COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

COMMON LAW AND EQUITY DIVISION

2005/CLE/gen/FP/00234

BETWEEN

JAMES DELEVEAUX

Plaintiff

AND

GRAND BAHAMA PORT AUTHORITY, LIMITED

First Defendant

AND

GRAND BAHAMA POWER COMPANY LIMITED

Second Defendant

AND BETWEEN

GRAND BAHAMA POWER COMPANY LIMITED

Plaintiff in Third Party Proceedings

AND

BAHAMA TELECOMMUNICATIONS COMPANY LIMITED

Third Party

BEFORE The Honourable Mrs Justice Estelle Gray Evans

APPEARANCES: Mr Gregory Moss with Mrs Lena Hield-Bonaby
for the plaintiff

Mrs A. Kenra Parris-Whittaker with Ms Lisa Fox
for the first defendant

Mrs Gail Lockhart-Charles with Mr R. Oneal Brown
for the second defendant

Mr Harvey O. Tynes, QC with Ms Tanisha Tynes
for the third party

2011: 19, 20 and 21 September

Written closing submissions:

2012: 23, 26 March and 15 June

JUDGMENT

Gray Evans, J

1. The plaintiff is a sous chef and resident of Freeport, Grand Bahama,

2. The first defendant, also referred to herein as "the Port Authority", is a limited company incorporated under the laws of The Bahamas and is the legal owner of the Port Area as defined in the Agreement ("the Principal Agreement") set out in the Schedule to the Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Act, chapter 261, Statute Laws of The Bahamas ("the HCA"). The first defendant is also the licensing authority in the Port Area and is responsible for licensing all businesses operating within the Port Area as provided in the Principal Agreement.

3. By sub-clauses (7) and (10) of clause 1 of the Principal Agreement, the first defendant covenanted with the Government of The Bahamas that, unless prevented from doing so by Act of God, insurrection, riots, civil commotion, war or warlike operations, strikes, lockouts, *force majeure*, or any unforeseen or extraordinary circumstances which may be reasonably considered to be beyond the control of the Port Authority (including the inability of the Port Authority to obtain or employ the necessary labour or to obtain or secure the necessary materials) the first defendant will:

> (7) If and when the Port Authority construct and operate any utilities within the Port Area, construct the same in a good, proper, and workmanlike manner having due regard for the safety of persons working and/or residing within the Port Area, and after construction operate the same in accordance with good operating practice and in a fit and proper manner having due regard for the safety of persons working and/or residing within the Port Area.
>
> (10) Cause all buildings and structures erected within the Port Area and all machinery and apparatus installed in or about any such buildings and structures to be so built, installed and maintained so as to provide properly for the health and safety of employees and the general public, and for good public sanitation within the Port Area.

4. Clause 2(21) of the Principal Agreement provides:

> "That subject to the provisions of subclause (10) of clause 1 hereof only, the Port Authority shall have the sole right to construct and operate utilities (and without limiting the generality of the foregoing word "utilities", in particular electrical supply…"

5. By an amendment to the Principal Agreement ("the Amended Agreement") set out in the Schedule to the Hawksbill Creek, Grand Bahama (Deep Water Harbour and Industrial Area) Amendment of Agreement Act, 1960, chapter 242, Statute Laws of The Bahamas ("the HCA as amended"), it was provided by clause 2(16) that whenever in the Principal Agreement (as amended) the first defendant was (either expressly or by implication) obliged or empowered to perform any act, the first defendant is entitled to license any other person or company to perform such act and all references in the Principal Agreement (amended as aforesaid) to the first defendant performing any act shall be deemed to include references to such act being performed by any person or company licensed as aforesaid to perform such act.

6. The second defendant is a limited liability company also incorporated under the laws of The Bahamas and a licensee of the first defendant pursuant to a license agreement dated 11 June 1964 ("the 1964 agreement") whereby the first defendant gave the second defendant a license "to carry on the business of an electric power and light utility company in all its branches". By clause 4(2) of the 1964 agreement, the second defendant agreed to: "observe perform and comply with all covenants provisions and conditions in the Government Agreement [that is the Principal Agreement as amended] contained and on the part of the Port Authority to be observed or performed so far as the same relate to all premises within the Port Area at any time owned or occupied by or leased to the [first defendant]…and without limiting the generality of the foregoing:…(c) to cause all buildings and structures erected or constructed by the Grantee [second defendant] within the Port Area and all machinery and apparatus installed in or about any such buildings and structures or otherwise to be so built, installed, operated and maintained so as to provide properly for the health and safety of employees of the Grantee [second defendant] and the general public and for good public sanitation within the Port Area..."

