



IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2008HCV02449

BETWEEN CHRISTOPHER CAMPBELL CLAIMANT
AND JAMAICA PUBLIC SERVICE CO. LTD. DEFENDANT

Mr. Leonard Green instructed by Chen, Green & company for the claimant

Mr. David Batts instructed by Livingston, Alexander & Levy for the defendant

Heard: July 18, 19 and 20, 2011 & June 19th, 2012

NEGLIGENCE – DUTY OF CARE OWED TO A TRESPASSER

SIMMONS, J.

[1] On the 22nd June 2006 the claimant, an Electrician, suffered injuries whilst installing twisted wire/service wire on a telephone pole along the West End Road in the parish of Westmoreland.

[2] Mr. Campbell's services had been retained by Mr. Clifford Morrell who operated a business in that area. Specifically, he was attempting to install a twisted wire from the stanchion of a building which belonged to Mr. Morrell to a telephone pole.

[3] The claimant did not complete this task as he was shocked and suffered severe injuries.

The Claim

[4] On the 9th day of May 2008 Mr. Campbell filed a claim in negligence, in which it was alleged that the defendant's high tension wire had fallen to the place where its

secondary lines were installed on the pole. The particulars of the defendant company's negligence were stated to be:

- i. Failing to keep their wires safely mounted on the poles in the designated positions;
- ii. Failing to effect proper maintenance of its equipment and causing them to fall into disrepair;
- iii. Failing to identify defective wiring and implement timely repairs so as to protect members of the public.

The Defence

[5] The defendant in its defence alleged that the claimant trespassed on its works by attempting to reconnect a service wire to the premises. It denied that its primary conductor/high tension wire was connected to the telephone pole and stated that the said conductor was attached to its own pole. It is also stated that it was the defendant's secondary lines that were attached to the telephone pole.

[6] With respect to the twisted wire that had been damaged, the defendant stated that its service crew had disconnected that wire and the customer, Mr. Morrell was instructed to contact its offices for reconnection. Instead, it is alleged, the customer retained the services of the claimant to effect the reconnection. The particulars of negligence and liability for the claimant's injuries were denied and he was put to proof in relation to the particulars of his injuries.

Claimant's evidence

[7] The claimant's evidence is that on the 22nd day of June 2006 he was contracted by Mr. Gifford Morrell to do electrical work at his business place which was situated at West End Road, Negril in the parish of Westmoreland. This job required him to access a telephone pole and he used a ladder measuring ten feet to assist him. Whilst on the ladder he observed that one of the defendant's poles was next to the telephone company's pole. He also indicates that bushes obscured his view of the defendant's

wires. He recalls stretching out a length of twisted wire and then waking up in the Savanna-la-mar Public General Hospital.

[8] At that time he noticed that there were burns to his skin. His evidence is that he was in a lot of pain. The claimant also stated that he has “huge ugly permanent scars” all over his body. He also asserted that he is unable to manage the same amount of work or engage in social activities as he would prior to the accident and that his sexual performance is not at the same level. The medical reports of Dr. B.A. Dosunmu dated the 24th January 2007 and Dr. Geoffrey D. Williams dated the 7th August 2007 were admitted in evidence and marked exhibits 2 and 3 respectively.

[9] In cross-examination, he stated that twisted wire is used to convey electricity from the defendant’s system to the customer’s building. This wire runs from the defendant’s system to a stanchion which is attached to the customer’s building. He stated that section of the wiring before the meter belongs to the defendant. That wire runs from the defendant’s works to the stanchion of the building.

[10] Mr. Campbell also stated that he had no permission from the defendant to install the twisted wire. He also indicated that in June 2006 he was not licensed as an electrician and was not being supervised by a licensed electrician.

[11] He also gave evidence that if a person is in the vicinity of a Jamaica Public Service facility they should ascertain whether or not the wires are energized. He stated that he failed to do so in this case because the pole on which he was working did not belong to the defendant and he was not making a connection. He also said that he was aware that the defendant’s secondary lines were in the area in which he was working. When asked whether or not he thought it important to find out the location of the defendants energized wires he stated “*I was paying attention to what I was doing*”.

