[2018] JMCA Civ 1

JAMAICA

IN THE COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO 8/2013

BEFORE: THE HON MR JUSTICE MORRISON P
THE HON MRS JUSTICE SINCLAIR-HAYNES JA
THE HON MR JUSTICE F WILLIAMS JA

BETWEEN	**ANTHONY MARTIN**	**APPELLANT**
AND	**ERIC BUCKNOR**	**1ST RESPONDENT**
AND	**JAMAICA PUBLIC SERVICE COMPANY LIMITED**	**2ND RESPONDENT**

Rudolph N Smellie instructed by Daly Thwaites & Company for the appellant

Garth Lyttle and Ms Renee Malcolm instructed by Garth E Lyttle & Co for the 1st respondent

Stuart L Stimpson instructed by Hart Muirhead Fatta for the 2nd respondent

10, 11 May 2016 and 29 January 2018

MORRISON P

[1] I have read in draft the judgment of my brother F Williams JA. I agree with his reasoning and conclusion and have nothing useful to add.

SINCLAIR-HAYNES JA

[2] I too have read the draft judgment of F Williams JA and agree with his reasoning and conclusion.

F WILLIAMS JA

Background

[3] Mr Anthony Martin, the appellant in this case, sustained a severe electric shock and burns, on 23 December 2003, whilst atop the roof of a building. This occurred when a 14-foot, expandable metal pole that he was using to paint the side of the building came into contact with wires. As a result of his injuries, the appellant's right arm had to be amputated below the elbow and his left arm has become severely limited in function.

[4] The appellant filed a claim against the 1st respondent, Mr Eric Bucknor, who is (and was at the material time) the owner and occupier of the said building. The building is located at the corner of Corinaldi Avenue and McCatty Street, Montego Bay, in the parish of Saint James. The appellant also sued the 2nd respondent, the Jamaica Public Service Company Limited (JPS), which holds a licence to supply electricity to the public, pursuant to the Electric Lighting Act.

[5] By way of a claim form, filed on 5 October 2005, the appellant claimed against the 1st respondent, damages for negligence and/or breach of contract of employment and/or breach of the provisions of the Occupiers' Liability Act. Against the 2nd respondent, the appellant claimed damages for negligence and/or breach of its

statutory duty under the Electric Lighting Act and Regulations, to install, operate and/or maintain its electric wires and cables.

[6] In his particulars of claim dated and filed 5 October 2005, the appellant further asserted that he was, at all material times, an employee of the 1st respondent and that there were terms implied in that employment contract which placed a duty on the 1st respondent to ensure that the appellant's work environment was safe. In relation to the 2nd respondent, the appellant pleaded that, pursuant to section 6 of the Electric Lighting Act and Regulations, the 2nd respondent had a duty to efficiently supervise and maintain its power lines and poles. Both respondents, it was asserted, had failed to fulfil their respective duties.

[7] On 6 December 2005, the 2nd respondent filed a defence denying liability. The 2nd respondent asserted, at paragraph 5 of the said defence, that the part of the building on which the appellant was working at the time of his injury had been recently constructed. It was contended that that recent extension had brought the building into close proximity with its electric lines. It was further averred that the 2nd respondent had done the necessary routine checks to ensure the safety of its cables and wires and that, prior to the accident, there had been no request by the 1st respondent for removal of the electric wires.

[8] The 1st respondent, in his amended defence filed on 20 July 2006, denied all liability. He stated that, the appellant, whilst painting the building, was operating as an independent contractor and that at the time he was so engaged there was no electricity

at the then newly-constructed part of the premises. Additionally, it was averred that the 1st respondent owed no duty of care to the appellant in respect of electric lines running along the roadway and that, moreover, the positioning of those lines conformed with the requirements for minimum distances prescribed by the relevant regulations, the appellant's injuries having been caused by his own negligent use of the metal painting pole.

[9] On 12 June 2009, the 2nd respondent filed an ancillary claim against the 1st respondent claiming an indemnity in respect of liability, if any was to be found on its part.

