

## **LIABILITY FOR CUSTOMER DAMAGE CLAIMS**

1. Damage to customer equipment as a consequence of a fault on the public electricity system has been a source of great concern to the damnified party particularly where –
  - (i) there is no procedure for dealing with such complaints made by customers, or
  - (ii) where the liability provision in the contract with the consumer is –
    - (a) either difficult for the complainant to interpret or of necessity require an attorney to pursue the claim;
    - (b) attempts to exclude liability for all possible situations.
  
2. Most Common reasons for denial of liability:

### **Maintenance of System**

- Bushing of Trees
- Washing of Lines
- Grounding at Transformer Grounding
  - Ground measurements at the transformer outside the accepted tolerance. Utility response is that they operate a multi-ground system which means that even if the ground measurement at the transformer that serves the customer is faulty, it does not necessarily mean that the voltage that will get to the customers' premises/equipment will be outside tolerance. Regulator refutes this and contends that the multi-ground system only works for system faults and not those that are localized to the feeder.
- Illegal Connections
- Overload of Transformers
- Condition of Poles and Cross-arm Failures

### **Protection of System**

- Transient Conditions on the System
- Tensioning of Wires
- Lightning Arresters

### **Acts of Third Party**

- Motor Vehicle Accidents
- Acts of God (Lightning Strikes, etc)
- Illegal Connections by person(s) unknown

### **Other Reasons**

- Grounding at Customer Premises
  - Utility unable to measure grounding (due to construction, etc) or finds that the grounding at the customer's premises is outside tolerance. Utility asserts that the customer has the responsibility for the condition of the grounding at its premises.
- Unable to identify any system condition that could have lead to damage to customer's equipment
- Customer cannot provide exact circumstances of incident that lead to damage

Legislative provisions in aid o consumer protection to a large extent plays an important role in minimizing the incidents of customer damage equipment by placing greater responsibilities on the public supplier of electricity, suppliers and dealers in electrical equipment up from as opposed to what now prevails in our jurisdiction. An examination of a few of these provisions would be useful.

### **3. CONSUMER PROTECTION BY A LEGISLATIVE PROCESS FOR DEALING WITH COMPLAINTS**

With regard to (i) above in the British System, for instance each public supplier of electricity must establish a procedure for dealing with complaints made by its customers and no such procedures may be established and no modifications of such procedures could be made unless the supplier had consulted the consumers committee to which the supplier had been

allocated and the proposed procedure or modification was approved by the Director General of Electricity Supply.

The procedure had to be publicized in a manner approved by the Director and a description of the procedure must be sent free of charge to an person who asks for it.

The Director may give directions –

- (i) requiring the supplier to review its procedure, or
- (ii) the manner in which such a procedure is operated

The Director may –

- (i) specify the manner in which the review is conducted
- (ii) require a written report to be made to the Director

Upon receipt of the written report he may after consulting with the supplier, direct that the supplier makes modification of the procedure or the manner in which the procedure operates as specified in the direction. The English Electricity Act of 1989 makes this protection for the consumer in such circumstance possible.

#### **4. PROTECTION RE ELECTRICAL APPLIANCES**

Again, consumer protection to a certain extent is assured by regulations made by the Secretary of State under the Consumer Protection Act 1987 which protects the consumer in respect of the supply of electrical appliances. Electricity is a product for the purpose of this Act. Contravention of the regulations is an offence punishable on summary conviction with imprisonment for a term not exceeding six months or a fine or both and is also a ground for civil action.

If the offence is committed with the connivance of or is attributable to neglect of any officer he as well as the body corporate is deemed to be guilty of the offence.

The European Commission Act 1972 lays down in regulation the requirements for information about household refrigerators freezer. A supplier of such appliances must provide the dealer who in turn must attach the label to the outside front or top of the appliance.

Again the European Community requires that electrical equipment which is adapted for use with certain specified voltages must be safe and constructed in accordance with principles generally accepted within its member states. In particular, it must be –

- (i) designed and constructed to ensure that it is safe when connected to the electricity supply system by producing a level of protection against electric shock which relies on a conservation of insulation and protective earthing conductor contained within the electricity supply system or which achieves that level of protection by other means.
- (ii) must be in conformity with the principal elements of the prescribed safety objectives for electrical equipment.

