[2020] JMSC Civ 99

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2009HCV05253

BETWEEN	**JOSEPH NELSON**	**CLAIMANT**
	DAVID ROBERT SPENCER, SHAIN WHITE AND CLUTHILD SPENCER (trading as PNEUMATRON ELECTRICAL SERVICES	**FIRST DEFENDANT/ ANCILLARY DEFENDANT**
	UC RUSAL ALUMINA JAMAICA LIMITED	**SECOND DEFENDANT/ ANCILLARY CLAIMANT**

IN OPEN COURT

Ms Christine Hudson instructed by K. Churchill Neita & Co. for the Claimant, Joseph Nelson.

Mr Canute Brown instructed by Brown, Godfrey & Morgan for the First Defendant/Ancillary Defendant.

Mr Christopher Kelman and Ms S Ewbank instructed by Myers, Fletcher & Gordon for the Second Defendant/ Ancillary Claimant

Heard: March 4, 5 and 11, April 11 and May 10 and 24, 2019 and May 19, 2020

Negligence – Employer's Liability – Contributory Negligence – Volenti Non Fit Injuria – Novus Actus Interveniens – Personal injury – Damages – Assessment – Loss of Earnings -

LINDO, J.

Parties

[1] The Claimant, Joseph Nelson (Mr Nelson) was a Linesman employed to the 1st Defendant/Ancillary Defendant, Pneumatron Electrical Services (Pneumatron) and he resided in the parish of Manchester.

[2] Pneumatron is an unincorporated entity registered under the Registration of Business Names Act and having its office at 37 Caledonia Road, Mandeville in the parish of Manchester. At the material time, Pneumatron was contracted by the 2nd Defendant.

[3] The Second Defendant/Ancillary Claimant, UC Rusal Alumina Jamaica Limited (Windalco) is a company duly incorporated under the Companies Act of Jamaica and having its registered office at Kirkvine P.O., in the parish of Manchester

The Claim

[4] The claim is grounded in negligence, more specifically, employers' liability. The allegations are that due to the negligence of Pneumatron and or Windalco "and/or in alternative by both ... ", Mr Nelson sustained injuries and suffered loss on or about June 8, 2007. He now claims damages, inclusive of loss of earnings, costs to future surgery, handicap on the labour market and interest and costs.

[5] In his Second Further Amended Particulars of Claim, Mr Nelson particularizes the alleged negligence of Pneumatron and Windalco and their servants or agents, and sets out the particulars of his injuries, treatment and prognosis and special damages.

1st Defendant's Defence

[6] Pneumatron, by their Defence filed on February 27, 2015, admit that they were engaged by Windalco to carry out repairs on transmission lines at Melrose in the parish of Manchester but deny that they, or their employee George Burton, were negligent or that the accident was caused by negligence on their part. Pneumatron

pleads *volenti non fit injuria* and contends, *inter alia*, that Mr Nelson climbed the electrical pole without being instructed to do so, and came in contact with energized lines which resulted in the sustained injuries.

[7] In their defence they state, *inter alia,* that:

> *"... The Claimant knew or ought to have known as a competent and experienced linesman that it was dangerous to climb the utility pole without being satisfied that the transmission line/lines were de-energised ..."*

2nd Defendant's Defence and Ancillary Claim

[8] By their Further Amended Defence filed on February 22, 2019, the 2nd Defendant admits that on June 8, 2007, by oral agreement, it engaged the services of the 1st Defendant to effect repairs to a corroded cross arm on an electrical pole, but deny that the repairs were to be carried out on transmission lines along Melrose Hill in the parish of Manchester. Windalco contends that the repairs should have been carried out between Trinity and Porus well sites in Porus in the parish of Manchester.

[9] In the Particulars of Negligence of the 1st Defendant, Windalco states*, inter alia*, that Pneumatron failed to follow their instructions to attend and carry out repairs on electrical pole between Trinity and Porus well sites; failed to follow their electrical clearance procedure; failed to complete a short and ground prior to commencing work, albeit at the wrong location; failed to provide adequate and proper supervision of its staff and failed to exercise the skill, care and diligence of specialist contractors while rendering its services to the 2nd Defendant/Ancillary Claimant.

[10] In the Particulars of Contributory Negligence of the Claimant, Windalco states the following:

> *"i. Failing to pay any or any sufficient regard for his personal safety.*
>
> *ii. Ascending electrical pole without first ensuring that short and ground was properly installed.*

iii. Failing to observe the 2nd Defendant's Standard Electrical Clearance Procedure.

iv. Failing to exhibit the ordinary care and skill of an experienced Linesman

[11] Windalco says that "but for the Claimant ascending the pole prior to the installation of the short and ground, the Claimant would not have suffered the injuries alleged or any injury at all" and that "the Claimant's premature ascension of the pole prior to the installation of the short and ground constituted a *novus actus interveniens,* thereby breaking the chain of causation (which is not admitted) between any of the 2nd Defendant's actions and the Claimant's alleged injuries"

[12] In the Ancillary Claim brought against Pneumatron, Windalco states, among other things, that in breach of the oral contract and on account of a failure of its own internal system of communication, the 1st Defendant/Ancillary Defendant failed to properly advise its staff of the correct work site and consequently the Claimant and other members of the 1st Defendant's staff proceeded to the wrong location and in the circumstances the Claimant embarked on the works in a location where the transmission lines were not isolated and as a result "allegedly has sustained injuries, loss and damage."

[13] Windalco therefore claims a declaration that it is entitled to an indemnity from Pneumatron with respect to any alleged losses sustained by the Claimant as a result of Pneumatron's negligence.

Reply to Defence of 1st Defendant

[14] Mr Nelson joins issue with Pneumatron on its defence and states that the accident was caused by a miscommunication between Pneumatron and Windalco in relation to the physical location of the Claimant and his co-workers which was compounded by the fact that no representative of Windalco was physically present at the site at which the Claimant and his co-workers were.

[15] He adds that it was common practice for workers to ascend the pole to the middle whilst the short and ground process was being completed, once there was confirmation from the supervisor that "the line is dead". He also states that at no material time did any of the servants or agents of Pneumatron warn him to refrain from ascending the pole before the short and ground process was completed.

The Trial

[16] Joseph Nelson gave evidence and called one witness, Glenroy Campbell in support of his claim, while David Spencer and George Burton gave evidence on behalf of Pneumatron, and Errol Mosely and Berris Brady gave evidence for Windalco.

[17] The Bundle of Agreed Documents comprising medical reports, receipts for medical expenses, the Windalco Manual of Safety Rules for Contractors; Alcan Jamaica Company Contractors Acknowledgement dated March 1, 2007; Records of Report from meeting in relation to investigation into the accident and photographs of the site of the accident were collectively admitted into evidence as Exhibits 1 – 3.

