[2016] JMSC Civ. 43

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012 HCV 00491

BETWEEN	**FITZROY BLAIR**	**CLAIMANT**
AND	**DONOVAN SMITH**	**1ST DEFENDANT**
AND	**THE JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**2ND DEFENDANT**
AND	**KAYDON & SONS COMPANY LIMITED**	**3RD DEFENDANT**

Mr. Sean Kinghorn instructed by Kinghorn & Kinghorn for the claimant.

Mrs. Tana'ania Small Davis and Mr. Joshua Sherman instructed by Livingston Alexander & Levy for the 2nd defendant.

Mr. David Johnson instructed by Samuda & Johnson for the 3rd defendant.

Heard: 22nd & 23rd June, 2015 and 29th March 2016.

Negligence – Employer's liability – Whether lineman an independent contractor or an employee – Safe system of work – JPS utility pole uprooting while the lineman was working on it – Utility pole rotten below the surface, whether JPS discharged its statutory duty to secure the public against personal injury **. Assessment of damages – Principles in quantifying general and special damages.**

EVAN BROWN, J

Introduction

On the 30th July, 2009, Robert Blair, a transmission and distribution lineman in the service of Kaydon & Sons Company Limited, sustained injuries when a Jamaica Public Service Company Limited utility pole broke under his weight and both came crashing to the ground from a height of about 35 feet. From that height, Mr. Blair heard someone shouted from the ground, “di pole a root out a grung”. “Grung” is the Jamaican word for ground.

[1] He looked down and saw the pole being uprooted and was aware of falling to the ground. The next thing he was aware of was being a patient in the Andrews Memorial Hospital. He was transferred later that day to the University Hospital of the West Indies, where he remained until his discharge on the 1st August, 2009. How did Mr. Blair come to be on the utility pole?

Background

[2] In 2009 the National Works Agency undertook the widening of Dunrobin Avenue in the parish of St. Andrew (the Dunrobin Avenue Project). That exercise impacted the works of the Jamaica Public Service Company Limited (JPS), the 2nd defendant. That is to say, the distribution line had to be relocated. New utility poles had to be planted and new conductors strung along the new distribution line. In addition, the existing utility poles and power conductors had to be removed.

[3] Kaydon & Sons Company Limited (Kaydon), the 3rd defendant, which provided electrical engineering services, was contracted by the 2nd defendant to accomplish that task. Mr. Donovan Smith, the first defendant, was the managing director of Kaydon. The claim against him was discontinued by notice of discontinuance filed on the 6th November, 2013. Specifically, Kaydon was contracted to relocate the 24Kv Distribution Line located along Dunrobin Avenue.

[4] The JPS's role was to oversee the complete "Works". Two of their employees, Raymond Ramsay, then Construction Coordinator and Mr. Antoney Riley, were present. The function of the JPS employees, however, was to de-energize and re-energize the distribution line to facilitate the contractor's crew working safely on the line. The power would be de-energized in the morning and at the end of each day the JPS workers would re-energize the distribution line to restore power to the area.

[5] As was to be expected in an environment such as the Dunrobin Avenue Project, safety was a major concern. Each day there were two meetings on safety before the commencement of work. The first meeting was conducted by Mr. Raymond Ramsay and Mr. Donovan Smith. Following that meeting there was a tailboard meeting. The tailboard meeting was conducted by Mr. Donovan Smith with his workers.

[6] At these meetings safety practices as well as the manner in which work scheduled for the day would be carried out was discussed. Members of the crew were checked to ensure that they had the proper safety gear for the day's work. Specifically, the removal of lines and poles was discussed at the safety meetings. There was also discussion about markings in the tailboard safety meetings. Utility poles which had markings should not be climbed. Those should be accessed by crane and bucket.

[7] By the 29th July, 2009, the new power lines had already been installed and the work on this day was to see to the removal of the old utility poles which were now encroaching on the newly widened roadway. In order to remove the old utility poles, all the equipment attached to them, for example conductors, had first to be removed by a lineman. Some of these utility poles, such as the one from which the claimant fell, were as tall as 45 feet. Therefore, to access the attached equipment the utility pole either had to be climbed or assailed with the use of a bucket truck.

[8] Whether the equipment was accessed by climbing or by the use of a bucket truck depended on the condition of the utility pole. Wooden utility poles were known to be susceptible to rotting, especially at the base. The most common area of rot was the section just above the surface and about 2 feet below ground. To ascertain the condition of the utility pole above ground, the lineman would use an implement such as a lineman spanner or ball pin hammer to knock around the pole from the base upwards and listen for the sound of hollowness. The lineman would also carry out a visual inspection of the utility pole.

[9] Having done that, the next thing was to inspect the utility pole below the surface. To do that, the lineman was required to dig to a depth of between 18 inches and 2 feet around the utility pole. Utility poles were typically planted at a depth of 6 feet. Where a wooden utility pole was planted in concrete, various tools could be used to dig around it, such as a steel bar, hilted bar, digging bar, or a jack hammer. A digging bar was also used to dig where the utility pole was planted in dirt.

[10] The JPS too was concerned about the condition of its wooden utility poles, being aware of its vulnerability to rotting. In furtherance of that, the JPS had a system in place to periodically check those poles for rot. That task was undertaken under two procedures known as detail patrol and hazard patrol. The detail patrol would check from pole to pole and all the hardware on the pole. That took place every three years. A record would be made of the state of integrity of each utility pole.

[11] Outside of the detail patrol, utility poles were examined sometimes every six months under the hazard patrol procedure. The purpose of the hazard patrol was to discover deterioration in wooden utility poles in the three year cycle. The hazard patrol would be done with reference to the file compiled from the detail patrol. This procedure involved driving through the feeder that is, the circuit, while looking for specific hazards.

[12] It appeared that normally, there would not be any examination of utility poles below the ground during the hazard patrol. Indeed, the hazard patrol did not normally examine utility poles not marked with an "X". Once the utility pole is marked with an "X" the hazard patrol would do a below ground examination as the "X" indicated the detail patrol found rotting.

[13] The JPS marked poles with an "X" when they were bad in cases where it is doing works, for example maintenance, with the intention of removing them from the line. Where all the poles were to be removed, as was the case with the Dunrobin Avenue Project, there would be no need to mark any of them as bad. The purpose of the JPS in marking a pole with an "X" was never to indicate its fitness for climbing to a lineman. When the entire work was contracted, as it was to Kaydon, the JPS was not responsible for marking poles as good or bad.

[14] Ordinarily, where the JPS engaged the services of an independent contractor, the JPS would carry out an examination of its equipment before handing over to the independent contractor. That notwithstanding, it was not standard operating procedure for the JPS to check utility poles before handing over to the contractor. The Dunrobin Avenue Project was, however, a special undertaking. Consequently, the JPS would not check utility poles on a project like this.

The claim against the 3rd defendant

[15] During the trial the claimant accepted that he was not employed by the 2nd defendant. Consequently, it is more convenient to first consider the liability of the 3rd defendant.

[16] Mr. Blair said that he was engaged under a contract of service with Kaydon. He commenced working for Kaydon in 2006. He first worked as a lineman in about 1989 when he worked with a Mr. Vincent Gardner. However, when asked about training as a lineman he said he got training from one Mr. Burton. His training as a lineman continued in 2003 when he worked with the JPS for three months.

Between 2003 and 2006 it appears that he worked as an electrician with his uncle. Kaydon was the last entity he worked with as a lineman.

[17] Mr. Blair alleged that on the 30th July, 2009 he was in the lawful execution of his duties as a lineman on premises owned, controlled or occupied by the JPS when, as a result of the negligent manner in which both defendants executed their operation, he was exposed to the risk of injury. Mr. Blair listed eleven particulars of negligence of the defendants generally, all of which do not apply to Kaydon.

[18] The particulars of negligence which appeared pertinent to Kaydon were, failing to provide a safe place of work; failing to employ a safe system of work; failing to provide the requisite warnings, notices and or special instructions to the claimant and its other employees in the execution of its operations so as to prevent the claimant being injured; failing to provide a competent and sufficient staff of men; failing to modify, remedy and or improve a system of work which was manifestly unsafe and likely at all material times to cause serious injury to the claimant; failing to warn the claimant of the dangers involved in climbing on the said pole; causing the claimant to suffer injury in the course of replacing the said electrical wires of the said light pole; employing a manifestly unsafe and dangerous procedure in the replacing of the said electrical wires of the said light pole and instructing or causing the claimant to climb upon a defective pole.