[10] The trial took place on 26 and 27 November 2012, before K Anderson J. At the end of the trial, the learned judge invited written submissions on the question of liability. An oral judgment was delivered on 20 December 2012. The learned judge found that the appellant's case had not been proven and awarded judgment and costs to the respondents. Judgment on the 2nd respondent's ancillary claim was awarded to the 1st respondent.

The appeal

[11] The appellant, by notice and grounds of appeal filed on 31 January 2013, contends that the learned judge erred in fact and law in several respects. The grounds (some of which overlap and, as such, have been grouped together for convenience), are summarised as follows:

(i) The learned judge erred in arriving at his findings in respect of the respective parties' liability:

a. as to whether the 1st respondent was negligent (grounds (i)-(iii)); and

b. he failed to properly consider the issue of foreseeability and as to whether the 2nd respondent had fulfilled its duty to monitor and maintain its cables and wires (ground (vi)).

(ii) The learned judge erred in accepting as proven the 1st respondent's defence of *volenti non fit injuria,* specifically in relation to his treatment of the appellant's statement that "Had I known I was so close to the wires, I would have, used a paintbrush" (ground (iv)).

(iii) The learned judge erred in his treatment of the expert evidence as to whether it had proven how the appellant was injured (ground (v)).

Discussion and analysis

[12] Where this court is called upon to review the findings of fact of a judge below, the learning from the decision of **Beacon Insurance Company Limited v Maharaj**

Bookstore Limited [2014] UKPC 21, is instructive. In that case, Lord Hodge stated, at paragraph 12, that:

> "…It has often been said that the appeal court must be satisfied that the judge at first instance has gone 'plainly wrong'…This phrase...directs the appellate court to consider whether it was permissible for the judge at first instance to make the findings of fact which he did in the face of the evidence as a whole. That is a judgment that the appellate court has to make in the knowledge that it has only the printed record of the evidence. The court is required to identify a mistake in the judge's evaluation of the evidence that is sufficiently material to undermine his conclusions. Occasions meriting appellate intervention would include when a trial judge failed to analyse properly the entirety of the evidence…"

[13] Additionally, the decision of **Watt or Thomas v Thomas** [1947] AC 484, at pages 487-488, is of further assistance, providing that:

> "...I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court...."

[14] In summary, the learned judge's findings of fact may not lightly be disturbed. It must therefore be demonstrated that the above conditions have been satisfied in order to warrant an interference by this court with his findings of fact.

The learned judge's treatment of liability

Submissions on behalf of the appellant

[15] Counsel for the appellant submitted that the 1st respondent should have been found, at the very least, partly liable under the Occupiers' Liability Act. It was submitted that the learned judge's failure to find the 1st respondent at least partly liable was in turn due to a failure to make a necessary prior finding as to how the appellant had reached on the roof of the 1st respondent's building. The choice was between the competing accounts of the appellant on the one hand and the 1st respondent on the other.

[16] This is a summary of the competing contentions gleaned from a review of the submissions of both sides and the evidence: In a nutshell the appellant had contended at trial that the 1st respondent had told him that certain sections of the wall of the outside of the building could have been painted from the roof. The 1st respondent then escorted him to the roof, using keys to open doors to gain access to the said roof. On the other hand, the 1st respondent had contended that the appellant had found his way onto the roof without his knowledge and by somehow gaining hold of his keys; and in spite of warnings that he had given to the appellant: (i) not to go on the said roof; and (ii) not to use the metal pole.

[17] It was submitted that, had a definitive finding been made in keeping with the appellant's account, as the evidence required, then a finding of, at the least, partial liability on the part of the 1st respondent was likely.

Submissions for the 1st respondent

[18] Counsel for the 1st respondent submitted that there had been no breach of a duty of care by the 1st respondent in respect of the appellant as there had been no loose or faulty wiring, but that rather, the appellant's injuries were caused by his own negligent handling of the painting pole. Further, it was submitted that, (i) since the overhanging wires were not on the building being painted; and (ii) since they did not belong to the 1st respondent, no fault could be laid at the feet of the 1st respondent. Neither could it be said that he had played any or any great role in exposing the appellant to danger.