The Claimant's Case

[18] Mr Nelson's witness statement filed on June 29, 2016 stood as his evidence in chief after he was sworn and it was identified by him.

[19] His evidence is that he was sent by Mr Spencer, as a part of a crew of five men, to Melrose Hill to repair a light post with a rotten cross arm and when they got there they waited on his supervisor, Mr George Burton, to speak with a Windalco supervisor in order to know if work could begin. He says he saw Mr Burton on his phone and after he hung up, Mr Burton said "the line dead", by which he understands that there was no electricity in the line.

[20] He states further that he and his co-worker Peter Williams put on their gears and he mounted the pole with the rotten cross arm and Peter mounted the light pole next to him, to put on the short and ground. He adds that he stayed at the middle

of the pole waiting on Mr Williams to put on the short and ground, and while waiting, he saw a fire start on the pole he was on, and did not know anything until he woke up in the Mandeville Hospital.

[21] He says he saw gauze all over both arms, his back, was in “some very bad pain”, he spent about two weeks in Mandeville Hospital and after being discharged he was sent to National Chest Hospital and he made several visits to the clinic where he received dressings to the burns, did an operation in April 2008 and spent two days and continued to attend the National Chest Hospital for treatment for about five months. He also says that he was to do another surgery but could not afford it and that he incurred expenses for treatment, transportation and costs

[22] When cross examined by Mr Kelman, he said he was a trained, Grade 1 Electrician and had worked with other companies as linesman, all of which involved high tension wires. He said “no current no in deh” means it is safe, and said before climbing, a short and ground has to be done “but it not a must”. He said it took about ten minutes to put on the short and ground and that to do the work of a linesman you have to climb the pole or you could use a ladder.....

[23] The evidence in chief of Glenroy Campbell is contained in his witness statement filed on July 1, 2016. He states that he was an Electrician for Pneumatron at the time of the incident and that during a de-bushing exercise at Melrose Hill in June 2007, a broken cross arm was discovered. He says the information was passed on to Mr Spencer and, about a week or less, they were advised there would be a one hour close down to change the broken cross arm.

[24] He adds that there was to be a “close down” meaning that “the power in the area of the broken cross arm would be shut off...” and on the day of the ‘close down’, five persons including himself and Mr Nelson, went to Melrose location with the understanding that Mr Brady, the supervisor from Windalco, would call Mr Burton to indicate when the power had been shut off so they could do the work. He says

"soon after George Burton got a call from Mr Brady", Mr Burton told them the lines were dead.

[25] He states that Mr Nelson, dressed in his gears, started to climb the pole and waited on Mr Williams to install the short and ground in order to complete the climbing to start changing the cross arm. He states further that the short and ground is used for restricting current from travelling to where the work is being done. He adds that before Mr Williams could install it there was an explosion, and he saw Mr Nelson surrounded by a ball of fire. He says everybody started panicking, Mr Williams came down from the post he was on, climbed onto the post Mr Nelson was on and cut the strap holding him to the pole, and he fell to the ground. He states that "we called Mr Brady", and that he came and took them to meet the Windalco ambulance which transported Mr Nelson to the hospital.

[26] In cross examination by Mr Kelman, Mr Campbell agreed that they waited about ten minutes for Mr Brady to tell them when the power had been shut off and during that time there was no briefing or meeting and that the short and ground takes about ten minutes to install.

[27] He said Mr Nelson went about 15 feet and stopped, waiting, and he heard Mr Burton say the line was dead. He added that Mr Nelson had no reason to go up to the top until the short and ground was applied and that his role was to give material to the men on the pole. He insisted that he heard, from the office, that they were getting one hour to change the cross arm and he disagreed with the suggestion that there was no restriction on time relayed for shut down.

[28] When cross examined by Mr Canute Brown, he said he lived in Trinity and was familiar with the pole where the accident occurred. He admitted that he noticed the problem at Melrose when clearing bush from under the transmission line, and he made the report to Mr Spencer the day after he saw it, and that he went back in less than a week, having been told by Mr Spencer that they were going back to change the cross arm.

[29] He said he was at the office when he received that information, all the workers were present and that in a meeting, they were told that a phone call would come through and he expected Mr Burton to get the call. He also said he was a groundsman and was there assisting Mr Nelson to change the cross arm and that he had seen Mr Nelson work before that day.

The Second Defendant's/Ancillary Claimant's Case

[30] Mr Errol Mosely and Mr Berris Brady gave evidence on behalf of Windalco and their witness statements filed on July 31, 2017 stood as their evidence in chief.

~~[31]~~ Mr Mosely states that he has been an Electrical Engineer for Windalco from 1986 and that a Linesman is a specialist area in which he is not trained, and he has minimum knowledge of the duties and responsibilities of a Linesman.

[32] He states further that Pneumatron was informed by letter dated November 5, 1996 from Windalco (previously Alcan Jamaica Company) of their appointment as a registered electrical contractor and were provided with copies of the General Conditions of Contract, Acknowledgment of the General Conditions of Contract, Manual of Safety Rules for Contractors and Current Labour Agreement and that according to the terms of Windalco's Manual of Safety Rules for Contractors, Pneumatron was to ensure that their employees strictly observed all of Windalco's policies, rules and regulations concerning safety and health, consult with Mr Brady to ensure all safety clearances are in place before commencing work and actively monitor their employees' activities and correct them when necessary.

[33] He says that Windalco does not have the tools, equipment and personnel to carry out repairs to cross-arm, and where such work arises, they outsource it to a registered electrical contractor such as Pneumatron. These jobs, he says, would entail site visits, standard safety procedures including removing voltage from the lines to permit work on the lines and the issuance of safety clearance certificates signed by Windalco and the contractor.

[34] He also states that safety clearance certificates are issued for all electrical jobs and the standard practice instructions state that work on an electrical circuit without both parties signing the safety clearance certificate should never be attempted and it was Pneumatron's responsibility to ensure their workmen's safety by waiting on receipt of the safety clearance before commencing work.

[35] Mr Mosely indicates that he attended an investigation hearing into the accident between June and December 2007, which is a standard practice at Windalco in cases of accident. He explains that the receipt of a safety clearance certificate would have indicated that the line was de-energised and safe to work on and Windalco personnel being on site, would confirm the job location and provide the safety clearance. He adds that before the start of the job, an 'on site' briefing should have been done.

[36] He says short and ground involves connecting a de-energised electrical circuit to ground which prevents injury to workmen if the circuit is accidentally re-energized and where work is being done on high tension wires, the short and ground must be installed after safety clearance is given as this is standard and approved practice in Jamaica and internationally, and was so in 2007. He adds that it is Windalco's standard practice that safety clearance certificate is signed by both Windalco and the contractor.

