[2020] JMSC Civ 134

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CIVIL DIVISION

CLAIM NO. 2010 HCV06289

BETWEEN	**THURMETA ROSE-MARIE SAMUELS SMITH (Personal Representative for the Estate of Stephen Smith deceased)**	**CLAIMANT**
AND	**S & T ELECTRICAL COMPANY LIMITED**	**1ST DEFENDANT**
AND	**C & T ELECTRICAL LIMITED**	**2nd DEFENDANT**
AND	**JAMAICA PUBLIC SERVICE CO. LTD**	**3RD DEFENDANT**

Miss Georgia Buckley and Mr. Jason Mitchell instructed by Juliet Bailey and Company for the Claimant

Miss Olivia Derrett instructed by Oswest Senior-Smith and Company for the 1ST Defendant.

Mrs. Tanania Small-Davis and Miss Sidia Smith instructed by Livingston Alexander for the 3rd Defendant.

HEARD ON THE 18th – 28th November, 2019 and the 3rd July, 2020.

Negligence – Breach of statutory duty- Breach of contract – Employer liability – Lending/Borrowing an employee - Liability of independent contractor – Electrical burns – Contributory negligence - Personal Injury-Damages

WILTSHIRE, J.

THE PARTIES

[1] Thurmeta Rose Marie Samuels-Smith makes this claim on behalf of the original Claimant, her late husband Stephen Smith's estate, pursuant to section 2 (1) of the Law Reform (Miscellaneous Provisions) Act LRMPA. His claim was for damages for negligence, breach of contract and statutory duty in relation to an accident in which he was electrocuted on or about the 23rd day of October, 2009, while running neutral wires and erecting switches on electrical poles at Mount James District in the parish of St Andrew, causing him personal injury, loss and damage.

[2] He sought damages with interest pursuant to the Law Reform (Miscellaneous Provisions) Act, at a rate and for a period as the Court deemed just along with costs and any further other relief as the Court deemed just. He died on October 17, 2015 of unrelated causes, before the matter was tried. His wife now stands in his stead as his personal representative pursuant to a court order on February 16, 2017.

[3] The 3rd Defendant, JAMAICA PUBLIC SERVICE COMPANY LTD, JPS is a public utility company incorporated under the Laws of Jamaica whose corporate office is located at 6 Knutsford Boulevard, Kingston 5 in the parish of St. Andrew.

[4] The 2nd Defendant, C&T ELECTRICAL COMPANY LIMITED is a registered company incorporated under the Laws of Jamaica and is engaged in the business of electricians and electrical engineering. Their registered offices are at 158 Orange Street in the parish of Kingston. This Defendant was contracted by the 3rd Defendant Company to prepare and install a live feed to a coffee factory at Mount James District in the parish of Saint Andrew.

[5] The 1st Defendant, S & T ELECTRICAL LIMITED is a registered company incorporated under the Laws of Jamaica and is located at 59 Harwood Drive,

Washington Gardens, Kingston 20 in the parish of St. Andrew. They are engaged in the electrical contractor's business and were sub-contracted by the 2nd Defendant, C&T, to carry out works contracted between the said 2nd Defendant Company and the 3rd Defendant Company JPS. This Defendant was the employer of the now deceased Stephen Smith.

THE CLAIM

[6] Stephen Smith, deceased, was originally named Claimant in this matter. He worked as an Electrician and was employed to S&T Electrical Company Limited from 2008 until October 2009 when he was involved in the accident, which led to him receiving electrical burns and severe injuries. A claim was filed in 2012 against the Defendants and after he died in 2015, the Court granted leave to Mrs. Smith to continue the case in his place. All references hereafter to the Claimant are with respect to Stephen Smith.

[7] The Amended Particulars of Claim alleged that the Claimant was an employee of the 1st Defendant company which was a subcontractor of the 2nd Defendant company. The allegations are that he commenced work under the direct supervision of Curtis Edwards, also known as Zumba on or about October 12, 2009 and was directed to plant poles, put up transformers, and install transformers, switches and neutral wires. On or about the 23rd day of October, 2009 the Claimant was instructed by his supervisor Zumba to install a switch on a primary line which had been de-energized during the course of the said work. While he was at the top of the pole installing the said switch he was electrocuted.

[8] It was alleged that his electrocution resulted from the negligent re-energizing of the primary line while he was carrying out the work directed by his immediate supervisor, of installing a switch on the said line. Further, that the said negligent re-energization of the said primary line was done by the servants and/or agents of the 1st Defendant and/or breach of an implied term of the contract of employment, and/or the negligence of the 2nd Defendant's servants and/or agent and/or the 3rd

Defendant's negligence and/or breach of statutory duty which caused him to sustain severe personal injuries, loss and damage. Further and/or alternatively the occurrence of his said electrocution was evidence of the negligence of the said servants and/or agents of one or more of the said Defendants or either of them.

[9] PARTICULARS OF NEGLIGENCE AND BREACH OF IMPLIED TERMS OF THE CONTRACT OF EMPLOYMENT BY THE 1 ST DEFENDANT

(i) Failing to take any or any adequate precautions for the safety of the Claimant while he was engaged upon his said work;

(ii) Exposing the Claimant to the risk of damage or injury of which it knew or ought to have known;

(iii) Failing to take any or any adequate precautions to prevent the Claimant from being electrocuted while he was active in the course of his duties;

(iv) Failing to take any or any adequate precautions to ensure that the place where the Claimant carried out his work was safe; and

(v) Failing to provide or maintain a safe and proper system of work.

[10] PARTICULARS OF NEGLIGENCE OF THE 2ND DEFENDANT

(i) Failing to take any or any adequate precautions to prevent the Claimant from being electrocuted while he was running the neutral wires on the electrical poles and erecting switches; and

(ii) Exposing the Claimant to the risk of damage or injury of which it knew or ought to have known;

[11] PARTICULARS OF NEGLIGENCE AND/OR BREACH OF STATUTORY DUTY OF THE 3RD DEFENDANT

(i) Exposing the Claimant to the risk of damage or injury of which it knew or ought to have known;

(ii) Failing to de-energize or insulate the electricity wires when it knew or ought to have known that the Claimant was running neutral wires and erecting switches on

electrical poles as a part of the process of preparing the lines to feed to the Coffee Factory.

Overall Defences

[12] The 1st and 3rd Defendants in this matter denied negligence, breach of contract or statutory duty. They blame the Claimant and in instances even each other. The 3rd Defendant has also sought to recover from the 1st and 2nd Defendants for the claim and costs and/or for a contribution towards any damages/costs recovered on behalf of the Claimant against it as well as damages for negligence and/or breach of contract and/or breach of statutory duty. The 2nd Defendant company was unrepresented at the trial and lead no evidence on its behalf.

The 1st Defendant

[13] In their Defence the 1st Defendant admitted that the Claimant was at all material times an Electrician employed to them since 2008. They denied being sub-contracted to install a live feed to a coffee factory at Mount James District in the parish of Saint Andrew. That, they said, was the contractual arrangement between the 2nd Defendant and the 3rd Defendant. They in turn were subcontracted by the 2nd Defendant to install neutral wires.

[14] The 1st Defendant said that Mr. Curtis Edwards was an employee of theirs and was the team leader of the group of employees hired by the 2nd Defendant. The oral agreement between the 1st Defendant and the 2nd Defendant however, was that Mr Allen of the 2nd Defendant would be the supervisor and not Mr. Edwards. Mr. Edwards was not directed to supervise the work by the 1st Defendant, neither did the 1st Defendant instruct Mr. Edwards or the Claimant to plant poles, put up transformers and/or install transformers, and switches. They say that there was no requirement to plant poles, put up transformers and install transformer and switches for their workmen to be able to carry out the task of installing neutral wires.

[15] Further on the day in question a tailboard meeting was held with the men to go over the safety measures to take into account in carrying out their tasks, what the tasks were and how they were going to complete them. The men were informed that they were to assist in running neutral wires. Neutral wires they noted, are stringed from pole to pole. They say the 1st Defendant instructed Mr. Edwards and the rest of the team, including the Claimant to run neutral wires as they were not trained to install switches. At no time were the men including the Claimant instructed to install switches.

[16] The 1st Defendant stated that after their workmen were dispatched, Mr. Allen, their supervisor, instructed the workmen, including the Claimant to install switches. Further, that on the said morning the Claimant had told the Principal of the 1st Defendant that Mr. Allen had called and told him that he wanted him to install a switch. The Principal of the 1st Defendant told the Claimant "No", as that was not his instruction. Also the 1st Defendant said they could not have agreed to the installation of switches as their entire staff had not been trained in installing/erecting switches in a live line.

[17] They say they did not instruct any of their employees, including Mr. Edwards and the Claimant to install any switches. The 1st Defendant asserts that Mr. Edwards was not positioned in a supervisory role by the 1st Defendant and Mr. Edwards was acting under the sole directions of the 2nd Defendant at all material times. They denied any negligence on the part of the 1st Defendant and/or breach of statutory duty and/or breach of contract employment.

The 2nd Defendant

[18] In their Defence the 2nd Defendant admitted that the Claimant was an employee of the 1st Defendant Company. They say the 1st Defendant Company was a sub-contractor to the 2nd Defendant for the purpose of carrying out works contracted between the 3rd Defendant Company and the 2nd Defendant Company to prepare and install a live feed to a coffee factory at Mount James District in the parish of

Saint Andrew. They say that the 1st Defendant was sub-contracted to plant poles, put up and install transformers.

[19] They say no employee or agent of theirs was present at the time and place of the alleged incident, that the 2nd Defendant was not in any way associated with the re-energising of the primary line and that that it was neither negligent nor in breach of any statutory duty to the Claimant.

The 3rd Defendant

[20] In their further amended defence the 3rd Defendant said that it entered into a contract with the 2nd Defendant for them to provide distribution pole line services in Mount James in the parish of Saint Andrew. They denied that the 2nd Defendant was a sub-contractor of the 3rd Defendant and state that the 2nd Defendant was an independent contractor contracted to provide distribution pole line services in Mount James, St. Andrew.

[21] They said that the 2nd Defendant was a Company with reasonable competence and was aware of the Jamaica Public Service Company Limited Safety Policies and Procedure regarding the distribution of pole line services. They denied being negligent or having breached their statutory duty. They denied that the Claimant was electrocuted or that any electrocution was caused by their negligence or at all. They deny that they exposed him to risk of danger or injury and also that they had any duty to de-energize and/or insulate electricity wires in the circumstances obtaining at the material time as alleged or at all.

[22] They said that the removing of neutral wires and/or the erection of switches on electrical poles did not require that electrical lines be de-energized or insulated, nor was it a part of process of preparing lines to feed to the Coffee factory. Further that at all material times and on or about the 23rd October 2009 the 3rd Defendant retained the 2nd Defendant to install a D-iron on a concrete pole and that the 2nd Defendant was a reasonably competent electrical contractor who had been

instructed and familiar with the necessary safety procedures to be employed when installing a D-iron.