[19] Counsel further submitted that the learned judge had properly considered and applied the principles of occupiers' and employers' liability and that it was the appellant who had failed to discharge the burden of proving his claim. Consequently, the judgment below should not be disturbed.

[20] In relation to the claim for breach of contract, it was submitted that the learned judge had correctly assessed the evidence before him, enabling him properly to conclude, as he did, that that claim was misconceived.

[21] As this issue did not affect or concern the 2nd respondent, no submissions were made on it by the 2nd respondent.

The judge's findings

[22] In respect of the 1st respondent, the learned judge, in what may be described as a comprehensive judgment, expressed the view that the determination of the question of whether the appellant was an employee or independent contractor of the 1st respondent was a central issue in resolving the claim. He also considered, in view of the part of the claim made pursuant to the Occupiers' Liability Act, whether the appellant was a visitor to or trespasser on the 1st respondent's premises at the time of his injury and whether the defence of *volenti non fit injuria* had been sufficiently proven.

[23] The learned judge, at paragraph [56], found that, in the light of all the circumstances, where the appellant had provided his own painting tools, painted with an assistant workman and was hired on a 'one time' basis, the appellant was an independent contractor. Consequently, he dismissed the claim for damages for breach of employers' liability.

[24] At paragraph [72] of the judgment, the learned judge rejected the 1st respondent's evidence that he had warned the appellant of the risk of injury and that he had told the appellant not to go onto the roof. As such, based on his finding that the appellant had been invited to the premises for the purpose of work, the learned judge, at paragraph [73], found that when he was injured, the appellant was a visitor, within the meaning of the Occupiers' Liability Act. The learned judge found that, although a common duty of care was owed to the appellant pursuant to section 3(1) of the Occupiers' Liability Act, any liability arising from a breach of that duty was to be viewed

within the context of the pleadings. He found that there was no breach of that duty. In the light of that finding, although he proceeded, at paragraphs [79] and [80], to find that the roof of the 1st respondent's building did constitute an unsafe work environment, he opined that he could not rely solely on that finding to determine that the 1st respondent was liable under the Occupiers' Liability Act.

Discussion

[25] In the written judgment, after finding as he did, that the 1st respondent owed the appellant a common duty of care (as stated above), the learned judge continued his assessment by evaluating whether the 1st respondent could have been relieved of liability by virtue of any of the other sections of the Occupiers' Liability Act. In the course of his assessment of the evidence and the law, the learned judge, having found that the 1st respondent could avail himself of the defence of *volenti non fit injuria,* concluded that no liability could attach to the 1st respondent.

[26] The court's findings and conclusion in relation to the two competing contentions as to how the appellant came to have gone onto the roof are reflected in paragraph [72] of the judgment. The relevant parts read as follows:

> "…In the circumstances, it is this Court's conclusion that not only did the First Defendant not limit the Claimant's access to the roof via the stairway, but instead, actually left that stairway and by extension, the roof to which it leads, accessible, specifically so as to enable the Claimant to access same if he chose to do so. In hindsight perhaps, the First Defendant would not have done so, had he thought through it carefully at the time. It is even conceivable that the First Defendant did not specifically intend for the Claimant to have entered and remained upon the roof of the building, to

> paint any portion of that building while there. That though, having to the Court's mind, perhaps only been the First Defendant's intention, if indeed it was his intention at all, would not be enough to change the Claimant's legal status, for the purposes of the law…"