[37] In amplifying his evidence in chief**,** Mr Mosely said that where he speaks to Pneumatron Electrical Limited, he was referring to the same company, Pneumatron Electrical Services and when he says Pneumatron is one of Windalco's contractors, he meant that to be employed to Windalco as a contractor, the company has to be registered through the government.

[38] He said that he is unaware of the climbing of a utility pole, halfway, before the short and ground is installed, to be a common practice, as the short and ground is installed because it is a safety device to protect the workmen. He added that before

the short and ground is installed Windalco would take the safety certificate, which states that the line is de-energised and it is safe to work, to the contractor.

[39] In commenting on Mr Nelson's statement that you can lean on a pole and be electrocuted, he said that is not entirely true and that once a line is energised you should not knowingly install a short and ground, and that high voltage gloves which can withstand up to 100,000 volts are to be put on before installing the short and ground. He also said arcing, which is a blaze of fire and smoke coming from the transmission line, would not cause injury to the person installing the short and ground as the voltage gloves provide protection.

[40] When cross examined by Ms Hudson, Mr Mosely said he was aware of Pneumatron carrying out de-bushing exercise for Windalco and that when a contractor is called to do any job on Windalco property, a representative from Windalco would brief the contractor on the nature of the job, take the contractor to the location and the contractor would give a quotation as to the charge to do the job. He added that the technician or engineer of Windalco would generate a 'purchase requisition' through Windalco's computer based management system and the Purchasing Department would generate a Purchase Order and give permission to the contractor to execute the job.

[41] He stated that the safety certificate has to be signed by both Windalco's and the contractor's representatives, to indicate that they are sure the line has been de-energised, and then the short and ground would be installed and that when Mr Brady proceeded to isolate the line and inform Mr Burton that the short and ground should be applied, it was a breach of standard protocol.

[42] He indicated that he has not done any 'line work' but he has supervised the repairing of Windalco's transmission lines by registered contractors including Pneumatron, and that investigations were done by Windalco following the accident in which it was found that no Windalco personnel were on site and there was no safety clearance.

[43] He further stated that where Mr Brady said he isolated the section of the lines between Trinity Wells sites and Porus, called and informed the person who answered that the isolation was complete and he should install the short and ground, that is in breach of the procedures set down by Windalco. He added that safety clearance is issued before you install the short and ground and the safety clearance certificate would confirm that the line is de-energised, and would confirm the job location. He said the standard practice is to apply the short and ground to a de-energised line.

[44] He was not cross examined by Mr Brown.

[45] In clarifying his evidence, he explained that the secondary purpose of short and ground is to indicate whether or not there is any power in the line that should have been de-energised.

[46] Mr Berris Brady's evidence is that he is an Electrical Facilitator at Windalco's Kirkvine, Manchester Plant and that in June 2007 he was an Electrical Technician at Windalco and his duties included maintaining the Plant's high voltage distribution lines, verifying reports of electrical faults and coordinating the response. He states that he arranged for a job to be done by Pneumatron to repair a defective cross-arm on an electrical pole between Trinity Wells site and Porus Wells site after cancelling the job with Crawford and Sons, as a result of a call he received from David Spencer.

[47] He states further, that in the conversation with Mr Spencer he "informed him of the nature of the defect and told him the job scope" and told him to meet him at the start of the job at the Trinity Wells sites for the verification of the isolation of the lines. He also states that the safety clearance procedure for any job requires that all parties involved meet in order to verify clearance that it is safe to proceed with the job. The clearance he says is a written certificate required by Windalco's safety clearance rules for all electrical jobs.

[48] He indicates that the job should have been done on June 7, 2007, but on that date Mr Spencer telephoned him to say he could not make it, and he, Mr Brady, agreed to reschedule it for June 8, 2007. He says that on June 8, 2007, he telephoned Mr Spencer and informed him that he should meet him at Trinity Wells site and Mr Spencer informed him that he would not be coming to the location and gave him the telephone numbers for two of his workmen who he said were already on the site, and that he should proceed with the isolation and call either of the numbers and his supervisor on the ground "would receive the clearance for him". He said he isolated the lines between Trinity Wells sites and Porus Wells sites, called one of the numbers given to him and informed the person that the isolation was complete, he was on his way to the site and the person should install the short and ground.

[49] He states that he headed to the pole between the Trinity Wells site and Porus Wells site and on his way, having received a call giving information that the pumps at Trinity wells site had stopped running. He says as a result, he called the same number given to him by Mr Spencer and was informed that Mr Nelson was badly burnt. He says that he asked the caller where they were and was told that they were at Melrose Hill in Manchester as that was where Mr Spencer had instructed them to go. He says he was headed in the opposite direction, so he turned his vehicle around and drove to Melrose Hill and on his arrival he transported Mr Nelson to the main road and an ambulance from Windalco took him to the hospital.

[50] He adds that the lines at Melrose Hill were not isolated as no work was planned for that area and at no time during his discussion with Mr Spencer was there any mention of work being done at Melrose Hill.

[51] He stated further that there was an internal investigation into the incident and representatives of both Windalco and Pneumatron attended.

[52] In amplification of his evidence in chief, Mr Brady stated that the short and ground would prove if the line is actually dead and that when he said he was on his way

to the site, they would wait for him to arrive to issue the certificate indicating that the line is dead.

[53] When cross examined, by Ms Hudson, he said he carried out inspection on Windalco lines from time to time, but an employee made a report about a defective cross arm on a utility pole between Trinity and Porus Well sites which was considered as an electrical emergency, so he promptly visited the location to verify the report. He said in order to repair the defect, arrangements were made with one of Windalco's registered contractors, Crawford and Sons, but after receiving a phone call from Mr Spencer, he cancelled the job with Crawford and Sons and made an oral agreement for the job to be done by Pneumatron.

[54] He agreed that the standard operation procedure, for an on-site visit and a briefing on the scope of the work, was not done, and that the short and ground is part of the safety clearance, but that before he reached the location, he instructed Pneumatron personnel to install the short and ground and he was on his way to the location to sign the safety clearance certificate. He also agreed that he could have isolated the line without communicating with the men and then proceeded to the location and would then have realized that the men were at the wrong location. He said that, based on his instructions, the short and ground would have been applied to an energised line.

[55] He admitted that after the incident he had the opportunity to view the transmission line at Melrose and there was in fact a defective cross arm. He disagreed that he failed to carry out or abide by standard procedures of Windalco as it relates to working on transmission lines. He however agreed, that he failed because in assigning Pneumatron to the job he did not satisfy himself as to certainty of location. He also agreed that his duty to isolate lines is a serious task because you are dealing with electricity.