In the absence of such legislative protection the complainant's ability to be compensated for damage caused to his/her electrical equipment depends in his/her ability to successfully challenge the liability provision in his/her contract with the public electricity supplier. The area of challenge would focus on:

- (i) whether the Liability Clause provides protection against claims where he damage or losses due to negligence on the part of the Company;
- (ii) whether negligence would be deemed to include lack of maintenance.

## **5. The JPS Liability Clause**

### **ISSUE NO. 1 - WHETHER THE EXISTING JPS LIABILITY EXCLUDES LIABILITY FOR NEGLIGENCE**

- (i) The Liability Clause in the Standard Terms and Conditions of Contract (“the Contract”)

(Second Revised Sheet No. 213) provides:

“The Company will use reasonable diligence in furnishing as constant a supply of electrical energy as practicable but in case such supply shall be interrupted or fail by reason of strike, fire Act of God, the Public Enemy, accident, legal processes, interference by Government or Local Authority, breakdown or injury to machinery or lines of the Company’s system or repairs, the Company shall not be liable for damages. The Company shall not be liable to the Consumer for any damage of any nature whatsoever resulting from the Consumer’s use of the electrical energy furnished by the Company or from the connection of the Company’s line or lines with the Consumer’s wiring and appliances.

(ii) Additionally, it is stated in the Contract at Second Revised Sheet No.216, that:

“(b) The Consumer shall install only such motors or other apparatus or appliances as are suitable for operation with the character of the service supplied by the Company, and which shall not be detrimental to same, and the electrical energy must not be used in such a manner as to cause voltage fluctuations or disturbances in the Company’s distribution system”.

“(c) It is the responsibility of the Consumer to provide the necessary equipment to protect all motors and other apparatus or appliances from damage resulting from low voltage, single-phasing conditions, etc”.

It is further provided in Second Revised Sheet No.217, that:

“(b) In the case of other apparatus or equipment taking a highly intermittent or fluctuating supply of energy and/or low Power Factor, the Company will require the Consumer to furnish and install at his own expense the correcting equipment necessary to stabilize the intake and maintain at least 85% of Power Factor”.

You will observe that there is an absence of obligations on the part of the Company other than to use reasonable diligence in furnishing a constant supply of energy. The burden is placed on consumers to be technically savvy and alert to protect his/her equipment by adhering to the requirements set out above.

## 6. Excluding Liability for Negligence

The liability provision of necessity invites a look at some legal principles relating to negligence.

- (i) Negligence consists in the neglect of the use of ordinary care and skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property (**Heaven v Pender (1883), 11 Q.B.C. 503 C.A. per Brett, M.R.**)
  
- (ii) Generally the Law allows contracting parties to limit or exclude their liability for negligence (**Photo Production v Securicor Transport [1980] A.C. 827.**). However, a clause purporting to grant such an exemption must contain express language to that effect. Exemption from liability for negligence will not be implied by the courts into the parties' agreement; neither will the strict rules of construction which apply to the construction of exemption clauses permit any doubt or ambiguity to be resolved in favour of a party seeking protection from liability (**Photo Production v Securicor**).

Accordingly, a clause construed as capable of excluding liability for breach of contract will not be extended to exclude liability for negligence in the absence of clear and unambiguous language to that effect. (**Canada Steamship Lines Ltd. V Regen [1952] 1 ALL E.R. 305 Privy Council**).

In **Alderslade v Hendon Laundry Limited [1945] ALL E.R. 244**, Lord Greene M.R. stated:

“....Where...the head of damage may be based on some ground other than that of negligence, the general principle is that the Clause must be confined to loss occurring

through that other clause to the exclusion of loss arising through negligence. The reason for that is that if a contracting party wishes, in such a case, to limit his liability in respect of negligence, he must do in clear terms, and in the absence of such clear terms the clause is to be construed as relating to a different kind of liability and not liability on negligence”.