[12] With respect to distance, the claimant’s evidence is that the ladder on which he was standing was ten feet tall and when leaned against the pole would be about eight feet from the ground. He indicated that the area from which the defendant’s wire is alleged to have been broken was about fourteen feet from the ground and that his feet were approximately nine feet from the ground. His head was approximately fourteen to

fifteen (14 -15) feet from the ground and that the accident occurred whilst he was pulling the twisted wire over his shoulder.

[13] Mr. Vincent Bailey an electrical inspector with some twelve years experience also gave evidence for the claimant. He stated that primary power lines are required to be twenty five to thirty five (25-35) feet from the ground and that when he went to the location those lines were hanging “too low”. He also stated that there should be a minimum clearance of at least twenty (20) feet at any given point. The purpose of that clearance requirement was to ensure that it is safe to traverse the area. He also stated that it was also to ensure the safety of workmen who may be working on the line at different heights.

[14] In cross examination, he stated that secondary lines are to be at least eighteen (18) feet from the ground. The witness indicated that he did not measure the height of the defendant’s pole or the distance of the primary wire from the ground when he went to the location. He also gave evidence that the said wire was not so low that his head would touch it and that he would have had to use a ladder to climb the pole in order to come into contact with it.

Defendant’s Evidence

[15] Mr. Peter Guthrie, a Journeyman Lineman employed to the defendant stated that one of his duties is to respond to emergency calls through the customer call system from the defendant’s customers.

[16] On the 20th June 2006 he recalled being dispatched to respond to an emergency call in respect of premises situated at West End Road, Negril. On arrival at the location at about 6:50 p.m. he stated that he saw a torn service wire. One piece was connected to the customer’s premises and the other to a telephone company pole across the road. He disconnected the service wire that was connected to the customer’s pot head which was broken. The pot head at the said premises was supported by a stanchion. The other two wires that connected the service wire to the defendant’s secondary lines were also removed.

[17] His evidence is that the defendant's distribution system consisted of forty foot poles with three primary lines connected at the top of the poles. There are also three secondary lines below those lines. It is from these lines that the customers receive their electricity supply. The telephone pole which is an intermediary pole is situated between two of the forty foot poles. He stated that none of the primary or secondary lines were attached to that pole which he said was a part of the works of the defendant.

[18] Mr. Guthrie stated that the wire that had been broken was connected to the customer's pot head at one end and the intermediary pole at the other. There was another connection from the service wire to two of the three secondary lines.

[19] On the 23rd June 2006, the witness stated that he went back to the location to plant a forty foot pole near to the telephone pole. The primary and secondary lines were then connected to this pole. This it is said allowed the defendant to raise the height of the service wire that ran across the road.

[20] In cross examination, he stated that he did not take any measurements where the forty foot pole was located to ascertain the height of the wires. He also said that there was a sag where the intermediary pole was installed and that an intermediary pole is one that is situated in the middle of sag. It's purpose is to attach service lines that run across the road. He also gave evidence that the twisted wire which runs from the pot head to the service wire is usually installed by the defendant.

[21] Mr. Kenston Tomlinson a claims engineer also gave evidence on the defendant's behalf. His evidence is that the portion of the service wire which runs from the defendant's pole to the customer's metering point is the property of the defendant. The wire which runs from the metering point to the customer's premises is the property of the customer.

[22] The witness also stated that where an incident affects the electrical distribution system the defendant would assess the situation and where the problem poses a danger to the customer or his surroundings, the electricity supply ought to be disconnected. Where the fault occurs on the customer's portion of the system, the customer is required to correct that fault before electricity is restored.

[23] In cross examination, the witness stated that primary lines are particularly dangerous and can cause severe burns or loss of limbs with the slightest contact.

[24] With respect to the issue of customers purchase of twisted wire Mr. Tomlinson stated that such wires must be terminated on the customer's property. It was also said that the defendant uses its own wire to establish the connection with its system. His evidence is that customers buy twisted wire to make preparation for connection by the defendant. He indicated that where the customer's building is situated more than three hundred feet from the defendant's secondary line, the customer would be required to erect a private pole on their property. The defendant would then run its wire from the secondary line to the private pole. The service wire which runs from the private pole to the pot head would then be the property of the customer. Where the premises are less than three hundred feet away the defendant would run the wire from the secondary line to the pot head.