7. By a supplemental agreement dated 30 April 1993 ("the 1993 agreement"), the first defendant granted the second defendant an exclusive right and license to, inter alia, "own and operate any and all electric generation, transmission and distribution assets in the Port Area".

8. The third party is also a licensee of the first defendant having by an agreement dated 1 June 1986 ("the 1986 agreement") been licensed to carry on the business of a telephone company and its related services.

9. The second defendant, as owner of the lamp posts within the Port Area, by an agreement dated 1 June 1986 ("the post agreement), agreed with the third party that the third party could use any of the second defendant's posts that were suitable for use by the third party who agreed to install and maintain its attachments covered by the post agreement in a safe and proper condition.

10. Cables belonging to the third party were attached to the second defendant's post on the north side of Rum Cay Drive opposite Duke's Way in the Bahamia Subdivision, Freeport, Grand Bahama ("the said lamp post").

11. The plaintiff commenced this action on 17 October 2005 by a generally endorsed writ of summons in which he claims damages for personal injuries to himself and damage to his vehicle, a 2011 Ford F-150 truck. In his statement of claim filed on 9 January 2007, as amended with leave on 8 March 2008, the plaintiff states, inter alia, that:

(1) On or about 3 September 2004 the Island of Grand Bahama was struck by Hurricane Frances which left extensive damage to property in its wake.

(2) By reason of the said hurricane or otherwise, one of the lamp posts along Dukes Way and Rum Cay Drive ("the roadway") in South Bahamia, Freeport, Grand Bahama, The Bahamas, sustained damage which caused the said lamp post to break and to posture in an overhung position over the said roadway such that certain sections of electricity or other cables (hereinafter referred to as "cables") connected to the said lamp post were caused to lie across a portion of the said roadway.

(3) On or about 13 September 2004 while the plaintiff was driving his truck along the roadway and past the said lamp post, sections of the said electricity cables connected thereto became entangled in one of the front tyres of the plaintiff's said truck causing the said lamp post to be pulled upon and to fall onto the plaintiff's said truck causing extensive damage to the said truck and serious injuries to the plaintiff's person.

(4) By reason of the matters aforesaid the said lamp post and cables at all material times impeded the passage of vehicles along the said roadway and thereby constituted a nuisance. The said roadway was at all material times a major road used by heavy traffic and at all material times the Defendants jointly and or severally knew or ought to have known of the said nuisance but permitted the same to remain in the aftermath of the said hurricane for an unreasonable period of time.

(5) Further, or alternatively, the circumstances complained of herein were caused by the negligence of the defendants their servants or agents jointly and/or severally.

12. The plaintiff gives the following particulars of negligence on the part of the defendants:

(1) Allowing the said broken lamp post to remain in a dangerous position for an unreasonable period of time after the passage of said hurricane in that it was liable to and did in fact fall as hereinbefore set out.

(2) Allowing sections of the cables connected to the said lamp post to remain lying across a portion of the said roadway as aforesaid for an unreasonable period of time after the passage of the said hurricane in that they were liable to and did in fact get entangled in one of the tyres of the plaintiff's truck as hereinbefore set out.

(3) Failing to repair or otherwise safeguard the said broken lamp post from falling on traffic moving along the said roadway.

(4) Failing to repair or otherwise safeguard sections of the said cables from dangerously impeding traffic moving along the said roadway as hereinbefore set out.

(5) Failing to give any or sufficient warning to traffic on the said roadway about the presence of the said broken lamp post.

(6) Failing to give any or sufficient warning to traffic on the said roadway about the presence of sections of the said cables lying across a portion of the said roadway as aforesaid.

(7) The plaintiff will further rely on the fall of the said lamp post and the entanglement of the said cables in one of the front tyres of the plaintiff's said truck as evidence of negligence on the part of the defendants.