[23] They said the 1st and 2nd Defendants or either or both of them had a duty to instruct their employees, servants and/or agents and in particular a duty to instruct the Claimant in the safety procedure when dealing with electricity. They added that the 1st and 2nd Defendants had a duty to ensure by adequate supervision and/or instruction that when installing a D-iron on a concrete pole with the use of a ladder what safety procedures were to be applied. They said that any injury, loss and/or damage suffered by the Claimant was caused and/or contributed to by his own negligence and/or the 1st and /or the 2nd Defendants. They particularised the Claimant's negligence as follows:

(a) Failing to take any or any adequate steps to isolate the conductor before commencing work on the top of the pole.

(b) Failing to secure the top of the ladder to the pole before commencing work on the said pole.

(c) Failing to take any or any reasonable care for his own safety before doing or after working on the said pole in accordance with safety practices and procedures.

(d) Failing. neglecting and/or refusing to carry out any or any adequate risk assessment.

(e) Failing to make any or any suitable and sufficient assessment of the tasks entailed in the said works.

They particularised the negligence of the 1st and 2nd Defendants or either or both of them as follows:

(a) Failing to take any or any reasonable care for the safety of their employee.

(b) Failing to ensure that their employee was instructed in safety procedures and/or that he implemented the said safety procedures.

(c) Failing to ensure that the conductors were insulated before allowing him to commence work on the said pole.

(d) Failing to ensure that the top and bottom of the pole was secured before allowing the Claimant to commence working on the said pole.

(e) The 2nd Defendant failing to implement and act in accordance with the 3rd Defendant's safety procedures of which 2nd Defendant was fully aware and advised of

(f) Failing, neglecting and/or refusing to set up and implement a safe system of work and/or to provide a safe place of work and/or to provide a safe equipment for the Claimant.

(g) Failing, neglecting and/or refusing to provide the Claimant with adequate and relevant information and/or training to enable him to effect said works safely and with due regard for his own safety.

(h) Failing, neglecting and/or refusing to give effect to the appropriate and safe arrangements for the effective planning, implementation and/or execution of the said works

(i) Failing, neglecting and/or refusing to make any or any suitable and sufficient assessment of the tasks and risks entailed in the said works.

(j) Failing, neglecting and/or refusing in all the circumstances to take reasonable care and have due regard for the safety and well-being of the Claimant.

Claimant's Evidence

[24] The Claimant relied on the evidence of Stephen Smith, Thurmeta Samuels-Smith, Omar Johnson and Dr. Rajiv Venugopal. Their redacted witness statements were permitted to stand as their evidence in chief. Prior to his death, Stephen Smith had provided a witness statement which by order of the court was tendered into evidence.

[25] The Claimant evidence was that on or about October 15, 2009, his boss at S&T Electrical Limited, Mr Solomon Taylor instructed him and other workers on a project in the Mount James District, in the parish of St Andrew. The purpose of the project was to provide more electricity to the coffee factory and as such they needed to erect new poles and upgrade the electrical line from one leg of primary to two legs of primary. There was one leg of primary wire there with a neutral wire beside it. It was their job to turn the neutral wire into the second leg of primary wire. Primary wire was the high tension wire which carried a high level electricity to the transformer. They were instructed to install a second, high tension, wire since more electricity was needed.

[26] The Claimant said his supervisor was Zumba, who was the foreman on the project and who also gave them instructions. The project was being carried out by both C&T Electrical Company Limited and S&T Electrical Company Limited. Mr Henry, also known as Mr. Allen, was one of the bosses from C&T Electrical Company Limited and he also gave them instructions. Both Mr Henry and Mr. Solomon Taylor were lead advisers on the project and they, along with Zumba instructed them during the project.

[27] He said the project involved changing several poles because they were rotten. During the week leading up to October 23, 2009, he dug holes, changed poles, ran neutral wires and so on. The neutral wires are connected from the ground to the transformer and work to balance the current running through the wires. Jamaica Public Service Company Limited had scheduled outages for the lines to enable

them to work and these outages lasted several hours on some days. On Thursday October 22, 2009 he was back on the site in Mount James with Mr Henry, Zumba and other workers. They had one more pole to change and to install more neutral wires, put the hardware on the pole, and take down the old rotten pole, after erecting the new one. The hardware was the D- iron, the cross arm and the insulator. They were unable to complete the project on the Thursday because of the weather and so they returned the Friday morning, October 23, 2009.

[28] On Friday October 23rd, 2009 they ran some more neutral wires and having completed that he then went to do further work on the line. He was placing a drop out switch on the cross arm which is on the pole to control the original neutral wire, so that when the line was energized and turned into the second phase leg of primary wire, the line could be opened from the drop out switch. He placed the drop out switch on a cross arm then went to connect the neutral wire to the switch. He reached for his spanner to pull the clamp when he heard “boom” and blacked out.

[29] The Claimant stated that neutral wires do not have any power and for approximately two weeks that they worked on that wire to turn it into a second leg of primary it was dead. It was the same wire that he worked on many times during those two weeks and it was always dead. He said that the line was only to be energized by Jamaica Public Service Company Limited when the project was completed. The 1st Defendant, S&T Electrical Limited would have to advise Jamaica Public Service Company Limited when the project was completed.

[30] He said that on the Friday, the project was nearing its end but they still had one dropout switch to put up which was his responsibility, whilst Zumba and others were doing the ground matting by the transformer pole at the coffee factory. The line was dead and could only have had electrical current running in it if Jamaica Public Service Company Limited turned on and energized the wire, or there was some negligence on the part of the contractors for S&T Electrical Limited and C&T

Electrical Company Limited to ensure that all the switches were open to prevent any electrical current from running to this wire.

[31] Omar Johnson testified that on the said Friday he was on the project site as a groundsman with the Claimant. All that was left to be done was the running of some neutral wires and putting a drop out switch on the cross arm. He described the cross arm as being positioned at the top of the pole for the purpose of holding high voltage wires in place. He said that the Claimant used a ladder to get to the high tension wires at the top of the pole, specifically to get to the cross arm at the top of the pole.

[32] He stated that on the Friday at the bottom of the pole, Zumba the foreman turned to the Claimant and told him to install the switch. He said that the Claimant hesitated and grumbled to him about the instructions from Zumba but still proceeded to install the switch. He further said that it was Zumba who gave the switch to the Claimant as a linesman didn't walk around with a drop out switch in his tool harness. It was a thing they rarely used and when they used it, the boss always provided it. He said that he did not know that the wire was live that day and to their knowledge it was not live. He described the Claimant as the type of man, if he knew that the wire was live he would make sure they killed the electricity before he climbed the pole. He asserted that this was not the first time a drop out switch was being installed and any time they were installing a switch the line was always dead. He said any time they were doing any work it went without saying that the line was dead.

[33] Under cross examination Mr. Johnson insisted that the Claimant was installing the drop out switch on a neutral wire and admitted that a neutral wire was usually low voltage. He was adamant that the Claimant was not working on a high power line and maintained that he was working on a neutral wire which was to be turned into a primary wire. He also said that the drop out switch was in the vehicle that carried them to the project site. Mr. Johnson agreed that the connection of a short and ground signalled to the linesman that the line was dead and safe to work on and

there was no such attachment to the line on that Friday. He admitted that Mr. Smith was not working between two short and ground when he got injured and he did not see him testing the line before he started working.

[34] Mr. Johnson agreed with Counsel's suggestion that the Claimant did say to Floyd Taylor that he was installing a switch and hit the wire with a spanner then heard 'boom'. While he agreed that the Claimant was working at the top of the pole where there were two lines, he was adamant that both lines were not primary. He however also agreed that neutral wires were not connected to a drop out switch.

1st Defendant's Case

[35] The 1st Defendant relied on the evidence of Solomon Taylor and Floyd Taylor whose witness statements were permitted to stand as their evidence in chief. Solomon Taylor identified himself as the principal and managing director of the 1st Defendant. He testified that the 2nd Defendant got a contract with the 3rd Defendant and the 1st Defendant came into the contract as a sub-contractor. He said that he was contracted by the principal of the 2nd Defendant to assist in the completion of the project of expanding the electricity supply to a coffee factory in Mount James, in the parish of Saint Andrew.

[36] He sent the Claimant, Floyd Taylor, Curtis Edwards a.k.a. Zumba and Omar Johnson on the project. It was agreed that as the project was under Mr. Henry/Allen's control and that he had direct instructions from the 3rd Defendant, he would supervise the project. It was agreed that the workers would be installing poles, putting up a 2nd phase of wire that would be used as a primary wire and installing neutral wires. On the first day the team installed poles and added a second leg and/or second primary line.

[37] He said that Floyd Taylor told him that the pole installation and the dead primary wire were installed. Mr. Henry Allen also called him and told him that the work was not completed and he would require the installation of neutral wires. He told him that the workers would be there the following day to install neutral wires. He met

with the team in a tailboard meeting and briefed them as to what they would need to do and complete for the day. He went over the safety measures that they would need to take in mind and to comply with for the work to be done. He gave his workers gears to be able to complete the tasks of installing low voltage wires (secondary wires) and neutral wires.

[38] The Claimant came to him before he left the meeting and told him that Mr. Henry/Allen asked him to take a switch. He disagreed strongly as they were going to install neutral wires not work on any live or primary wire so he did not give him a switch. Further the workmen were not trained to install switches. He stated that the four workmen left without a switch. He also said that the Claimant knew that if he were to handle a primary line without knowing if it had current or not he should disable the line with a short and ground as that was the only way to safely work on a primary line unless there was a power cut.

[39] Solomon Taylor said that he got a call from Floyd Taylor, later on the 23rd day of October, 2009, who told him that the Claimant got burnt while installing a switch on the primary line. He got upset at the news as that was not what his workmen were contracted to do. He said Floyd Taylor said that Mr. Henry/Allen told the Claimant to put in the switch on the live wire which he did because he was the supervisor. When Solomon Taylor subsequently saw the Claimant at the hospital he said that Mr. Henry/ Allen asked him to install the switch.

[40] Solomon Taylor denied that Zumba was the supervisor on the project and that Zumba instructed Mr. Smith to install the switch. He maintained that there was no subcontract to put a drop out switch on the cross arm or to work on high voltage wires. On the 22nd October, 2009, when there was an outage, dead primary lines were run and on the 23rd October, 2009 only neutral lines were to be run 8ft below the top of the pole. He said that his men would not be converting neutral wires to primary wires and agreed that it was JPS's policy that linesmen should not go within 5ft of live wires especially without a short and ground on the line. He also said that a drop out switch was only used on primary wires, not neutral wires.

[41] Floyd Taylor's evidence was that the team from the 1st Defendant Company and others installed poles and another primary line on the 22nd October, 2009. He said the 3rd Defendant Company had cut off the electricity and he helped to put up the primary line. On October 23, 2009, they had a meeting with Solomon Taylor and they were told that for that day they were to put up neutral wires. He stated that Solomon Taylor did not instruct them to put up any switch. He said that he witnessed the Claimant speaking to Mr. Henry/Allen but did not hear what was said. He also said that the Claimant and Mr. Henry/Allen were close and he would usually talk to the Claimant about the job to be done and then leave the site.

[42] Floyd Taylor also denied that Zumba was the supervisor on the project or operating as the foreman but he agreed that he was a foreman at S&T at the time of the incident. He said that the Claimant got instructions from Mr. Henry/Allen and supervised them and he, Floyd Taylor, took instructions from the Claimant and Zumba. Further that the Claimant was the acting foreman/team leader on Friday 23rd October. However, he also said that at S&T, Solomon Taylor told them what they were doing for the day, but "Curtis Edwards direct me down the road, in case, cause he's the foreman." He admitted that Mr. Henry/Allen was in charge of the work site. He testified that JPS was only present on 22nd Octobe,2009, outage day, and told them when the lines were dead. On that day S&T had put up their own short and ground.