[27] This conclusion was arrived at after the court had, earlier in paragraph [72] of the judgment, rejected the 1st respondent's evidence as to how the appellant had been able to go up on the roof. The court indicated that such evidence "lacks credibility" and "defies likelihood and credibility". The court below, in rejecting the 1st respondent's evidence in respect of access to the roof, engaged in some analysis, showing why it was being rejected. It is noteworthy that no similar analysis seems to have been done in respect of the appellant's evidence as to how he got on the roof. However, his account was apparently rejected, with the court arriving at a conclusion that seems to be something in the nature of a middle ground between the two diametrically-opposed accounts. I find myself persuaded by the arguments advanced by Mr Smellie, counsel for the appellant, that: (i) the 1st respondent was at pains to persuade the court to accept his account of how the appellant gained access to the roof as he knew that an acceptance of the appellant's account would almost guarantee a finding of liability on his (the 1st respondent's) part; and (ii) in the circumstances, there was a need for the court below to have made a specific finding, in keeping with the evidence presented, as to how the appellant gained access to the roof. In my view, the rejection without analysis of what, on the face of it seems like a reasonable and acceptable account, in circumstances in which the court below did not comment adversely on the credibility of the appellant and his version of the events, necessitates an allowing of the appeal. The

appellant's account of how he came to be on the roof must be accepted. This, coupled with the finding of the court below at paragraph [79] must result in liability being affixed to the 1st respondent. The relevant finding is as follows:

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

Foreseeability

Submissions

[28] Counsel for the appellant contended that there was no proper application by the learned judge of the principle of foreseeability in determining the liability of the 2nd respondent.

[29] On the other hand, counsel for the 2nd respondent submitted that the findings of the learned judge regarding foreseeability should be upheld as they were justified and supported by the applicable legal principles. Further, he submitted, the main thrust of the appellant's grounds of appeal being against the learned judge's findings of fact, in circumstances in which it had not been demonstrated that the learned judge had failed to take advantage of having seen and heard the witnesses or failed to properly consider the evidence as a whole or misdirected himself, the appeal should be dismissed (citing **The Attorney General of Jamaica and the Ministry of National Security v Paul**

Facey (unreported), Court of Appeal, Jamaica, Resident Magistrates Civil Appeal No 25/2006, judgment delivered 31 July 2007).

[30] Counsel further contended that the learned judge assessed the liability of the 2nd respondent in accordance with the particulars pleaded by the appellant (having set those out at paragraph [6] of that judgment) and there found that the appellant had failed to prove the particulars of negligence pleaded against the 2nd respondent, that the 2nd respondent's electrical wires had caused his injury and that there was a breach of a statutory duty.

The judge's findings

[31] The learned judge's reasoning, at paragraph [4] of the judgment, which is reflected below, demonstrates the consideration that he gave to the matter:

> "As far as the Second Defendant is concerned, there is no dispute that at the material time, they would not and could not have known of the work that the Claimant was then engaged in, nor would they have been in a position to have known what tools he would have been using to conduct that work....Furthermore, evidence was also led by the Second Defendant at trial, through its only witness called...that none of the poles shown in the photograph which was taken of the relevant scene not long after the Claimant's injuries had occurred and which the Claimant accepted in his evidence under cross-examination, as showing how the relevant area and building looked on the day when he was electrocuted and also showing light poles located in the immediate vicinity of the relevant building that were not leaning in any way, nor showing that there were any wires loosely hanging or in other words, dangling, from any of those light poles...."

[32] Of assistance also are paragraphs [28] and [29] of the judgment, which state that:

> "[28] Applying all of the aforementioned dicta and case law as regards foreseeability to the adjudication of this Claim, it is apparent, that the Second Defendant cannot and should not, be held liable. This is because, the Second Defendant, firstly, would not have known and did not know and had no reason to have known, that the Claimant would have been working in the relevant location at the relevant time. Considered in that context, is the Second Defendant to be expected to cause severe inconvenience to an entire segment of a community by cutting off electricity supply to that community, so as to protect the Claimant, who was working, at the material time, in a dangerous manner, while in that community? This Court does not think that such action could possibly have been that which the Second Defendant ought reasonably to have been expected to have taken, particularly in circumstances wherein they would not have known of, and did not know of any risk of any injury from electric shock, as regards the Claimant in this Claim, before this Court.
>
> [29] If electrical wires were hanging down or poles were leaning due to neglect of the Second Defendant, then the situation could very well have been materially different, insofar as the suggested liability of the Second Defendant is concerned. There is in this Claim however, no evidence whatsoever of such."