- (iii) The issue as to whether the Company’s Liability Clause is expressed in terms sufficiently clear to exclude liability for negligence received judicial consideration in the case of **Dr. Lynden Evelyn vs Jamaica Public Service Company [1976], 24 WIR 429** which was discussed in the previous opinion dealing with amending the liability clause. For completeness of this opinion, I have found it necessary to extrapolate that discussion from the earlier opinion and include it herein.

The suit arose out of an interruption in the supply of electricity to the Appellant’s office, which left his air-conditioning unit damaged. He sought to recover the cost or repair from the Company by claiming negligence and breach of contract. On the question of negligence, the Court of Appeal adopted the ratio decidendi of the Canada Steamship case, and held that the Liability Clause and Clause (c) of Revised Sheet No.216 (see Paragraph 4 ante) are not so worded as to exclude the Company’s liability for negligence. Graham Perkins, JA. In delivering the decision of the Court of Appeal stated (at page 433):

“Two further questions remain. Firstly, assuming a finding of negligence can the respondent rely on a clause in its contract with the appellant which purports to exempt it from liability in the circumstances therein defined? That clause reads:

**‘Liability**

....the Company shall not be liable to the Consumer for any damage to his equipment or for any loss, injury or damage of any nature whatsoever

resulting from the Consumer's use of the electrical energy furnished by the Company or from the connection of the Company's lines with the Consumer's wiring and appliances'.

Mr. Hill argued that the word 'whatsoever' must, in fact be read as if it meant 'howsoever caused'. I am quite unable to share this view. There cannot, I think, be the least doubt that the word 'whatsoever' qualifies the word 'nature' immediately preceding it and, therefore, as a matter of language, refers directly to the kind of damage suffered by a Consumer and not to the cause of that damage.

In view of the order that I propose at the end of this judgement, I say no more than that in my view the liability clause is not so worded as to exclude the Respondent's liability for negligence. See **Canada Steamship Lines Limited vs. R.**

The second question in relation to a term of the contract contained in the Second Revised Sheet N-216. This term reads:

“(c) It is the responsibility of the Consumer to provide the necessary equipment to protect all motors and other apparatus or appliances from damage resulting from low voltage, single phasing conditions, etc”.

Here again, I will say no more than that in my view this provision, as imprecisely worded as it is, is clearly inserted for the benefit of the Consumer and cannot be called in aid to protect the Respondent against its own negligence, assuming a finding of negligence, since to permit it to do so would be to convert the provision into a clause excluding liability for negligence when the one clause in the contract dealing with exclusion of the Respondent's liability does not, by its terms, exclude such liability”.

- (iv) These decisions act as authority for the view that the Liability Clause (Revised Sheet No. 213) or the clause imposing an obligation on the Consumer to fit his equipment with protective equipment (Revised Sheet No.216(c) do not exempt the Company from liability for negligence.



7. **ISSUE NO. 2 - WHETHER NEGLIGENCE INCLUDES LACK OF MAINTENANCE**

The Tort of Negligence is not restricted to the Commission of an act but extends to the omission or failure to act under circumstances which establish a duty to take reasonable care by the performance of a positive act. This is the basis of the *res ipsa loquitur* doctrine (the thing speaks for itself) Erle C.J. in *Scott v London Dock Company* [1865], H&C 596 explained the doctrine as follows:

“But where the thing is shown to be under the management of the defendant or his servants and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendants that the accident arose from want of care”.

A successful claim under the doctrine usually alleges that the defendant breached his duty of care by failing to properly maintain machinery or equipment under his management; which failure is the only explanation for the accident. Even where the defendant provides an explanation for the accident, he is still liable in negligence if he failed in the reasonable maintenance of the equipment which resulted in the damage (*Moore v R. Fox & Sons* [1956] 1 ALL E.R.).

8. At Common Law, negligence of the Company would be deemed to include lack of maintenance. In *Vincent v Thamesmouth Web Offset Ltd.* [1989] Prosser Q.C., in holding the defendant liable for negligence said:

“To find that an omission to provide simple maintenance at the defendant’s factory with the possible consequences referred to is negligence is not such a draconian or unrealistic or forced inference that it ought not to be taken”. (p.5).