[43] He said that JPS never came to de-energize the line on 23rd October, 2009 as they were not working on any primary line. They also did not need any short and ground that day as the work to be done was to run neutral wires 8ft below the primary wire. He said that he knew that the primary wire at the top was live as JPS had re-energized them the day before. He also agreed that on the day of the incident Mr Smith was not working between two short and ground. He said when he asked the Claimant what happened, he told him that he installed a switch and his mind tell him to use the spanner and slap the wire to test it.

[44] Floyd Taylor was clear that as a linesman one could not assume that a line was dead, one had to assume it was live unless the procedure to de-energize the lines was undertaken by JPS. Further that no neutral wires were on the pole that Mr. Smith was working on. He had walked over to work on the pole and the Claimant told him that he wanted to work on that pole and he must work on another pole. He agreed with Defence counsel that for any work to be done at the top of the pole an outage would be required.

3rd Defendant's Case

[45] The 3rd Defendant relied on the evidence of Mr. Marvin Campbell and Mr. Jathriel Randall. Mr. Campbell was the Manager for Special Projects and gave evidence about the contract between the 2nd and 3rd Defendant. He indicated that the 3rd Defendant was not aware that the 2nd Defendant had subcontracted the work to the 1st Defendant and it was a breach of the contract for them to have done so without the consent of the 3rd Defendant. Mr. Campbell noted the allegations made by the Claimant and referred to letters received from Mr. Henry/Allen of the 2nd Defendant reporting on the incident. One letter said that the Claimant received burns as a result of an illegal connection on a pole on which he was installing D-irons. Another letter stated that the accident was caused by poor workmanship.

[46] Mr. Randall identified himself as the JPS Supervisor, and outlined one of his responsibilities as liasing with the contractor on a daily basis to ascertain what he required from JPS in order to carry out the project. He indicated that he was familiar with the terms of the contract and scope of the work related to the project. He testified that the 2nd Defendant begun working on the Mount James project in or about October 2009. On 23 October 2009, he received a call from Charles Allen the Managing Director of the 2nd Defendant who informed him that the work planned for the 22nd October, 2009 was completed and that the rest would be done over the weekend. However, that same 23rd October, 2009 he received another call from Mr Allen who informed him that he dispatched his crew to the site to carry out some minor bushing as well as earth treatment. Mr. Randall stated that those

activities did not require JPS lines to be de-energized and it was not communicated to him that any work would be carried out on the JPS power lines on 23 October 2009.

[47] Mr. Randall indicated that drop out switches are located at the top of the pole along with the high voltage wires hence any work to be carried out on a drop switch would require the lines to be de-energized. He went on to explain that a permit to work had to be issued by JPS to the contractor prior to the commencement of any such work. The process involved the contractor making the request to the JPS Supervisor for the lines to be de energized. The JPS Supervisor would then put in a request to the JPS Systems control for the area to be isolated from the grid and the power lines in the area de-energized. Once this was done, JPS would install a main short and ground on the de-energized wire. He explained that the short and ground functioned to dissipate any unforeseen incursion of electrical current on the line whether by lightning and even abstraction which would result in the line being energized. The short and ground would prevent the line from being energized by preventing any electrical current from running along the power line and taking it to the ground.

[48] The installation of the short and ground by the JPS Supervisor is confirmed with Systems Control who then authorize the work. The contractor's supervisor would then sign that he received the permit to work and to confirm that the lines have been de-energized. The JPS Distribution Pole Line Maintenance Technical Specifications require that all work on a de-energized circuit must be done between two installed short and ground. Hence the contractor would also always be required to install at least one other short and ground.

[49] The permit to work was generally issued for a set period of hours on a given day. At the end of the day upon the JPS Supervisor being advised by the contractor that the task for the day was completed and that it was safe to re-energize the power lines, the permit to work would be cancelled after the JPS Supervisor verified for himself that it was safe to reenergize the lines and that all short and

ground were removed. There was no Permit to Work issued to C&T on 23 October *2009* as JPS was not informed that the scope of work to be carried out on that day involved installation of drop out switches or that neutral wires were being inserted into the switch as the Claimant asserted.

[50] Mr. Randall explained that two primary lines previously existed at the top of the pole and one was being temporarily used a neutral line. The project was to reinstate that primary line to increase the feed to the coffee factory. That meant there would be two primary lines at the top of the pole. He indicated that one would not convert an existing neutral line to a primary as it would be too low. On outage day the temporary neutral wire was reinstated as a primary wire. He agreed that neutral lines would therefore have to be replaced/run, but that was not agreed for work on the 23rd October, 2009.

[51] Mr. Randall stated that there was only one scheduled outage day, the 22nd October, 2009, the lines were re-energised at about 5:00pm that day and the contractor was on site when that was done. He admitted that the majority of the agreed work for that day was completed and he agreed with the contractor that on the 23rd October, 2009 he would do bushing and earth treatment which would not require the Claimant to be working at the top of the pole. The running of wires and the installation of a dropout switch was not part of the agreed scope of work for that day. He further agreed with Counsel that there was no need to de-energise the lines in order to run neutral wires and no linesman should assume a line is dead unless a short and ground has been applied.

Submissions

[52] The 2nd Defendant company was unrepresented at the trial and no evidence was lead on their behalf. Since January 22, 2019 when the attorney for the 2nd Defendant was removed there has been no representation or appearance from the 2nd Defendant. Submissions before the court were from the Claimant, the 1st Defendant and the 3rd Defendant.

The Claimant's position

[53] It was submitted by Counsel, Miss Buckley, that the Claimant was an employee of the 1st Defendant whose employees worked on the project at Mount James on its instructions. Further that the 1st Defendant retained control of its workers and since they were on the project as its employees, it had a duty to provide a safe and proper system of work and to take adequate precautions for their safety. This included adequate supervision. It was pointed out that Solomon Taylor gave evidence that he had an oral agreement with Mr. Henry/Allen that the latter would supervise the workers on the site. It was submitted that Mr. Henry/Allen was given the task of supervising the workers of the 1st Defendant by Solomon Taylor and if the Claimant proceeded to act on the instructions of Mr. Henry/Allen, he was entitled to do so, as Mr. Henry/Allen had been given a supervisory role over him.

[54] Counsel submitted that since the Claimant stated that his work entailed among other things installing switches and both Solomon and Floyd Taylor had agreed with this, he could not be accused of acting outside the scope of his duties if he obeyed the instructions of Mr. Henry/Allen. Additionally, as Zumba was his foreman on the site he could not be accused of acting outside the scope of his duties when he obeyed Zumba's instructions to install the switch. It was submitted that based on the evidence of the Claimant and evidence elicited during cross examination, it could be concluded that the installation of a switch when a neutral wire was being converted to a primary wire was a normal and incidental part of the job. Therefore, the Claimant was acting on the instructions of his supervisor in installing the switch and within the scope of his duties. It was reasonable for the Claimant to rely on his supervisor's assessment of what needed to be done and how it should be done. No evidence had been led that the Claimant acted on his own or in defiance of someone who had a duty to supervise him.

[55] Counsel argued that it was reasonable to conclude that the supervisor must have believed the wire to be neutral when he sent the Claimant to work on it. Further that from the Claimant's evidence he also believed that the wire was not energised.

A reasonable conclusion is therefore that there was a breakdown of communication and/or a miscommunication, between the 1st Defendant and/or the 2nd Defendant and the 3rd Defendant and inadequate supervision by all three Defendants. Counsel submitted that it was not the Claimant's responsibility to show what breakdown occurred in the communication between the responsible officers. The very fact that this accident occurred while the Claimant was carrying out the instructions of a supervisor of the site pointed squarely to the fact that there was inadequate supervision of the site.

[56] Counsel submitted that a duty of care was also owed to him by the 3rd Defendant. The 3rd Defendant gave a contract to the 2nd Defendant and although the 3rd Defendant stated that it did not know that the work was subcontracted to the 2nd Defendant "*the contract of C&T of necessity empowered it to hire workers for the project and Mr. Smith was one such worker. Therefore, as the entity with responsibility for the power lines that were being worked on with its authority, JPS also had a duty of care to Mr. Smith".* It was argued that if the accident had resulted in a fire and damage to surrounding properties, the 3rd Defendant would have retained liability even if they could have been indemnified by the other Defendants.

[57] It was also submitted that the 3rd Defendant had a duty to ensure that the persons contracted to do the work on the project were reasonably competent to do so, especially given the nature of the work and the inherent dangers and also a duty to properly supervise the project, given that its power lines were being worked on. The 3rd Defendant breached its duty of care by not properly supervising the site and ensuring that there was proper communication between it and its contractor.

[58] This miscommunication and lack of adequate supervision resulted in a supervisor sending a worker to work on a line which was unexpectedly energised. Counsel submitted that any contact with the energised wire by the Claimant would have resulted in electrocution and that it was reasonable for him to have believed that based on the procedures of previous days of work as well as the instructions of his supervisor, the wire was in fact neutral. They submitted that a reasonably

competent electrician would be entitled to act on the instructions of his supervisor and therefore it is of no moment whether another electrician would have done additional tests to determine if the wire was neutral.

1st Defendant's position

[59] The 1st Defendant has sought to escape any possible liability by stating that the Claimant's employment, at the time of the incident, had passed to the 2nd Defendant. Miss Derrett cited the case of **Bain v Central Vermont Rly Co.** (1921) AC 412-415 where the court said the master in whose general service a man is, is not responsible for the tortious act of the man if the control of the master has been, for the time being, displaced by the power and control of another master into whose temporary service the man has passed by being lent (even gratuitously) or subcontracted. Reliance was also placed on the case of **Donovan v Laing, Wharton and Down Construction Syndicate** [1891-94] All ER Rep 216 in that regard.

[60] Regarding employer's liability, it was submitted that the case of **Oscar Clarke v Attorney General of Jamaica** [2016] JMSC Civ 65 was instructive as the court outlined the tort of employer's liability and what is required to prove a claimant's case. Further, in the case of **Shonique Clarke v Omar Palmer and Accent Marketing Jamaica Limited** [2019] JMSC Civ 106 the court outlined what constituted the employer's duty to provide a safe place and system of work. It said that the premises must be maintained in as safe a condition as reasonable care by a prudent employer can make. Counsel also referred to **Clerk and Lindsell on Torts** at page 922 where it said that the duty to provide a safe system of work requires at least "*appropriate instruction of the work force as to the safe performance of the task*". Complex tasks, it added, may involve more such as the organization of the work, procedure, sequence, taking safety precautions and the provision of supervision.

[61] Counsel also cited Mangatal J in the case of **David Lawrence v Nestle–JMP Jamaica Limited (incorporating Cremo Limited)** Suit No. 019 of 2001, where a safe system of work was described. It was pointed out that in the case of **Morris v Seamen Fixtures (**1976) 11 Barb LR 104 High Court, Barbados, an injured claimant's negligence claim failed as he was not acting under the directions of the employer.

