890, provides as follows:

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

There has, in the Claim, been no evidence whatsoever, provided to this Court either by the Claimant or by anyone else, such as could properly enable this Court to conclude that there has been a breach of that regulation, which as a point of note, was published in the Jamaica Gazette on March 2, 1922 and thus, came into force and effect on said date. In point of fact, there also exists no evidence that even if there has or had been a breach of regulation 6 as above-quoted, by the Second Defendant, as is alleged by the Claimant, that such breach either caused or contributed to the causing of the unfortunate injuries which he suffered on that fateful day of December 23, 2003. In the circumstances, the Claimant's Claim for breach of statutory duty as against the Second Defendant, must fail and Judgment on that aspect of the Claim, just as it was on the negligence aspect of the Claim, is, insofar as the Second Defendant is concerned, awarded in favour of the Second Defendant.

[40] There can be no doubt whatsoever, that if the Claimant is, as he has claimed in this Claim, determined by this Court, as having been an employee of the First Defendant at the material time, then clearly, some liability in negligence, in terms of the injuries and loss suffered by the Claimant herein, must be attributed by this Court, to the First Defendant.

[41] This would be so because, at all times, the Claimant was carrying out painting work, which he was hired to perform, by the First Defendant. If while doing so, in the capacity of an employee of the First Defendant, he was either not being supervised, or not being properly supervised, then this would in of itself, likely give rise to some liability in negligence on the part of the First Defendant. Also, if he was, as he has claimed, painting with a metal pole in close vicinity to electrical wires at the material time, then consideration must be given by this Court as to whether such a tool was an appropriate tool for him to have been permitted and/or required by his 'employer' to use, to carry out that which inevitably certainly, he went on the roof of the building, to commence the painting of the uppermost portions of the First Defendant's building, was a dangerous task, when viewed in that context, wherein wires undoubtedly carrying electrical current, were positioned nearby that building at the material time.

[42] In the Claimant's Particulars of Negligence, he has essentially alleged two main aspects, these being firstly, the failure to take any or any adequate precautions for the Claimant's safety while he was engaged in his work and secondly, overall, failing to provide a safe place of work for the Claimant. This second aspect is insofar as the relevant electrical wires and/or cables were allegedly in a manifestly unsafe position and had not been de-energized by the First Defendant and also, insofar as the First Defendant had allegedly failed to warn the Claimant of the presence of those wires and/or cables.

[43] All of the aspects of alleged negligence as particularized would, undoubtedly be worthy of careful consideration by this Court, if this Court were to conclude that at the material time, the Claimant was an employee of the First Defendant. The First Defendant however, has denied that at the material time, the Claimant was employed by him as an employee and instead, has averred, that at the material time, the Claimant was employed by him as an independent contractor.

[44] Why then, is the distinction between an employee and an independent contractor, of such importance in the particular circumstances of this particular case? It

is because, completely different legal consequences flow from that distinction, insofar as is concerned, the allegedly negligence of an employer in relation to one of his employer in relation to one of his employees as distinct from the alleged negligence of a hirer in relation to an independent contractor hired by him to perform a particular task or tasks.

[45] It is now well and long established at common law that the standard of an employer's duty towards his employee is overall, to see that reasonable care is taken for the employee's safety. The scope of that duty extends to the provision of safe fellow-servants, safe equipment, safe place of work and access to it and a safe system of work, as well as the provision of adequate supervision while the employee is engaged in performing the work which he is employed to perform. See in that regard, the locus Classicus Judgment of the House of Lords in **Wilsons & Clyde Coal Co. v English** [1938] A.C. 57, esp. per Lds. Wright & Maugham, at pp. 78 & 86, respectively.

[46] From this, it can readily be discerned that a failure to take adequate precautions for an employee's safety would likely arise in a situation wherein an employer fails to provide appropriate, suitable and safe work equipment, in a situation wherein an employee is performing the work tasks which he is expected by his employer to perform.

[47] In the particular circumstances of this particular case, there can be no doubt that the First Defendant failed to provide any adequate supervision to the Claimant whilst he was working on painting the roof of the building. In fact, this is clearly borne out by the First Defendant's strong assertion as made through his own evidence at trial, that he had specifically told the Claimant not to go up on the roof of the building to paint, but rather, just to paint the side of the wall of a building which the Claimant testified to having been approximately 24 feet in height – this being evidence of height of the relevant building, which this Court accepts, even though, when questioned about that height, while on the witness stand, the First Defendant testified that the building was

about 20 feet high, whereas the Second Defendant's sole witness, testified that it was about 35 feet high.