[19] The claim against Kaydon was also framed, alternatively, in contract. Mr. Blair averred that it was an expressed or implied term of the contract that Kaydon would take all reasonable care to execute its operation in the course of their trade in such a manner so as not to subject him to reasonably foreseeable risk of injury. Mr. Blair alleged that in breach of that contract Kaydon exposed him to reasonably foreseeable risk of injury as a consequence of which he sustained serious personal injury, loss and damage.

[20] In its defence to the claim, Kaydon said Mr. Blair was employed under a contract for services as a task worker to provide lineman services. Kaydon, however,

admitted that Mr. Blair was in the lawful execution of his duties as a lineman at the material time. Kaydon admitted that Mr. Blair was injured when a pole which he climbed snapped and fell with him. That admission carried with it a denial that it was negligent in the manner in which it carried out its operations or that it exposed Mr. Blair to risk of injury and in fact caused Mr. Blair to sustain injuries.

[21] Kaydon further averred that it was advised by the JPS that before it was engaged, the latter checked the utility poles along the length of roadway which carried the 24Kv distribution line and marked unsound poles with an "X". The unsound poles were to be accessed with the aid of a bucket truck. Kaydon admitted assigning Mr. Blair to climb an unmarked utility pole.

[22] Notwithstanding the pole being unmarked, in keeping with its safety practices, Mr. Donovan Smith, the managing director of Kaydon, instructed Mr. Blair to check the utility pole for soundness so that he would be reasonably safe in climbing and working on it. Mr. Blair, Kaydon said, complied with the instructions to check the pole then put on the safety gear and climbed the pole. While Mr. Blair was carrying out the designated work on the pole it suddenly broke and fell, taking Mr. Blair with it. An examination later revealed that the pole had rotted below the ground level and appeared to have been infested with duck (wood) ants.

[23] In the circumstances, Kaydon denied that it, or its servants or agents, was guilty of any negligence. Alternatively, Kaydon counter-averred, any injuries, loss and damage Mr. Blair may proved was caused wholly or in part by his own negligence, or the negligence of the JPS, or the combined negligence of both. Kaydon went on to particularise the negligence of the JPS and Mr. Blair. In respect of Mr. Blair, Kaydon charged that he failed to examine or properly examine the utility pole before climbing it; failed to comply with the standard safety procedures and practices it implemented; failed to apply the procedures expected of an experienced lineman of which he was either aware or ought to

have been aware and failed to take any or any reasonable care for his own safety prior to and while he was on the pole.

Was Mr. Blair an independent contractor?

[24] From the forgoing recount of Kaydon's pleaded case it can be seen that there was no dispute that Mr. Blair was in its employment, whatever the nature of that relationship. He was instructed to climb the unmarked utility pole and, while performing his duties on it, it crashed to the ground with him, without warning. Issue has been joined with the nature of his engagement with Kaydon and the assignment of negligent liability. Mr. Johnson submitted on behalf of Kaydon that I ought to find that Mr. Blair was employed as an independent contractor. That submission was premised on the nature of the work performed by Mr. Blair and the task work contract he executed with Kaydon.

[25] In response, Mr. Kinghorn submitted that the claimant was an employee and not an independent contractor. Mr. Kinghorn relied on a passage from Halsbury's Laws of England 4th ed. vol. 16 para. 3 which is worth quoting in extenso:

> *"Characteristics of the relationship. There is no single test for determining whether a person is an employee; the test that used to be considered sufficient, that is to say the control test, can no longer be considered sufficient, especially in the case of highly skilled individuals, and is now only one of particular factors which may assist a court or tribunal in deciding the point. The question whether the person was integrated into the enterprise or remained apart from and independent of it has been suggested as an appropriate test, but likewise only one of the relevant factors, for the modern approach is to balance all of those factors in deciding on the overall classification of the individual. This may sometimes produce a fine balance with strong factors for and against employed status. "The factor relevant in a particular case may include, in addition to control and integration: the method of payment; any obligation to work only for that employer; stipulations as to hours; overtime, holidays etc; arrangements for payments of income tax and national insurance contributions; how the contract may be terminated; whether the individual may delegate work; who provides tools and equipment; and who, ultimately, bears the risk of loss and the chance of profit. In some cases the nature of the work itself may be an important consideration."*

[26] That submission notwithstanding, the bits of evidence highlighted by Mr. Kinghorn shows that he employed the control test to maintain that Mr. Blair was Kaydon's employee. For example, counsel argued that Mr. Smith directed Mr. Blair which post to climb, to conduct checks before climbing, even directing Mr. Blair to repeat the latter task as he, Mr. Smith, was not satisfied that the check had been done properly.

[27] The first question for my determination, therefore, is, was Mr. Blair engaged by Kaydon as an employee as he contended or, an independent contractor, as Kaydon asserted? An employer owes a duty of care to his employees and is liable for any breach of that duty resulting in damage to the employee which occurs during the course the employee's service. That duty, however, is peculiar to the employee-employer relationship: ***Clerk & Lindsell on Torts*** 19th ed. para. 13-03. It is therefore palpable that the duty is not owed to an independent contractor: ***Jones v Minton Construction*** (1973) 15 K.I.R. 309. Similarly, the independent contractor does not owe a duty of care to the employee of the person who employed him: ***Taylor v Rover Co Ltd and Others*** [1966] 1 W.L.R. 1491.

[28] In the unreported case of ***Roger Ian Dayes v A. Chong and Others*** C.L. D207/95 delivered on 8th October, 1999, Pitter J held that where the employer not only determines what is to be done but also retains control over the performance, the relationship of employer-employee exists. On the other hand, when the employer prescribes the work but leaves the manner of its performance to the workman, the relationship established is that of employer and independent contractor.

[29] While Pitter J did not cite any authority for holding as he did, his classification falls neatly into the traditional control test described by Gilbert Kodilinye, the learned author of ***Tort Text, Cases & Materials.*** In that work, Hilbery J's dictum, expressed in similar vein to Pitter J, is cited from ***Collins v Hertfordshire County Council*** [1947] K.B. 598,615, articulating the control test.

[30] Lord Thankerton in the House of Lords decision of ***Shorty v J. & W. Henderson Ltd*** (1946) 62 T.L.R. 427, 429 set out four criteria of the contract of service: the master's power of selection, the payment of remuneration, the master's right to control the method of doing the work and the master's right of suspension or dismissal. In the view of ***Clerk & Lindsell***, *op.cit*. para. 6-06, control extends beyond the method of doing the work to the number of hours spent on the project. The authority there cited was ***W.H.P.T. Housing Association Ltd v Secretary of State for Social Services*** [1981] I.C.R. 737 in which an architect was held to be an independent contractor because he retained sole control over the hours of service, notwithstanding a high degree of supervision and control over the method of his work.

[31] The control test has been criticised for its inadequacy in the context of a modern business enterprise*: Gilbert Kodilinye op. cit.* p.381. Consequently, the 'organisation' or 'integration' test was propounded as one more befitting the realities of modern commerce. The parameters of the 'organisation' or 'integration' test were articulated by Denning L.J. in ***Stevenson, Jordan and Harrison Ltd. v Macdonald and Evans Ltd*** [1952] 1 T.L.R. 101,111:

> *"Under a contract of service, a man is employed as part of a business, and his work is done as an integral part of the business; whereas under a contract for services, his work, although done for the business, is not integrated into it but is only accessory to it."*

One category of worker held to be an independent contractor under this test was the self-employed electrician: op. cit. p.381.

[32] The 'mixed' or 'multiple' test has also been advanced as a way to differentiate the employment relationship: ***Ready Mixed Concrete (South East) Ltd. v Minister of Pensions*** [1968] 2 Q.B. 497. Under this test the fulfilment of three conditions is taken as establishing a contract of service. They are:

(i) "the employee agrees to provide his work and skill to the

employer in return for a wage or other remuneration;

(ii) the employee agrees, expressly or impliedly, to be directed as to the mode of performance to such a degree as to make the other his employer; and

(iii) the other terms of the contract are consistent with there being a contract of employment."

[33] According to Gilbert Kodilinye, op.cit. p.382, when applying this test, courts do not confine themselves to the three factors listed above. The courts also take into consideration a raft of other matters which amount to elements of the control and organisation tests. The approach is to treat the question as one of mixed law and fact, according to each factor the appropriate weight, in the opinion of ***Clerk & Lindsell,*** *op.cit*. para. 6-10. In assessing whether the other factors are consistent with a contract of service, the learned authors recommend keeping Cook J's rule of thumb in mind, articulated in ***Market Investigations Ltd v Minister of Social Security*** [1969] 2 Q.B. 173. That is, to pose the question, "is the worker in business on his own account?"