[62] It was conceded that the usual team leader and foreman for the 1st Defendant was Curtis Edwards aka Zumba but Counsel contended that on the day of the accident he was not the supervisor of any work. Counsel submitted that Zumba was not a foreman nor a supervisor for the project because the sub- contract meant that the workers were "lent" to assist in this task. It was also submitted that there was no evidence that Zumba was instructed by the 1st Defendant to supervise the work. Counsel asked the court to find that Floyd Taylor was a credible witness and accept his evidence that the Claimant was the acting foreman on the site.

[63] It was argued that there were no pleadings stating that the 1st Defendant was contracted to or that the 1st Defendant gave instructions to his employees to install a switch on a primary line, or that Zumba was acting under the instructions of the 1st Defendant when he allegedly instructed the Claimant to install the switch. Counsel asserted that there was no evidence in the witness statement of the Claimant that the 1st Defendant instructed him to install a switch or that Zumba instructed him to install a switch. Further he gave no evidence as to where he got instructions to install a switch or where he got the switch. It was submitted that the court should accept Solomon Taylor's evidence that the contractor provided the material and that Mr. Henry/Allen would give the workers the material.

[64] Counsel contended that the Claimant had not satisfied the standard of the burden of proof as he only provided an assumption as to how instructions were given to him for the switch's installation. This was in contrast to the 1st Defendant's insistence that he was not instructed by them to install the switch on a primary live

line as that was unsafe practice. Further the Claimant informed the 1st Defendant that Mr. Henry/Allen of the 2nd Defendant had given him that instruction.

[65] Counsel also contended that the Claimant did not plead how the 1st Defendant, its servant and/or agents had negligently re-energized the lines which he had said was the cause of his injuries. Neither did he give any evidence that the re-energizing of the line by the 3rd Defendant was negligent in any way. It was argued that even if the lines were de-energized the Claimant should have known that unless a short and ground had been applied by the contractor, JPS or by him then the lines could become energized and cause the same injuries if he was working on or near a primary line.

[66] Counsel pointed out that the medical evidence indicated that the Claimant could only have received his electrical burns if he had been working on high voltage wires. The Claimant's evidence from his witness statement was that he was installing a switch on a neutral wire but in his amended particulars of claim he said he was advised to install the switch on a primary line. Counsel submitted that he was not forthright. Further that all parties agreed that a switch was not connected to a neutral wire but a primary line. Hence the Claimant must have known that the line he was going to connect to was a primary line.

[67] Counsel submitted that both the lines at the top of the pole were primary lines and the Claimant, as an experienced linesman, should have and must have known this and should not have assumed that the lines were dead. Counsel pointed out that the Claimant was present on outage day and based on the process outlined by Mr. Randall, he should not have assumed the following day, without any of the of the procedure for an outage being done, that the line was still neutral and dead. Further, in light of Mr Randall's evidence that lines can be re-energized by lightning or back feed from a customer's generator, a short and ground must be applied. Counsel said there was no evidence of the Mr Smith testing the wire, observing a short and ground or being advised of an outage.

[68] Counsel submitted that Solomon Taylor did not have control over the workmen at the time they were dispatched to the 2nd Defendant. It was further submitted that based on the pronouncement in **Bain** (supra) the 1st Defendant, in whose general service the Claimant and the other three employees were in, was not responsible for the acts or omissions of any of the said four (4) employees. The control of the 1st Defendant, was for the time being, displaced by the power and control of the 2nd Defendant in whose temporary service the four (4) employees had passed by being subcontracted.

[69] Counsel also submitted that the Claimant had failed to establish the basis of the negligence against the Defendants. It was contended that led no evidence of their failure to take any adequate precautions for his safety while at work and to take adequate precautions to prevent him from being electrocuted while he carried out his duties. Further that it was not the responsibility of the 1st Defendant to re-energize or de-energize lines or to consult for such as the instructions to the 3rd Defendant to do so would come from the 2nd Defendant who had the contract. The Claimant was instructed to install neutral wires and was not put at risk by the 1st 3rd Defendants. It was also contended that he undertook a task outside the scope of his employment and training. Counsel cited the case of **Morris v Seamen Fixtures** (supra) in support.

[70] Counsel stated that based on the case of **Shonique Clarke** (supra), if an employee exercising sufficient care is at no real risk, then there is no liability to the employer. Counsel said that the Claimant was an experienced linesman yet no evidence was led of him showing that he exercised precautions such as applying short and ground even as he installed a switch on and connected it to the primary wire. It was submitted that he did not act with sufficient care for his own safety, failed to state what made the system of work unsafe in the circumstances and did not give evidence that he lacked supervision.

3rd Defendants Position

[71] The following cases were cited in support of the submissions on behalf of the 3rd Defendant:

(a) ***Jamaica Public Service Company Limited v Winsome Patricia Crawford Ramsey [2006] 12 JJC 1806***

(b) ***JPS v Marcia Haughton [2006] 12 JJC 1806***

(c) ***Dominion Natural Gas Company Ltd v Collins and Perkins [1909] AC 640***

(d) ***Norris v Moss [1954] 1 W.L.R. 346***

(e) ***Chrismore Reid & Anor v Warren Wilson & Anor [2015] JMSC Civ. 15***

(f) ***Ready Mixed Concrete (South East) Ltd. V Minister of Pensions and National Insurance [1968] 1 All ER 433***

(g) ***Market Investigations Ltd v Minister of Social Security [1968] 3 All ER 732***

(h) ***Harris v Hall (1997) 34 JLR 190***

(i) ***Saper v Hungate Builders Limited [1972] RTR 380***

(j) ***Green v Fibreglass Ltd [1958] 2 Q.B. 245***

[72] Counsel, Miss. S. Smith stated that, based on **Dominion Natural Gas** (supra), the 3rd Defendant as a generator and supplier of electricity, has a general duty to take reasonable precautions to ensure that those who come in close proximity to its utility lines and other apparatus do not suffer loss or damage. Counsel referred to the evidence of the 3rd Defendant's safety policies and submitted that in the instant case, where work was being conducted on the line, at all material times they took all the reasonable precautions to protect the Claimant and all those who worked on the Mount James project against all foreseeable harm. Counsel also submitted that the Claimant failed to follow the known and stipulated safety measures when

he undertook work which put him in harm's way and his failure absolved the 3rd Defendant of any liability. The sole cause of the Claimant's injuries, Counsel contended, was his deliberate act of climbing to the top of the utility pole to install a drop out switch without performing or observing any of the fundamental safety procedures and his disregard for his own safety.

[73] It was further submitted that the 3rd Defendant could not have breached its duty to take reasonable precautions as they did not know that the Claimant would be working at the top of the pole on 23rd October, 2009 and therefore could not have known to take steps to de-energize the lines. The 3rd Defendant did not issue a Permit to Work so they could not have known or foreseen the risk. Counsel argued that the Claimant also could not have reasonably believed that the lines were de-energized on the 23rd October, 2009 as a linesman should never assume that a line was dead. Further the lines would have been re-energized at the end of the outage day on the 22nd October, 2009, the procedure to de-energize lines was not undertaken on the said 23rd October and there was no short and ground attached to the lines.

[74] Regarding the claim for breach of statutory duty, Miss Smith pointed out that neither the Claim Form nor the Amended Particulars of Claim identified the statute that the 3rd Defendant had allegedly breached. Counsel therefore submitted that said deficiency in the Claimant's pleadings amounted to an embarrassment to the 3rd Defendant which was not given the full particulars of the case it should meet at trial. Consequently, the claim for breach of statutory duty should be dismissed.

[75] Counsel argued that the Claimant did not plead that either the 1st or 2nd Defendants were employees, servants or agents of the 3rd Defendant or that they were vicariously liable for any acts of negligence committed by either the 1st or 2nd Defendants or their respective servants or agents. Counsel submitted that the 3rd Defendant could only be held liable for the actions of the 2nd Defendant if it was an employee acting under a contract of service. Reference was made to **Charlesworth & Percy on Negligence** which stated as follows:

> *"Generally speaking, an employer is not vicariously liable for the negligence of an independent contractor, his workmen or agents in the execution of his contract.*
>
> *'Unquestionably, no one can be held liable for an act or breach of duty, unless it can be traceable to himself or his servant in the course of their employment. Consequently, if an independent contractor is employed to do an unlawful act. And in the course of the work he or his servants commit some casual act of wrong or negligence, the employer is not answerable* ***R. A. Percy and C. T. Walton, Charles worth & Percy on Negligence****, (9th edn, Sweet & Maxwell 1997), para.2-298*

[76] Counsel pointed out that in the present case, both the 1st and 2nd Defendants have admitted that the 3rd Defendant's contract with the 2nd Defendant was only to carry out the works. The 2nd Defendant was in business on its own account and was hired to produce a result at a price. The 2nd Defendant was at all material times an independent contractor and the 3rd Defendant was therefore not liable for its actions or omission.

[77] It was further submitted that the 3rd Defendant was not aware that the works or any part of it was subcontracted to the 1st Defendant prior to the incident. The 2nd Defendant breached its contract when it hired the 1st Defendant without the 3rd Defendant's consent. In so doing, it prevented the 3rd Defendant from confirming that the employees of the 1st Defendant, including the Claimant, were competent to carry out the works. Further that the 3rd Defendant was entitled to rely on the 2nd Defendant as a competent contractor capable of carrying out the works for which they were hired: **Saper v Hungate Builders Limited [1972] RTR 380, p. 386; Green v Fibreglass Ltd.** [19581 2 Q.B. 245. Miss Smith stated that the 3rd Defendant had no relationship with the 1st Defendant, which was a subcontractor of the 2nd Defendant. It was submitted that the Claimant had failed to establish any relationship between the 3rd Defendant and the 1st Defendant which would render them liable for the actions of the 1st Defendant.

Counsel submitted that the Claimant's injuries, loss and damage were, alternatively caused by a breach of the 3rd Defendant's safety standards by the 2nd

Defendant. By allowing the Claimant to install a drop out switch without a Permit to Work and while the primary lines were energized, the 2nd Defendant breached the 3rd Defendant's safety standard and policies. The Claimant failed to prove that his injuries and loss were caused by the 3rd Defendant's negligence or breach of statutory duty and that he also failed to establish that the 1st and/or 2nd Defendants were the agents and/or servants of the 3rd Defendant.

Facts Not In Dispute

[78] On the evidence the following is undisputed:

(i) The Claimant was injured on the 23rd October, 2009 while trying to install a drop out switch at the top of a pole in Mount James in the parish of St. Andrew.

(ii) The Claimant was an employee of S&T.

(iii) JPS contracted C&T Electrical Company to carry out works in Mount James in the parish of St. Andrew.

(iv) S&T Electrical Ltd was subcontracted by C&T without the knowledge or consent of JPS.

(v) JPS personnel had no contact with S&T or its employees in respect of the works.

(vi) There was a scheduled outage on the 22nd October, 2009.

(vii) No request was made by C&T for JPS utility lines to be de-energized on the 23rd October, 2009.

(viii) The Claimant was not working between two short and grounds when he attempted to install a drop out switch at the top of the pole on the 23rd October, 2009.

(ix) No short and ground was affixed to the utility lines on 23rd October, 2009.

(x) Primary or high voltage wires are located at the top of the JPS poles.