[48] If indeed, the 1st Defendant had instructed the Claimant not to go on the roof of the building to paint, that instruction alone would, if the Claimant was, as he has alleged, an employee of the First Defendant at the material time, not be enough to completely satisfy the duty of care which the First Defendant would have owed to the Claimant in a legal circumstance such as that. This is because the mere conveying of appropriate safety instructions by an employer to an employee is certainly not enough to completely discharge the duty of care owed by that employer to that employee, in respect of the work duties being performed by the latter. This is why adequate supervision of one's employee is also required of each and every employer. If there had been adequate supervision of the Claimant at the material time there is no doubt that he could not have even reached onto the roof and commenced painting there.

[49] Also, the Claimant had alleged in his witness statement and thus, by extension, in his evidence-in-chief at trial, that he was asked by the First Defendant, sometime in December 2003, to paint a building owned by him at No. 1 McCatty Street in Montego Bay, St. James and that he agreed to do so and Mr. Bucknor bought the paint and supplies needed for painting the building. Whilst under cross-examination by Mr. Lyttle-counsel for the First Defendant however, the Claimant's evidence either changed or, at the very least was clarified, in terms of who purchased the pole and whose pole it was, that was to have been used and in fact, was used by the Claimant to paint the building on the relevant day. The Claimant made it very clear, while under cross-examination by Mr. Lyttle, that the relevant metal rod was his and that it was about a year old when he commenced the painting of the First Defendant's building this apparently having been sometime in October or November of 2003. The Claimant testified to that effect and this Court accepts his evidence in that regard. He also testified and this Court accepts, that that rod was on the First Defendant's premises from as of sometime in October or November.

[50] Again though, the fact that the Claimant had with him at the material time, in close proximity to wires and/or cables undoubtedly conveying electrical current, a metal painting pole, such as would have caused any reasonable adult to have recognized, could have been dangerous, since metal is a conduit of electrical current, even if all accepted by this Court, does not and cannot, if the Claimant was an employee of the First Defendant, serve to exempt that Defendant from liability, if as a direct result of the use of unsafe equipment/tools, the Claimant suffers injury or loss. This is so because, an employee is to be expected to use, whichever tools he has been provided with by his employer, in order to perform the work tasks which he is expected to perform on the employer's behalf. Thus, even if the employee is using a tool which he should not, for the benefit of his own safety at the material time have been using, nonetheless, the fact that he was using same, once again points not only to a lack of provision by the employer of proper tools, but also to a lack of adequate supervision by the employer – if in fact the First Defendant were to be determined as being such. The same would be true, if this Court accepts as indeed it does, that the ladder which the Claimant was expected to have used at the material time, in order to have, as the First Defendant has contended, painted only the side of the outside of his building, whether that ladder was provided to the Claimant by the First Defendant or not, was too short, to have enabled the Claimant to have safely painted the portions of the building which he was painting when he got injured. This is simply because, it is not to be expected, for the employee to provide his own tools or that, if the employee provides his own tools and those tools are either inadequate, or inappropriate, from an employee safety perspective, for the purposes of same, that the employer can wholly avoid liability in negligence, simply by asserting that the employee provided his own tools. The only thing that can properly be considered by a Court in such circumstances is, whether contributory negligence is a live issue.

[51] It might seem from all of that which this Court has set out in quite a great deal of detail above, that in the circumstances, the First Defendant should be held liable to the Claimant for damages arising from his negligence. This Court does not so conclude. This is because, to put it simply, this Court does not accept the Claimant's submission,

that the Claimant has proven, on a balance of probabilities, that at the material time, he was employed by the First Defendant as an employee, rather than, as the First Defendant has asserted, in his Defence and evidence brought before this Court, hired as an independent contractor, to perform a specific task of painting the upstairs portion of a building which the First Defendant is the owner of.

[52] Insofar as there exists, for the purposes of this Claim, dispute between the Claimant and the First Defendant, as to whether, at the material time, the Claimant was performing the required task – that being, painting the upstairs of the building, as an employee, or instead, as an independent contractor, the burden rested on the Claimant to prove his assertion that he was an employee at the material time. No burden whatsoever, rested on the Defendant to prove otherwise.