13. The first defendant's defence was filed on 22 March 2007 and the second defendant's on 7 March 2007. Each of the defendants denies liability and says that if the circumstances that the plaintiff complains of did occur, the same were caused or contributed to by the plaintiff's negligence as follows:

1) Driving at an excessive rate of speed having regard to the circumstances prevailing at the time of the accident;

2) Failing to heed, or pay sufficient heed, to warnings issued by the second defendant and other relevant governmental agencies to drive with extreme care and caution in the aftermath of Hurricane Frances due to the high number of lamp posts and utility wires damaged by the said hurricane;

3) Failing to steer his vehicle in such a manner so as to avoid the area of the roadway where the cables were allegedly located on the roadway.

14. The second defendant avers further that the cables that became entangled in one of the front tyres of the plaintiff's truck were not electricity cables owned by the second defendant and, therefore, the second defendant was not responsible for the maintenance and removal of those cables, which belonged to either the third party or Cable Bahamas Limited, whose responsibility it was to maintain and to remove any damaged cables owned by them in the aftermath of the hurricane.

15. Further, the second defendant by a third party notice filed 24 July 2008 against the third party claims that it ought to be indemnified against the plaintiff's claim and the costs of this action on the ground that the injury to the plaintiff was caused by cables owned and maintained by the third party, who also denies liability.

16. The second defendant had also taken out a third party notice against Cable Bahamas Limited. However that notice was subsequently withdrawn.

17. The issues, then, that arise for consideration:

1. Whether the plaintiff's injuries were caused by the negligence of the defendants or either of them? And

2. Whether the plaintiff's injuries were caused wholly or contributed to by his own negligence?

18. At the trial, the Court heard from the plaintiff on his own behalf; Nicole Colebrooke on behalf of the first defendant; Leroy Labear Simmons, Samuel Rolle and Paul Gary Lockhart on behalf of the second defendant; and Calvin J. Hart on behalf of the third party.

19. The plaintiff was the only witness to the accident.

20. The plaintiff's evidence is that on the date of the accident, 13 September 2004, at about 9:30 in the morning, he was returning home via Rum Cay Drive, a route that was familiar to him. However, he said, that was the first time he had taken that route since the passage of Hurricane Frances a few days earlier.

21. The plaintiff said he was traveling on Rum Cay Drive in a westerly direction towards Duke's Way, which is off Rum Cay Drive, at a speed of no more than 20 miles per hour; that there was a vehicle in front of him, which was being driven at a very slow rate of speed. He said he considered overtaking the vehicle, but decided against it, reminding himself of the recent hurricane and the uncertainty of "what might lie ahead". In any event, he said he was not in a hurry, so he remained behind the vehicle. Under cross examination, in response to counsel for the second defendant's question as to what sort of things he thought could lay ahead, the plaintiff said: "I know we have a lot of pine trees and they usually fall in the street. And I know there could be probably wires from some damage that may have occurred, so I was conscious of that".

22. According to the plaintiff, the vehicle in front of him was a green sedan, which shortly before it reached Duke's Way, slowed to about 15 mph and "pulled more to the centre of the street". He said he was aware that some drivers do that when turning left onto Duke's Way, so he assumed that the driver of that vehicle was about to turn left through Duke's Way. The plaintiff said he kept his vehicle to the left and waited for the vehicle in front of him to turn. However, instead of turning through Duke's Way as he had anticipated, the vehicle in front of him "apparently" crossed the wire; that it was at that point that "the wire appeared" in front of him and he realized that the reason the other driver had moved to the centre of the road was so that he could cross the wire; that he, the plaintiff, immediately turned his wheel "hard to the right" to try to get to the centre of the road, while, "at the same time", applying brakes. He said that he felt his truck "come in contact with the wire"; that he felt the truck "sliding"; he heard a big bang and the "lights went out" for him. By that latter comment the plaintiff said he meant that "everything was in darkness"; that he "had no memory" and he "did not know what happened."

23. Under cross examination the plaintiff said that he tried to apply his brakes and to turn his wheel to the right, not to avoid the wire, but to cross the wire in the path that the car in front of him had gone; that the application of his brakes was an instinctive action; that he hoped to stop, but if not, he thought he would cross over the wires in the path of the other vehicle. In his words: "That was my, I think the, choice I had."

24. The plaintiff said that at the time of the accident the brakes on his truck were working but he could not account for why the truck did not stop when he applied brakes.

25. The plaintiff admitted that he had heard radio announcements and talks on the need to be cautious for downed power lines following the hurricane and he also admitted that on the day of the accident the sky was clear and the road was dry.