(xi) Industry standard and practice was that a linesman must never assume that a line was dead and must always check to confirm.

Issues

[79] The following issues are to be determined by the court:

(2) Whether the Claimant had been passed from the 1st Defendant, his employer, into the temporary employment and control of the 2nd Defendant.

(3) Whether the Defendants owed a duty of care to the Claimant and if so was it breached

(4) Whether the Claimant's injuries were the result of a breach of duty on the part of the Defendants

(5) Whether the Claimant's actions contributed to him sustaining injuries.

(6) Whether the 3rdt Defendant is liable for the actions or omissions of the 1st and/or 2nd Defendant

(7) The measure of damages to be awarded

Law and Analysis

Negligence

[80] According to Halsbury's Laws,

> *Negligence is a specific tort and in any given circumstances is the failure to exercise that care which the circumstances demand. What amounts to negligence depends on the facts of each particular case. It may consist in omitting to do something which ought to be done or in doing something which ought to be done either in a different manner or not at all."(78 Halsbury's Laws of England (2018) (para 1))*

Regarding this duty Halsbury's Laws continue:

> *The defendant must owe a duty of care in relation to the general class within which the claimant and the type of damage that has arisen fall before there can be any question of liability to the claimant in question. Where there is no such notional duty to exercise care, negligence in the popular sense has no legal consequence. However strong the facts of the claimant's particular claim, it will fail unless the defendant owes a duty to take care in the kind of relationship in question ……Once a notional duty of a given scope has been accepted, then the question is whether, on the particular facts, the claimant comes within the scope of that duty so as to render the damage actionable at his suit, that is the question becomes one of factual duty. A factual duty of care is owed only to those persons who are in the area of objectively foreseeable danger; the fact that the act of the defendant violated his duty of care to a third person does not enable the claimant who is also injured by the same act to claim unless he is also within the area of foreseeable danger. (78 Halsbury's Laws of England (2018) (para 2))".*

[81] All the allegations have an overarching theme that the employer had failed to keep the Claimant safe while he worked. Therefore, before we consider the question of negligence we must determine the relationship between the Claimant and the 1st and 2nd Defendants. According to the Employment (Termination and Redundancy Payments) Act section 2(1)

> *"employee" means an individual who has entered into or works (or, in the case of a contract which has been terminated, worked) under a contract with an employer, whether the contract be for manual labour, clerical work or otherwise, be express or implied, oral or in writing, but does not include- (a) any person employed by the Government; or (b) any person employed in the service of the Council of the Kingston and St. Andrew Corporation or in the service of any Parish Council, and "employer" and any .reference to employment shall be construed accordingly;"*

The Labour Relations and Industrial Disputes Act, section 2

> *"worker" means an individual who has entered into or works or normally works (or where the employment has ceased, worked) under a contract, however described, in circumstances where that individual works under the direction, supervision and control of the employer regarding hours of work, nature of work, management of discipline and such other conditions as are similar to those which apply to an employee."*

At the time of the incident who was the Claimant's employer?

[82] Counsel for the 1st Defendant submitted that it had passed from the 1st Defendant to the 2nd Defendant. Miss Derrett cited the case of **Donovan v Laing, Wharton and Down Construction Syndicate** [1891-94] All ER Rep 216 where it was said that the only consideration was who was the employer of the person at the time when the acts were done. The court said the employer is the person who has the right at the moment to *control the doing of the act.*

[83] In that case it is noted that the servant was lent to the second employer wholly under his control. According to Halsbury's Laws of England, (97 Halsbury's Laws of England (2015) para 802)

> ***"Transfer of employee; onus of proof.*** *The presumption is against a transfer of an employee of such a kind as to make the hirer or person on whose behalf the employee is temporarily working responsible for the employee's acts, and a heavy burden rests upon the party seeking to establish that the relationship of employer and employee has been constituted, for the time being, between the temporary employer and the general employer's employee. It seems that the onus may be easier to discharge if labour only, particularly unskilled labour, and not both machinery and labour to operate it, are supplied by the general employer. The fact that a term of the contract between the hirer and the supplier of a workman purports to lay down whose employee the workman concerned is to be deemed to be does not conclude the question who is liable for injury caused by the workman's negligence.The questions of by whom the negligent employee was engaged, who paid him, and who had power to dismiss him do not determine the matter, but may be relevant considerations. To succeed in discharging the burden, it must be shown that* pro hac vice *the temporary employer had the right to control how the work should be done. Whether or not the temporary employer had such a right in any particular case is a question of fact. If it can be shown that the relationship of employer and employee exists* pro hac vice*, the liability of the temporary employer is the same whether the lending of the employee is gratuitous or for reward."*

[84] In addition, in **Tolley's Employment Handbook** para 57.5 it was said

> *"…. Sometimes an employer (the general employer) may lend or hire his employee to another employer (the special employer) for a particular task or transaction. Although the employee continues to be employed by the general employer under his contract of employment, he may in certain circumstances be treated as the employee of the special and not of the*

> *general employer for the purposes of establishing vicarious liability. One term for this situation is pro hac vice ('for this occasion') employment. Whether the potential liability has in fact been transferred from the general to the special employer must depend upon the arrangements that exist between them, and in particular upon which of them has the right to control the way in which the work is done. … Where it is the subcontracted employee himself who is injured, the pro hac vice doctrine does not apply and there is a right of action against the general employer. The question of who controls the subcontracted employee is only relevant to the issue of liability if the subcontracted employee injures a third party (***Morris v Breaveglen ltd t/a Anzac Construction Co** *[1993] IRLR 350…"*

In the case at bar there is no issue of vicarious liability. It is the employee who has suffered injuries not a third party. Therefore, the principle enunciated in **Bain** (supra) and relied on by the 1st Defendant is not applicable here. The Claimant's employment had not been passed to the 2nd Defendant.

[85] The case of **Morris v Breaveglen** (supra) is very instructive on the second issue of the duty of care where the employee has been 'lent'. In that case Mr. Morris was employed to Anzac Construction as a building site worker. He was sent to carry out labouring work at the farmyard at Dartmoor Prison. The main contractors for the work were a firm called Sleeman Construction. They had subcontracted part of the work to Anzac on a labour only basis. The work in question involved digging up and removing a large quantity of peat. Sleeman's site foreman instructed Mr. Morris to use a dumper truck to remove the peat. When the soil became very stony, Mr. Morris was told to take the stony soil to a tipping site and he was taken there by another worker and shown where to tip the loads. He understood his instructions to be to dump the soil either by some trees or over the edge of a drop.

[86] The following day he drove a load to the site and decided to tip it over the edge. While preparing to tip the bucket, he felt a jerk and the truck went over the edge. He managed to jump clear but in doing so sustained injuries which left him permanently disabled. He claimed damages against his employers, Anzac Construction, for negligence and breach of statutory duty. In resisting the allegation of negligence, it was submitted that Anzac had lent Mr. Morris to Sleeman, that he worked under the control of Sleeman and that he had thus become, pro hac vice,

the employee of Sleeman. Accordingly, it was argued that Anzac did not owe to Mr. Morris the duty of care normally owed by an employer to an employee but that, if they did, they had discharged it sufficiently by leaving its performance to Sleeman, who were competent contractors.

[87] The judge at first instance, on the question of negligence, found that there had been a failure to provide a proper and safe system of work for which Anzac remained liable, notwithstanding that they had delegated that duty to Sleeman's site foreman. Anzac's appeal was dismissed and the Court of Appeal held as follows:

(i) An employer was not released from his contractual duty of care when he requires an employee to work for a time under the direction and control of another employee.

(ii) The duty on an employer to take all reasonable steps to provide and maintain a safe system of work and not to expose the employee to unnecessary risk of injury is an important implied term of every contract of employment, which can be varied only with the employee's express or implied consent. The fact that the employee had been lent to another employer cannot of itself be a basis for saying that the contract had been varied. There was no evidence to suggest that Mr. Morris had agreed to any variation of the contractual position.

(iii) Where an employee is asked by his employer to work under the direction and control of another employer, a distinction must be drawn between those cases in which the court has to consider which of two possible defendants is vicariously liable for the acts or omissions of the employee causing damage to a third party, and cases in which the employee himself is injured by a failure to take reasonable care for his safety and in which the court is concerned to decide whether his general employer, or the particular employer, owed to him a duty not to expose him to

unnecessary risk of injury. Where the employee himself has been injured, that question is not answered by whether he was in the category of servant to the particular employer pro hac vice. The doctrine of master and servant pro hac vice is relevant only to a question of vicarious liability.

(iv) Anzac therefore remained liable to fulfil their obligation to Mr. Morris regarding his safety at work.

[88] The 1st Defendant cannot delegate its obligation to the Claimant regarding his safety at work. They retained and performed that obligation through Mr. Henry/Allen of the 2nd Defendant. The court is of the view that in the course of his employment by the 1st Defendant, the Claimant was required by the 1st Defendant to go to the project site at Mount James and work under the directions of the 2nd Defendant. This however, did not carry any implied release by the 1st Defendant from their duty to take reasonable care to see that in the operations carried out on the project site, the Claimant was not exposed to unnecessary risk of injury. Downer J.A. in **Courage Cons. Ltd. v Royal Bank Trust Co. & Silver** (1992) 29 JLR 115 at 123 referred to **McMermid v Nash Dredging & Reclamation Co. Ltd** [1987] 2 All ER 878 where Harrison J stated that:

> *"At common law an employer owes to his employee a duty of care which though not an absolute one, is a high duty to ensure the safety of his employee. This duty is non-delegable. Accordingly the employer is not absolved from his responsibility by the employment of an independent contractor."*

[89] So, having determined that the Claimant's employment had not been passed to the 2nd Defendant, and hence the 1st Defendant retained their obligations regarding his safety, what of the 2nd Defendant? Lord Justice Beldam at page 357 of Morris' case referred to Lord Denning's judgment in **Savory v Holland & Hannen & Cubitts (Southern) Ltd** [1964] 1 WLR 1158 and said,

> *"He added that the duty which was owed by contractors like the defendants towards a man who comes on to the site to do specialist work for them was at common law a duty simply to use reasonable care in all the*

> *circumstances – that is, notwithstanding that he had not become their servant."*

Lord Justice Beldam went on to say that the court in **Savory** (supra) pointed out,

> *"……..that other contractors on a site as well as an employer may be held to owe a duty to an employee and that the question of transfer of a servant for a particular task had by that time become relevant only to the question whether the general employer remained liable for injury caused to third parties."*

[90] The 1st Defendant's argument that it was not responsible for the acts or omissions of any of its four employees, including the Claimant, as the control of the 1st Defendant was, pro hac vice (for the time being), displaced by the power and control of the 2nd Defendant, must fall flat. Further the 2nd Defendant's very bare denial that any of their servants or agents was present at the site on the day of the incident, does not absolve it of responsibility. Therefore, both the 1st and the 2nd Defendants had a responsibility to use reasonable care for the safety of the Claimant. They both owed him a duty of care.

[91] So was there a breach of this duty of care? Does the determination of this issue lie in the answers to the questions of who gave the switch to the Claimant and instructed him to install same? The Claimant's evidence was that his supervisor was Zumba, who was the foreman on the project and gave them instructions. He also said that Mr. Henry aka Mr. Allen of the 2nd Defendant and Solomon Taylor of the 1st Defendant were lead advisors on the project and they along with Zumba instructed them during the project. The Claimant however gave no evidence as to who gave him the switch or who instructed him to install it.