[56] He indicated that in order to achieve certainty of location, Windalco and Pneumatron representatives must meet physically at the location and identify the

problem and he admitted that he proceeded to isolate the line without first calling the men on the ground and that when he called the number he did not enquire where they were. He also admitted that his presence at the location could have confirmed the provisions of the safety clearance that the line was safe to work on and agreed that short and ground should not be applied to an energised line.

The First Defendant's Case

[57] The witness statements of George Burton and David Spencer filed on July 31, 2017 stood as their evidence in chief.

[58] George Burton states that he is an electrician and Team Leader employed to Pneumatron Electrical Supplies and as Team Leader he supervises four workers in the firm. He says sometime in 2007, he was told by his employer David Spencer to go to "Melrose Old Road at a location" and wait for a call, and that he was familiar with the location, as two weeks before he had noticed that a cross arm on a pole needed to be replaced and had told Mr Spencer.

[59] He says he got the call, did not know who the call was from, and "related the call to members of the group". He says further that the caller stated "that the line was open, meaning that the line is dead". He adds that Williams was about to put on the short and ground when there was an explosion and he saw Nelson hanging from the pole, Williams came down from the pole, climbed the pole Nelson was on and tried to take him down, while he, Burton, tried to call for help.

[60] He states that he called Mr Spencer, the other members of the group tried to lift Mr Nelson, who was unconscious, to their vehicle and later they saw a "pick-up from Windalco" which was used to take Mr Nelson to the main road from where he was taken by ambulance to the hospital.

[61] Under cross examination by Ms Hudson, he said he was familiar with the area and that two weeks earlier he had noticed a cross arm on a pole in that area which was 95% rotten and informed Mr Spencer. He said on the day of the accident he was

in charge and he received a call that the line was open, he did not know the caller, and before receiving the call he had informed the men what was to be done. He stated that after he received the call he did not see Mr Nelson do anything, that he, Mr Burton, was assisting Mr Williams who was about to install the short and ground and the accident occurred in less than five minutes after receiving the call. He said there was an explosion and he saw Mr Nelson about half way up the pole.

[62] Mr Burton indicated that from time to time workmen would climb an isolated pole and wait for the short and ground to be installed, and on that day he did not, as supervisor, warn or remind Mr Nelson not to climb the pole before the short and ground was completed. He also said during the time he would see men climbing de-energised line without the short and ground completed, he would not tell them to come down, but he told them to wait where they were on the short and ground to be installed. He agreed that it was a common practice for workers to climb poles when the line is de-energised and before the short and ground is completed.

[63] He said that he has observed workers from Crawford and Sons climb on the pole, midway, when the line was de-energised. He said that climbing a de-energised pole is not as risky as climbing an energised pole and at the time when he told the workers that the transmission lines at Melrose were de-energised, he did not know that they were energised.

[64] He admitted to failing as a supervisor in carrying out his duties and giving the workmen proper warnings. He indicated that the insulator on the right was falling and it represented a danger to anyone that passed by if there was a slight jerk, shake or breeze, as it could cause a fire or electric shock and that it is possible that if the insulator fell, the pole would become energised and cause a fire. He added that if the line was isolated, that kind of damage wound not be likely.

[65] Mr Burton was not cross examined by Counsel for the 2nd Defendant and there was no question asked in re-examination.

[66] David Spencer's witness statement filed July 31, 2017 stood as his evidence in chief after he was sworn and he identified same. He states that he is the Principal of Pneumatron which has been a contractor with Alcan Jamaica Company and its successor companies since January 24, 1997. He says that on the morning of June 8, 2007, he sent four men to Melrose Old Road to do some work with Mr Brady, the technician from Windalco. He says Mr Brady called him to ask for a phone number of the person in charge, said he was on his way to them and that he gave them permission to apply the short and ground.

[67] He adds that some time after 10 am he received a call that Mr Nelson was badly burnt, and, on investigating, he discovered that Mr Nelson went on the pole while Peter Williams was in the process of putting on the short and ground. The short and ground he states, is the only thing that can indicate to the field personnel that the line is dead.

[68] In amplifying his evidence in chief, he said that he spoke to Mr Brady about the job, denied that he called Mr Brady and said the job was his, but indicated that he told Mr Brady that he had just spoken to Mr Mosely who said he would let him Brady, coordinate the job. He said he spoke to Mr Brady on the phone, told him he would not be able to come and that he would send George. He also said that a week or two before the incident they all went to Ewarton and Mr Nelson was the one who put up the short and ground after Mr Findley gave them the clearance.

[69] When cross examined by Ms Hudson, he said he was told that the defective cross arm was considered an emergency. He said it was important, when contractor and employer such as Windalco decide they are going to carry out repair, that both know where they are going. When pressed, he admitted that a mistake was made and when asked if it is prudent, when work is carried out, like a contractor and employer, that both meet at the job location first, he said "to be honest, that is very rare".

[70] He denied that it is common practice, when a line is de-energised, for workmen to climb half way and wait for the short and ground to be installed, but added “I don’t say it don’t happen”. He stated that he has seen linesmen step on pole and he would shout that the short and ground is not yet on. He said once the switch which controls high tension wires ‘down there’ is switched off, the chances of that line becoming energised is slim and that short and ground is “more than extra” precaution. He said after the short and ground is put on, he would write in “scratch pad” that it was “put on at 11:15” and say “gentlemen it is now safe to go on the line”

[71] He also said the short and ground is the only instrument they can use to know when a line is dead. He said it was never reported to him that before the short and ground is put on workmen would climb the pole. He indicated that when he spoke to Mr Brady, his understanding was that the work was at Melrose because he had not done any work at Trinity for a long time and he knew they were bushing at Melrose. He disagreed that Mr Nelson had ever, in his presence, climbed on a de-energised pole before the short and ground is completed.

[72] When cross examined by Mr Kelman, Mr Spencer said through the short and ground process they have a measure of protection. He said arcing is that electrical sparks emanate from the energized line and you would see “something like you throw gas, so would either burn off, trip breaker, blow fuse”.

[73] He also said that had Mr Nelson remained on the ground with the other men, he would have known that the line was not de-energised when Peter put on the short and ground. He said his training was in electrical installation. He said in 2007 he was the only proprietor of Pneumatron and when he commenced work in 1997 he was also the only proprietor. He indicated that he graded Mr Nelson by the standard of work performed and with regard to the meetings held at Windalco after the incident, he said he could not recall attending.

[74] He agreed that the job of a linesman is hazardous work and agreed that if Mr Nelson remained on the ground he would not get any injury. When asked if on site job briefing was part of the routine practice of Pneumatron he said they had a discussion at the office and that it is not all the time that they had pep talk and "this is a simple little job. A cross arm that don't take about half an hour, ¾ hour. It's a single cross arm, not a double one".