Discussion

[33] In relation to the findings of the learned judge in respect of the case against the 2nd respondent, as expressed in the foregoing paragraphs of the judgment, I find no error of law or fact. Consequently his finding that the 2nd respondent was not liable for the appellant's injuries ought not to be disturbed, as that finding is clearly supported by the evidence before the court.

Whether the learned judge erred in his finding re *volenti non fit injuria*

Submissions

[34] Counsel for the appellant submitted that, as evidenced by paragraph [85] of the judgment, the learned judge's main reason for rejecting the appellant's claim against the 1st respondent was his finding that the defence of *volenti non fit injuria* had been made out. Such a finding, counsel submitted, was an error because the learned judge failed to properly apply the principles of *volenti non fit injuria*, especially where (as the learned judge himself found) there had been no warning given by the 1st respondent to the appellant.

[35] On the other hand, counsel for the 1st respondent submitted that the learned judge had been correct in his finding, as, by the appellant's own statement in cross-examination that he believed the wires to be about 20 feet away from him when in reality they were about 4 feet, there was a demonstrated "clear error of judgement" on the part of the appellant, leading to his injuries, for which the respondents should not be faulted. Further, the appellant's statement that, had he known that the wires were so close, he would have used a paintbrush instead, indicated, it was argued, that he knew of the danger but was "oblivious" to it.

Findings of the learned judge

[36] The learned judge in addressing whether the 1st respondent could avail himself of the defence of *volenti non fit injuria* had the following to say:

> [85] ...one who consents to injury cannot be heard to complain of it thereafter. In order for such a defence to be

> applicable, it is not enough, that the danger is apparent. A person who comes into the proximity of danger, of his own free will, must have full knowledge of the nature and extent of the risk. See **Smith v Baker** – [1989] A.C. 325. Additionally, in order for the defence to be applicable, it must be sworn [sic] that not only did the Claimant have full knowledge of the risk, but that he consented to waiving his right of action, if such risk were to have eventralized [sic] and caused him loss and/or injury...
>
> [86] This Court takes the view that in the case at hand, the defence, has proven, through the Claimant's own evidence, that the Claimant not only knew of the risk, but decided to accept such risk and do the relevant work anyway, thereby in essence, having accepted that he would not hold the First Defendant as legally responsible if such risk became a reality (as it in fact did) and thereby resulted in injury and/or loss to him.
>
> [87] This Court so concludes, because of the evidence when considered as a whole, but in particular, bearing in mind firstly, that the risk would have been obvious to anyone such as the Claimant, on the given day, in the given circumstances which were then applicable... The Claimant chose, even while on top off [sic] the roof in order to paint there, to do so with that metal paint roller pole, rather than with a paintbrush which was also available to him to have used, had he wished and thereby chosen to have done so. Considered in that particular context, the evidence of the Claimant as given during cross-examination by the First Defendant's Attorney, that – 'Had I known I was so close to the wires, I would have, used a paintbrush there,' is particularly enlightening and instructive. That bit of evidence, to my mind, makes it clear, that not only did the Claimant know of the relevant danger, but also knew of the risk that arose as a consequence of the existence of that danger."

Discussion

[37] It is without question that the learned judge expressed the correct legal principles with regard to the defence of *volenti non fit injuria.* However, there is some concern regarding the learned judge's application of that principle. In **Nettleship v**

Weston [1971] 3 All ER 581, Lord Denning MR, at page 587, expressed the following view:

> "...Now that contributory negligence is not a complete defence, but only a ground for reducing the damages, the defence of volenti non fit injuria has been closely considered, and, in consequence, it has been severely limited. Knowledge of the risk of injury is not enough. Nor is a willingness to take the risk of injury. **Nothing will suffice short of an agreement to waive any claim for negligence. The plaintiff must agree, expressly or impliedly, to waive any claim for any injury that may befall him due to the lack of reasonable care by the defendant: or more accurately, due to the failure of the defendant to measure up to the standard of care that the law requires of him...**" (Emphasis added).