26. The plaintiff could not account for how his vehicle ended up on the right side of the road; he only recalled that when he turned the wheel to the right in order to get to the centre of the road, his vehicle "was moving more to the right"; that it came into contact with the wire and for a "split second" he felt the vehicle sliding on the wire and then the post came crashing down.

27. When it was put to the plaintiff that evidence would be led to show that his vehicle left tyre-brake or skid marks of about 194 feet the plaintiff said that that was impossible.

28. Although none of the other persons who gave evidence at the trial actually witnessed the accident, two of the second defendant's witnesses, Messrs Simmons and Rolle, and the third party's witness, Mr Hart, went to the scene of the accident shortly after it occurred. At the date

of the accident the three of them were employed by the second defendant. By the date of the trial, Mr Hart had been terminated by the second defendant.

29. At the date of the accident, Mr Simmons was the second defendant's Line Construction Maintenance Supervisor and as such he had been assigned, inter alia, to work in the Bahamia West Subdivision, which is situated within the Port Area of Grand Bahama. Part of his responsibility included identifying posts that needed to be replaced. At the time of the accident he was working in West End, Grand Bahama, and was called to the scene of the accident by his supervisor.

30. According to Mr Simmons, when he arrived at the scene, he saw the plaintiff's truck with cable wrapped around its tyres and the plaintiff sitting inside. He said that he "immediately recognized that the cables entangled in the truck did not belong to Grand Bahama Power." He said that while at the scene, he personally inspected the cable around the tyres of the truck and noted that it was a thick black cable with "guy" wire attached to it and there was no doubt in his mind that the cable and guy wire belonged to the third party. Under cross examination, Mr Simmons said that the "guy" or "messenger" wire is used by the third party and Cable Bahamas Limited to support their cable and although silver in colour like the #2AAAC wire used by the second defendant, it is different from the #2AAAC wire. According to Mr Simmons, "everyone in the utility business" knows which cable belongs to each of the second defendant, the third party and Cable Bahamas Limited as Cable Bahamas Limited and the third party use a black cable attached to a messenger wire, whereas the second defendant's cable is usually silver. In any event, Mr Simmons said that the second defendant had no cables crossing the street from north to south at the junction of Rum Cay Drive and Duke's Way where the accident occurred.

31. Mr Simmons also pointed out that the top part of the lamp post was still suspended in the air and that it was held there by the second defendant's #2AAAC wire which, he said, is usually at the top of its lamp poles.

32. Mr Rolle's evidence is that when he arrived on the scene of the accident he "immediately" noticed that the cables entangled in the plaintiff's vehicle were not the second defendant's; that they were "black insulated" and "could only belong to either Cable Bahamas or Bahamas Telecommunications."

33. Mr Hart's evidence is that when he arrived on the scene he observed two black cables, one belonging to Cable Bahamas Limited and the other to the third party wrapped around the front of the truck; that he could tell that one of the cables belonged to Cable Bahamas Limited and the other to the third party by the insulation of the wires because the second defendant "does not carry cable", only "wire that is not insulated".

34. In his witness statement, Mr Hart said that in addition to the two black cables which he observed "wrapped around the front of the truck", he also noticed that the right front wheel of the truck was entangled in a #2AAAC wire which was "wrapped around the front of the truck with one end of the wire still attached to the suspended portion of the wooden post"; that he used a "bull cutter" to cut the #2AAAC wire to enable a wrecker to remove the truck from the scene."

35. However, in a written report dated 19 October 2004 to Mr Carlton Bosfield in relation to the accident, Mr Hart had written, inter alia:

> "My investigation revealed that speed was a factor with brake marks measuring 194 feet from the impact with Cable Bahamas and BaTelCo wire wrapped around the front of the vehicle, also a fine silver wire <u>not</u> belonging to Grand Bahama Power Company." [emphasis mine]

36. Mr Hart said that the "not" underlined by me in the above statement was a typographical error; that the handwritten version of his report actually said "a fine silver wire belonging to Grand Bahama Power Company". Although the typewritten report bears his signature, Mr Hart attributes the error to the secretary who reproduced the report from his handwritten copy.

37. According to Mr Hart, that "fine silver wire" was actually a #2AAAC wire used by the second defendant to transmit electrical power. However, under cross examination, he could not account for why, since he knew what a #2AAAC wire looks like, he would have referred to it as a "fine silver wire" and not a #2AAAC wire.