[75] When asked if it was a routine for 'pep talk' to be done in 2007, whether or not the job was simple, he said "we no really do pep talk, we discuss it at the office". He admitted that it would be best practice to have pep talk but they had discussion at the office and "preach it night and day that nobody go on pole until short and ground applied". He agreed that it would be a significant matter that the same morning of the incident he told Mr Brady that his men were at Melrose.

[76] Mr Spencer said Pneumatron Limited ceased to exist about two years ago, it was also a contractor to Alcan and that the same obligations that Pneumatron Limited were under, were the same Pneumatron Electrical Services was under, and that he got a copy of the General Conditions of Contract.

[77] In response to Ms Hudson, he said Mr Nelson was employed to Pneumatron Electrical Services.

The Submissions

[78] At the end of the hearing, Counsel for the parties were directed to file written submissions by April 12, 2019. The court then reserved its decision in order to properly evaluate the evidence and consider the submissions and authorities.

Findings

[79] I find that the Claimant was a highly experienced Linesman and that he was aware of the danger associated with the work he was assigned to do and it was within ten minutes of being told by Mr Burton that the line was dead that he climbed the pole

and stopped midway while Mr Williams was in the process of applying the short and ground.

[80] I also find that Mr Nelson was trained not to climb electric poles before the short and ground was installed but that it was a common practice for this to be done and that Mr Nelson climbed the pole on hearing Mr Burton say the line was dead. Mr Burton, the supervisor, did not conduct an on-site briefing at the time and neither did he give any warning to the men, and in particular to Mr Nelson, at the material time. He therefore failed in carrying out his duties as a supervisor.

[81] It is also my finding that it is very rare that the employer, Windalco, and the contractor, Pneumatron, meet at the job location first and have a briefing on the scope of the work to be done or that they ensure that the proper practices and procedures are carried out such as ensuring that the safety clearance certificate was signed by the respective parties before the permission was given to install the short and ground and the 1st and 2nd Defendants failed in so doing.

The Issues

[82] It fails to be determined whether the Defendants or either of them is liable for the injury, loss and damages suffered by the Claimant; whether the Claimant was responsible for the accident by reason of his own negligence or under the maxim "*volenti non fit injuria*"; whether the Claimant was contributorily negligent and thereby partly responsible for the accident and contributed to the injuries he sustained or whether the plea of *novus actus interveniens* can avail the 2nd Defendant.

The Law and Discussion

[83] In order to establish liability on the part of the Defendants, the Claimant must show that they owed him a duty of care, there was a breach of that duty and as a consequence of that breach he suffered damage. The Claimant must also show that the foreseeability of damage is a result of the negligence of the Defendants.

[84] In **Jamaica Public Service Company Limited v Winsome Ramsay**, SCCA No. 17/03, unreported, delivered December 18, 2006, Harris JA noted that in discharging the burden of proof, the Claimant:

> *"must show the existence of sufficient relationship of 'proximity' or 'neighbourhood' between the defendant and himself, the foreseeability of damage by reason of the defendant's negligent performance of an operation resulting in injury... "*

[85] It is well established that an employer has a duty to have reasonable care for the safety of his employees. In **Davie v New Merton Board Mills Ltd**. [1959] 1 All ER 340, the common law duty of care owed to an employee is stated to be to take reasonable care for their safety. This includes provision of competent staff, adequate plant and equipment and provision of a safe place and a safe system of work and adequate supervision. Failure to fulfil this duty may amount to negligence on the part of the employer.

[86] A safe system of work includes the way in which it is intended that the work shall be carried out, the giving of adequate instructions and the taking of precautions for the safety of workers. Where there is a duty to provide a safe system of work this duty is not discharged by merely providing it. The employer must take reasonable steps to ensure that it is carried out and this involves providing instructions in the system as well as some measure of supervision.

[87] A safe system of work also includes the physical layout of the job; the setting of the stage, the provision in proper cases of warnings and notices and the issue of special instructions. (See **Speed v Thomas Swift & Co.** [1943] KB 557)

[88] On the issue of an employer's duty to provide a safe system of work, the following passage from **Clerk & Lindsell on Torts**, 18th Edition, is instructive:

> *"... An employer does not warrant that the equipment or process is unattended by danger but he is under a duty to see that a safe system of work and adequate supervision are provided. A system of work is a term usually applied to work of a regular and more or less uniform kind. In this connection, it means the organization of the work, the procedure to be followed in carrying it out, the sequence of the work, the taking of safety*

> *precautions and the stage at which they are to be taken, the number of men to be employed and the parts to be taken by them, and the provision of any necessary supervision. ... It is a question of fact whether a system should be prescribed, and in deciding this question regard must be had to the nature of the operation, whether it is one which requires proper organization and supervision in the interests of safety, or whether it is one which a reasonably prudent employer would properly think could be safely left to the man on the spot."*

[89] A Defendant will be said to have breached his duty of care if his conduct falls below the standard required by law and this normal standard is said to be that of a reasonable prudent man. (See **Blythe v Birmingham Waterworks Ltd**. (1856) 11 Ex. Ch. 151). The essence of the duty owed by an employer to the employee is that the operations are not carried out in a way which would subject the employee to unnecessary risks.

[90] I have considered that the nature of the work to be carried out by the Claimant in the case at bar, is one which required very careful organization and supervision and it also required systemic organization and planning. Pneumatron had a duty to fully instruct the Claimant and the evidence discloses that even at the site where the incident took place, there was no briefing on the job to be done and neither was there any meeting between the 2nd Defendant and the 1st Defendant at the job location. The Claimant therefore went about his duties in the usual way and although I accept that there were safety policies, it is clear that they were not adhered to. It is also clear that they were not put in place, monitored, controlled or even insisted upon by Pneumatron and neither did Windalco adhere to what they claim to be their standard practice of ensuring that the safety clearance certificate was signed by them and the contractor before informing the contractor that the line was de-energised and they should install the short and ground.

[91] There was a real and substantial risk of injury to workmen if a safe system of work with adequate supervision were not provided. In my judgment, Pneumatron clearly failed in that duty. Mr Nelson, not expecting the line to be energized, did not act unreasonably, in light of the evidence that his supervisor told him the line was dead. He clearly was led to believe the line was dead by the negligence of his

supervisor who acted on a telephone call from Windalco. Mr Brady and Mr Burton should have ensured there was safety clearance prior to information being given that the line was dead and the short and ground should be installed.