[92] Mr. Solomon Taylor testified that on the 23rd October, 2009 he refused to give the Claimant a switch as requested by Mr. Henry/Allen. He also said that when he spoke to the Claimant at the hospital, he told him that Mr. Henry/Allen had instructed him to install the drop out switch. Mr Johnson's testimony was that the switch was in the vehicle in which they travelled to the project site and Zumba as the foreman gave the Claimant the switch and told him to install it. Floyd Taylor was unable to assist concretely with who caused the Claimant to put up the switch.

He said that Solomon Taylor would provide the tools and Mr. Henry/Allen would provide material and the switch was material that Mr. Henry/Allen provided.

[93] The court does not agree with the submissions that the Claimant acted outside the scope of his employment. His evidence was that he was trained to erect switches and although Solomon Taylor initially said that he was not so trained, when he amplified his witness statement, he indicated that the Claimant's job required him to erect switches when the line was dead.

[94] The absence of the Claimant at the trial to throw some light on those two questions has resulted in the court's inability to make a finding thereon. However, that does not prevent the court from determining whether the 1st and 2nd Defendants breached their duty of care. Mr. Henry/Allen was the supervisor in charge of the project and on site the workers would follow his orders. All the workers were present with the consent of Solomon Taylor to be supervised by Mr. Henry/Allen. Zumba was a foreman for the 1st Defendant. Hence whether or not he was asked to put in the switch by Mr. Henry Allen or Zumba, the Claimant was under the instruction of his employers.

[95] The court accepts Mr. Johnson's evidence that as a linesman, the Claimant would not be walking around with a switch and would only have access to one through either the 1st or 2nd Defendants. He had to ask Solomon Taylor for a switch. If he was not given the switch he would not have needed to climb to the top of the pole to carry out instructions. In this court's view it is immaterial who specifically provided the switch and gave the instructions to install. The only question is whether in all the circumstances the 1st and 2nd Defendants took reasonable care for his safety or were they negligent?

Employers liability

[96] In the case of **Orlando Adams v Desnoes & Geddes Ltd. (trading as Red Stripe)** [2016] JMSC Civ. 21 BERTRAM LINTON, J. (AG.) said:

"The obligations of employers for the safety of their employees are governed in part by the common law. In addition to long standing common law duties, several statutes address employee safety. However, the majority of claims for injuries suffered at the work place are still brought under the common law. For the claimant to succeed under this heading he must show that the several obligations of the employer were not complied with. Several of the cases have been cited in detail in the submissions of the parties. Those authorities establish that under the common law, an employer owes four duties to his employees, namely duties to provide: - A competent staff of employees - Adequate plant and equipment - A safe place of work and; - A safe system of work with effective supervision. (McDonald –Bishop, J (as she then was) in ***Ray McCalla v Atlas Protection Limited and Ringo Company Ltd.*** *2006HCV 04117 citing* ***Wilson v Tyneside Window Cleaning Co.*** *[1958) 2 QB 11o at 123-124*

This obligation requires the employer to provide and maintain in proper condition a proper plant and equipment. This will involve the implementation of regular inspection of both plant and equipment, including necessary maintenance and repairs deemed necessary. Where the nature of the work being carried out makes it reasonable for employees to be provided with protective devices and clothing, the employer is fixed with a duty not only to provide those items but to take reasonable care to ensure that they are actually used. (Edwards, J (as she then was) in ***Leith v Jamaica Citrus Growers Limited*** *2009 HCV00664 citing Lord Greene MR in* ***Speed v Thomas Swift and co. Ltd.*** *[1943] KB 557*

While the previous duty deals with outfitting the plant, this one requires the employer to make the workplace as safe as reasonable skill and care permits. This will require provision of protective clothing and devices, appropriate warnings (even of temporary dangers, such as wet floors), guard rails, hand rails, fire escapes, among others. The courts have determined that a safe system of work describes the organisation of the work, provision of adequate instructions (especially to inexperienced workers); the taking of safety precautions and the part to be played by each of the various workmen involved in relation to particular employees. (Dunbar-Greene, J in ***Wayne Howell v Adolph Clarke t/a Clarke's Hardware*** *[2015] JMSC Civ.124 citing Mason, J in* ***Wyong Shire Council v Shirt [1980] HCA 12.)***

In deciding whether the system devised is reasonable, the court will consider the nature of the work and whether it required careful organisation and supervision. Naturally, operations of a complicated and unusual nature will require more systematic organisation and planning than ones of a more simple nature. However, even operations falling in the latter category will require the institution of a safe system of work when necessary in the interests of safety, for instance work done in factories and mines (for which there are specific statutory obligations). It is not enough for the employer to prescribe a safe system of work; he must ensure that the system is followed by providing efficient supervision.

> *The duty cast on an employer is to take reasonable care for his employee's safety. What is reasonable in any situation will ultimately depend on the facts of the case. The essence of the duty is that operations are not carried out in a way that subjects employees to unnecessary risks. (Parker, L J in* ***Wilson v Tyneside Window Cleaning Co.*** *(1958) 2 QB 110 where he said "…it is no doubt convenient, when one is dealing with any particular case to divide that duty into a number of categories; but for myself I prefer to consider the master's duty as one which is applicable in all circumstances, namely, to take reasonable care for the safety of his men"*

[97] For the Claimant to succeed he must show that the 1st and 2nd Defendants did not live up to their duty and did not provide a safe working environment in general and that it was this deficit that caused his injury and loss. Bearing this in mind we therefore consider whether the test for success in a claim for Negligence is made out on the facts of this case because if the Claimant can prove negligence then he must succeed in his claim for damages under employer's liability. The claim in breach of contract is bound up with the allegations of negligence.

[98] Who should have ensured a safe place of work? The court is of the view that both the 1st and 2nd Defendants should have done so. It was not disputed that live wires were the subject of a power outage scheduled by the 3rd Defendant in order to facilitate work on the 22nd October, 2009. Hence it is accepted that it was not intended that the Claimant or any of the other workers work on live wires. The power outage could only have been countenanced by the 3rd Defendant if the request came from the 2nd Defendant as the contractor. The 1st Defendant was never in a position to secure the power outage and cannot be responsible for the lack of one. However, Solomon Taylor testified that when the Claimant told him Mr. Henry/Allen had asked him to bring a switch he knew "*that that was dangerous and warned against it".* Why? Because he realised that the installation of a drop out switch required close contact with primary wires, which must be de-energised to facilitate such work. He said that his contract with the 2nd Defendant did not involve the putting up of switches and specifically on the 23rd October, 2009 his workers were only to run neutral lines. From his evidence he was conscious that an accident could occur. The warning he issued was not enough. As the court said

in **Shonique Clarke v Omar Palmer and Accent Marketing Jamaica Limited** (supra) at para 83:

> *"……..The place of employment should be as safe as the exercise of reasonable care and skill permits; it is not enough for the employer to show that the danger on the premises was known and fully understood by the employee."*

[99] Further even though he sent his workers to a site over which he had no control, Solomon Taylor still had a duty of care to ensure a safe place of work for them especially as he knew that the site supervisor wanted the job of putting in a switch done and he knew it was dangerous. In **Wilson v Tyneside Window Cleaning Co** [1958] 2 QB 110 at 124, Parker LJ pointed out that,

> *"The duty is there, whether the premises on which the workman is employed are in the occupation of the master or of a third party…….but what reasonable care demands in each case will no doubt vary."*

Reasonable care in this case demanded that Mr. Solomon Taylor travel to the project site to ensure that the men were not put at risk. He failed in his duty to take reasonable care for the safety of his employee.

[100] The evidence is undisputed that the lines were not de-energised. The agreement between the 1st and 2nd Defendants was that the 2nd Defendant would supervise the project. The contract between the 2nd Defendant and the 3rd Defendant stipulated at paragraph 6.8 that "The *Supplier shall: comply with JPS Co.'s Safety and Environmental Policy and procedures". A*ll the activities done on the site were under the 2nd Defendant's control and therefore in this court's view the installation of a drop out switch on the 23 October 2009 was not outside their knowledge. From the evidence of Mr. Randall, drop out switches are located at the top of poles along with high voltage wires. The installation of the drop out switch therefore required the lines being de-energised. The 2nd Defendant as contractor, in this court's view, had knowledge of the instruction that the Claimant was to install the switch. The court accepts the unchallenged evidence that the dropout switch is placed on the cross arm which is at the top of the pole, that drop out switches are used with primary lines and primary lines are high voltage wires at the top of the pole. Mr.

Randall's unchallenged evidence was that no request was made by the 2nd Defendant for the lines to be de-energised on the 23rd. The 2nd Defendant would know that in installing the switch, the Claimant would be in proximity to high voltage wires which had not been de-energised. Mr. Henry/Allen was present the day before when the line was re-energised and made no arrangements to have the lines de-energised for the installation of the switch. The 2nd Defendant therefore failed to ensure safe working conditions for the Claimant.

[101] The 2nd Defendant's principal Mr. Henry/Allen died before the commencement of this trial. He was not represented and no evidence was given on behalf of the 2nd Defendant challenging the evidence on the Claimant's or the other Defendants' case. Both the 1st and 2nd Defendants are in breach of their duty of care to the Claimant and as a result of their negligence the Claimant suffered injuries and incurred losses. I find that the 1st and 2nd Defendants are jointly and severally liable for damages due to the Claimant.

Was the 3rd Defendant negligent or in breach of a statutory duty to Stephen Smith

[102] The Claimant must prove that the 3rd Defendant failed to carry out its foreseeable duty of care to him. The class of persons in which the Claimant fell was that of a person employed under a sub-contract to a JPS contractor. We have already determined that the 2nd Defendant was negligent. But did the 3rd Defendant also owe such persons a duty of care? We agree with Counsel for the 3rd Defendant that usually one cannot be made liable for the tortious acts of the contractor it engages. However, there is an exception to that rule and in light of the submissions on the Claimant's behalf we will examine it. There are some duties that cannot be delegated. Halsbury's Laws states:

> *"An employer is not generally liable for torts committed by his independent contractor but liability may arise where the law imposes on him a non-delegable duty not merely to take care but to ensure that care is taken. Where such a duty exists, it is not discharged by delegating its performance to a contractor if the latter in fact performs it negligently.English law has*

> *long recognised that non-delegable duties exist, but there has been no single theory to explain when or why. However, two broad categories of case have been identified in which such a duty has been held to have arisen. These are:*
>
> *(1) where the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work; and*
>
> *(2) where the common law imposes a duty upon the defendant arising from an antecedent relationship between the defendant and the claimant." (97 Halsbury's Laws of England (2015) (para 794)).*

[103] In the case of ***Woodland v Essex County Council*** [2014] 1 All ER 482, W, a minor, a pupil at a school for which the local education authority was responsible, suffered serious brain injury in a swimming lesson in normal school hours at a swimming pool run by another local authority. The swimming lesson was taught by a swimming teacher with a lifeguard in attendance. The swimming teacher and the lifeguard were not employed by the education authority; their services had been provided to the authority by an independent contractor who had contracted with the education authority to provide swimming lessons to its pupils. W brought a claim for damages for personal injury which included allegations that her injuries were due to the negligence of the swimming teacher and the lifeguard. She alleged that the education authority owed her a non-delegable duty to procure that reasonable care was taken in the performance of the functions entrusted to it by whoever it arranged to perform them. The judge struck out that part of her claim as a preliminary issue, on the pleadings, and the Court of Appeal affirmed his decision by a majority.