38. In the circumstances, I accept the submission of counsel for the second defendant that Mr Hart's evidence in regard to the "fine silver wire" being a #2AAAC should be rejected and I find, on the evidence of Messrs. Simmons, Rolle and Hart, that the cable which became entangled with the plaintiff's front tyre belonged to the third party.

39. Further, on the evidence, I have come to the conclusion that the accident occurred in the following manner. The plaintiff, while driving along Rum Cay Drive, whether or not behind a green sedan, came upon cable, or as he says, wires, belonging to the third party and laying north to south across Rum Cay Drive in the area of Duke's Way and hanging from the second defendant's lamp pole situate on the northern side of Rum Cay Drive opposite Duke's Way. The plaintiff, who had heard warnings via the media to avoid downed power lines, made the decision to cross the wire, moving, as he said, to the middle of the road in an attempt to cross the wire in the path which he thought the green sedan had taken. He was unsuccessful. Instead of safely crossing the cable, the front tyre of his truck became entangled therein and, in my judgment, the tension from such entanglement caused the lamp post on the northern side of Rum Cay Drive, to which the cable was attached, to break and to fall onto the plaintiff's truck, resulting in serious personal injuries to the plaintiff and damage to his truck.

40. In the case of Randall v Tarrant [1955] 1 WLR 255, it was observed by the court that a driver on a highway who sees a stationary vehicle [in this case I say downed cables laying in his path across the road] has to take all possible care to avoid a collision. If there is insufficient room to pass, he is negligent if he attempts to do so. If, however, there is enough room but a collision occurs, then prima facie, he is again negligent, the onus being on him to show that he has taken all steps which a reasonable man would take in the circumstances, that is, all possible care to avoid a collision."

41. Further, as counsel for the first defendant points out, the plaintiff knew or ought to have known that particular care was required when driving in the aftermath of the hurricane. Indeed, the plaintiff's evidence is that he decided against overtaking the vehicle in front of him because he did not know what may lie ahead. So, having seen the cable laying across the road, the plaintiff had the option of stopping or continuing. He chose to continue and in doing so, he clearly took a risk that his truck's tyre could become entangled in the downed cable.

42. As I understand the plaintiff's evidence, his intention was to cross the wire/cables in the same way that he thought the green sedan had done and although he said he applied brakes, it was more, according to him, due a natural instinct than an intention to stop. In any event, despite the fact that his brakes were working, the plaintiff said his truck did not stop. The plaintiff's evidence is really to the effect that by the time he saw the cables it was too late to avoid them. It seems to me that must have been because he came upon the cables suddenly, a clear indication, in my view, that he was either driving faster than he said he was, or he was driving too close behind the other vehicle or he was driving without paying due care and attention. In any case, in my judgment, the plaintiff either contributed to, or caused, the accident and the resulting injury and damage by his own negligence.

43. The question is whether or not the accident was also caused by the negligence of the defendants or either of them.

44. In order to prove common law negligence, a plaintiff must satisfy the following criteria: (1) the defendant owed him a duty of care; (2) the defendant breached that duty in the manner he alleges; (3) he suffered injury or damage as a result of that breach; and (4) the resulting injury or damage was reasonably foreseeable. Donoghue v Stevenson [1932] AC 562

45. Alderson, B. in the case of Blyth v Birmingham Waterworks (1856)11 Exc 781, 784 defined "negligence" as "the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent man and reasonable man would not do."

46. And, Lord Mackay in Smith v Littlewoods [1987] 1 All ER 710 at 721, restated the test of liability previously stated by Lord Macmillan in Hay (or Bourhill) v Young [1942] 2 All ER 396 at 403, [1943] AC 92 at 104, when he said that:

> "The duty to take care is the duty to avoid doing or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed."

47. In determining whether or not a duty exists, courts apply the three-fold test laid down by the House of Lords in the case of Caparo Industries plc v Dickman [1990] UKHL 2, that is: (1) the harm must be reasonably foreseeable as a result of the defendant's conduct; (2) the parties must be in a relationship of proximity; and (3) it must be fair, just and reasonable to impose liability.