[34] In ***Anthony Martin v Eric Bucknor and Jamaica Public service Co Ltd*** [2012] JMSC Civ. 186 Anderson J, similar to the authors of ***Halsbury's Laws of England***, *supra*, opined that no single test is useful to answer the question of whether a workman is an employee or an independent contractor. Citing ***Market Investigations Ltd v Minister of Social Security***, *supra,* the learned Judge considered that other factors such as whether the worker provided his own equipment, hired his own helpers and the degree of financial risk he undertakes, among others, were relevant. In the case before him, Anderson J held the painter who was hired for one task and provided his own painting equipment and helper to be an independent contractor.

[35] Mr. Blair was described as a transmission and distribution lineman with in excess of twenty years experience. Mr. Donovan Smith considered Mr. Blair an expert in his field. Mr. Blair agreed that Kaydon, as well as other contractors, employed him as a task worker. That is to say, he was given a specific task and he was paid according to the task performed. Quite simply, if he performed no task he did not get paid. He was clearly not employed to Kaydon on continuous basis. When he was not working for Kaydon he either worked for other contractors or private individuals, apparently as an electrician.

[36] The occasional nature of Mr. Blair's employment as a lineman is exemplified by the task work contract, tendered and admitted into evidence as exhibit 8. The task work contract revealed that for the month of June 2009, Mr. Blair was contracted to work six or seven days with Kaydon at various locations, none of which seems to have been consecutive, at the rate of $3,500.00 per day. Two of those days appear to have been on the Dunrobin Avenue Project.

[37] According to Mr. Smith, Kaydon's core business was the provision of electrical engineering services. The company would be contracted occasionally by the JPS to carry out various functions relating to the maintenance of its power distribution lines. To use Mr. Smith's words, "the flow of work in this particular field fluctuates." As a result of this fluctuation, the unemployed lineman was a common feature of the trade. This necessitated the ad hoc engagement of linemen described above.

[38] Although Mr. Blair was only occasionally employed to Kaydon, his evidence was that he had been in their employ since 2006. In fact, his unchallenged assertion was that he had not worked with anyone else since 2006. So, although Mr. Blair's employment by Kaydon was not continuous, it was continuing employment for the space of approximately three years.

[39] No doubt that continuing employment provided the framework for Mr. Blair's five days suspension from duties in the wake of the breaking of the pole. In their letter

suspending Mr. Blair, Kaydon directed that upon his resumption he would join a named worker as safety monitor.

[40] It is my considered opinion that Mr. Blair was Kaydon's employee and not an independent contractor. There was no evidence from which it can fairly be said that Mr. Blair was in business on his own account: ***Market Investigations Ltd. Minister of Social Security***, *supra*. Neither was there any evidence that he provided his own tools or hired anyone to assist him in the completion of the tasks assigned by Kaydon: ***Anthony Martin v Eric Bucknor and Jamaica Public Service Company Ltd*** *supra.* In the undertakings in which he was engaged by Kaydon Mr. Blair undertook no financial risks.

[41] Further, while the evidence did not go so far as to demonstrate whether Kaydon exercised any control over Mr. Blair in the actual performance of core lineman duties, there was a measure of control. This control was exercised in instructing Mr. Blair to check the assigned pole that he would have been working on.

[42] Beyond that, Mr. Blair's suspension "from duties" and instruction to as act jointly with another employee as safety monitor are the clearest indication that Kaydon considered him an employee. The power of suspension is one of the long recognized indicia of the master and servant relationship: ***Shorty v J. & W. Henderson***, *supra.* Both the suspension and direction to act as safety monitor are consistent with a contract of service: ***Ready Mixed Concrete (South East) Ltd v Minister of Pension,*** *supra*. It is surely inconsistent with an independent contractor having control over the time within which the work is to be performed to say he is suspended from the performance of his duties.

[43] I would go further to say that the service Mr. Blair provided to Kaydon was not of a collateral nature but integral into its operation: ***Stevenson, Jordan and Harrison Ltd. v Macdonald and Evans Ltd***. *supra*. This was not a situation in which, for example, Mr Blair was hired to provide electrical services in respect of Kaydon's offices or their motor vehicles. In that case it would have been

collateral to the core function of electrical engineering. On the contrary, the kind of service which Mr. Blair brought to Kaydon was essential or integral to Kaydon fulfilling their obligations under the contract with the JPS. In my view, the continuing nature of Mr. Blair's employment to Kaydon, spanning a period of three years, is evidence that his employment was an integral part of their business.

[44] Returning to Mr. Johnson's submission, respectfully, it does not resonate with me. That Mr. Blair would take private work when he was not working for Kaydon is not inconsistent with him being an employee. The fact that Mr. Blair signed a task work contract with Kaydon is not a factor to be considered in isolation of all the circumstances surrounding his employment with Kaydon. The effect of the task work contract was to ensure that he was paid in arrears and only for work done. Payment in arrears is identical to what obtains in a contract of service. In that vein, payment in cash does not necessarily an independent contractor make. Therefore, I accord no weight to the fact that Mr. Blair's wage was paid in cash.

[45] While Mr. Blair was paid according to work done, the continuing nature of his employment over such an extended period, coupled with Kaydon retaining the right to instruct him, partly, in the performance of his duties and exercising a power of suspension made his engagement one of employee. Added to that is the fact that Mr. Blair was fully integrated into the operations of Kaydon. Putting all these factors together, I am persuaded that Mr. Blair was engaged under a contract of service, as he averred.

Did Kaydon owe Mr. Blair a duty of care?

[46] Having found that Mr. Blair was Kaydon's employee, I turn my attention to the question of whether, as his employer, Kaydon owed Mr. Blair a duty of care. The claimant's counsel submitted that a duty of care was owed. Likewise, counsel for the third defendant accepted, if the claimant was found to be their employee, as an employer, Kaydon owed Mr. Blair a duty of care. At common law, an employer

bears a non-delegable duty of care to each of his employees. That is, even if the employer chose to delegate the performance of the duty, he remained personally liable to see that care was taken by his appointee.

[47] As Lord Thankerton said:

> *"The master cannot "delegate" his duty in that sense, though he may appoint someone (sic), as his agent in the discharge of the duty, for whom he will remain responsible under the maxim respondeat superior." See* ***Wilsons and Clyde Coal Company Limited v English*** *[1937] A.C. 57, 65 (****Wilson and Clyde Coal Co. Ltd****.)*

Black's Law Dictionary *renders* "*respondeat superior*" as "the doctrine of holding an employer or principal liable for the employee's or agent's wrongful act committed within the scope of the employment or agency."

[48] As was explained in ***Davie v New Merton Board Mills, Ltd and Others*** [1959] 1 All E.R. 346, 350, the duty of the employer is to take reasonable care for the safety of the workman. Put another way, the employer's duty is to take reasonable care to carry out his operation in such a way that his employees are not subject to unnecessary risk: ***Smith v Baker & Sons*** [1891] A.C. 325,362. As was said in ***Davie v New Merton Board Mills Ltd***, the answer to the question whether the employer has taken reasonable care for the safety of the workman, has to be gleaned from all the circumstances of the case, *per* Viscount Simonds at page 350.

[49] While the standard of care expected of the employer has been described as high, it is not absolute. To say that the standard of care is high is simply saying the precautions required of the employer are not to be viewed in isolation of the perceived danger. In other words, the intimacy in the relationship between the two, precautions and dangers, means more is required of the employer the greater the danger involved in the operation. The converse is also true. (See ***Clerk & Lindsell,*** *op. cit*. para. 13.16)

[50] According to Wolfe JA (as he then was), the employer's duty of care is discharged by the exercise of due care and skill: ***United Estates Limited v Samuel Durrant*** (1992) 29 JLR 468,470. The learned Justice of Appeal relied on ***Davie v New Merton Board Mills***, *supra*, for that proposition. The Court of Appeal followed that House of Lords decision in laying down that the determination of this question is settled upon a consideration of all the circumstances.

[51] The circumstances to be considered are inseparable from the relevant duty the employer is alleged to have breached. Among the employer's common law duties are the duty to provide a safe place of work and a safe system of work and effective supervision: ***Wilson and Clyde Coal Co. Ltd***, *supra*. In the opinion of ***Clerk & Lindsell***, *op. cit*. para. 13-11, the place of work should be as safe as the exercise of reasonable care and skill can make it. Those learned authors are of the further view that an employer cannot discharge this duty by showing that the employee appreciated the existence and nature of the danger on the premises.