[53] The Claimant has wholly failed to lead before this Court, the requisite evidence to prove the same and in having failed to do so, the Claimant has also failed to prove his Claim for damages in negligence as against the First Defendant. The distinction between an employee and an independent contractor is a very significant one, insofar as the law of negligence is concerned. This is because there exists no case law that has either been brought to this Court's attention by either party's counsel, either within this jurisdiction, or elsewhere, such as would even be persuasive in this Court, in which, the hirer of an independent contractor has been held by a Court as being obliged to uphold the same duty of care to an independent contractor hired by him for a particular purpose, as is the employer of an employee, as decided on at common law, both within over several years now, obliged to uphold. Thus, since the Claimant's Claim is undoubtedly premised on the employer's duty of care to an employee, unless such duties are the same vis-a-vis the hirer of an independent contractor, then, as a matter of law, the First Defendant cannot be held liable in this particular Claim.

[54] There is one decided case which this Court has found reference to, in the leading text on the law of Torts, this being **Clerk and Lindsell on Torts**, which in fact makes the point that not only is the duty of care not the same in respect of the hiring of an

independent contractor, as it is in respect of an employer and employee, and furthermore, that there exists no duty of care, in terms of safe system of work, safe place of work and other the like, owed by a hirer to an independent contractor hired by him. See: **Jonas v Minton Construction** [1973] 15 K.I.R. 309 and paragraph 10 -126 (pp. 552 -555 and esp. at p. 553 of that text – [1989] – 16th ed.)

[55] Who then, is an employee? Several tests have been formulated by Courts in England over the years, in an effort to answer this by no means, easy question. These tests are not useful, in and of themselves, as the question must be answered looking at everything, holistically. Whilst control of how the worker is to perform the tasks that he is expected to perform, is of some importance, it can hardly by itself, be taken as being conclusive. Other factors to be considered would be whether the person performing services, provided his own equipment, hired, his own helpers, what degree of financial risk he takes, amongst other factors. See **Market Investigations Ltd. v Minister of Social Security** [1969] 2 Q.B.173.

[56] In the case at hand, the Claimant provided at least, his own painting pole, though not his own paint. He provided his own helper – this according to the unchallenged evidence on that point, as was provided to the Court by the First Defendant during the course of oral testimony. There is no evidence that the Claimant was provided with either a weekly, fortnightly or monthly wage by the First Defendant. All the evidence as given suggests that the Claimant was to have been paid by the First Defendant only for the specific task which he was, on one specific occasion, hired to carry out. Whether the Claimant was hired on the same day that he got injured, is of no relevance for the purpose of deciding as to whether or not he was an employee or an independent contractor at the material time. This is simply because, a person can be hired as an independent contractor, to perform one task, which is expected to last over a number of days and even months.

[57] All in all, the evidence as provided to this Court during the trial of this Claim, far from satisfying this Court that the Claimant was an employee of the First Defendant at

the material time, rather and to the contrary, suggests that he was hired as an independent contractor at the material time, for the purpose of painting the upstairs portion of the relevant building, over a period of time. In the circumstances, this Court concludes that Judgment on the Claimant's Claim for damages in negligence, is to be awarded in favour of the First Defendant.

[58] The Claimant has also made Claim against the First Defendant for breach of contract of employment insofar as it is essentially alleged, in respect thereof, that the Claimant was an employee of the First Defendant and since the First Defendant failed to provide a safe system of work and a safe workplace, the First Defendant is therefore in breach of that contract of employment.

[59] This Court means no disrespect to counsel, by concluding that this aspect of the overall Claim made as against the First Defendant is entirely misconceived. This would be so, even if this Court had concluded that at the material time, the Claimant was a party to a contract of employment with the First Defendant, this as distinct from a contract of hireage of the First Defendant's services as an independent contractor. For the record though, it is to be recalled that this Court had earlier concluded that the Claimant was not, at the material time, employed to the First Defendant as an employee. (See paragraph 57 of this Judgment). As such, with this Court having so concluded, it follows inexorably, that there could have been no breach by the First Defendant of any contract of employment with the Claimant, since none such existed and insofar as none such existed, the duties owed by the Claimant, who was hired by the First Defendant only to perform a particular service, would then, by no means include as part and parcel thereof, the duty to provide a safe place of work and/or a safe system of work. (See paragraph 54 of this Judgment).