48. The duty of care which the plaintiff alleges was owed to him by the defendants is said to arise out of the relationship between the defendants. Counsel for the plaintiff submits that the second defendant whose lamp post, power lines and other equipment attached thereto ("attachments") have been installed on land belonging to the first defendant, had a duty to properly install, and once installed, to properly maintain the same. Counsel submits further that the first defendant, as owner of the land, had a duty to ensure that any item so installed and/or placed upon its property was maintained properly. Additionally, counsel submits, it was reasonably foreseeable by the defendants that failure to maintain on the part of the second defendant, and failure to ensure the maintenance on the part of the first defendant, of the said lamp post and attachments could result in injury to the plaintiff.

49. In addition to, or as part of such duty to maintain, the plaintiff contends that the defendants also had a duty to repair the said lamp post and downed cable in the vicinity of Rum Cay Drive and Duke's Way within a reasonable time after the same became damaged and until repaired, to safeguard the same and to provide the public with sufficient warnings thereof, which the plaintiff says, the defendants have failed to do.

50. The second defendant admits the alleged duty of care, but denies that it is in breach thereof. The first defendant does not admit the duty of care, but says that even if it did owe the plaintiff the duty of care he alleges, the first defendant is not in breach thereof.

51. It is common ground that the first defendant owns the land on which the second defendant's lamp posts and their attachments have been installed. It is also common ground that the first defendant was obliged by the provisions of the Principal Agreement to construct, and once constructed, to operate utilities, including electrical supply, in the Port Area in accordance with good operating practice and in a fit and proper manner having due regard for

the safety of persons, including the plaintiff, working and or residing within the Port Area. (See clauses 2(21), 1(7) and 1(10) of the Principal Agreement).

52. Further, by clause 2(16) of the Amendment Agreement, the first defendant has the authority to license others to provide electrical supply and has, by the 1964 and 1993 agreements, licensed the second defendant to perform its duties/functions in that regard and by clause 4(2) of the 1964 agreement the second defendant was obliged to maintain the said lamp post "so as to provide properly for the health and safety...of the general public". Similarly, the third party by virtue of the 1986 agreement with respect to the downed cable.

53. Consequently, counsel for the first defendant submits that although the first defendant owns the land on which the second defendant's lamp posts and attachments are installed, it is the second defendant who is responsible for maintenance of the same and, therefore, the first defendant did not owe a duty of care to the plaintiff as he contends.

54. I accept that the first defendant is authorized to assign its responsibilities under the Agreement to its licensees. However, clause 2(16) aforesaid expressly provides that the licensing of another entity to perform the duties/functions of the first defendant under the Principal Agreement, as amended, does not relieve the first defendant from any of its primary obligations thereunder, one of which is to operate and maintain utilities, including electrical supply, in the Port Area in accordance with good operating practice and in a fit and proper manner having due regard for the safety of persons, including the plaintiff, working and or residing within the Port Area, as alleged by the plaintiff. In my view, the first defendant was not absolved from that duty by virtue of the 1964 or the 1993 agreements and, that such duty included a duty to ensure that the second defendant perform its duty to properly maintain the said lamp post and its attachments.

55. The issue, then, is whether the defendants are in breach of the aforesaid duty of care.

56. In order for the defendants to be held liable for the accident and resulting injuries and damage which he suffered, the plaintiff must either prove that it was the defendants' negligent action that caused the said lamp post to be damaged and the said cable to lay across the roadway at Rum Cay Drive and Duke's Way; or, that it was the defendants' negligent inaction, that is their failure to remove the cable and/or repair the lamp post within a reasonable time after the passage of Hurricane Frances, and/or to give sufficient warning to the public of the same.

57. There is, in my view, no evidence that the said lamp post was not installed and/or maintained properly prior to the hurricane. In his statement of claim, the plaintiff alleges that the said lamp post was damaged by Hurricane Frances or otherwise. The second defendant admits that the said lamp post was damaged by Hurricane Frances. There is no evidence, in my view, that the lamp post was damaged otherwise than by Hurricane Frances.

58. Although Mr Lockhart could not say that the second defendant had a schedule for regularly maintaining and replacing posts that had aged, under cross examination he said that the second defendant inspects its posts from time to time and when they show signs of damage or the second defendant receives reports about damaged posts from the public, those posts are changed. Mr Lockhart had no idea as to the age of the lamp post involved in the plaintiff's accident. Nor was he aware of whether that lamp post had been identified during the assessment as having been damaged and in need of repairs. In response to counsel for the plaintiff's question as to why so many posts were down, Mr Lockhart said "because of the weather; the wind and the weather."