Submissions on liability

[25] Mr. Green submitted that the claimant was not trespassing on the works of the defendant as the wire that he was handling was purchased by him. He argued that the act of running a wire from the defendant's pole to the claimant's premises did not amount to tampering with the defendant's property. He queried whether the act of mounting the defendant's pole was an act of trespass. He argued that the act of affixing an un-energized wire to the pole could not amount to a trespass and it has not been alleged that claimant was attempting to make an illegal connection.

[26] Counsel directed the court's attention to the claimant's evidence that although he was aware of the presence of energized wires he was not paying attention to them as he was not making a connection to those wires.

[27] It was also submitted that the injuries sustained by the claimant were consistent with high voltage electric shock.

[28] With respect to the location of the wires Mr. Green argued that it was sufficient for the claimant to plead that the wires fell to the location of the secondary wires stating their height.

[29] He referred to ***The Electric Lighting (Extra High Pressure Conductors) Regulations, 1928***. Regulation 9 states:-

“The conductors (wires) shall be carried by insulators of approved design and manufacture to which they shall be securely attached with soft drawn tie wire not smaller than No. 8 S.W.G. No extra high pressure conductor shall have less than 20 feet clearance above ground at any point in any span.”

[30] Mr. Green also cited the case of ***Fisher and another v. Atkinson and others*** Suit No. C.L. 1993/F202 delivered on June 23, 2000, in support of the proposition that there was no obligation on the claimant to prove that the wires were less than twenty feet above the ground. He also highlighted the fact that the claimant’s evidence is that he was working at approximately fourteen to fifteen feet from the ground and did not see the wires because they were covered by bushes.

[31] With respect to the issue of whether a duty of care is owed to a trespasser, counsel referred to ***Hibbert v. Parchment*** Suit No. C.L. 1986/H129 delivered on May 6, 1999, in which Harrison, J. relied on the decision of the court in ***Revill v. Newbery*** [1996] 1 All E.R. 291. In ***Revill*** it was held that the plaintiff was not prevented from recovering damages because he was a trespasser and was engaged in criminal activities.

[32] Mr. Batts submitted that the claimant has failed to prove its case as pleaded. He emphasized that the claimant has pleaded that his injuries were sustained as a result of high tension wires falling and the defendant’s failure to keep its wires safely mounted. It was also alleged that the defendant failed to identify defective wiring. He further stated that there is no allegation of low wires or any allegation that the defendant has breached its statutory duty.

[33] It was further submitted that there is no evidence that any of the defendant's wires fell. It was also stated that the evidence revealed that the defendant's wires were out of the reach of persons on the ground and that the claimant was injured because he used a ten foot ladder to climb the pole. Counsel also asserted that the claimant's evidence reveals that the defendant was responsible for attaching the twisted wire from the pole to the stanchion and he had no permission to do so.

[34] Mr. Batts also submitted that even if the claimant's evidence is accepted as true the claim ought to be dismissed on the basis that there was no pleading in relation to wires sagging or that ***The Electric Lighting (Extra High Pressure Conductors) Regulations, 1928*** were breached. In those circumstances it was asserted that the claimant could not rely on any evidence which would support such an allegation. He relied on ***Lloyde v. West Midlands Gas Bank*** [1971] 2 All E.R. 1240. In that case the plaintiff filed an action in which it was pleaded that the explosion which caused his injuries were as a result of the defendant's failure to rectify gas leaks. The defendant denied that there had been an explosion or leakage of gas. The trial judge found that the explosion was caused by the failure of the gas apparatus and that there was no perceptible gas leak. On appeal it was held that the judgment must be set aside as the pleadings had not alleged any defective installations or maintenance.

[35] It was also submitted that even if the court were to allow the claimant to rely on the evidence that the wires were sagging, there is no evidence that this was due to the defendant's negligence.