[52] When a court comes to consider whether or not a place of work is safe, the court must be mindful of the nature of the place. That is, if, as in this case, it was a utility pole, the standard of safety to be applied is that of a reasonably prudent employer who provides a utility pole for his workman to work on: ***Clerk & Lindsell*** *op.cit*. That said, however, none of the parties in this case made an unsafe place of work a focal point. I will, consequently, pass onto a consideration of the system of work.

[53] An employer has a common law duty to organise a safe system of working for his employees which involves the further obligation to ensure compliance with it, as far as is possible: ***Commonwealth Caribbean Tort Law*** 3rd ed. p.143. The need to organise a safe system of work is coextensive with the complexity of the task involved: ***Clerk & Lindsell*** *op.cit*. para. 13-13.The employer is not called upon to devise a system which will expose the workman to absolutely no risk. The obligation of the employer is to devise and implement a system which is

reasonably safe, in the context of the dangers which inhere the operation: ***General Cleaning Contractors Ltd v Christmas*** [1953] A.C. 180.

[54] The system of working, in its simplest expression, appears to be the setting in which the task or operation is to be performed. While Lord Greene M.R., in ***Speed v Thomas Swift & Co Ltd*** [1943] K.B. 557, 563, specifically declined to define the term, he offered a guide on the matters the system may include. His refusal to attempt a definition appears to rest upon the recognition that the system of work is both an amorphous and ambulatory creature. That is to say, the system of work assumes shape according to the "facts of the particular case", and "can only be determined in light of the actual situation on the spot at the relevant time".

[55] The system of work will, therefore, include:

> *" the physical lay-out of the job, the sequence in which the work is to be carried out, the provision in proper cases of warnings and notices, and the issue of special instructions. A system may be adequate for the whole course of a job or it may have to be modified or improved to meet circumstances which arise. Such modifications or improvements appear to me equally to fall under the head of system."*

[56] In considering the question of the provision a safe system of work, it is clear that a distinction is drawn between the actual operation and the conditions of safety under which the operation is carried out. So that, while an employer may be under a legal disability to personally provide technical supervision of his operation, he remains personally liable for the conditions of safety in which the work is to be performed. (See ***Wilson and Clyde Coal Co Ltd***, *supra*) To adopt and adapt Lord Greene M.R. the system of work is temporally first in time and while it is unconcerned with the work itself, its focal concern is with the safety conditions under which the work is to be performed. In short, the system of working is the safety matrix in which the operation or task is conducted.

[57] Since the employer's obligation is not only to devise and implement a safe system of work but also to ensure compliance with it, his obligation is not fully discharged without adequate supervision. Adequate supervision encompasses the giving of instructions to the employee about how to comply with the system as well as some degree of supervision: ***General Cleaning Contractors Ltd v Christmas***, *supra*. In this vein, it must be borne in mind that the level of supervision required of the employer is commensurate with the depth of experience of the worker: ***Clifford v Charles H. Challen and Son Ltd*** [1951] 1 K.B.495. In the latter case a failure by the foreman to encourage the use of a barrier cream was held to be evidence of an unsafe system of working.

[58] An employer must do his best to see that there is adherence to the system he has put in place. According to Lord Denning, an employer must always bear in mind that workers engaged in routine activity are apt to throw caution to the wind, to borrow a phrase. The employer, however, must do his best to keep that at the requisite standard and be impatient of their slackness. (See ***Clifford v Challen***, *supra*, p.497-498) This, of course, does not mean that workers bear no responsibility for their own safety. In Lord Denning's immortal words, "the employers must take care of the men, but the men must also take care of themselves": ***Clifford v Challen*** at p. 499.

[59] So, on the one hand, the enormity of the risk might necessitate an obligation falling upon the employer to issue an absolute prohibition against the use of a particularly dangerous method of working: ***King v Smith*** [1995] I.C.R. 339. On the other hand, the circumstances may show that it was reasonable for the employer to expect that his experienced worker would guard against an obvious risk. In the opinion of Parker L.J. "reasonable care" does not demand repeated warning to a skilled man where the danger is patent: ***Wilson v Tyneside Window Cleaning Co*** [1958] 2 Q.B. 110,126. Indeed, Lord Parker opined that the disadvantages of doing so may well outweigh the advantages.

[60] Lord Justice Stuart-Smith, in ***Baker v T. Clarke (Leeds) Ltd*** [1992] P.I.Q.R. 262,267, held it to be unnecessary:

> *"for an employer to tell a skilled and experienced man at regular intervals things of which he is well aware unless there is reason to believe that that man is failing to adopt the proper precautions or through familiarity, becoming contemptuous of them."*

[61] That takes me to the rationale for placing the onus on the employer to devise and lay down a safe system of working with effective supervision. Workers, it has been said, are notorious for their frequent, and sometimes habitual, carelessness concerning the risks inherent in their task. Consequently, even where an employer has experienced persons in his employ, his duty to lay down a safe system of work remains undiminished. The thinking appears to be, that even the experienced worker making a decision about imminent danger, does so on the spur of the moment and, therefore, without the benefit of reflection. On the contrary, his employer has the benefit of the contemplative and relaxed atmosphere of the boardroom to consider the problems presented by his operation and apply his mind to them as a reasonably employer would. (See ***General Cleaning Contractors Ltd v Christmas***, *supra* pp.189-190).

[62] In the instant case the claimant, Mr. Fitzroy Blair, was required to perform his task on a wooden utility pole approximately thirty-five feet above ground. To reach that height, he was required to climb the utility pole. Mr. Blair was supplied with a spur and belt to assist him in making the climb. The spur was a strapped on equipment that was placed on the feet with one spur on each leg. The belt would be placed around his waist and a length of it, known as the pole piece, was used to wrap around the utility pole. The belt also had sections to carry the tools required for the job. No issue was taken with the adequacy of the climbing equipment which Mr. Blair was supplied with.

[63] The claimant's contention, made with some force, was that Kaydon employed an unsafe system of working on a wooden utility pole. In my opinion, this was not a simple operation requiring only the giving of safety instructions. Performing a task on a utility pole thirty-five feet above ground carried with it the inherent danger of the pole breaking under the weight of the lineman if the pole proved to be unsound by virtue of rot at its base.

[64] It is axiomatic that serious injury or death could result from such a fall as no net, tarpaulin or other such mechanism was put in place to catch the falling lineman. Exposure to the risk of death or other serious injury to both the lineman and other workers was patent to Kaydon (see exhibit 9). Indeed, it was an agreed fact that it was dangerous to climb a wooden pole without having first checked it for rot. The prior checking of the pole bore such importance that no lineman would rely on the word of another before climbing the pole. The lineman charged with climbing the pole had to be personally satisfied of its soundness for climbing.

[65] Since performing work on a wooden utility pole was so fraught with danger, there was an unmistakeable obligation on Kaydon to devise and implement a reasonably safe system of working on the wooden utility pole. The system deployed by Kaydon must be assessed on the basis of what the reasonable and prudent employer would have done: ***Stokes v Guest, Keen and Nettleford (Bolts and Nuts) Ltd*** [1968] 1 W.L.R. 1776, 1783.

[66] Before finding what the system in place was at the time of the accident, it may be instructive to do so against the backdrop of what appears to have been the standard in the light and power sector. It was common ground that wooden poles were subject to rot over time. The rotting would, notoriously, take place at or near the base of the pole; that is, just above and below ground. Consequently, the lineman was required to conduct a sight and sound inspection of the pole before climbing. As was said in the background, this was both an above and below ground inspection. As this was the evidence from all the parties, I accept this as

the practice in the light and power sector although it was not specifically said to have been.

[67] Since it was Mr. Blair who alleged that the system of working was unsafe, the burden is on him to prove that the system in place was defective in some way. He must prove, on a balance of probability not only that the system was defective but also that the defect was attributable to the negligence of his employer. Within the allegation that the system of working was unsafe is the kernel of an assertion that Mr. Blair complied with the system in place but, notwithstanding his compliance, came to harm because of the inadequacies which inhered the system.

[68] Among the things which Mr. Blair said guided him in his check to ensure that this utility pole was safe to climb, was to ascertain whether it had been marked with "RX", usually in red paint, by the JPS. In his understanding, "R" meant 'retired' and the "X" indicated 'that it should not be climbed'. It should be recalled that the wooden pole Mr. Blair climbed was the only one not marked. Whether this admitted policy of marking wooden poles in a state of rot was part of the system of working was a hotly contested issue.