59. Consequently, I find that the plaintiff has failed to prove that there was any negligence on the part of the defendants in the installation or maintenance of the said lamp post that caused the plaintiff's accident.

60. I also accept the submission of counsel for the defendants that the downed cable and the damaged lamp post in the area of Rum Cay Drive and Duke's Way were, on a balance of probabilities, caused by an Act of God, namely Hurricane Frances and not by any negligence on the defendants' part and I so find.

61. Notwithstanding the damage having been caused by the hurricane the defendants, in my view, owed the motoring public, including the plaintiff, a duty to repair and/or make safe the said lamp post and/or the cables within a reasonable time after the same became damaged and until repaired to warn the public, including the plaintiff, thereof.

62. Counsel for the first defendant submitted that it fulfilled any duty to maintain the roadways or any duty to repair the damaged lamp post and downed cable subsequent to the hurricane, which it denies, through its licensees, the second defendant and the third party, as well as by its own efforts to ensure that there were sufficient warnings to the public to take care when driving on the roadways after the passage of Hurricane Frances.

63. Counsel for the second defendant submits that there is no evidence that the second defendant could have prevented poles being downed by Hurricane Frances, nor is there any evidence that the cleanup and restoration process could reasonably have been completed in a shorter period of time. Furthermore, counsel pointed out, the plaintiff admitted that he heard the warnings that had been issued by the second defendant regarding the downed wires. Consequently, in counsel for the second defendant's submission, the plaintiff has failed to prove that the second defendant was negligent in causing the plaintiff's accident.

64. The issue then, is, whether at the date of the accident, 13 September 2004, sufficient time had passed for the defendants to have completed the necessary repairs so as to remove the potentially dangerous situation which the cable laying across the roadway and the damaged lamp post posed to the motoring public, including the plaintiff.

65. In deciding what is reasonable time, I must take into account all the circumstances. (Monkland v Jack Barclay [1951] 2 K.B. 252).

66. The circumstances in this case are that this was not an isolated case of one damaged lamp post or downed cable of which the defendants may or may not have been informed and had failed to repair.

67. It is common ground that the Island of Grand Bahama had been hit by a category four hurricane that caused extensive damage.

68. Mr Lockhart recalls that Hurricane Frances was a "slow moving" hurricane that "sat over the island [of Grand Bahama] for 24 hours, leaving in its wake, extensive damage", including downed utility posts, power lines and cables; that after the hurricane passed, the second defendant's work crews had to wait 24 hours before going out to assess the damage. Consequently, the restoration work did not begin immediately.

69. By his calculation, at least 2100 of the second defendant's utility posts were lost and numerous others were damaged. Mr Lockhart's evidence is that the damage was such that without outside help, customers in Grand Bahama would have been without power for months and although they were able to get some help from crews from outside The Bahamas, that process was hampered as a result of the damage to the airport which was closed for several days after the hurricane. Additionally, he said, the hurricane had also affected parts of the Southern United States, so instead of getting crews from that area, the second defendant, in addition to the crews they were able to hire from the Caribbean and Louisiana, also had to hire crews all the way from Canada,

70. According to Mr Lockhart, in an effort to complete the restoration work in the quickest possible time, the second defendant had seven teams working officially from 6:00 a.m. until 10:00 p.m., and sometimes later, each day. However, with 2100 posts down, Mr Lockhart says it was impossible, even if the crews worked "24/7" to have completed the work necessary to repair all of those posts by the date of the accident, which occurred nine days after the hurricane, but eight days after the work commenced. In his estimation, it took months after the hurricane passed before the Island of Grand Bahama got back to "normal". Furthermore, Mr Lockhart said, because of the volume of work to be done, the second defendant decided to work on the major thoroughfares first and Rum Cay Drive, being off the main highway, was not considered a major thoroughfare.

71. Additionally, Mr Lockhart says that in the aftermath of the hurricane, because the roads were deemed to be potentially hazardous, members of the public were advised by the local authorities through public announcements to stay indoors or to exercise extreme caution if they found it necessary to move about the island. According to Mr Lockhart, the second defendant's public relations department sent out regular announcements to the press advising of downed power lines and utility posts and warning members of the public to stay away from them.