[60] In any event though, it was a matter of law, entirely inappropriate to proceed on a Claim for breach of contract and on a claim for the tort of negligence, injuries which were caused to the Claimant. This is a Claim brought, arising from injuries to the Claimant's person and arising from circumstances wherein it has been contended that

the First Defendant's negligence caused those injuries. If this had been a Claim for that which is termed in law, as being 'pure economic loss' (which it is not), then in such a circumstance, if the Claim has been pursued both in terms of breach of contract and negligence, it is only the breach of contract claim that could properly be pursued by the Claimant. See **Laufer v F.S.I. Financial Services U.S. Inc. & International Marbella Club S.A.** – Supreme Court Civil Appeal No. 2 of 88, on this point. Thus, where, as is the case here, the Claim is founded on injury to the person and is brought under two separate heads being breach of contract and negligence, the converse must also be true, this being, that the Claim for damages for breach of contract must inevitably fail. This Claim should have been pursued based on the law of tort only, as distinct from a Claim based both on tort and contract.

[61] The final legal issues to be addressed by this Court in respect of this Claim pertain to the law as regards occupier's liability. The Claimant has made Claim for damages against the First Defendant, arising from the First Defendant's alleged failure to comply with his statutorily required duty of care, pursuant to the provisions of Jamaica's Occupier's Liability Act. In that regard, this Court will pose a series of questions, which will be highlighted in separate paragraphs hereof below, and in turn, answer each of those questions. By that means, a conclusion can and will properly be drawn by this Court, as to whether the Claimant has properly established liability under this head of Claim.

[62] **Was the first Defendant, at the material time, an occupier of the premises at which the Claimant suffered injury?** The simple answer to this question is – '**Yes**.' As set out in **Wheat & E. Lacon & Co. Ltd.** [1966] 1 A.C. 552, esp. at pp. 578 F – 579 A, per Ld. Denning, quoting an extract from the text – **Salmond on Torts, 14th ed**. [1965], at p. 372 . The test in Salmond on Torts, 14th ed. [1965] p. 372, that an occupier is,

> *'He who has the immediate supervision and control and the power of permitting or prohibiting the entry of other persons is too narrow. There are other people who are occupiers even though they do not say 'come in.' If a person has any degree of control over the*

> *state of the premises it is enough.' Ld. Pearson in the same case, stated in his Judgment, at p. 589 F, that the foundation of occupier's liability is occupational control, that is, control associated with and arising from the presence in and use of or activity in the premises.'*

Applying the law in that regard to the case at hand, it is very clear that the First Defendant had such a degree of control over the relevant premises, at the material time, as to constitute him in law, as being an 'occupier' of same. In fact, the First Defendant has not disputed this.

[63] **Was the Claimant, bearing in mind the precise moment in time when he suffered injuries and where on the first Defendant's building he was positioned when he suffered same, than a 'visitor' or a 'trespasser?'** It is worthy of mention at this juncture, before proceeding to specifically answer this question, that Jamaica's Occupier's Liability Act came into force and being on October 1, 1969. It is based in large measure on and is thus, very similar in terms to England's previously existing Occupier's Liability Act, that being the Occupier's Liability Act [1957]. That 1957 English statute was later repealed and replaced by another statute as regards Occupier's Liability, that being the Occupier's Liability Act [1984]. Jamaica's Occupier's Liability statute though, has remained unchanged, ever since it was passed into law.

[64] The Claimant has contended, in his statement of case, that he was a visitor to the First Defendant's premises at the material time, as he was directly and specifically engaged by the First Defendant to provide painting services at the relevant premises. He was so engaged from as of November 2003 and the injuries which he suffered, unfortunately occurred on December 23, 2003. As such, at common law, prior to the passing into law in England, of the Occupier's Liability Act [1957], the Claimant was on the First Defendant's premises at the material time, as an invitee – this being someone who was invited onto that Defendant's premises, for a particular purpose and within a particular and limited period of time. By virtue of the provisions of section 2 (2) of Jamaica's Occupier's Liability Act, once a person could properly have been categorized

as an invitee at common law, such person is now to be categorized, for the purpose of the relevant statute, as being a 'visitor' and that statute specifically sets out at Section 3 thereof, the duty of care owed by an occupier to a visitor. It is also made clear in Jamaica's Occupier's Liability Act, Section (1), that Sections 3 & 4 of that same statute, shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