[69] In their amended defence, Kaydon averred that it was advised by the JPS that they had examined the utility poles along the 24Kv line and marked those found to be unsound. The unsound utility poles were not to be climbed but accessed by use of a bucket truck. Mr. Raymond Ramsay, who testified on behalf of the JPS, could not recall any discussion about marked and unmarked poles coming up in their safety meetings with Mr. Donovan Smith. Mr. Ramsay asserted that if the position was as claimed by Mr. Smith that would have been a subject at the meetings.

[70] Mr. Ramsay further insisted that there was no need to mark the poles in the Dunrobin Avenue Project as they were to be removed. In any event, the JPS's purpose in marking the poles was never to indicate to a lineman that it was safe

to climb. Whether or not a pole was safe to climb was the responsibility of the lineman. The purpose of the JPS in marking bad utility poles with an "X" during its own maintenance work is to signal an intention to remove it from the line.

[71] That was his evidence as captured in his witness statement. In his oral evidence in chief, Mr. Ramsay denied that any patrol was conducted by the JPS along the lines in the Dunrobin Avenue Project to mark poles to be retired, poles that were good or bad. To his knowledge, no such representation had been made by the JPS to Mr. Donovan Smith. That such a representation was made by the JPS became impossible to accept during Mr. Smith's testimony. The oral representation averred in his defence became representation by actions in his witness statement. More was to come.

[72] When Mr. Donovan Smith was cross-examined by learned counsel for the claimant, he, initially, jettisoned the averment that the JPS checked the poles and advised him of the results of that exercise and all the supporting particulars of negligence. He recanted and agreed with Mr. Ramsay that those poles would not have been checked as they were all slated to be retired. When pressed, however, he said the pole should have been marked as, he seemed to reason, the state of the rot observed could not have occurred during the life of the project.

[73] That, of course, was not the full extent of Mr. Smith's vacillation. It is noteworthy that in Kaydon's contemporaneous report of the accident to the JPS (exhibit 11), under the hand of Mr. Smith, absolutely no mention is made about either the alleged assurance he received from them, or their failure to mark the utility pole involved. It was clear to me, as I watched Mr. Smith going through his vacillation and recantation, that this was a witness engaged in a struggle with his conscience. His was a wily attempt to convert his knowledge of the JPS' maintenance practice of marking poles to be retired with an "X" with the coincidence of the unmarked rotten utility pole to his advantage. I do not accept that the JPS gave any such assurance to Mr. Smith.

[74] This is not to say that Mr. Smith was unaffected in his attitude toward the safety of his workmen by his knowledge of the JPS' policy of marking rotting utility poles with an "X". Consequently, it was highly probable that he included this in his safety instructions to Mr. Blair. Was he entitled to rely on it, as a reasonable and prudent employer, in the formulation of a system of working on the utility poles? Mr. Smith is self confessed on the imprudence in doing so. The essence of his evidence, in his witness statement, was that of an insistence on "the usual safety checks" notwithstanding the representation of the JPS by its actions. He, therefore, was plainly of the view that the absence of an "X" was a wholly insufficient guide to a conclusion that a wooden utility pole was safe to climb.

[75] Mr. Blair was similarly infected by knowledge of the JPS practice of marking rotting poles with an "X". He was trained to look for this "X". On the morning of the accident, he was specifically instructed to do so. Mr. Blair, however, said he was "trained ... to still carry out a personal examination of the pole". So, no one placed complete reliance on the absence of an "X". Be that as it may, although he was an experienced lineman, the obligation did not fall to him to devise and lay down a safe system of working: ***General Cleaning Contractors Ltd v Christmas***, *supra*. His obligation was compliance without close supervision as an experienced lineman. Did he?

[76] The system of working Mr. Blair was required to comply with appears to have included looking if the pole was marked with an "X". The system of working also imposed the further obligation to check the soundness of the pole by knocking it with a ball pin hammer. Ample evidence of this is to be found in Kaydon's report. I quote:

> *"Mr. Fitzroy Blair was asked to check the pole he was assigned to climb and work on. He checked by knocking it with his lineman spanner and reported that the pole was "solid". (Lineman term meaning 'good')."*

[77] From the conspicuous absence of any reference to a failure to dig below the surface of the pole, I infer that that did not form a part of the system of working. The reference to digging is similarly conspicuous by its absence from Mr. Smith's letter of suspension to Mr. Blair. Not even in the particulars of Mr. Blair's alleged negligence is there to be found the vaguest or most oblique hint that he failed to dig below the surface. I therefore find that the system Kaydon had in place required Mr. Blair to check the soundness of the utility pole above ground by knocking it with his lineman spanner.

[78] I am unable to accept as true, Mr. Smith's assertion that he saw Mr. Blair and another worker digging at the foot of the pole. The only activity I accept that Mr. Smith observed was Mr. Blair using his lineman spanner to hit the pole. The assertion that Mr. Blair and his colleague dug below the surface of the pole was first made in his witness statement dated and filed on the 21st April, 2015. That is, almost six years after the incident; and from a witness who left me wholly unimpressed regarding his willingness to be bound by his oath.

[79] Further, Mr. Blair, whose evidence I accept, denied that he did so. In this vein, I reject that Mr. Smith sent back Mr. Blair in the company of another worker to do a more thorough examination of the utility pole. While Mr. Blair was not without sin in so far as veracity went, he struck me as being generally disposed to speaking the truth. Mr. Blair had nothing to lose by saying that he dug at the foot of the pole and checked below the surface. The internal consistency of his denial bellowed decibels of truth. Mr. Blair's position on the state of the utility pole below the surface was first made known in his response to that disclosure in Kaydon's defence.

[80] According to Mr. Blair, he was without the means of discovering the rot below the surface for two reasons. First, neither his training nor instructions included any means of detection. Second, he was not provided with any equipment to dig below the surface. Thus deprived, he had no way of discovering the rot below the surface without impugning the integrity of the utility pole. This evidence

harmonised with Mr. Smith's report to the JPS that Mr. Blair "checked by knocking it with his lineman spanner". Mr. Smith's eleventh hour assertion of digging was yet another part of the web he attempted to weave to make for Kaydon, and by extension himself, a fig leaf.

[81] Returning to Mr. Blair's sin of veracity, he asserted that the utility pole was planted in concrete. That was offered as an explanation for not checking below the surface of the utility pole he climbed. His demeanour betrayed that this was only an extemporaneous but disingenuous response to incisive and unrelenting cross-examination. Coming as it did, for the first time in cross-examination, and finding no support in either his case or that of the defendants, I reject it.

[82] So then, I find that the system of working required Mr. Blair to check the utility pole for an "X". If the pole was not marked with an "X", he was further required to examine the pole for rot by knocking the pole above the surface with his lineman spanner. That is what he said he did. In short he complied with the system of working devised and laid down by Kaydon. Was that a reasonably safe system of working on a wooden utility pole thirty-five feet above ground?

[83] In deciding what was reasonable, it is entirely legitimate for me to have regard to any longstanding established practice in the light and power sector: ***General Cleaning Contractors Ltd v Christmas***, *supra*, p. 195. The accepted standard was that it was unsafe to climb a wooden utility pole without having first examined it for rot. In accordance with that, the acknowledged proper examination involved an above and a below the surface inspection of the pole. The former was not complete without the other.

[84] In so far as the system of working Kaydon had in place did not require Mr. Blair to examine the pole below the surface, it was manifestly unsafe. The susceptibility of wooden utility poles to rot below the surface was so notorious that it did not take great foresight to appreciate that not checking below the

surface was negligent. I regard it as nothing short of reckless for Kaydon to have incorporated into its system of working an examination of the pole for an "X".

[85] Relying on the absence of the "X" lulled both Kaydon and Mr. Blair into a false sense of security, seducing both into thinking there was no need for a below the surface inspection. Kaydon's duty not to expose Mr. Blair to unnecessary risks could never be fully discharged by the design and implementation of a system of working which contemplated reliance on the judgement and actions of a third party over which they had no control. By so doing, Kaydon denied themselves of a well-known means of knowledge; and in the process of doing that, they exposed Mr. Blair to an obvious and unnecessary risk of injury. Kaydon must therefore answer to Mr. Blair in damages.

The case against the second defendant

[86] Mr. Blair alleged that the JPS breached its duty of care to him, generally and as his employer. The contention that he was employed by the JPS was abandoned during cross-examination. Alternatively, Mr. Blair's claim against the JPS was for breach of its statutory duty to him under the ***Occupier's Liability Act***. More specifically, Mr. Blair charged that he was in the lawful execution of his duties as a lineman on premises owned, controlled or occupied by the JPS when, as a result of the negligent, unsafe and dangerous manner in which the JPS kept and maintained its premises, he suffered serious injury and loss.

