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UNIVERSITY OF LONDON
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19 FEB 1957
INSTITUTE OF ADVANCED LEGAL STUDIES

No. 37 of 1955.

In the Privy Council.

46018

ON APPEAL
FROM THE SUPREME COURT OF NEW SOUTH WALES.

BETWEEN—

GEORGE FRASER (Plaintiff) *Appellant*

— AND —

THE COUNCIL OF THE CITY OF LISMORE (Defendant) *Respondent.*

CASE FOR THE RESPONDENT.

RECORD.

CIRCUMSTANCES OUT OF WHICH APPEAL ARISES.

1. This is an Appeal, by leave of the Supreme Court of New South Wales, from a Judgment and Order of that Court made and given on the 1st day of July, 1954, allowing an Appeal by the Respondent whereby the said Supreme Court set aside a verdict and Judgment for the Appellant in the sum of £5,000 and entered a verdict and Judgment for the Respondent. p. 68.

2. The action arose out of an occurrence at Lismore, New South Wales, on the 11th January, 1951, when the Appellant who was a linesman employed by the Respondent Council, was removing certain wires from the top of a pole in order to allow a tree to be lopped. The pole broke and the Appellant fell to the ground and was injured.

3. The Appellant, alleging a breach of duty owed to him by his Respondent employer, commenced an action in the Supreme Court of New South Wales in November, 1951, and the trial of that action took place before a Judge and a Jury of four at Lismore on the 14th September, 1953. The Jury found a verdict in favour of the Appellant for the sum of £5,000. p. 66.

4. The Respondent Council filed a Notice of Appeal to the Full Court of New South Wales and that Court on the 1st July, 1954, allowed p. 67. p. 68.

the Appeal, set aside the verdict in favour of the Appellant and entered a verdict and Judgment for the Respondent.

5. This Appeal was then lodged by the Appellant.

CONTENTIONS TO BE URGED BY THE RESPONDENT.

p. 67. 6. In its appeal from the Jury's verdict to the Supreme Court of New South Wales the Council of the City of Lismore made submissions which fall into three categories; firstly, that a verdict should be entered in its favour by the Full Court pursuant to Section 7 of the Supreme Court Procedure Act 1900 on the ground that as a matter of law upon the evidence the Respondent was entitled to a verdict; secondly, in the alternative, that His Honour the Trial Judge made certain errors in admitting evidence and directing the Jury and that a new trial should be ordered; and, thirdly, in the alternative, that the damages awarded by the Jury were excessive and that a new trial should be ordered on that ground.

p. 68. 7. The Full Court unanimously agreed with the submissions of the present Respondent on the first of the above-mentioned submissions and accordingly did not proceed to determine the second and third submissions.

8. The Respondent maintains that the Judgment of the Full Court of New South Wales was correct and contends that on the evidence the verdict entered for the Respondent was the proper one.

9. In the alternative, it will argue that there should be a new trial of the action in accordance with the second or third submissions above-mentioned.

10. In support of its major contention, the Respondent relies upon the facts set forth in the following paragraphs numbered 11 to 26.

p. 3, l. 13. 11. The Appellant, aged 57 years, was a linesman who had been employed in that capacity by the Council for 14 years and had worked in the locality for that period. Prior to that he had gained experience over a number of years with the Clarence River Council and with the p. 8, l. 3. Post Master General's Department. In all, he had nearly twenty years' experience as a linesman up till the date of the accident and that p. 3, l. 20. experience extended to handling lines and poles.

p. 3, ll. 28-36. 12. On the day of the accident in the afternoon he had received instructions from an officer at the Depot to go with an assistant in a motor lorry to Borton's house and take down some wires to enable trees to be lopped. The pole which subsequently fell was not the property of the Respondent but was situated within Borton's property.

p. 4, l. 26. 13. The Appellant was in charge of this small sub-unit. It was p. 11, l. 5. the Appellant's responsibility to inspect the area and go about the p. 8, l. 31. job in the way which was proper in the circumstances.

14. It was not disputed at the trial that the job was within his capacity nor was it suggested that for a job of this nature any more senior member of the Council's employees should have been present.

15. The Appellant proceeded with the assistant, Tulk, to Borton's property which was in the residential area of the town of Lismore. The locality was as follows:— p. 4, l. 24.

> Borton's house and land are situated on high ground. There was a footpath outside Borton's front fence. Beyond the footpath a bank of some 20 feet descended to a formed road approximately 60 feet in width. On the far side of this road were the main power lines and poles outside a Convent. The electricity wires ran from a high pole outside the Convent diagonally across the roadway to a pole in the front garden of Borton's land and thence again at an angle to Borton's house. The pole in Borton's property was situated about 6 feet from the front fence, with its butt in the garden bordering on the lawn in front of Borton's house. The tree which was to be lopped was situated between this pole and Borton's house. Two methods of removing the electric wires to permit the tree to be lopped were open to the Appellant. He could have deadened the wires at the junction on the pole outside the Convent and then removed the wires where they entered Borton's house and pulled them to the base of the pole in Borton's garden. He did not adopt this method. p. 47, l. 11.