[65] The First Defendant has not disputed that at the material time, the Claimant was on his premises performing the task of painting a portion of a building on said premises. The First Defendant though, does not accept that, at the material time, which for the purposes of the law, would be the specific moment in time when the Claimant suffered injuries, he was then a lawful 'visitor' to his premises. One may, without a complete understanding of the law as to who would properly be determined in law, as being a 'visitor' as against a 'trespasser,' find the lack of acceptance by the First Defendant, that at the material time, the Claimant was a lawful visitor, difficult, if not impossible to understand. In truth though, based on the law, the factual contentions as specifically placed before the Court in the First Defendant's Amended Defence, are such that if this Court were to accept the same as being true, the same must, as a matter of law, lead this Court to conclude that at the material time, the Claimant was a trespasser. Of course too, there is considerable legal significance to be attached to the distinction in law between one who is a visitor and one who is a trespasser, this insofar as, the duty of care owed by an occupier to a visitor, is significantly higher than the duty of care which is owed by an occupier to a trespasser. That distinction will be addressed in further detail, below.

[66] In paragraph 5 of his Amended Defence, the First Defendant has contended that the Claimant's service was contracted as an independent contractor to paint an upstairs building, and at the time of negotiations leading to the contract for his service, the Claimant was advised :- '(a) Not to climb on the top of the roof of the building as it was specifically pointed out to him that the painting of the sides of the building did not

require his going on the roof as there were electrical wires that run across the building as per Jamaica Public Service Co. Ltd. stipulation. (b) The Claimant was seen with an aluminium rod and it was specifically told to him by the First Defendant not to extend or use the said aluminium rod in the area of the roof nor near the electrical wires. Therefore paragraph 4 and its contents, in particular, sub-paragraph a-d, are denied. (d) The First Defendant says that all reasonable precautions were taken to make the premises safe and that the Claimant was not exposed to any risk or danger or hazard in the area to which he was specifically assigned and repeats that he was required to go on the roof of the building to do the job of painting the said building.'

[67] What is very clear from this factual contention of the First Defendant, is that, if it is accepted by this Court, then, since it is not disputed by the Claimant that at the time when he was injured, he was engaged in painting a portion of the relevant building, whilst then positioned on the roof of that building, this would therefore mean that this Court would be obliged to conclude that at that material time, the Claimant was positioned on the relevant premises, in a location where he not only ought not to have been, but more specifically, was allegedly informed by the occupier of that premises, that he ought not to have gone to.

[68] The legal question which must now be answered by this Court therefore, is whether a person who enters a premises as a visitor can later on, in any circumstance, be considered, for the purposes of the law, as being a trespasser – this for example, if he enters upon a portion of the premises, which he is not authorized to enter into.

[69] The answer to that question is one that has already been provided in English case law. See **The Carlgarth** [1927] P. 93, at p. 110 per **Scrutton, L.J. and Mersey Docks and Harbour Board v Procter** – [1923] A.C. 253. Case law makes it clear that a person can be on premises as a visitor at one stage and later, be considered in law, as being a trespasser, whilst still on that premises. This is simply because, one's lawful visit to premises as a visitor, can be limited in scope, both in terms of time and place and perhaps even in other respects. See paragraph 13-09 of the text – **Clerk and Lindsell on Torts, 16th ed**. [1989] on this point.

[70] It is the law therefore, that once a person remains on a premises to which he had been lawfully invited either beyond the time limited for that person to remain there, or where a person specifically goes to an area of that premises which he was specifically warned not to go to or enter upon, then in such a circumstance, if that person suffers injury as a consequence of either of those scenarios, the occupier does not owe to him the duty of care which is owed to a visitor, as is set out in detail, in **Section 3 of the Occupier's Liability Act**. See also on this point – **Walker v Midland Ry.** [1886] 55 L.T. 489 and **Lee v Luper** [1936] 3 ALL E.R. 817**.**

[71] The Claimant has, it must be noted though, expressly disputed, in his oral evidence before this Court that he was ever told by the First Defendant either that he was not to have painted the roof of the building, nor that he was not to have gone onto the roof of the building for the purpose of painting while there. On the other hand, the First Defendant, in his evidence before this Court, has expressly suggested to the contrary. This therefore, is a disputed factual issue which must first be resolved by this Court, in order for this Court to thereafter be properly enable to make the required legal determination, as to whether or not, at the material time, the Claimant should properly be considered as having been a visitor or a trespasser.