9. The Common Law duty may, however be excused by statute (**Swinamer v Attorney General of Nova Scotia 112 D.L.R. 4<sup>th</sup> 18 per Cory J.**). Is the Company excused by statute for negligence due to lack of maintenance? Clause 41 (a) of the Licence granted under the Electric Lighting Act, for the Company to supply electricity states:

“The Company shall be excused for any non-compliance with this licence caused by uncontrollable forces”.

Uncontrollable forces is defined by clause 2 of the said licence to include:

“...breakdown of machinery or equipment or other forces or causes of similar nature not within the control of the Company and which by the exercise of diligence it is unable to prevent”.

The Clauses do not, in their effect, exclude liability for negligence. Properly construed, clause 41(a) applies only if the breakdown was beyond the Company’s control and could not reasonably have been prevented. Even without the exemption granted by clause 41 (a) the Company would not in those circumstances be liable in negligence. At Common Law, a defendant will not be held liable for mechanical defect or fault which an order system of maintenance and inspection would not have revealed. **Tan Chye Choo v Chong Kew Moi [1970] ALL E.R.**

10. Alternatively, the Common Law duty may be reinforced by the explicit provision(s) of a statute. In **Heard v Brymbo Steel Company Limited [1974] K.B. 692** the English Court of Appeal held that the electric company was liable under the statute for injuries suffered by the plaintiff as a result of the defendant’s failing to maintain the relevant electrical switches in a safe condition, suitable for their respective purposes.

Is there statutory reinforcement of the duty imposed on the Company not to cause negligence by a failure to maintain its equipment or apparatus? The Company’s licence

(which Licence is statutory in effect) contains references to the Company's duty to maintain its system in the preamble as well as in the following sections:

**Condition 2 paragraph 3**

“Subject to the provisions of this Licence the Licensee shall provide an adequate, safe and efficient service based on modern standards, to all parts of the Island of Jamaica at reasonable rates so as to meet the demands of the Island and to contribute to economic development”.

**Condition 2 paragraph 6**

“The Licensee shall discharge its obligations and perform the duties imposed or authorized under the relevant laws and this Licence and shall enjoy the rights and exercise all powers conferred by such laws on authorized undertakers”.

11. The cited provisions and the decision of the Court of Appeal in **Heard v Brymbo Steel** compel a finding that the Company is under a statutory duty to carry out reasonable maintenance of its apparatus and equipment. More often than not, an appropriate civil claim will be a claim in nuisance or negligence. The answer to question (2) is that negligence on the part of the Company will include lack of maintenance resulting in damage or loss which could have been avoided had reasonable and adequate maintenance being effected by the Company.

12. **ISSUE NO. 3 - AN AMENDED LIABILITY CLAUSE**

As the existing Liability Clause (Revised Sheet No.213), does not limit or exclude the Company's liability for negligence, a successful plaintiff would be entitled to be placed in the same position he would have been in had the tort not been committed. Consequently, damages recoverable from the company would not be confined to repair or replacement cost of the damaged article but would extend to foreseeable consequential loss including loss of use, loss of revenue etc. unless there were clear terms imposing a limit on the damages recoverable. **Parsons (Livestock) v Uttley Ingham & Company [1978] Q.B. 791**. This,

when viewed within the context of the Company's revenue and the cost of electricity, persuaded the Company to amend the existing Liability Clause.

It appears that the objective of the Company would be to formulate an amended clause which would reserve to consumers an entitlement to compensation for damage or loss which is the result of the Company's negligence while imposing a limit on the extent of the Company's liability.