[92] The failure of Pneumatron to ensure there was complete safety clearance, which is a step in providing adequate supervision, led to Mr Nelson climbing the pole before the short and ground was applied. Had proper supervision been given, it is highly improbable that the eventuality of climbing onto the pole before the short and ground was installed, even with the information that the line was dead, would even have arisen. It is therefore the dereliction of duty on the part of the supervisor Mr Burton, who conceded that he failed as a supervisor in carrying out his duties, compounded by the fact that it was common practice for workmen to climb on the pole while the short and ground is being installed, which exposed Mr Nelson to the danger which caused his injury. Mr Burton admitted to not having seen Mr Nelson until after the accident. He also admitted that he did not warn Mr Nelson against climbing the pole until after the short and ground was installed although he knew that it was a common practice for this to be done. The failings by Pneumatron also in my view amount to a breach of their duty to provide a safe system of work and exposed the Claimant to significant risk of injury.

[93] The job carried out by Mr Nelson was inherently dangerous notwithstanding that he was said to be competent and highly experienced. It therefore required strict compliance with safety practices. Pneumatron was well aware that the work of effecting repairs to transmission lines is hazardous and that the method of operation must anticipate danger resulting from the conduct of the careless, inadvertent or indolent employee who exposes himself to injury. Pneumatron therefore fell short in taking all reasonable precautions against such an occurrence.

[94] Pneumatron failed in providing a competent staff, a safe place of work and a safe system of work with effective supervision. The ordinary reasonable and prudent employer would have provided adequate supervision while the Claimant was

engaged in the work he was employed to carry out. I therefore have no difficulty in finding, in the circumstances, that Pneumatron failed in its duty to provide a safe system of work. Lability has therefore been proved on a balance of probabilities as against the 1st Defendant, Pneumatron.

[95] In addition to the general duty of care owed to its employees, Pneumatron had a contractual duty in keeping with the general conditions of the contract signed on January 24, 1997 with Windalco, who contracted them to carry out the job. The contract provides that Pneumatron shall be solely liable for and shall indemnify Windalco, *inter alia*, as follows:

> *" ... in respect of any liability, loss and proceedings arising under statute or at common law in respect of personal injury ... arising out of or in the course of or caused by the execution of the service or work contracted to be done, unless due to any act of neglect by Windalco."*

[96] Windalco, however, cannot escape liability as having contracted Pneumatron, they also had a duty to ensure that the safety clearance certificate was taken to the job location to be signed by the contractor before the short and ground was installed. If it is Windalco's standard practice that the safety clearance certificate is signed by them and the contractor before the work commences, I find it odd that Mr Brady would be calling Mr Burton to say the line is dead and they should install the short and ground. This I believe was a common practice. I also believe that, as stated by Mr Spencer, it is very rare that employer and contractor would meet at the job location first.

[97] Although he admitted to calling to indicate that the line was dead and the short and ground should be applied, Mr Brady indicated that he was then on his way to the location with the safety clearance certificate when as a result of information he received, he called the number he had called earlier and asked where they were. I note that with reference to this second call, he referred to the person he claimed to have called as "the caller". This gives the impression that he is not being truthful. Additionally, the safety clearance certificate which would have given credence to his version of how the event unfolded, was not provided to the court.

[98] Windalco failed to abide by the standard practice and in collaboration with Pneumatron, had telephone contact arranged, and Mr Brady, having isolated the line, instead of proceeding to the job site and ensuring it was safe for the work to be done, informed Mr Burton that the line was dead and that he should install the short and ground. Mr Burton was not told to wait for him to arrive with the safety clearance certificate. This, I find, shows negligence on the part of Windalco, and I am of the view that this, too, was another common practice of Pneumatron and Windalco in their dealings with each other.

[99] In the execution of the work contracted to be done, Windalco was negligent in failing to adhere to the safety procedures. Both Pneumatron and Windalco are therefore liable to Mr Nelson for the injuries he sustained as a result.

Contributory Negligence

[100] Where a defence of contributory negligence is made out, it operates to reduce the claim of a Claimant to the extent which the court finds the Claimant to be at fault. (See Sec 3 of the Law Reform (Contributory Negligence) Act)

[101] The 2nd Defendant having specifically pleaded contributory negligence on the part of the Claimant, has a duty to provide evidence from which the court can find, on a balance of probabilities, that the injury, of which Mr Nelson complains, resulted from the particular risk to which he exposed himself by virtue of his own negligence. All that is necessary to establish this defence is to prove that Mr Nelson did not in his own interest take reasonable care, and contributed, by his want of care, to his own injury. (See **Nance v British Columbia Electricity Railway Co. Ltd** [1951] AC 601

[102] Windalco has asserted that Mr Nelson failed to pay any or any sufficient regard to his own personal safety, ascended the pole without first ensuring the short and ground was properly installed, failed to observe their Standard Electrical Clearance Procedure and failed to exhibit the ordinary care and skill of an experienced Linesman.

[103] Although an employer cannot be expected to protect an employee from their 'most egregious follies', at the same time, the employer ought to take steps to eradicate obviously dangerous practices and it is clear from the evidence that the supervisor Mr Burton failed to ensure that Mr Nelson waited until the short and ground was installed. It is also clear from the evidence that Mr Brady failed to ensure that the safety clearance certificate was signed before indicating that the short and ground should be installed.

[104] Mr Nelson was experienced. He, however, was not under any obligation to devise or lay down a safe system of work. (See **General Cleaning Contractors V Christmas** [1953] AC 180) He was to comply with the system of working which on the evidence would include waiting until the short and ground is installed and when told that the line is dead, to climb the pole.

[105] Mr Nelson climbed the pole after hearing that the line was dead, but before the short and ground was installed, and the information came from his supervisor, who had a duty to ensure that standard procedures and practices were followed. The supervisor received a telephone call from Windalco's technician who should have attended at the location to have the security certificate signed before indicating that the short and ground could be applied. However, I find on a balance of probabilities that it was an established practice to climb the pole while the short and ground was being installed, so his voluntary exposure to the risk of injury by doing what he did in a way which it has been done before, or which is a common practice, on hearing that the line was dead, was due to lack of proper supervision at the material time and the failure of Windalco's personnel to follow standard procedures.

[106] There is no evidence to show that Mr Nelson had done a deliberate act against which he had been warned, but I find that being a highly experienced electrician and Linesman he would be considered to understand the hazardous nature of the job he was employed to do. He should therefore bear some of the responsibility for the injuries he sustained on the basis that he clearly did not have due regard

for his own safety and was not in full compliance with the system of work which was put in place by his employer, Pneumatron. Having taken the risk to climb the pole, awaiting the short and ground to be installed, albeit after having heard from his supervisor that the line was dead, he must therefore be held partially responsible.

Volenti Non Fit Injuria

[107] The 1st Defendant did not plead contributory negligence as against the Claimant but pleads *volenti non fit injuria*.

[108] It was submitted on behalf of the 1st Defendant that the defence is not that Mr Nelson simply knew of the risk of harm to him and yet pursued the course of action that resulted in his injury, the risk was not created or enhanced by the negligence of the 1st Defendant.