[36] In addition Counsel stated that based on ***Wright v. Lodge*** [1993] 4 All E.R. 299 there can be no liability in negligence unless the negligent act caused the injury. He asserted that in this matter the claimant would not have been injured if he did not climb the ladder. He also failed to note the position of the energized wires which caused his injury. The claimant was also doing an act which he admitted was the responsibility of the defendant.

[37] It was also argued that the claimant was either a trespasser or taking steps preparatory to trespass. Counsel referred to ***Revill v. Newbery*** (supra) and asserted

that the defendant owed no duty of reasonable care to a trespasser especially one such as the claimant who asserts that he is an electrician and knew what he was doing. Reference was made to ***Clunis v. Campden and Islington Health Authority*** [1998] QB 978, in which the plaintiff who had a history of mental disorder and had failed to attend appointments for treatment pleaded guilty to manslaughter. He subsequently brought an action against the defendant on the basis that its breach of the common law duty to treat him with reasonable professional care and skill had caused injury, loss and damage to him. The court held that it was a rule of public policy that a plaintiff should not be able to rely on his own criminal or immoral act to advance his case. It was also stated that the policy was restricted to persons who were presumed to have known that what they were doing was unlawful.

[38] It was argued that the claimant's act of climbing the pole was an offence under section 3 of the ***Public Utilities Protection Act*** and that the principle which was applied in the ***Clunis*** case ought to be applied. The section states:-

“(1) Subject to the provisions of this section, any person who, as respects any public utility:

(a) Trespasses upon the works or any part thereof; or

(b) Unless acting pursuant to the express authority of the licensee or owner of the public utility or pursuant to a licence duly issued to him in relation to such works under any law for the time being in force, meddles, interferes or tampers with the works or any part thereof,

commits an offence under this Act.

(2) without prejudice to any liability under contract, subsection (1) shall not apply in respect of a consumer in relation to works which are located on his premises and which having regard to a contract relating to such premises between the consumer, in his capacity as such, and the public utility, are intended to be used or dealt with by the consumer in the ordinary course of enjoyment of the service provided under that contract,

unless in relation to such works located as aforesaid any act is done which-

(a) is expressly forbidden by the consumer's contract with the public utility or is inconsistent with the terms of such contract; and

(b) is detrimental to the safety or efficient operation of the works.

(3) It shall be a defence to a charge against a consumer pursuant to subsection (2) for him to prove that there were reasonable grounds on which he assumed that the act constituting the alleged offence would not be detrimental to the safety or efficient operation of the works.

(4) In this section "consumer" means any person who holds a contract with a public utility for the supply of services by that utility."

[39] Section 2 defines a public utility as including *"any electric light, telephone, telegraph, water, sewerage or undertaking and any other service system, or undertaking and any other service system, or undertaking which the Minister may from time to time declare to be a public utility for the purposes of this Act"*. The term works as defined *"includes such cable, wire, line conduit, meter, pole, pipe, main, premises, plant, machinery, apparatus, dam, reservoir, tank, equipment, matter or thing as are erected or used by a public utility for or in connection with its operations."*

Issues

[40] The issues which arise in this case are:

- a) Whether the claimant was trespassing on the works of the defendant at the time of the accident;
- b) Whether or not the claimant's injuries are a result of him coming into contact with the defendant's primary/ high tension wires;

- c) Whether the claimant was wholly or partially responsible for the accident due to his own negligence or acceptance of the risk of injury; and
- d) What are the appropriate damages, if any, in the circumstances

Liability

[41] In order to establish liability the claimant must prove that he was injured as a result of the defendant's negligence. The claimant must therefore prove that the defendant owed a duty of care to him and that there was a breach of that duty. It must also be proved that the breach caused him to suffer injury and loss. This principle was expressed by Lord Atkin in **Donoghue v. Stevenson** [1932] A.C. 562, in the following terms:-

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

[42] In this matter the **Electric Lighting Act** is relevant to the extent that it deals with the duty of care owed by the defendant to members of the public. Section 5 of the Act states:-

"The undertakers shall be subject to such regulations and conditions as may be inserted in any license, order or special Statute, affecting their undertaking with regard to the following matters-