[104] W. appealed to the Supreme Court which held that *(1) A non-delegable duty of care would arise where: a claimant was especially vulnerable or dependent on the protection of the defendant against the risk of injury; there was an antecedent relationship between the claimant and the defendant, involving an element of control, and independent of the negligent act itself. Which placed the claimant in the actual custody , charge or care of the defendant, and from which it was*

possible to impute to the defendant the assumption of a positive duty to protect the claimant from harm; the claimant had no control over whether the defendant chose to perform those obligations personally or through employees or through third parties; the defendant had delegated to a third party a function which was an integral part of the positive duty which he had assumed toward the claimant, and the third party was exercising, for the purpose of that function, the defendant's custody or care of the claimant and the element of control that went with it; and the third party had been negligent in the performance of the function assumed by the defendant and delegated by the defendant to the third party.

[105] On non-delegable duties in relation to hazardous activities Halsbury's Laws of England state:

> *"The first category of cases in which there are non-delegable duties is where the defendant employs an independent contractor to perform some function which is either inherently hazardous or liable to become so in the course of his work. These cases have often been concerned with the creation of hazards in a public place, generally in circumstances which apart from statutory authority would constitute a public nuisance.*
>
> *An employer who employs an independent contractor to execute inherently dangerous work from which, in the natural course of things, injurious consequences to others must be expected to arise unless measures are adopted by which such consequences may be prevented, is bound to see that everything is done which is reasonably necessary to avoid those consequences. He cannot, therefore, relieve himself of his responsibility in such a case by proving that he had delegated the performance of this duty to the contractor employed to do the work, or to some independent person , however competent the contractor or delegate may be….." (97 Halsbury's Laws of England (2015) (para 795),*

[106] Hence a company may be made liable to a third party by the negligence of its contractor. Was the 3rd Defendant one such company? It indeed had a non-delegable duty to take care despite the competence of its contractors. The 3rd Defendant employed an independent contractor to perform some functions which were inherently hazardous or liable to become so in the course of the work. But did the law impose a duty upon them arising from an antecedent relationship between them and the Claimant? What was the relationship between the 3rd Defendant and the Claimant?

[107] The Public Utilities Protection Act states as follows:

> *"2. In this Act- "public utility" includes any electric light, telephone, telegraph, water, sewerage, cable or wireless 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; "works" 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.*
>
> *3.-(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.*

Hence, it is perceived that persons are able to interfere with JPS works but the authorized presence of such a person on the JPS works is not a trespass and therefore, if allowed to enter or interfere with JPS property particularly in order to work, such a person has an expectation that they will be protected from electric shock or electrocution, a known hazard of such works.

[108] As the student swimmer in **Woodland** (supra) was a member of a class of persons, namely student swimmers, in the instant case, the Claimant could have been part of a class of persons namely electricians or electrical workers allowed to be on the JPS property. Such persons have a dependency on JPS to manage their environment so that work is safe. Like the student he was unnamed as far as particulars went as it is impossible to know ahead of time who specifically such persons will be. If he was at the time of the incident a licensee, the common law imposes a duty to not harm licensees as they have permission to enter a space.

[109] The 3rd Defendant did have such persons as the agents and employees of C&T Electrical company in their contemplation. Paragraph 6.6 of their contract with C&T stated, *"Contractors, their directors, employees and agents shall avoid or prevent any action, activity or situation that may influence JPS directors and /or employees to act against the best interest of the Company and its affiliates."* It also said at

paragraph 6.9 that *"The supplier will be responsible for conducting its own labour relations including but not limited to the right to direct the work force, recruiting and hiring of personnel, the selection of personnel…"*

[110] They did contemplate the presence of workers from the 2nd Defendant but the Claimant and the other S&T workers were not recognised as employees of the 2nd Defendant. S&T workers were part of a subcontract between the 1st and 2nd Defendant. This was done in breach of the contract that the 2nd Defendant had with the 3rd Defendant. At paragraph 6.14 it says *"The Supplier shall not assign, in whole or part, its obligations to perform under the Contract, except with the Purchaser's prior written consent. Such consent shall not relieve the Supplier from any liability or obligation under the contract with the purchaser".*

[111] There was no such consent in this case. This made the presence of the Claimant unauthorised and showed that he had no antecedent relationship with the 3rd Defendant. He was not an anticipated "authorised person" on their property. Mr. Randall testified that he thought the Claimant was employed to the 2nd Defendant. Only after the accident was he told otherwise. Further the court accepts that no request was made by the 2nd Defendant for the power lines to be de-energised by the 3rd Defendant on 23rd October,2009. The 3rd Defendant would not have known that the Claimant would be working at the top of the pole and therefore could not have foreseen the risk. The 3rd Defendant was not negligent and is not liable for the actions or omissions of the 1st and/or 2nd Defendant. The court has also concluded that as the Claimant's pleadings did not indicate which statute the 3rd defendant breached, it cannot determine if there was a breach of statutory duty. The

Contributory Negligence

[112] Section 3(1) of the Law Reform (Contributory Negligence)) Act states that:

> *"Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering*

> *the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the Claimant's share in the responsibility for the damage…"*

[113] Halsbury's Laws of England indicates that:

> *Where a claimant suffers loss as a result of his own fault as well as that of two or more defendants, the practice is first to decide the degree of responsibility of the claimant in order to determine the percentage reduction for contributory negligence and then apportion any resulting award rateably between the defendants." (29 Halsbury's Laws of England (2019) (para 625))*

[114] The Claimant was no novice in terms of his work. He indicated that he had been working as an Electrician since he was 19 years old and had learnt his skills and trade while on the job. At the time of the accident in 2009, he had been doing electrical work for over 25 years. Apart from the wires not being de-energized and posing a severe threat to his safety we examine whether he was contributorily negligent. He stated that he reached for the spanner, heard "boom" and lost consciousness. Floyd Taylor testified that on asking what had happened, he told him that he had slapped the wire with the spanner to test it. It was suggested that Floyd Taylor was telling the truth about what was said because that was confirmed by Omar Johnson. The record of Omar Johnson' s evidence under cross examination by Counsel for the 1st Defendant is as follows:

> *"Suggest that when Mr Smith was taken to the ground he said to Mr Floyd Taylor that he was installing a switch and hit the wire with a spanner, then he heard boom."*
>
> *"Ans. Yes."*

[115] The court notes that he did not say he agreed that the Claimant said he slapped the wire to test it. What he agreed to was that the wire was hit with the spanner. Only Floyd Taylor said that the Claimant did so to test the wire. The court does not accept that the Claimant slapped the wire to test it, because he was of the view that the wire was not energized. His failure was in not testing the wire before preceding to work on the line. No evidence was given to show that he did. He therefore seemed to have assumed the line was dead. This must never be

assumed. There was no evidence of the usual procedures which preceded a power outage being implemented that day.

[116] He should not have assumed the line dead. According to Jathneil Randall there had to be several steps in the de-energization process including the communication between the JPS and the contractor and the installation of a short and ground by JPS and also by the contractor. He said if the Claimant was present on October 22, 2009 he would have signed off that the work was completed for that day. Mr. Randall said he was not sure that all the work was completed but that "*enough was completed to reinstate the line*." The Claimant stated that he was at work on the 22nd October, 2009.

[117] No evidence was given of a short and ground being present on the lines to indicate they were dead on October 23, 2009. The evidence is consistent from the witnesses for both the claim and the defence that a linesman should check for himself if a line was dead. Solomon Taylor also said that the linesman or contractor has a duty to test the line to ensure that it is dead. This as "*When the JPS open the line and put on their short and ground it may not put on at the place where we working so before we put on our short and ground we will test the line for our self. - the noisy tester.*" The Claimant had no proof the line was dead and did not check if it was before working. According to Solomon Taylor "*Unless he saw a short and ground on the line he should not have gone within 5 feet of those lines."* He also said "*JPS policy is that linesmen cannot go within 5 feet of live primary wire".*

[118] Omar Johnson agreed under cross examination that primary lines were at the very top of the poles while neutral wires would be below the primary ones. He remained adamant that the Claimant was working on neutral wires but also testified that he was at the top of the pole. He said however, that he did not know the procedure to test if a line is dead. At the same time, he said his stepfather was a trained linesman and had taught him that a linesman should test the high voltage wire to make sure it was dead and apply a short and ground. He admitted that he said that on the day of the incident he did not know the wire was live and to their knowledge

it was dead. He agreed that neutral wires are not connected to drop out switches yet denied that the Claimant was connecting a primary live wire to a drop out switch when he received the electrical burns.

[119] As to whether the Claimant was working on primary or neutral wires, Mr. Johnson was not a credible witness. The undisputed fact however, is that he was at the top of a pole and that is where the primary live wires would be. Mr Johnson said he and others went there to the site *"with knowledge that it was neutral.* "He said "*the line was not supposed to be live."* This shows an assumption that based on his evidence should not have been entertained by a linesman, even more so, a linesman of the Claimant's experience. He was working in close proximity to live wires without either installing his own short and ground or testing the wire before doing so. The Claimant failed to take care for his own safety and his negligence contributed to the injuries he sustained. I find that that he is 50% contributorily negligent.

Damages

[120] The Claimant pleaded that he sustained injuries and incurred losses as follows:

i. Loss of consciousness

ii. Loss of power to the right upper extremity

iii. Decreased sensation to the right upper extremity

iv. Burns to the right lateral arm and forearm

v. Full thickness burns to the dorsum of the right foot extending to the sole

of the foot

vi. Lack of motion in the right toes

vii. Lack of dorsalis pedis.

viii. Reduced movements in the left ankle joint

ix. Lack of motion in the left toes

x. Full thickness burns on the sole of the feet

xi. Full thickness burns on the lateral aspect of the left foot

xii. Myoglobinuria of the urine

PARTICULARS OF SPECIAL DAMAGE

a) Hospital Expenses	$887,323.48
b) Medical Expenses	$49,475.40
c) Travelling Expenses	$300,000.00
d) Medical Report	$2,000.00.
e) Loss of earnings for 5 days per week from 23/9/2009-30/11/2010 = 288 days at $4,000.00 per day and continuing $1,152,000.00 - $193,000.00 received from the 1st Defendant between 6/11/09 and 29/10/10	$ 959,000.00
f) Helper for 26 days @ $2,500.00 per day	$ 40.000.00
TOTAL -	$2,235,798.48

[121] The Claimant was admitted to University Hospital of the West Indies from 23rd October, 2019 to 23rd February, 2010 and 15th April, 2010 to 26th April, 2010. He was seen by Dr Rajeev Venugopal whose report dated May 13, 2010 stated that

his examination revealed that the Claimant had initially no power and decreased sensation in the right upper extremity. The burns were affecting the lateral arm and forearm. His left upper extremity had normal power. The right lower extremity had full thickness burns to the dorsum of the foot extending to the sole and he had no motion in the toes. Concerning the lower extremity movements were reduced in the ankle joint and no motion was in the toes. There was also full thickness burns on the sole of the feet and lateral aspect of the foot. His assessment was of a high voltage electrical injury. Physical therapy was instituted to maintain joint motion.