[109] Counsel cited the case of **Imperial Chemical Ltd v Shatwell** [1965] A.C.656 in support of the general proposition that where a Claimant was under no pressure from a Defendant to adopt a dangerous method of work, which to his knowledge is forbidden, and departs from that which might reasonably be expected by anyone carrying out that work, sustains injury, the defence is available to the Defendant.

[110] A person who consents to injury cannot be heard to complain thereafter. In order for the defence of *volenti non fit injuria* to apply, 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)

[111] Lord Denning in **Nettleship v Weston** [1971] 3 All E.R. 581 at 587 expressed the view that:

> *"... knowledge of the risk of injury is not enough. Nor is the willingness to take the risk of injury. Nothing will suffice short of an agreement to waive any claim for negligence. The Plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of*

> *reasonable care by the defendant: or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him ... "*

[112] The 1st Defendant in pleading this as a defence, indicates that Mr Nelson climbed the pole before being satisfied that the lines were de-energised. Mr Nelson was a highly experienced linesman and he had knowledge of the danger associated with his job. His mere knowledge, however is not sufficient to fulfil the requirements for establishing the elements of the maxim, as it is clear on the evidence that he was told by his immediate supervisor Mr Burton, that the line was dead, and thereafter he climbed the utility pole. It is the breach of duty of Pneumatron and Windalco which created the stage for the subsequent injuries.

[113] Additionally, there is not sufficient evidence led to show that the Claimant had agreed that if injury resulted, the Defendants would be absolved from liability and neither can it be said that Mr Nelson assumed the risk to climb the pole at a time when it was not de-energised.

[114] I therefore find that the defence of *volenti non fit injuria* is not applicable in the circumstances.

Novus actus interveniens

[115] In order for this maxim to apply, the *novus actus* must constitute an event which obliterates any wrongdoing on the part of a Defendant. The injury to Mr Nelson was the precise event which the common law and statutory duties of the Defendants were directed at, and therefore, the act of climbing the pole before the short and ground was installed could not be said to be a *novus actus interveniens*.

[116] If the Claimant had sustained his injuries by intentionally and deliberately, doing that which the Defendants are under a duty to prevent him from doing negligently, it may be held that the chain of causation was broken by his deliberate act and in such a case his claim would be defeated on the principle of *novus actus interveniens.*

[117] I find however, that although Mr Nelson's act of climbing the utility pole would appear to be an intervening act, it was a foreseeable consequence of Mr Brady informing Mr Burton that the line was dead and the short and ground should be installed, as Mr Nelson's act of climbing the utility pole before the short and ground was installed, as stated earlier, was a common practice of employees at Pneumatron at the material time. Without the affirmative message of the lines being de-energised, Mr Nelson would most likely not have made the careless decision of climbing the utility pole before the short and ground was installed.

[118] I therefore find that this defence cannot stand, as the act of climbing the pole, at the time, which is being relied on by the 2nd Defendant, is an act which the Defendants have a duty to ensure does not take place.

Indemnity

[119] An acknowledgment of the general conditions of contract was signed on behalf of Pneumatron by its managing director and electrical supervisor in January 24, 1997. It implies that Pneumatron fully understands that work carried out for Windalco will be carried out under the terms and conditions of the general conditions of contract, current collective labour agreement and the manual of safety.

[120] In the general conditions of contract, it is provided that Pneumatron shall be solely liable for, and shall indemnify Windalco:

> *"…in respect of any liability, loss and proceedings arising under statute or at common law in respect of personal injury whomsoever arising out of or in the course of or caused by the execution of the service or work contracted to be done, unless due to any act of neglect by Windalco."*

[121] I find that Windalco is not free from liability in relation to the personal injuries suffered by Mr Nelson. Windalco breached their duty of care owed to Mr Nelson as Mr Brady did not ensure that the Pneumatron workers were at the correct location before informing Mr Burton that the lines were de-energised and neither did Mr Brady follow the proper procedure of attending at the site to have the safety clearance certificate signed before indicating that the line was de-energised and

the short and ground should be applied. Windalco is therefore not entitled to an indemnity as the injury to Mr Nelson arose partly due to their negligence.

Apportionment of Liability

[122] Although he was an experienced linesman, Mr Nelson was not obliged to devise and implement a safe system of work: (See **General Cleaning Contractors Ltd v Christmas** [1954] AC 80) He was under an obligation to comply with the system of work, which on the evidence, would include waiting until the short and ground was installed and waiting to be told that the line was dead. It is clear on the evidence that Mr Nelson should bear some of the responsibility for the injuries he sustained on the basis that he clearly was not in full compliance with the system of work devised and implemented by Pneumatron, notwithstanding that it was the practice to climb the pole and await the short and ground being installed.

[123] On the other hand, it is also clear that neither Pneumatron nor Windalco acted reasonably in the circumstances. They did not follow their own operating standards and thereby did not provide a safe system of work for the Claimant. Mr Burton on behalf of Pneumatron did not ensure that it was safe for Mr Nelson to climb the pole and did not insist on him not climbing the pole before the short and ground was put on, while, Mr Brady on behalf of Windalco, made a telephone call, but failed to attend at the site where the work was to be carried out and failed to ensure that the safety clearance certificate, which should have been signed, presumably at the site before the work was undertaken, was signed before informing Mr Burton that the line was dead.

[124] In the case of **Smith v Chesterfield District Co-operative Society Ltd.** [1953] 1 All ER 447, the plaintiff was held 40% to blame because she had done a deliberate act against which she had been warned. The Jamaica Court of Appeal in **Desnoes & Geddes v Garry Stewart**, SCCA No. 74/2002, (unreported), delivered November 3, 2009, at page 9 of the judgment, with reference to the cases of **Smith**

v Chesterfield and Amy Pitters, noted that if the "risky thing" was in disobedience of orders, the court will apportion the degree of responsibility.

[125] Mr Burton acted unreasonably in placing reliance on Mr Brady's call that the line was dead and in his failure to ensure that Mr Nelson did not climb the pole before the safety clearance was given. It is therefore clear that Pneumatron did not provide a safe system of work and it is this failure which is the main cause of the incident leading to the injuries sustained by Mr Nelson.

[126] Both Pneumatro and Windalco were negligent by not ensuring that all systems were in place and in particular that the safety clearance certificate was signed before Mr Burton was told that the line was dead and he gave this information to Mr Nelson and the other workers. Although Mr Nelson's action cannot be equated with that of Smith, in the case of **Smith v Chesterfield**, *supra,* in that his action was not in direct disobedience of any particular order, it is the fact that he was well aware of the danger associated with the job he was doing and his failure to wait until he was advised that it was completely safe which to my mind leads to a finding that he ought to bear some blame.