- (a)
- (b)
- (c) *The securing of the safety of the public from personal injury, or from fire or otherwise."*

[43] In the case of **Jamaica Public Service Co. Ltd. v. Barr and others** (1988) 25 J.L.R. 326 the Court of Appeal examined the scope of this statutory duty as well as that

under common law. Downer, JA referred to the case of ***Dominion Natural Gas Co. v. Collins*** [1908-10] All E.R. 61, in which it was stated that persons who install dangerous articles have a duty of care towards persons who may come within that area. In that case Lord Dunedin said:-

“It has however, again and again been held that in the case of articles dangerous in themselves, such as loaded firearms, poisons, explosives, and other things ejusdem generis, there is a peculiar duty to take precaution imposed upon those who send forth to install such articles when it is necessarily the case that other parties will come within their proximity. The duty being to take precaution, it is no excuse to say that the accident would not have happened unless some other agency than that of the defendant had intermeddled with the matter. A loaded gun will not go off unless someone pulls the trigger, a poison is innocuous unless someone takes it, gas will not explode unless it is mixed with air and a light is set to it.....On the other hand if the proximate cause of the accident is not the then he will not be liable. For against such conscious act of volition no precaution can really avail”.

[44] Downer, JA was of the view that electricity could be described as one of those things ‘*dangerous in themselves*’. His Lordship cited a passage from the above case in which Lord Wright stated:

“In truth the gravamen of the charge against the appellants in this matter is that though they had the tremendous responsibility of carrying this highly inflammable gas under the streets of a city, they did nothing at all in all the facts of this case.

His Lordship was of the view that the utility company in that case, had a duty under the general law of negligence and by virtue of section 5 of the Act to secure the safety of the public from personal injury.

[45] In this matter, there is no claim for breach of statutory duty. Where such a breach is claimed the claimant is not required to prove that the actions of the defendant were either intentional or negligent.

[46] The defendant has argued the defendant owed no duty of reasonable care to the claimant as he was a trespasser. In fact, counsel sought to bring the actions of the claimant within the ambit of section 3(1) of the **Public Utilities Protection Act**. The section states:-

“Subject to the provisions of this section, any person who, as respects any public utility:

- (a) Trespasses upon the works or any part thereof; or*
- (b) Unless acting pursuant to the express authority of the licensee or owner of the public utility or pursuant to a licence duly issued to him in relation to such works under any law for the time being in force, meddles, interferes or tampers with the works or any part thereof,*

commits an offence under this Act”.

There is no dispute that the defendant is a public utility as defined in section 2 of the Act and that the term “works” includes a pole. A trespasser is a person who wrongfully enters land without permission. In this matter, the claimant has admitted that he did not have the defendant’s permission to install the twisted wire and there is no dispute that he had not obtained its permission to do anything on the pole. There is also no allegation the claimant was attempting to connect the twisted wire to the defendant’s power lines and he has not been charged with any offence under the Act. The defendant’s evidence is that he was running the wire from the premises to the pole where he intended to attach it, presumably to shorten the process when the defendant came to reconnect the electricity supply. This pole was said to belong to a telephone company but was shared by the defendant. This in my view makes it a part of the defendant’s works and in light of the claimant’s admission as stated above, it is my finding that he was a trespasser.

[47] The duty of care owed to a trespasser was set out in the case of **British Railways Board v. Herrington** [1972] A.C. 877. In that case held that the duty owed to a trespasser is that of “ordinary humanity”. That duty was described as being a

subjective one which was dependent on the circumstances of each case and is less onerous than that laid down in **Donoghue v. Stephenson**. In **Pannett v. P. McGuinness & Co. Ltd.** [1972] 2 Q.B. 599 at 606 Lord, Denning M.R. said:

“The long and short of it is that you have to take into account all the circumstances of the case and see then whether the occupier ought to have done more than he did. (1). You must apply your common sense. You must take into account the gravity and likelihood of the probable injury. Ultra-hazardous activities require a man to be ultra-cautious in carrying them out. The more dangerous the activity, the more he should be take steps to see that no one is injured by it. (2) You must take into account also the character of the intrusion by the trespasser. A wandering child or a straying adult stands in different position from a poacher or a burglar. You may expect a child when you may not expect a burglar. (3). You must also have regard to the nature of the place where the trespass occurs. An electrified railway line or a warehouse being demolished may require more precautions to be taken than a private house. (4). You must also take into account the knowledge which the defendant has, or ought to have, of the likelihood of trespassers being present. The more likely they are the more precautions may have to be taken.”