[38] In the light of this learning, it is apparent that the learned judge erred in his application of the principle of *volenti non fit injuria*. To my mind, the very use by the appellant in his evidence of the words, "Had I known I was so close to the wires, I would have, used a paintbrush", impels one to the conclusion that the appellant was not, as required by law, fully aware of the risk of injury. As Mr Smellie for the appellant submitted, it is something said in hindsight. The appellant was actually saying that he did not in fact know that he was so close to the wires at the time, but had he known, he would have used a paint brush. Moreover, even if that statement could be taken as connoting knowledge, mere knowledge is not sufficient to fulfil the requirements for establishing the elements of *volenti non fit injuria.* It simply has not been demonstrated by any or any sufficient evidence that the appellant did in fact agree that if injury should have resulted, the 1st respondent would have been absolved from any such liability.

[39] This, therefore, is another basis on which the appeal ought to be allowed.

Whether sufficient evidence was before the court regarding how the appellant was injured

Submissions

[40] It was the position of counsel for the appellant that the court could take judicial notice of the fact that the injuries suffered by the appellant were not likely to have been caused by his painting pole coming into contact with telephone wires, in circumstances in which the learned judge had expressed the view that the court was left to speculate on such a finding. Additionally, it was submitted that causation had been sufficiently established; and that even the pleadings of the respondents had been predicated on the assumption that the injuries were caused by the 2nd respondent's power lines. That position likewise was supported by the expert report, it was submitted.

[41] Counsel for the 2nd respondent contended that the appellant had failed to prove the averments in the particulars of his claim in the court below; and to have found otherwise, the court would have had to improperly delve into speculation.

Discussion

[42] In cross-examination, the appellant stated that he was unsure of how he was injured because he was not in a position to see exactly which wires his painting pole had touched. His first two witness statements had failed to address how he was injured. However, in the 3rd witness statement, the appellant stated, at paragraph 2, that:

> "...it is now clear to me that I most probably got injured ...when my pole came in contact with the [2nd respondent's] power lines overhead, that the statements in the Answers to Request for Information filed on December 18, 2006 and on August 13, 2008 that contact was made with a pigtail cluster of electrical wires at the apex of the building were probably not correct, and that the mistake came about because of the fact that, at the time of the accident, I was not totally sure as to how I got shocked..."

[43] The learned judge, in light of the further contradictions in his examination-in-chief, rejected that evidence.

[44] Regarding the evidence of the expert witness, the report was prefaced with the statement that the expert's findings were "[a]s a result of visual inspection of the site where the accident took place and interviews carried out with Mr. Martin and Mr. Bucknor". He thereafter concluded that the accident was caused from the painting pole coming into contact with the 2nd respondent's overhead power lines.

[45] This report, the learned judge found (at paragraph [17]) to be of "very limited assistance". The learned judge stated that:

> "[20] Whilst therefore, there does exist evidence from the expert, to suggest and which this Court does accept, that the Claimant did, at the material time, suffer the injuries...as a consequence of electrical shock, what is uncertain in this Court's mind, is exactly whose electrical wires caused that shock. Was it a telephone company's wires that caused that shock, or was it the Jamaica Public Service Company Limited's wires that caused same? The failure to prove same is, in the circumstances, fatal to the Claimant's case.
>
> ....
>
> [22] ...It seems to this Court, that [the assertion of the appellant] was made as a consequence of the conclusions

> drawn by the Court appointed expert and...as already stated, it appears to this Court that the conclusions of the expert were derived from interviews which he conducted with the Claimant and the First Defendant respectively – neither of such persons being persons who were either, at the precise moment in time, just prior to the accident's occurrence, in a position to have seen exactly what caused the accident, nor did see what in fact caused the accident."