[127] I would therefore apportion liability 50% against Pneumatron, 30% against Windalco and 20% against Mr Nelson.

[128] I will now consider the damages to which Mr Nelson is entitled.

Damages – Assessment

General damages

[129] Mr Nelson was about 49 years old at the time of the incident. He was diagnosed by Dr Copeland as having partial thickness electrical burns to both upper limbs on approximately 12% of his body and cerebral concussion. Dr Arscott examined him on January 26, 2011 and found that he had obvious extensive hypertrophic and keloid scarring and pigmentary blemishes and pointed out that corrective surgery will provide partial improvement to some aspects of the keloid scarring. There was

no further improvement seen when he was examined on January 28, 2016. Mr Nelson however continues to suffer from itching and pain. Additionally, he had to wear 'Pressure garments' for over one year.

[130] Counsel for Mr Nelson submitted that he was claiming $7,500,000.00 as general damages. Reliance was placed on the following cases:

i. **Walter Dunn v Glencore Alumina Jamaica Limited t/a West Indies Alumina Company (Windalco**) Claim No. 2005HCV1810, unreported, delivered April 9, 2008, in which the claimant was diagnosed with burns to 3% of his total body surface. He complained of pain and itching and was assessed as having 5% PPD. He was awarded $1,312,500.00 (CPI 124.8) which updates to $2,834,284.85

ii. **Kirk Barrett v Glencore Alumina Jamaica Limited** Claim No. 2005HCV05127, unreported, delivered June 11, 2007. This claimant was diagnosed with chemical burns to 6% of his body surface and was awarded $1,950,000.00 ((CPI 105.1) which updates to $5,000,237.86 (CPI 269.5)

[131] Counsel for Pneumatron had pleaded volenti non fit injuria, which the court found inapplicable to the facts in issue, and he made no submissions in the event the defence was not accepted, while Counsel for Windalco made no submission on damages, contending that the issue of damages "ought not to arise vis-à-vis the 2nd Defendant.

[132] Having considered the medical evidence and the cases cited for comparison, I find that the cases are reasonable guides in determining the general damages to be awarded to Mr Nelson. Both Dunn and Mr Nelson spent three weeks in hospital, suffered from itchiness and pain at the affected areas and they both had surgery, while Barrett's burns were to 6% of his body. In Mr Nelson's case however, the burns cover a larger percentage of his body surface than Dunn and Barrett, and while Dunn was assessed as having 5% PPD, there was no such assessment made in respect of Mr Nelson. He however has residual hypertrophic scars, keloid

scarring and pigmentary blemish which are permanent and he had to wear pressure garments for approximately one year.

[133] In all the circumstances therefore, I find that adequate compensation for his pain and suffering would be $6,000,000.00.

Future medical expenses

[134] Mr Nelson has claimed the sum of $780,000.00 for future medical expenses. And he has given evidence that he was to do another surgery but that he could not afford it. Dr Arscott opined that Mr Nelson may require at least two surgical procedures and that surgery will provide partial improvement to some aspects of the keloid scarring and that the post-operative superficial x-ray therapy would be necessary to limit recurrence of keloid scarring. Dr Arscott indicated in his report dated February 8, 2016, that the costs for the surgery, x-ray therapy and follow up care would be approximately $1,110,000.00.

[135] Mr Nelson in his Second Further Amended Particulars of Claim has particularised his cost to future surgery as totalling $780,000.00.

[136] Applying the principle that judgment cannot be entered for a sum greater than that which is pleaded, I will make an award of $780,000.00 for future medical expenses.

Handicap on the labour Market

[137] Under this head of damages, the court is being asked to assess the Claimant's reduced eligibility for employment or the risk of future financial loss. The Claimant therefore need to provide evidence to show that his reduced eligibility for employment is as a result of his injuries.

[138] Mr Nelson claims that he is unable to return to his pre-accident status as a Linesman due to his current disability. He states that he still feels pain and itching in the burnt areas, when the time is cold, and that he cannot lift anything that is too

heavy and has not had any steady work since the accident. He also states that because of his age no one really wants to employ him.

[139] Dr Arscott who examined Mr Nelson on January 28, 2016, noted that "...apart from extensive disfigurement, there are no significant functional limitations resulting in the scars to the right and left upper limbs."

[140] Mr Nelson has not presented any cogent evidence to support a claim in respect of reduced eligibility for employment and there is no medical evidence to suggest that he cannot work despite his injuries. I do not find that Mr Nelson has made out a case for an award for handicap on the labour market. I will therefore make no award under this head of damages.

Special damages

[141] Special damages must be specifically pleaded and proved. (See **Lawford Murphy v Luther Mills** (1976) 14 JLR 119). The authorities however show that the court has some discretion in relaxing the rule in the interest of fairness and justice, based on the circumstances. (**Julius Roy v Audrey Jolly** [2012] JMCA Civ 53)

[142] Mr Nelson in his Second Further Amended Particulars of Claim has pleaded a total of $1,309,477.16 as special damages. This includes his claim for medical expenses, $44,800.00 for transportation expenses, $855,000.00 for loss of earnings, $292,500.00 for extra help, and loss of contract under the Canadian Farm Work Programme.

[143] He has proved on his evidence that he incurred medical expenses totalling $117,177.16. In relation to his claim of $44,800.00 for transportation expenses, I find that Mr Nelson would have incurred expenses for transportation for his many visits to the doctors and the clinic and that the sum claimed is reasonable under the circumstances. I will therefore award the sum claimed.

[144] He did not provide any evidence in relation to his claims for extra help and no sum was pleaded for the loss of contract under the Canadian Farm Work Programme. Therefore, no award will be made in respect of those claims.

Loss of earnings

[145] Mr Nelson in his Second Further Amended Particulars of Claim states that he lost earnings at $7,500.00 per week from June 8, 2007 to August 21, 2009. His evidence is that since the accident he has not had any steady work and because of his age nobody wants to employ him. He has not provided any evidence as to the amount he earned when he worked and neither has he produced any documentary evidence to support his claim for loss of earnings.

[146] I accept the Claimant's explanation regarding his lack of steady work and I am of the view that sum claimed is reasonable, based on the nature of the work he did. I will therefore make an award for loss of earnings in the sum claimed.

Disposition

[147] Judgment for the Claimant with damages assessed and awarded as follows:

General damages for pain and suffering and loss of amenities awarded in the sum of $6,000,000.00 with interest at 3% from October 12, 2009 to date of judgment

Costs to future medical care awarded in the sum of $780,000.00 (no interest)

Special damages awarded in the sum of $161,977.16 with interest at 3% from June 8, 2007 to the date of judgment

Loss of earnings awarded in the sum of $855,000.00 (no interest)

Costs to the Claimant to be taxed if not agreed

Execution stayed for 6 weeks