[48] In light of the above, the fact that the claimant is an electrician and was aware of the danger posed by the defendant’s wires is very relevant. In fact his evidence is that he was aware that the defendant’s secondary wires were situated in the area in which he was attempting to place the twisted wire and that they were energized. He also was engaged in an activity which he admitted was the responsibility of the defendant. I also bear in mind that electricity is inherently dangerous and the pole which was shared by two public utilities could be lawfully accessed by their employees or agents. It should therefore be in the contemplation of the defendant that someone other than its own employees or agents may try to access the pole with the assistance of a ladder. In these circumstances, I find that the defendant owed a duty of care to the claimant.

[49] Having found that a duty of care was owed to the claimant it must now be now be ascertained whether there has been a breach of that duty. In this regard it is useful to

examine provisions of the ***Electric Lighting (Extra High Pressure Conductors) Regulations***. Those regulations stipulate that extra high pressure conductors must be at least twenty feet from the ground. These wires are also referred to colloquially as high tension wires.

[50] Although there is no claim for a breach of its statutory duty a failure to meet that standard may amount to a breach of the defendant's common law duty of care. A common law duty of care can arise as a result of a statutory duty where the requirement to do something gives rise to that duty.

[51] The claimant has pleaded that the defendant's high tension wire fell to the place where its secondary lines were installed on the pole. It is my understanding based on the evidence that what is being alleged is that there was a sag in the wire which put it at the height of the secondary lines. The claimant asserts that this was due to the defendant's failure to properly maintain its system. However, no measurements of the height of either the high tension wire or the secondary lines were taken to substantiate this claim.

[52] The evidence is that the claimant is that his head was approximately fourteen to fifteen feet from the ground and that at the time when he was injured, he was pulling the twisted wire over his shoulder. Mr. Bailey said that he observed high voltage/high tension wire was sagging too low. His evidence is that the minimum clearance for the defendant's secondary lines is eighteen (18) feet. If the claimant was injured by the high tension wire it may be possible to find on a balance of probabilities that they had sagged below the minimum statutory height. It is however not known which of the wires caused the claimant's injuries as the secondary lines were also energized and there is no allegation that they were not in their proper position. The medical evidence is that the claimant's injuries are consistent with *"the passage of a high voltage current through the body"*. The defendant's witness, Mr. Kenston Tomlinson stated that in his experience contact with secondary lines may cause severe burning on the body. He also said that primary lines/high tension wires are particularly dangerous and even the slightest contact can result in the loss of limbs. No expert evidence has been presented to suggest, that the injuries sustained by the claimant are consistent with those caused by

contact with high tension wires, which according to the evidence carry twenty four thousand (24,000) kilo volts of electricity.

[53] In addition, Mr. Peter Guthrie who gave evidence on behalf of the defendant stated that none of its primary or secondary lines were attached to the telephone pole. He said that when the new forty foot intermediary pole was installed they were attached to it. He maintains that the wires were not sagging too low and that the purpose of installing the new pole was to raise the height of the service wire to lessen the likelihood of it being damaged in the future.

[54] In order to establish negligence there must be some evidence that the defendant's high tension wires were below the minimum height and that the claimant came in contact with those wires. No evidence has been presented to support the claimant's allegation that those wires fell or sagged to the place where the secondary lines were located and that he was in fact injured by those wires. In fact, the claimant admitted that he was not paying attention and was only concerned with the installation of the twisted wire. The burden is on the claimant to prove the defendant breached the duty of care that was owed to him. Mr. Campbell who has unfortunately suffered severe injuries has failed to discharge that burden.

[55] In the circumstances judgment is awarded to the defendant with costs to be taxed if not agreed.