72. Under cross examination, Mr Lockhart said he was not aware of whether any signs had been erected in or about the post involved in the accident to warn the public that that particular post was damaged or needed repairs. In any event, he said that to put up signs everywhere there was damage would have taken away from "getting the job done"; that because the damage was so extensive, the second defendant simply warned people by radio announcements. He was not aware whether any requests were made to the police to close the road because of the damaged state of the post on Rum Cay Drive.

73. I accept Mr Lockhart's evidence that given the magnitude of the damage, even if the second defendant had crews working 24/7, there was no way for them to have completed the repairs to 2100 poles in eight days after the hurricane. I also accept his evidence that Rum Cay Drive was not considered a major thoroughfare and consequently would not have been among the first areas to be repaired.

74. In the circumstances I find that the plaintiff has failed to prove, having regard to the extensive damage caused by Hurricane Frances, that eight days after the passage of the hurricane was sufficient time for the defendants to have repaired the damaged lamp pole and downed cable, particularly in light of the Mr Lockhart's evidence, which was not challenged or controverted, that Rum Cay Drive was not a major thoroughfare and "back to normal" took several months.

75. As for the duty to warn the public and the plaintiff about the damaged lamp post and downed cable, the evidence is that the defendants caused announcements to be made in the voice and print media. The plaintiff admits that he heard the announcements regarding the need to take care. In fact, his evidence is that one of the reasons he did not overtake the vehicle that he says was in front of him was because he was uncertain as to what lay ahead.

76. Now counsel for the plaintiff submitted that the second defendant could have done more to warn the public. As I understood his submission, in addition to its general warning via the media to members of the public of the need to take care as they moved about the streets because of the number of damaged lamp posts and the possibility of energized downed electricity lines, the second defendant ought also to have provided "specific information regarding specific poles and specific areas to avoid...by way of signs" as well as, in the case of the damaged pole and downed cable at Rum Cay Drive and Duke's Way, having the Royal Bahamas Police Force close off portions of the roadway in that area until the lamp post could be repaired or replaced so as to avoid accidents such as the plaintiff's. Indeed, as I understood

counsel for the plaintiff's submission, had the plaintiff been made aware of the downed cable and damaged lamp post along Rum Cay Drive he would have taken a different route home. I merely note here that there is no evidence to that effect and the plaintiff was not questioned along those lines.

77. I also note that although the second defendant, in its defence admitted that the said lamp post had been damaged by Hurricane Frances, neither Mr Simmons nor Mr Lockhart could say whether or not it had actually been identified as one that needed to be repaired or replaced. In fact, Mr Simmons' evidence is that if the lamp post needed to be repaired or replaced the electricity would not have been on in the area and he knew "for a fact" that "the electricity was on" although he could not say "categorically" that the said lamp post had been identified for repair or replacement.

78. On the other hand, although in his witness statement the plaintiff says that "one of the lamp posts along Dukes Way and Rum Cay Drive sustained damage which caused the lamp post to lean and cables affixed thereto to overhang and lay upon the roadway," under cross examination the plaintiff said that he did not see the pole leaning.

79. In any event, I accept Mr Lockhart's evidence that even if the lamp pole at Rum Cay Drive and Duke's Way did sustain the damage alleged by the plaintiff and admitted by the second defendant, with 2100 poles down and many others damaged, to have tried to mark every street that had damage would have interfered with, and taken valuable time away from, the real task of repair and restoration in as short a time as possible.

80. In the circumstances, I accept the submissions of counsel for the defendants that the plaintiff has failed to show that the defendants could reasonably have done more to prevent the plaintiff's accident.

81. On the other hand, it is clear from the evidence that the plaintiff in attempting to cross the downed cable took a risk. He could not have known whether they were electricity wires belonging to the second defendant or cables belonging to another utility company. As I understood his evidence, although he saw the wires, albeit late, he did not intend to stop but rather to cross in the middle as he thought the vehicle in front of him had done. In my judgment, he did so, at his own risk and, unfortunately, to his peril.

82. In the result, I find that the plaintiff has failed to prove that the accident in which he was involved on 13 September 2004 was caused by the negligence of the defendants or either of them.

83. The plaintiff's action is therefore dismissed with costs to be paid by the plaintiff to the defendants to be taxed if not agreed.

84. The third party having adopted the closing submissions of the second defendant with respect to the allegations of negligence against the second defendant, the claim against the third party claim is also dismissed.

85. I will hear the parties as to the costs in the third party claim.

DELIVERED this 19th day of October A.D. 2012

Estelle G. Gray Evans

Justice