[72] On this particular factual issue of dispute between the Claimant and the First Defendant, this Court does not accept the evidence of the First Defendant. This is because such evidence lacks credibility. To put it simply, the Claimant was employed to carry out a particular task, which was supposedly limited in scope, that being to paint the side of a building. If therefore, the Claimant was expressly told this by the First Defendant and he was also expressly told that he was not to climb up or go onto the roof at the top of the building in order to paint any portion of said building, why then, would the Claimant have acted contrary to those instructions allegedly expressly so given? The Claimant certainly would not only have, in having so done, given himself more work to do, for which work he would clearly have derived no benefit of payment, but also, have put himself to more difficulty, not to mention, in danger. That he would have done so contrary to instructions, defies likelihood and credibility. Added to that, is

the fact that the First Defendant gave evidence to this Court that one can only access the roof of that building via a stairway which is ordinarily kept locked and which he had thought was, on the relevant day and time, actually locked inside of that building. The keys to the lock for the grill, which must be opened in order to access that stairway, are kept in the study and for most of the time when the Claimant was painting on the 23rd December, 2003, when he was eventually injured, that First Defendant gave evidence that he was in the study. The First Defendant also gave evidence that after the Claimant got injured, he then noticed that the grill was open and the keys for the grill lock were in the study. In the circumstances, it is this Court's conclusion that not only did the First Defendant not limit the Claimant's access to the roof via the stairway, but instead, actually left that stairway and by extension, the roof to which it leads, accessible, specifically so as to enable the Claimant to access the same if he chose to do so. In hindsight perhaps, the First Defendant would not have done so, had he thought through it carefully at the time. It is even conceivable that the First Defendant did not specifically intend for the Claimant to have entered and remained upon the roof of the building, to paint any portion of that building while there. That though, having to this Court's mind, perhaps only been the First Defendant's intention, if indeed it was his intention at all, would not be enough to change the Claimant's legal status, for the purposes of the law as regards occupier's liability, from that of a visitor, to that of a trespasser. Such would have required more than a more intention on the First Defendant's part. That intention would have had to have expressly been made known to the Claimant. To this Court's mind, that was never done by the First Defendant, either by means of wording expressed to the Claimant by that Defendant, or by means of action, in terms of locking the grill and keeping the key away from where the Claimant was ever to have been expected to have had access to same.

[73] What then is the legal significance of this conclusion? The legal significance is that insofar as the Claimant was, at the material time, a visitor, the duty of care owed to the Claimant is higher than the duty of care that would have been owed to him, if he had been categorized by this Court as having been a trespasser at that time.

[74] The duty owed to a trespasser is, for the purposes of Jamaica's law, set out in the common law and not statute. That was formerly the position in England also, but was changed when the Occupier's Liability Act (Eng.) [1984], was enacted. Formerly at common law, prior to the renowned case of **British Railways Board v Herrington (H.L.)** [1972] 1 A.C. 877, the law vis-à-vis occupier's duty to trespassers was laid down by the H.L. in the case – **Addie v Dumbreck** [1929] A.C. 358. In the Addie case, that law was laid down as being that,

> *'Towards the trespasser the occupier has no duty to take reasonable care for his protection or even to protect him from concealed danger the trespasser comes on to the premises at his own risk. An occupier is in such cases liable only where the injury is due to some wilful act involving something more than the absence of reasonable care. There must be some act done with the deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser' per Ld. Hailsham, at p. 365*.

That common law principle was changed by the later decision of the House of Lords in **British Railways Board v Herrington** (op.cit). To put it succinctly, as per Ld. Morris of Borth -Y- Gest, at p. 909 F-H, there is no duty on an occupier to ensure that no trespasser enters his land, nor to make his land fit for trespassers to trespass in, nor to survey his land to discover the existence of dangers of which he is not aware, since a trespasser trespasses at his peril; but, while the occupier is not under the same duty of care which he owes to a visitor, he owes a trespasser a duty to take such steps as common sense or common humanity would dictate to exclude or warn or otherwise, within reasonable or practicable limits, reduce or avert danger.

[75] As this Court has already determined that at the material time, the Claimant was a visitor and not a trespasser, the next question to be answered is – **What is the duty of care owed to a visitor?** That duty is set out in **Section 3 of the Occupier's Liability Act**. In particular, in **Section 3 (1) and (2)** thereof, it is stated,

> *'(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.'