**13. An examination of the Houston Light & Power Company provision may be instructive.**

**The Houston Clause:**

The Houston Clause, insofar as is relevant, reads:

“Company will make reasonable provisions to supply steady and continuous electric service, but does not guarantee the electric service against fluctuations or interruptions. Company will not be liable for any damages, whether direct or consequential, including without limitation, loss of profits, loss of revenue, or loss of production capacity, occasioned by fluctuations or interruptions unless it be shown that company has not made reasonable provisions to supply steady and continuous electric service, consistent with the customer's class of service, and in the event of a failure to make such reasonable provisions whether as a result of negligence or otherwise. Company's liability shall be limited to the cost of necessary repairs of physical damage proximately caused by the service failure to those electrical facilities of customer which were then equipped with the protective safeguards recommended or required by the then current edition of this National Electrical Code in no event shall company be liable for damage occasioned by fluctuations or interruptions of failure to begin supplying electric service caused by an act of God, the public enemy, unavoidable accident, fire, explosion, strike, riot, war, order of any court or judgment granted in any bona fide adverse legal proceedings, or action or order of any commissioner or tribunal having jurisdiction in the premises, or without limitation by the preceding enumeration, any act or thing reasonably beyond company's control, or for interruptions (when customer has been given reasonable notice) which are necessary for inspection, repair or changes in company's generating equipment or its transmission or distribution system.

Company may, without liability therefore, interrupt service to any customer or customers in the event of an emergency arising anywhere on the interconnected system of which it is a part, which emergency poses a threat to the area power supply if, in its sole judgment, such action may prevent or alleviate the emergency condition. Company makes no warranties with regard to the provision of electric service and disclaims any and all warranties, express or implied, including but not limited to warranties of merchantability or fitness for a particular purpose.”

14. The Houston Clause essentially achieves the twin objective of reserving to the Customer an entitlement to be compensated for loss or damage resulting from the negligence of the Company while limiting the extent of the Company’s liability. However, in seeking to comprehend all the elements of that objective in one paragraph, the Clause loses precision and clarity in its structure and language as it strives to exclude several eventualities in a single clause, as a result, it becomes difficult to construe. The applicable rule of construction would result in any ambiguity in the clause being resolved against the company.
15. Additionally, I would make the following comments in relation to the Houston Clause:
  - (a) The provision makes Houston Light liable for breach of contract if fluctuation or failure in supply occurs because Houston Light “... **has not made reasonable provisions to supply steady and continuous electric service ....**” I have two objections:
    - (1) The ground for liability is too vague and uncertain and allows for several possibilities: Does it include the failure to acquire new technology recommended for service, or the failure to replace dated machinery? Nothing in the statement excludes these considerations which of themselves may lead to tremendous financial implications for the Company.
    - (2) The multiplicity of claims that will arise if an entity which is under a duty to supply a service to the general public, is made liable for a failure to supply

this service, makes it desirable that the Company be exempt from such liability. The wisdom of excluding liability in contract for the breach of such a duty has been recognized judicially. In **Clegg, Parkinson & Company v Earby Gas Company** [1896] 1 QB 592, a consumer brought an action against the gas company for damages sustained by reason of the company's failure to give him sufficient supply of gas. In denying his claim. Wills J opined that "when large number of people are supplied with gas, the undertakers might speedily be ruined if anyone could bring an action of this kind against them:.

It is not recommended that there should be imposed in the Company a liability for failure or discontinuance of supply.

- (b) The exclusion of liability for consequential losses is necessary to reduce the obvious financial burden on the Company that would attach in the absence of such an exemption.
- (c) There may be occasions when limiting liability to the cost of repairs is less economical than the cost of replacement. Consequently, a reformulated clause should give the Company the option to compensate by repair or replacement cost.
- (d) The court's construction of Clause C in Revised Sheet No. 216, in **Evelyn v Jamaica Public Service Company**, makes it necessary to expressly exclude liability for damage to equipment not fitted with the necessary safeguards in terms similar to the corresponding provision in the Houston Clause.
- (e) The Houston Clause unnecessarily restricts the Company's right to interrupt supply on the ground of emergency. Emergencies, other than those which pose –

"a threat to the are power supply" may warrant interruption of the consumer's supply of electricity"

The Houston Clause is a useful guide to an amended Liability Clause for the Company.