[87] Mr. Kinghorn submitted that JPS was in breach of its common law duty of care to Mr. Blair. There is a duty to take precaution, imposed on those who send forth or install articles which are dangerous in themselves, when others will necessarily come within the proximity of the dangerous article. In support of that position Mr. Kinghorn cited a decision of the local Court of Appeal, ***Jamaica Public Service Co. Ltd. v Winston Barr, Bryad Engineering Co. Ltd., Raymond Karl Adams, Noel Bryan, Dervin Brown and Milton Verley*** (1988) 25 J.L.R. 326

(***JPS v Winston Barr***). Reliance was also placed on section 5 of the ***Electric Lighting Act***. Under that section, the undertakers' licence is subject to conditions and regulations in matters regarding, "the securing of the safety of the members of the public from personal injury," among other things.

[88] In their written submissions, filed on the 1st September, 2015, counsel for the JPS contended that the proximate cause of the accident was the claimant's failure to take care in examining the utility pole. From that proposition, they went on to say that would provide the JPS with a complete defence to the claim, even if the rotten wooden pole was an article dangerous in itself. For the latter proposition they relied on the dictum of Lord Dunedin in ***Dominion Natural Gas Co Ltd v Collins and Perkins*** [1909] A.C. 640,646. Addressing the duty to take precautions in respect of dangerous articles, Lord Dunedin declared, although it is no defence to say the accident came about through the agency of a third party, if the proximate cause of the accident was the "conscious act of another volition," and not the defendant's negligence, the defendant cannot be liable.

[89] I have already decided that Mr. Blair complied with the system of working put in place by Kaydon. Consequently, the proposition that Mr. Blair failed to exercise care in his examination of the pole stands rejected. He exercised as much care as the system of working required of him. Having regard to the rotten state of the utility pole, I have to consider whether the JPS were also negligent.

[90] In the ***JPS v Winston Barr***, Mr. Barr, an employee of Bryad Engineering Co Ltd, was injured when a length of steel he was handling on a construction site came into contact with the JPS power lines. The negligence of the JPS was founded on their failure to take such steps as the nature of the undertaking required, to prevent foreseeable injury, arising from that omission, to a person reasonably within their contemplation, per Kerr J.A. at page 337.

[91] It does not appear that the Justices of Appeal based their decision on the rule in ***Rylands v Fletcher*** (1886) L.R. 3 H.L. 330. Whether the public utility's liability is

to be assessed on the basis of the strict rule in v ***Rylands Fletcher*** or only in negligence is a matter of statutory construction. According to Downer J.A., since section 5 of the ***Electric Lighting Act*** admits of either form of liability, "a duty to exercise the statutory power with reasonable care, is to be preferred". (See **JPS Co Ltd v Winston Barr** at page 349)

[92] The question for me is whether a duty of care should be placed on the JPS in the circumstances of this case. The guiding principles were laid down in ***Jamaica Public Service Co Ltd v Winsome Patricia Crawford Ramsey*** SCCA 17/03 dated 18th December 18, 2006, an unreported decision of the Court of Appeal. The test in determining whether a duty of care should be imposed is threefold: foreseeablity, proximity and fairness, justice and reasonableness. Those ingredients are "inextricably interwoven in establishing a duty of care" per Smith J.A at page 63.

[93] So, was it foreseeable that harm could come to Mr. Blair if he came into contact with the works of the JPS? In considering this question, I must have regard to the nature of the relationship between Mr. Blair and the JPS. Mr. Blair was part of a crew hired by Kaydon, under contract with the JPS, to do work on a part of its undertaking. That work of necessity involved the climbing of some utility poles to effect the removal of the electrical apparatus. It was therefore abundantly clear that by the very nature of the service Kaydon was retained to perform, their workers would come into contact with dangerous aspects of the JPS' undertaking. The character of the work to be performed was itself a manifestation of the proximity of the relation between the workers of Kaydon generally, Mr. Blair more particularly, and the JPS.

[94] It is very clear that the JPS were cognizant of the proximity of the relationship between themselves and Kaydon's crew. To that end they de-energized and re-energized the power lines, as the need arose, to facilitate the relocation of the existing distribution line. That is, the JPS was guarding against the risk of electrocution to Kaydon's crew. But ought they to have confined themselves to

making the power lines safe? The JPS did not consider that it shared any of the responsibility to make the pole safe for the lineman. What was the state of their knowledge in respect of the wooden pole to which the power lines were attached?

[95] It was well-known that wooden poles were susceptible to rot. In light of that, the JPS, as part of its safety practices and procedures, regularly checked its wooden poles and kept records of the examinations. It was admitted that the rot observed on the pole which uprooted with Mr. Blair could have been discovered by regular maintenance. Therefore, a regular examination would have resulted in that pole being marked with an "X". The "X" would have indicated that the pole was defective and slated for replacement. Being so marked, the "X" on the pole would have alerted someone in the light and power sector, such as an experienced lineman as Mr. Blair, to "take better precaution in approaching that pole". The proposed climber "would definitely check the integrity of the pole".

[96] So, the JPS ought to have known that the wooden pole Mr. Blair climbed was defective. If they had not confined themselves to the danger posed by energized lines, no doubt they would have checked the pole and marked it with an "X". While a wooden utility pole, in and of itself, poses no danger, one that was rotten below ground bore all the hallmarks of danger, especially when the weight of a fully grown man is added to it thirty-five feet above ground. In the circumstances of the work to be undertaken, I cannot regard as reasonable the blinkered view taken by the JPS of the potential dangers in the Dunrobin Avenue Project.

[97] In light of the importance placed on the presence of an "X" on a wooden utility pole, that it was in some state of rot, it was not unreasonable to draw the opposite conclusion from its absence. Since its presence enjoined the experienced lineman to "take better precaution", undoubtedly, its absence would seduce him into taking less precaution before commencing the climb. So then, it was foreseeable that a lineman, charged with climbing an unmarked utility pole, would do so without digging below the surface. A corollary of that would be the

exposure of the lineman to the danger of the pole uprooting or breaking at the base and casting him to the ground with potentially fatal consequences. I am driven to the conclusion, therefore, that it was foreseeable that a lineman would climb that rotting wooden utility pole which was not marked with an "X".

[98] Having said that, is it fair, just and reasonable to impose a duty of care on the JPS in the circumstances of this case? In essence, the complaint against the JPS is this; they were under a statutory duty to safeguard against injury to the public. The discoverable state of rot of the pole Mr. Blair climbed is evidence that they failed in that endeavour. By virtue of that failure, a dangerous situation was thereby created. As a consequence of having created that dangerous situation, a duty to take precautions to prevent the resultant injury was thereby cast upon the JPS. In their omission to take any such precautions they were negligent.

[99] The scope or purpose of the duty placed on the JPS was to guard against their wooden poles breaking and causing personal injury to any member of the public. There was no suspension of that duty because all the utility poles in the Dunrobin Avenue Project were to be retired. Indeed, this was a duty to be discharged independently of any common law duty imposed on Kaydon, the independent contractors. Accordingly, the JPS' duty to secure the safety of the public from personal injury subsisted until the last wooden pole was taken down. There was not even the pretence at fulfilling this duty. By virtue of the restricted view they took of the prevailing dangers, the JPS clearly gave no thought to the danger posed by a rotten wooden pole. The matter was left to chance.

[100] Mr. Blair was a member of the class of persons for whose protection the duty existed. In the circumstances of the case, there was a high degree of risk of Mr. Blair sustaining personal injury if the duty was left unfulfilled. Viewed against that background, it seems fair to impose a duty of care upon the JPS in the context of this claim.

Apportionment of liability

[101] How then, should liability be apportioned? It may be said at once that Mr. Blair bears none of the responsibility for any injury he sustained as a result of the fall. The basis of that finding is the earlier finding that he was in full compliance with the system of working devised and implemented by his employers. The apportionment of liability is therefore between the defendants.

[102] Did Kaydon act reasonably in all the circumstances? Mr. Smith, on behalf of Kaydon, accepted that the "usual safety checks" were to inspect the pole and to dig the foot of the pole to see if it was rotten. Armed with that knowledge, it was entirely unreasonable to have incorporated into his system of working reliance on whether or not a pole had been marked with an "X" by the JPS. In so doing, Kaydon ceded, or abandoned, part of their personal duty to Mr. Blair. Therefore, the absence of a safe system of working was the major cause of the injuries Mr. Blair sustained. I would accordingly apportion liability at 75% against Kaydon and 25% against the JPS.