[76] **Did the first Defendant comply with his duty in that regard?** To this Court's mind, the First Defendant did not breach his duty under **Section 3 of the Occupier's Liability Act**, to the Claimant. For the purpose of determining whether the First Defendant is liable to the Claimant pursuant to Jamaica's Occupier's Liability Act, in respect of this particular Claim, firstly, the Claimant's Particulars of Claim must be carefully borne in mind, in terms of what has been alleged therein, as the particulars of the First Defendant's alleged breach of statutory duty. This is important, because a Claimant cannot rely on any allegation which he has not set out in his Particulars of Claim, but which could have been set out there, unless the Court gives permission- See **Rule 8.9A of the Civil Procedure Rules**, in this regard. Also though, this Court must consider whether, even assuming that there was a breach of duty by the Claimant in terms of Section 3 (2) of the Occupier's Liability Act, such breach was the cause of the Claimant's injuries and further, whether there is any statutory provision on which, on the facts of this particular case, serves to exempt the First Defendant from liability to the Claimant as an occupier.

[77] The Claimant has contended, in short, inter alia, in his particulars of breach of Occupier's Liability Act by the First Defendant, that the First Defendant failed to provide a safe place of work for the Claimant and that he exposed the Claimant to a risk of damage and/or injury of which he knew or ought to have known; and that he failed to have any, or adequate precautions for the safety of the Claimant while he was engaged in his work.

[78] These are duties owed by an employer to his employee. This Court has already determined that at the material time, the Claimant was not an employee of the First

Defendant. The First Defendant nonetheless, owed to the Claimant, who was a visitor working on his premises at the material time, a duty of care and that duty was a duty to take reasonable care to see that his premises was reasonably safe for the purposes for which it was being used at the material time, by the Claimant. This is very much the same as the duty owed by an employer to his employee. As between employer and employee however, the duty is even more strictly applied than it is in respect of Occupier's Liability. This is so because Jamaica's Occupier's Liability Act has provided for quite a few exceptions to that duty. Those exceptions will be addressed by this Court, further on in this Judgment.

[79] It is this Court's view that the roof of the First Defendant's premises constituted an unsafe work environment for the Claimant, particularly having regard to the work which the Claimant was then engaged in and the nature of the tool which he was then using to perform that work, that having been, as was known to the First Defendant, an aluminium paint roller pole. All of this was in a context where there were various electrical wires admittedly in close proximity to the roof of that premises at the material time.

[80] This Court though, cannot, solely on that basis, determine the First Defendant to be liable under the head of Occupier's Liability. **Section 3(4) of the Occupier's Liability Act** requires any Court, in determining whether the occupier of premises has discharged the common duty of care to a visitor, to have regard to all the circumstances. The Court must therefore, next go on to consider and determine whether the Claimant was warned of the risk and took it anyway and if so, whether such warning should serve to exempt the First Defendant from liability. Such considerations are necessary because of the provisions of **Section 3(5) of the Occupier's Liability Act**. Section 3(5) provides that,

> ***'Where damage is caused to a visitor by a danger of which he has 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.'***

[81] There is no evidence that the Claimant was specifically warned of the danger of risk vis-a-vis the electrical wires. There is evidence, which this Court was already rejected, that the Claimant was specially told not to go on the roof. This is not though, the same thing as having warned him of the danger or risk. Even if the Claimant had been informed by the First Defendant, that there were live electrical wires close to the top of the roof of the building, this would not be the same thing as having warned him of the danger/risk. Thus, **Section 3(5) of the Occupier's Liability Act**, is, in the particular circumstances of this particulars case, inapplicable to the matter at hand.

[82] **Section 3(3) of the Occupier's Liability Act**, is also inapplicable to the matter at hand. This is so because, the relevant risk is not a special risk which is ordinarily incidental to painting.

[83] **Section 3(6) of the Occupier's Liability Act**, provides that,

> *'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.'*

[84] The immediately aforementioned statutory provision is seeking to address a type of situation wherein an independent contractor whilst carrying out construction, maintenance or repair work on or at a particular premises, creates a danger arising from the faulty execution of any such work and thereafter such danger causes loss or injury or injury loss to any visitor to that premises. Said provision is not seeking to address the situation which exists in this case, that being one whereby, it is this Court's determination, that at the material time, the Claimant was both an independent contractor carrying out maintenance work on the relevant premises, as well as a visitor to said premises. As things turned out on the relevant occasion, there existed a danger

at a part of the site where such maintenance work was being conducted, that being on the roof. That danger however, was not created by the independent contractor. It existed even before the independent contractor went onto the roof. By having gone onto the roof however, with a metal paint roller pole, that danger was thereby, significantly exacerbated. That was a danger which, in this case, was one related to himself, as distinct from another person, who was at that time, a visitor to that premises. Thus, for those two reasons, one being that in this case, the injury was caused to the independent contractor who was himself, also a visitor to the premises at that time and such injury was caused, in the view of this Court, by his own failure to take due regard for his own safety in carrying out the maintenance work which was then performing; and the second being that it was not the Claimant's manner of execution of the relevant work, that created the danger, must lead to this Court's conclusion that **Section 3(6) of the Occupier's Liability Act**, cannot avail the Claimant.