**16. PROPOSED NEW LIABILITY CLAUSE**

**“Liability**

- (1) The Company will use reasonable diligent in providing the Consumer with as steady and continuous supply of electrical energy as practicable but does not guarantee such supply against surges, fluctuations, interruptions or failure.
- (2) Except in the circumstances specified in sub-clause (3) hereof, the Company shall not be liable to the Consumer for any injury, damage or loss of any nature whatsoever whether direct or consequential, including without limitation, loss of use, loss of earnings, loss of profits, loss of revenue, or loss of production capacity, occasioned by any surge, fluctuation, interruption or failure in the supply of electrical energy, howsoever caused.
- (3) On condition that it is proven by the Consumer:
  - (i) that a surge, fluctuation, interruption or failure in the supply of electrical energy to the Consumer occurred and that such surge, fluctuation, interruption or failure was caused by the negligence of the Company;
  - (ii) that such surge, fluctuation, interruption or failure was the direct cause of physical damage to the Consumer’s electrical equipment, appliance or apparatus during the Consumer’s use of the electrical supply provided by the Company;

- (iii) that, in accordance with the Standard Terms and Conditions of Electricity Service, Second Revised Sheet No. 216, the said equipment, appliance or apparatus at the time of the alleged damage:
  - (a) was suitable for operation with the character of the service supplied by the Company, was not detrimental to same and the electrical energy was not used in such a manner as to cause voltage fluctuations or disturbances in the Company's distribution system;
  - (b) had been provided with the necessary equipment to protect it from damage resulting from low voltage, single phasing conditions, etc;
  - (iv) that, if the said equipment, appliance or apparatus was of the kind referred to in the Standard Terms and Conditions of Electricity Service, Second Revised Sheet No. 217, the Consumer had furnished and installed the corrective equipment necessary to stabilize the intake and maintain at least 85% of Power Factor;
  - (v) that the Consumer delivered to the Company a claim in writing in respect of the alleged damage no later than three (3) months after the occurrence of the surge, fluctuation, interruption or failure which allegedly caused the damage to the Consumer's equipment, appliance or apparatus,

the Company shall be liable to indemnify the Consumer for such damage but such liability of the Company shall be limited to the proven cost of necessary repairs of the physical damage to or, if the Company so determines, the cost of replacement of the said equipment, appliance or apparatus which has been damaged aforesaid. The Company shall not be liable to indemnify the Consumer for any consequential losses whatsoever, including without limitation, loss of use, loss of earnings, loss of profits, loss of revenue or loss of production capacity.



In no event whatsoever shall the Company be liable for damage or loss of whatever and whether direct or consequential, occasioned by any surge, fluctuation, interruption or failure of the supply of electrical energy provided by the Company to the Consumer caused by Acts of God, action taken by or against the Queen's enemies, riot, civil commotion, strikes, lockouts, or other forms of industrial action or disturbances, act of public enemy, wars, blockades, insurrections, order of any court or judgment granted in any bona fide legal proceeding or action or other of any commission or tribunal having jurisdiction in the premises, restraints on Government, Government rationing of electricity or other wartime or other emergency Government controls, inability to obtain any requisite Governmental permits, fire, explosions, breakdown of machinery or equipment, the Company's inability to obtain necessary materials and equipment for its operations at reasonable costs or financing on reasonable terms or without limitation by the preceding enumeration, any act or thing reasonably beyond the Company's control or for interruptions or fluctuations which are necessary for the purpose of inspecting, repairing, maintaining or changing the Company's generating equipment or its transmission or distribution system.

(vi) The Company shall have the sole right to determine the existence of an emergency on its system which requires the interruption, fluctuation, discontinuance or limitation in the supply of electrical energy to a Consumer and may, in its sole judgment and without giving notice to the Consumer, effect such interruption, fluctuation, discontinuance or limitation without incurring any liability whatsoever for any loss howsoever caused and the Consumer shall not thereby be excused from performing any of his obligations under the Contract.

(vii) The Company makes no warranties with regard to the provision of electrical energy and disclaims any and all warranties, expressed or implied, including but not limited to warranties of merchantability or fitness for a particular purpose".