Quantification of damages

[103] Mr. Fitzroy Blair was born on the 3rd June, 1960. He said he awoke in the hospital in a great deal of pain. He had pain all over his body. For the time he remained in the hospital he was in pain. Upon his discharge from hospital, Mr. Blair took his medication as prescribed. Although he took the medication as prescribed, the pain lingered. Consequently, he sought further medical attention. In his witness statement, filed 2nd April, 2015, almost six years removed from the accident, Mr. Blair said he still felt pain in his back, leg and chest. His knees would sometimes become swollen. That happened mainly whenever he did anything strenuous. The pain, he complained, made him unable to do too much heavy work. The medical reports, however, did not speak to this period.

[104] Mr. Blair replied on the medical reports of Dr. Allie Martin, Consultant General Surgeon and Dr. Ravi Prakash Sangappa a general practitioner. Mr. Blair was seen at the emergency room of the University Hospital of the West Indies on the

30th July, 2009, upon transfer from the Andrews Memorial Hospital. Dr. Martin diagnosed Mr. Blair as having suffered a cerebral concussion, amnesia, superficial abrasions involving the right shoulder, distal right arm and right elbow as well as pain and tenderness involving the right leg. He was discharged on 1st August, 2009 on analgesics with planned outpatient visits.

[105] Mr. Blair was next seen at the University Hospital of the West Indies on the 18th August, 2009. He complained of still experiencing mild to moderate pain in his left chest, worsened by movement. That was thought to be secondary to soft tissue injuries which had not fully healed. He was advised to continue his analgesia as needed and discharged from further follow-up. His prognosis was full recovery from his cerebral concussion and associated soft tissue injuries with no permanent impact on his ability to earn.

[106] He was seen by Dr. Sangappa on the 1st October, 2009. He presented with pain to the left lower quadrant of his abdomen which was felt every day; pain in the left knee, felt mostly at night after riding his bicycle; pain in his lower back, felt intermittently and worsened by lifting weights; and pain to his left ankle, especially when walking on rough surfaces. Dr. Sangappa assessed him as having suffered cerebral concussion, lower back strain, and sprain of the left ankle and left knee.

[107] Mr. Blair's counsel submitted that an award of $3,000,000.00 would be a just compensation. ***Henry Bryan v Noel Hoshue and Wilbert Marriat-Blake*** Khan Vol. 5 p.177 (***Bryan v Hoshue***) and ***Bernice Clarke v Clive Lewis*** SC CL 2001/C234 dated 11th April, 2003 (unreported) (***Clarke v Lewis***) were relied on. In ***Bryan v Lewis*** the claimant suffered shock, excruciating pains, dizzy spells, abrasions over the frontal region of the scalp, pain and suffering in the lower back and severe headaches. It was noted in the report "that the injuries did not appear to be serious and were unlikely to cause permanent disability". That claimant was awarded $350,000.00 for general damages. When updated, using

the Consumer Price Index (CPI) for May 2015 of 224.2, that award amounts to $1,738,754.70.

[108] ***Bryan v Hoshue*** was relied on in ***Clarke v Lewis***. Miss Clarke suffered a mild cerebral concussion without any permanent disability as a result of a motor vehicle collision on the 28th January, 2002. On the day of the accident she experienced a brief loss of consciousness. She testified to feeling pain all over her body, particularly in her head, eyes, shoulder and feet. Those pains persisted for three months. She complained of having headaches, whenever she walked in the sun and also occasional back ache, at the assessment of damages hearing on the 11th April, 2003. Ms. Clarke was awarded $550,000.00 for her pain and suffering. Applying the same CPI, that award updates to $1,876,864.53.

[109] In the submission of Mr. Kinghorn, Mr. Blair sustained more severe injuries than the claimants in both ***Bryan v Hoshue*** and ***Clarke v Lewis***. The award to Mr. Blair, therefore, "should be increased dramatically."

[110] On the other hand, it was submitted on behalf of the JPS that a sum between $600,000.00 and $700,000.00 would adequately compensate Mr. Blair. That submission rested on ***Turkhiemer Moore v Elite Enterprises Ltd & Sherwin Oliver Brown*** Khan's Vol. 5 p.96 (***Moore v Elite Enterprises***) and ***Manley Nicholson v Edna Thomas and Glenmore Thomas*** Khan's Vol. 5 p.165 (***Nicholson v Thomas***).

[111] In ***Moore v Elite Enterprises*** the twenty-seven year old claimant suffered loss of consciousness, multiple bruises to the head with a haematoma and possible cerebral concussion, multiple bruises to the upper limb and fracture of the right clavicle when he was rundown while crossing the road. The claimant was left with a functional disability, assessed at 3% of the left upper limb and equivalent to 2% whole person disability. That attracted an award of $275,000.00. The updated award is $1,164,180.51.

[112] It was further submitted that the award to Mr. Blair should be discounted because he was not left with any disability. A further discount should be made, it was argued, to account for the difference in the age of the respective claimants. That is, Moore would have had to live with his disability for twenty-two more years than the forty-nine year old Mr. Blair. The award to Mr. Blair should therefore be $600,000.00 based on ***Moore v Elite Enterprises***.

[113] The claimant in ***Nicholson v Thomas*** was thirty-nine years old when he was involved in a motor vehicle accident on 15th July, 1999. Arising from the accident, there was a loss of consciousness, whiplash to his neck with soft tissue injuries, cerebral concussion, tenderness over the junction of his thoracic and lumbar spine, mild limitation of movement of the cervical spine and abrasion of the scalp in the left pariento-temporal region, chest and back pain. He was discharged from the hospital after twenty-four hours on analgesics.

[114] Six days later the claimant presented to Dr. Ken Baugh with complaints of chest pains, persistent headaches, pain in the upper back and neck. Examination revealed tenderness over the junction of the thoracic and lumbar spine and left chest postero-laterally. He also had mild limitation of movement of the cervical spine due to pain and muscle spasm. His award of $450,000.00 was reduced on appeal to $250,000.00. That award when indexed amounts to $1,061,553.03.

[115] Counsel for the JPS urged a reduction to $700,000.00 in making an award to Mr. Blair, to account for his absence of a whiplash injury. The whiplash injury was said to be a more significant injury. Counsel for Kaydon also relied on ***Nicholson v Thomas*** and invited the court to adopt the approach advanced on behalf of the JPS. Kaydon's counsel, however, submitted that an award of $850,000.00 would be just.

[116] The yawning gap between the suggested awards may give the appearance that an auction approach is adopted towards the assessment of damages. In that approach, he who bears the burden of compensation bids low and the one

obtaining the benefit of the compensation bids high. The determination of a just award, that is, compensation aimed at providing Mr. Blair with some solace for his misfortune: ***Warren v King*** [1964] 1W.L.R. 1, 10, is a wholly different matter. The judicial lodestar in quantifying personal injury awards is to, "take a reasonable view of the case" and give what is "under all the circumstances, a fair compensation" per Brett, J in ***Rowley v London and North Western Ry Co*** (1873) L.R. 8 Exch. 221,231.

[117] So then, when assessing damages for non-pecuniary loss, all that I can do is to make an award for fair compensation. This is in recognition of the impossibility of measuring the pain and suffering and, or, loss of amenities or loss of expectation of life, of a victim of tort in money. My starting point will, of necessity, be to advert to the judicial tariff for the particular injury, gleaned from the authorities, then varied by the peculiarities of the case before me. (See ***Pickett v British Rail Engineering Ltd***. [1979] 1 All E.R. 774,796) When considering an award for pain and suffering, a lot depends on the claimant's awareness of pain, that is, Mr. Blair's capacity for suffering: ***H. West & Son Ltd v Shephard*** [1964] A.C. 326.

[118] What does it mean to say that the compensation should be fair? Fairness "means no more than that they (sic) must be a proper compensation for the injury suffered and the loss sustained", per Lord Scarman in ***Lim Poo Choo v Camden and Islington Area Health Authority*** [1980] A.C. 174,187(***Lim Poo Choo v Camden***). To elaborate, fair compensation is what the fair-minded man, armed with a sufficiency of means, would be impelled by conscience to provide as a discharge of his moral obligation to someone who has been injured by his carelessness. It is that sum which not only assuages his conscience as fair but also meets with the approbation of his community that amounts to fair compensation. (See ***H. West & Son Ltd v Shephard***, *supra*, p. Lord Devlin's opinion)

[119] Compensation is based on the principle that the injured party should be placed, as nearly as possible, in the position he would have been in had he not suffered

the wrong. Consequently, the concept of fair compensation does not admit of considerations such as the consequences of a high award upon the tortfeasor: ***Lim Poo Choo v Camden***. That has to be counterbalanced by the vigilance of the court to avoid duplication in the award of damages and a surplus accruing to the claimant which exceeds fair compensation: ***Lim Poo Choo v Camden*** p. 190.