[85] **Section 3(7) of the Occupier's Liability Act** therefore now becomes central to the final resolution of this case. That section provides for the defence of, 'volenti non fit injuria', to be applicable in cases concerning occupier's liability as it is in the law of tort generally, in circumstances wherein one owes a duty of care to another. That defence, as set out in the Latin maxim quoted above, essentially represents that one who consents to injury cannot be heard to complain of it thereafter. In order for such a defence to be applicable, it is not enough, that the danger is apparent. A person who comes into the proximity of danger, of his own free will, must have full knowledge of the nature and extent of the risk. See **Smith v Baker** – [1989] A.C. 325. Additionally, in order for the defence to be applicable, it must be sworn that not only did the Claimant have full knowledge of the risk, but that he consented to waiving his right of action, if such risk were to have eventralized and caused him loss and/or injury. Furthermore, the burden of proof in respect of a special defence such as the volenti defence, rests on the party who raises same, who is, in this case, the First Defendant, at least insofar as the claim for damages arising from alleged breach of statutory duty in respect of the Occupier's Liability Act, is concerned. Such burden must be discharged on a balance of

probabilities in order for the First Defendant to succeed in establishing same. See **Murphy on Evidence 11th ed.,** [2009], p. 79.

[86] This Court takes the view that in the case at hand, the defence, has proven, through the Claimant's own evidence, that the Claimant not only knew of the risk, but decided to accept such risk and do the relevant work anyway, thereby in essence, having accepted that he would not hold the First Defendant as legally responsible if such risk became a reality (as it in fact did) and thereby resulted in injury and/or loss to him.

[87] This Court so concludes, because of the evidence when considered as a whole, but in particular, bearing in mind firstly, that the risk would have been obvious to anyone such as the Claimant, on the given day, in the given circumstances which were then applicable. It is not as though the Claimant ever suggested to the First Defendant that it would be unsafe for him to work on top of the roof of the building, given the work tool which he was then using, that being the metal paint roller pole. The Claimant chose, even while on top off the roof in order to paint there, to do so with that metal paint roller pole, rather than with a paintbrush which was also available to him to have used, had he wished and thereby chosen to have done so. Considered in that particular context, the evidence of the Claimant as given during cross-examination by the First Defendant's Attorney, that – 'Had I known I was so close to the wires, I would have, used a paintbrush there,' is particularly enlightening and instructive. That bit of evidence, to my mind, makes it clear, that not only did the Claimant know of the relevant danger, but also knew of the risk that arose as a consequence of the existence of that danger. I so conclude because, if the Claimant did not know of the risk, why then would he have, if he had known that he was so close to the danger and therefore, by extension, to the risk created by that danger, he would have used a tool, that being a paintbrush, which of course, would have averted that danger? It is clear that the Claimant not only knew of the danger, but also knew of the risk and accepted it anyway, in such circumstances that legally, he cannot properly seek to have the First Defendant hold liable under the Occupier's Liability Act, arising from any alleged breach of duty of care owed to him in

the context of that existing risk. What is equally clear, is that the Claimant did not expect the risk to materialize such as to have caused him injury and/or loss. The nature of 'risk' though, is as any definition of that word would no doubt make apparent, such that it is something which may or may not occur. Unfortunately, in this matter, it was a risk which did in fact occur. The Claimant may have tried to avoid the risk somewhat, but did not succeed in doing so, as he clearly was not aware, at the material time, of the close proximity of his metal paint roller pole, to the relevant overhead wires which were carrying/conducting electricity. As is after said, 'hindsight is often the equivalent of 20/20 vision.' The Claimant cannot, in the circumstances, succeed in his claim, as against either Defendant, for any aspect of his claim.

[88] In the circumstances, this Court Orders as follows:-

(i) The Claimant's Claim against both Defendants fails. Judgment on that Claim is awarded in favour of the Defendants.

(ii) Judgment on the Second Defendant's Ancillary Claim against the Claimant is awarded in favour of the First Defendants.

(iii) No order as to costs is made in respect of the Ancillary Claim.

(iv) Costs of the Claim are awarded to the Defendants, with such costs to be taxed if not sooner agreed.

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Honourable Kirk Anderson, J