[46] It is necessary for the expert report to be considered against the background of rule 32.3 of the Civil Procedure Rules, 2002 which provides that:

> "(1) It is the duty of an expert witness to help the court impartially on the matters relevant to his or her expertise.
>
> (2) This duty overrides any obligations to the person by whom he or she is instructed or paid."

[47] I have examined the expert report in this light and have given consideration to the particular qualifications of the expert: he holds a Master of Science degree in electrical engineering; is a licensed electrician; and a registered professional electrical engineer. Additionally, since 1982, he has constantly been engaged in electrical engineering works. At the time of giving his evidence, he was the Chief Electrical Inspector for the Government of Jamaica. Whilst the court was not bound to have accepted the report, with the expert having these credentials and experience it is difficult to understand why the expert's opinion or conclusion as to the source of power causing the injury, should not have been accepted.

[48] Orders were made deeming the expert an expert and for his report to be received into evidence, without any objection from either the appellant or the 2nd respondent. The expert, with his experience and credentials, came to a conclusion that

seems to be a not- unreasonable one that arrives at the reasonable inference that the injuries were caused by the 2nd respondent's wires. In any event, the question of whether the appellant's injuries were caused by the 2nd respondent's wires or telephone wires might have affected the question of whether the 2nd respondent was the proper party to have been brought before the court. That would be an issue between the appellant and the 2nd respondent. However, as between the appellant, on the one hand, and the 1st respondent, on the other, the question of which entity's wires caused the appellant to suffer the electric shock and resultant serious injuries is, to my mind, not of that great significance. There was, it should be remembered, no contest that the appellant did suffer electric shock and severe injuries whilst on the roof of the 1st respondent's building (which the learned judge found to be a dangerous environment), painting the walls thereof. In my respectful view, the learned judge erred in his reasoning in respect of this point.

Contributory negligence

[49] In the submissions presented, only counsel for the appellant (and not for either of the respondents) considered the possibility of a finding of contributory negligence on the part of the appellant. However, the issue of contributory negligence was not addressed in the notice and grounds of appeal or the counter-notice; neither did the learned judge make a finding on the issue. Dealing with the matter, therefore, would run afoul of rule 1.16(2) and (3) of the Court of Appeal Rules. Rule 1.16 reads as follows:

"**Hearing of appeals**

1.16 (1) An appeal shall be by way of re-hearing.

(2) At the hearing of the appeal no party may rely on a matter not contained in that party's notice of appeal or counter-notice unless-

(a) it was relied on by the court below; or

(b) the court gives permission.

(3) However –

(a) the court is not confined to the grounds set out in the notice of appeal or counter-notice, but

(b) may not make its decision on any ground not set out in the notice of appeal or counter-notice unless the other parties to the appeal have had sufficient opportunity to contest such ground.

(4) The court may draw any inference of fact which it considers is justified on the evidence."

[50] I would therefore propose that the appellant's appeal be allowed against the 1st respondent with costs to the appellant both here and in the court below, to be agreed or taxed and that the matter be remitted to the court below for there to be an assessment of the damages due to the appellant. I would also propose that the appellant's appeal against the 2nd respondent be dismissed, with no order as to costs. My proposal in relation to this costs order is informed by the consideration that the action of the appellant in having brought his suit at first instance and this appeal against the 2nd respondent cannot be regarded as unreasonable and was done in a

quest by the appellant, a relative "man of straw", to obtain some compensation for severe and life-altering injuries.

[51] In the result, the following are the orders that I would propose:

(i) The appellant's appeal against the 1st respondent is allowed with costs to the appellant both here and in the court below, to be agreed or taxed;

(ii) The matter is remitted to the court below for there to be an assessment of damages against the 1st respondent.

(iii) The appellant's appeal against the 2nd respondent is dismissed, with no order as to costs.

MORRISON P

ORDER

(i) The appellant's appeal against the 1st respondent is allowed with costs to the appellant both here and in the court below, to be agreed or taxed;

(ii) The matter is remitted to the court below for there to be an assessment of damages against the 1st respondent.

(iii) The appellant's appeal against the 2nd respondent is dismissed, with no order as to costs.