[120] The emphasis is, therefore, on fair and not full compensation. From time immemorial juries were directed not to attempt to award "damages to the full amount of a perfect compensation ... but to take a reasonable view of the case and give ... a fair compensation" dictum approved by Lord Devlin in ***H. West & Son Ltd v Shephard***, p.356. It has long been acknowledged that full compensation is both impractical, impossible and, in any event, would be unjust.

[121] The impracticality of perfect or full compensation is reflected in the recognition that it is impossible to equate "money with human suffering and deprivation", per Lord Morris of Borth-y-Gest in ***H. West & Son Ltd v Shephard***, p.345 – 346. Lord Pearce described the process as "a difficult and artificial task of converting into money damages the physical injury and deprivation and pain" to award reasonable compensation: ***H. West & son Ltd v Shephard*** p.364. As a consequence of that, all that this court can do, like all others, is to award a sum which, in all the circumstances, "must be regarded as giving reasonable compensation", per Lord Morris, at p. 346.

[122] Not only must awards be reasonable they must be assessed with moderation and consistency. The element of consistency, means that "so far as possible comparable injuries must be compensated by comparable awards" per Campbell J.A. in ***Beverley Dryden v Winston Layne*** SCCA #44/87 dated June 12, 1989 reported in ***Harrisons' Assessment of Damages*** 2nd Edition p. 432, 434. Compendiously stated, reasonableness, moderation and consistency are the manifestation of the courts' obedience to the injunction of Lord Morris in ***H. West***

& Son Ltd v Shephard to “endeavour to secure uniformity in the general method of approach”.

[123] Coming now to the instant case, Mr. Blair suffered a concussion like all the claimants in the cases cited by both defendants. A survey of the cases involving a concussion in ***Harrisons’ Assessment of Damages*** reveals that they attract substantial awards. Head injuries, generally, attract high awards according to the seriousness of the injury sustained. Mr. Blair suffered a brief loss of consciousness without any permanent or partial impairment of his cerebral functions. Any award to him which takes the loss of consciousness and cerebral concussion into consideration must therefore be at the lower end of substantial. In so far as his other injuries are concerned, they cannot be described as serious, however generously they are viewed.

[124] In endeavouring to make a comparable award for comparable injuries, I found that more guidance is to be had from the cases cited by Mr. Kinghorn. Quite separately from involving injuries not under consideration in the present case, I find the awards in the cases cited by the defendants too low to be considered reasonable in the circumstances. It is to be observed that the loss of an amenity or permanent partial disability is not de facto evidence that those claimants endured more pain and suffering than a claimant who was spared those misfortunes.

[125] After giving the matter anxious thought, I have come to the view that the injuries Mr. Blair sustained are not as serious as those suffered by the claimants cited by his counsel. Indeed, his accepted period of pain and suffering is similar to the claimant in ***Clarke v Lewis***, viz. three months. Consequently, I do not share his view that the award to Mr. Blair “should be increased dramatically”. In any event, such a submission is discordant with the principle that awards for personal injury must be assessed with moderation: ***Beverley Dryden v Winston Layne***, *supra*. Bearing in mind the relevant principles and attendant circumstances, an award of

$1,000,000.00 appears to be what the fair-minded man would be impelled by conscience to give to Mr. Blair.

[126] Turning now to special damages, Mr. Blair's aggregate claim was $798,400.00. Disaggregated, he claimed $32,400.00 for medical expenses, $10,000.00 for transportation expenses and $756,000.00 for loss of earnings. The medical expenses were properly supported by receipts. No receipts were tendered in support of the transportation expenses. It was submitted on his behalf that notwithstanding the absence of receipts, the award would be justified and reasonable in the circumstances.

[127] In respect of loss of earnings, Mr. Blair said he was unable to work for nine months following his discharge from hospital. He calculated his loss based on the undisputed daily rate of $3,500.00 paid to him by Kaydon. He therefore claimed $21,000.00 per week which, when multiplied by the thirty-six weeks in nine months, amounts to $756,000.00. The period of incapacity claimed for was said to be reasonable in light of the severity of Mr. Blair's injuries.

[128] The claim for medical expenses was accepted as having been strictly proved by both defendants. Whereas the JPS resisted the claim for transportation, Kaydon was in agreement with counsel for Mr. Blair that the sum claimed is reasonable. The JPS resisted the claims for transportation and loss of earnings on the basis that they had not been strictly proved, citing ***Barbara McNamee v Kasnet Online Communications*** RMCA 15/2008 dated 30th July,2009 (unreported), in support. Kaydon submitted that the claim for loss of earnings should be limited to two months. Both defendants contended that there was a lack of medical evidence to support the claim, the JPS in its entirety and Kaydon partially.

[129] In ***Barbara McNamee v Kasnet Online Corporations*** McIntosh J.A. (Ag), as she then was, relied on Cook J.A.'s distillation of the relevant principles in ***Attorney General of Jamaica v Tanya Clarke (nee Tyrell)*** SCCA 109/2002.

Consequent upon his review of the authorities, Cook J.A. adumbrated the following as encapsulating the applicable law:

"1. Special damages must be strictly proved: ***Murphy v Mills***; ***Bonham-Carter v Hyde Park Hotels Ltd***; (*supra*)

2. The court should be very wary to relax this principle:

Radcliffe v Evans; (*supra*)

3. What amounts to strict proof is to be determined by the court

In the particular circumstances of each case: ***Walters v Mitchell***; ***Grant v Motilal Moonan Ltd, and Another*** (*supra)*

4. In the consideration of 3. supra, there is the consideration of reasonableness.

(a) *What is reasonable to ask of strict proof in the particular circumstances* ***Walters v Mitchell****;* ***Grant v Motilal Moonan Ltd. and Another*** *(supra) and*

(b) *What is reasonable as an award as determined by the experience of the court:* ***Central Soya of Jamaica Ltd. v Junior Freeman****. See also* ***Hepburn Harris v Carlton Walker*** *SCCA No.40/90 (Unreported) ...*

5. Although not usually specifically stated, the court strives to reach a conclusion which is in harmony with the justice of the situation.

See specifically ***Ashcroft v Curtin***; ***Bonham-Carter v Hyde Park Hotels Ltd.*** (*supra*)."

[130] I agree with the submissions that the claim for medical expenses ($100,000.00) has been proved in accordance with the principles laid down by the Court of Appeal. While I share the view of counsel for the JPS that no receipts were tendered in support of the transportation expenses, we diverge on the absence of evidence "as to the need for this expense". Evidence was led that Mr. Blair attended the University Hospital of the West Indies, at least once as an outpatient. Further, he attended upon Dr. Sangappa later the same year as a result of the injuries sustained in the accident. He also gave evidence that he attended several physiotherapy sessions.

[131] While I am aware that I must insist upon as much certainty and particularity in the proof of special damages claimed, the rule is not wooden, although it is not to be unwarily relaxed. It is a notorious fact that the public transportation system is not a receipt-issuing enterprise even though ticket stubs are issued on state-run buses. So then, only the vanity of a fastidious court, indwelling an ivory tower untouched by the realities of modern Jamaican society, would insist on more proof than was tendered. Furthermore, as learned counsel for Kaydon submitted, the sum claimed is reasonable in the circumstances. Accordingly, I award the sum of $50,000.00 for transportation expenses.

[132] That takes me to the claim for loss of earnings. It is axiomatic that the claim for loss of earnings must be grounded in proved incapacity arising as a direct consequence of the injuries sustained. The only medical opinion which adverted to Mr. Blair's inability to work was proffered by Dr. Allie Martin. I quote the report, "we can only document that he was away from work up until August 18, 2009". I therefore find the claim proved only to that extent. That is, for nineteen days. The sum of $66,500.00 is awarded for loss of earnings.

Conclusion

[133] Mr. Blair sustained his injuries as a result of the negligence of both defendants. The liability of the JPS is apportioned at 25% and that of Kaydon at 75%. I make the following orders:

1. General damages -- $1,000,000.00 with interest at 3%. In respect of the JPS interest is awarded from the 21st February, 2012 to the date of delivery of this judgment. For Kaydon, interest is awarded from the 21st January, 2013 to the date of delivery of this judgment.

2. Special damages -- $216,500.00 with interest at 3% from the 30th July, 2009 to the date of delivery of this judgment.

3. Costs are awarded to the claimant against both defendants, to be taxed if not agreed.