[122] The Claimant underwent four surgical procedures which included the amputation of his right second toe, skin grafting, replacement of right foot flexor tendons with a distally based saphenorsual flap and debridement of the donor site. The following resultant disabilities were pleaded by the Claimant:

(b) *5 x 4 cm hyperpigmented area located on the left arm;*

(c) *18 x 8 cm area located on the left anterior torso along the anterior allixary line starting at the level above the nipple;*

(d) *The entire posterior surface of the right upper extremity starting from the axilla to the dorsum of the hand has patchy pigmentation abnormalities. There is a 13 x 5 cm hypertrophied area;*

- The posterior left torso has a 31 cm surgical scar for the Latissimus Dorsi harvest;

(e) *The right posterior leg has a 30 x10 cm contour deforminty due to the harvest for the sapheno-sural flap;*

(f) *The right and left anterior thigh has a hyperpigmented 25 x 20 cm and 18 x 20 cm respectively;*

- The right dorum of the foot has a hyperpigmented area with a contour abnormality due to debridement and skin grafting;

(g) *The left lower lateral aspect of the leg and foot has a contour abnormality of 18 x 22 cm area due to the latissimus dorsi flap;*

(h) *The ankle motion is reduced; and*

(i) *There is limitation in toe movements due to the injury in both lower extremities.*

[123] Dr. Venogupal's reports indicated that the Claimant had suffered a significant injury assessed his scars as permanent and indicated that the scars, from the electrical burns as well as the ones from the surgery would not undergo any significant change in the appearance based on the time that had elapsed and could not be significantly improved by surgical revisions. By the report of September 5, 2013 the doctor said "The sinus may settle down however if it does not, the plan will still be to offer the surgical intervention." In the medical report of December 3, 2013 he stated that "*the combined lower extremity score would be 21% of the whole person impairment. The disability related to pain, scar appearance and scar related impairment was increased from 10% to 20% based on the relative assessment of the symptoms. The 20% still keeps Mr Smith in the same Class II, which ranges from 10 to 24% of the whole person impairment (ClassII: The patients have signs and symptoms of the skin condition which are present continuously or intermittently. There is limitation of some of the daily activities. Intermittent to constant treatment may be required.) The combined whole person impairment is 37%. The overall whole person impairment is unlikely to change after this four year period. However, due to the nature of high voltage electrical injuries and the injuries suffered; he may be at risk for developing cataracts and osteomyelitis."*

[124] Under cross examination Dr. Venugopal admitted that he had said in a 2010 report that physical therapy was commenced to maintain joint motion and that in his December 13, 2013 he had said ankle motion had decreased. Further that the formation of scar tissue and reduction in joint motion was the result of the high voltage burn, electrical injury but added that the lack of physiotherapy could be a factor as well. He said when he examined the Claimant on September 4, 2013 the wound on his upper body and the wound on his lower extremity had healed

however the damage would go on for 2-3 years. He said healed referred to external i.e. superficial. He indicated that there was still an issue with the sinus over the right dorsum of the foot and for that he had recommended surgery. To his knowledge however, the surgery was never done and had it been done, it would have reduced the impairment rating.

[125] The Claimant's evidence was that he was in much pain. He did physiotherapy when he could but at times he was unable to afford same. He complained that after the incident, he had difficulty remembering events, difficulty walking properly and standing for long periods. During the rainy season or when it is cold, he was unable to feel anything in his feet and there was numbness and pain generally, especially in the left foot.

[126] Counsel for the Claimant relied on **Lincoln Nembhard v Wayne Sinclair and Lincoln Harriot,** reported in Khan's Recent Personal Injury Awards Volume 6 at page 178 where on July 25th 2008 the Claimant was awarded Four Million dollars ($4,000,000.00) having suffered deep third degree electrical burns to left hand, burns to left chest, burns to left arm, forearm and hand, and burns to left foot. There was a 90% impairment of the arm which amounted to a 49% impairment of the whole person. The award here would update to $7,886,567.16

[127] Reliance was also placed on **Walter Dunn v Glencore Alumina Jamaica ltd t/a West Indies Alumina Company (Windalco)** reported in Khan's Recent Personal Injury Awards Volume 6 at page 179. The claimant suffered circumferential burns to the distal quarter of the left leg and dorsum leg. The total body surface burn was 3% and he was assessed with partial disability of 3 % of the whole person. In April 2008 he was awarded $1,312,500.00 which updates to $2,778,545.67.

[128] Counsel also cited **Winston Pusey v Pumps & Irrigation Limited Jamaica Public Service Limited**, reported in Khan's Recent Personal Injury Awards Volume 5. In that case the claimant suffered electrical burns while removing a power line from a light pole. His injuries included unconsciousness pains all over

body, burns to hands, legs and chest; and fingers of right hand "hooked up". He was assessed at 54%-60% whole person disability. His right hand was amputated. On July 16th 1993 he was awarded $800,00.00 for pain and suffering and loss of amenities, which updates to $11,651,000.00.

[129] Counsel for both the 1st and 3rd Defendants submitted that an appropriate award for general damages was $6,000,000.00 using the **Winston Pusey** and **Lincoln Nembhard** cases respectively. It was further submitted by Counsel for the 3rd Defendant that this amount may be reduced having regard to the untimely death of the Claimant in October 2015 due to an unrelated incident. They referenced the cases of **McCann v Shepherd** [1973] 1 WLR 540 and **Inez Brown (near relation of Paul Andrew Reid, deceased) v David Robinson, Sentry Service Co. Ltd**. [2004] UKPC 56 They submitted that a reasonable award for pain and suffering and loss of amenities in this case is $5,000,000.00.

General Damages

[130] Regarding the cases put forward the court finds that **of Winston Pusey v Pumps & Irrigation Ltd. & Others** (supra) to be most helpful. There the plaintiff while in the course of his duties came into contact with high powered lines and received electrical burns on several parts of his body such as his hands, chest and legs. and his right hand was amputated below the elbow. As a result of the accident accident he could not no longer do several things including tie his shoe laces and he could not do electrical work. He also suffered embarrassment as a result of the loss of his hand. He had a 54% disability of the whole person. (60% if the possibility of cancer was included) He had made efforts to work but with not much success. The court noted however that he was not totally incapacitated and as a United Sates resident he had access to retraining. They awarded him $800,000 for pain and suffering and loss of amenities. Updated the award would be $11,163,394.34 i.e. (167.73/12.02) x $800,000) using a CPI of 167.73 for February 2020.

[131] I take into consideration that the Claimant in the instant case had a much longer period of hospitalization and underwent multiple surgeries. Like Mr. Pusey he suffered permanent scarring and could no longer work as a linesman as a result of the injuries received. I note however that Mr. Pusey's disability of the whole person was rated at 54% while the Claimant herein was assessed at 37%. For that reason the award would be adjusted downward to $10,500,000.00. This will be further reduced to $9,500,000.00 due to his having died in 2015. In light of his contributory negligence 50% of this will be paid by the 1st and 2nd Defendants.

Special Damages

Loss of Income

[132] According to Gilbert Kodilinye in the text, Tort, Text, Cases and Materials ((1995, reprinted 1998 p. regarding loss of future earnings,

> *"Earnings lost up to the date of the judgment can be precisely calculated and so are classed as special damages . . . but future earrings cannot be so quantified since no one can foretell what happens as regards the plaintiff's health, job prospects and other circumstances. Assessment of future earnings is thus largely guess work."*

In the case of the Claimant who has unfortunately died before trial, by virtue of circumstances independent of this matter, the loss in his earnings are calculable. Stephen Smith tried to work after his accident. His wife testified that he worked with Biggs Electrical & Construction Limited in November, 2012 for two days and earned $5,000.00. She said over the period November 2012 to July 2013 he worked several times with this company. This work was not consistent and in total he worked 111 days between November 20, 2012 and July 31, 2013.

[133] The Claimant stated that he could never climb a pole again and do the electrical work he used to do as a linesman. As a linesman he used to get a salary of $4,000 per day when he worked on distribution wires and when he worked on the larger transmission wires, he would earn a salary of $6,000 per day. He said that he used

to work seven (7) days per week depending on the project and some projects lasted several weeks and others several months.

[134] The wife of the deceased Claimant also gave evidence consistent with his that he had earned less afterwards - $2500 per day working at an electrical company. This as compared to between $4000 to $6000. She agreed that this was not every day but only when the company had work. She agreed that the Mount James project was coming to an end and there was no guarantee of his continued employment. She admitted that she did not know how often he was paid. She agreed that he was able to work from November 2012 until his death. Mrs Smith said the Claimant worked with S &T for a year before the incident and S&T had already paid $193,000 to him.

[135] The evidence before the court is that the work of the linesmen was not constant and was based on whether their employer obtained contracts such as the Mount James project. The Defendants say the Claimant has failed to prove that he is entitled to recover the lost income claimed and they submit that it ought not to be allowed.

[136] The Court accepts that the Claimant was not working from October 24, 2009 to November 2012. Thereafter he was employed but earned less than he did in his previous job as a linesman. The court accepts that he earned $4000 or $6000 sometimes, but it does not accept that he worked every day due to the unpredictable nature of projects. Further, any damages under this head must take into account the sum of $193,000 already paid by S&T. The payment of $193,000 represented one year's salary. Payment therefore for the two year period in which he did not work is awarded in the sum of $386,000.

[137] The Claimant worked with S&T for only one year before the accident. One cannot predict that he would have stayed there for any prolonged period even if he did not have an accident. The extent of his injury resulted in his inability to resume work as a linesman. He did however obtain employment albeit earning less and not with

any consistency. The court finds merit in the submission that any claim made regarding lost earnings after he resumed working in 2012, ought properly to have been made under handicap on the labour market. In light of the lack of evidence of the amount he earned when he resumed employment and the frequency in said employment, the court will not make an award for loss of earnings after he gained this employment.

Helper and Transportation

[138] There is no evidence that the helper was for the benefit of the Claimant. No award is made under this heading. No award is made for transportation as the court excluded the transportation receipts as Mrs. Smith admitted that all the transportation expenses were hers.

Medical and Hospital Expenses

[139] As pleaded, the sums awarded for medical expenses and hospital expenses are $49,475.40 and $887,323.48 respectively

Conclusion

[140] Judgment for the Claimant against the 1st and 2nd Defendants. The Claimant is 50% contributorily negligent.

Special damages are awarded as follows:

Medical expenses - $49,475.40

Hospital expenses - $887,323.48

Loss of income - $386,000.00

Total= $1,322,798.88 x 50% = $661,399.44 @ 3% from the date of accident to the date of judgment.

General damages awarded in the sum of $9,500,000.00 x 50% = $4,750,000.00 @ 3% from the date of the service of the claim to the date of judgment.

Costs awarded to the Claimant against the 1st and 2nd Defendants to be taxed if not agreed with the Claimant recovering 50% of the costs determined.

Costs awarded to the 3rd Defendant to be taxed if not agreed. The Claimant to pay 50% and the 1st and 2nd Defendants to pay 50%.