16. The alternative method and the one which the Appellant used was to deaden and remove the wires from the pole outside the Convent and drop them to the ground. He then proceeded to remove the wires which led from Borton's house to the pole in Borton's Garden where they joined that pole. It was whilst performing this second operation that the accident occurred. p. 4, l. 31.

17. The Appellant admitted that as an experienced linesman he was familiar with elementary safety precautions to be observed before mounting poles. He expressly admitted that it was a reasonable safety precaution that an employee before ascending a pole which was subject to decay or deterioration, should satisfy himself that there was no danger of the pole collapsing and that if such danger exists the pole should be effectively secured before an ascent is made. p. 8, l. 33. p. 8, ll. 36–41.

18. The Appellant further expressly admitted that if there was any danger the pole has to be secured before going up it. p. 8, l. 42.

19. The Appellant expressly admitted that at the time he examined this pole he knew the usual and proper way to test a pole to see if it was safe. He described the accepted method as tapping the butt of the pole with a hammer, boring with a brace and bit and digging 6 to 8 inches around the putt of the pole and examining the butt for evidence of decay. p. 9, l. 26.

20. The Appellant, however, did not carry out this procedure. He said he examined the pole. He tapped it and it sounded sound enough to go up. He did not bore into the pole nor did he dig around the butt. He felt that there was no need to dig around it, but admitted that if he had been sent out to inspect the pole he would have adopted the p. 9, l. 35. p. 10, ll. 17–23.

p. 4, l. 44. precautions above-mentioned. He placed a ladder against the top portion of the pole and shook it and it appeared firm.

p. 42, l. 19. 21. There was express evidence from the witnesses called by the Respondent that the pole, on examination after the accident, was

p. 52, l. 19. deteriorated and was obviously an old pole.

22. The Appellant admitted that the pole appeared to be an old one—

p. 13, l. 34. *Q.*—Didn't this pole appear to you to be a pretty old one?

A.—It did.

23. The Appellant admitted that he had been well instructed about safety precautions—

p. 11, l. 26. *Q.*—You had been instructed well about the safety precautions?

A.—Yes.

Q.—It was right in your mind that you should not go up poles if there was any chance of danger unless they were secure?

A.—That is right.

24. The Appellant also admitted that at the time he mounted the pole he did not think that any other equipment was necessary—

p. 12, l. 17. *Q.*—Did you feel when you went up this pole that you were not going up as safely as you should. Did you feel that?

A.—No.

Q.—By reason of the lack of equipment?

A.—No. I thought it was safe after I tapped it.

25. Although the Appellant complained that there were no pikes at the depot when he left he admitted in cross-examination that he would only use pikes if he thought the pole was faulty—

p. 13, l. 6. *Q.*—You would only use pikes if you thought the pole was faulty?

A.—Yes.

Q.—Did you think this pole was faulty when you went up that day?

A.—No, I thought it was a safe pole.

p. 28, l. 39. 26. The pole in question had been erected by Borton and others in 1924.

REPLIES TO THE CONTENTIONS OF THE APPELLANT ON HIS SUBMISSIONS IN THE SUPREME COURT OF NEW SOUTH WALES.

p. 69, l. 42. 27. The Appellant made four submissions that there was evidence to support a finding by the Jury of negligence on the part of the Respondent, viz.:—

(a) that it failed to provide a safe system of work;

(b) that it failed to provide equipment necessary for carrying out the work with safety;

(c) that it failed to provide adequate instructions to the Appellant to enable him to carry out the work with safety; and

(d) that it failed to maintain a regular system of inspection of poles.

28. As to (a) the Respondent submits that the system adopted, namely, of using a ladder to climb the pole after first having ascertained that the pole was safe was a reasonable safe system. That system involved as a preliminary elementary precaution an examination of the pole to make sure it was safe to climb. The Appellant had been instructed and knew that system but failed to put it into effect. Had he done so the accident would never have happened.

29. The Respondent relies on the reasons in this matter given in the Judgments of His Honour Mr. Justice Roper, C.J. in Equity and Mr. Justice Brereton with which His Honour the Chief Justice agreed. p. 69. p. 72.

30. As to (b) it is submitted that the question of equipment is not relevant in this case. Had any additional equipment been required by the Appellant he could have gone back to the depot and obtained it. There was no suggestion that proper and adequate equipment could not have been made available to him. The Respondent again relies upon the reasons in this aspect of the case given by their Honours in the Court below.

31. As to (c) the Respondent submits that there is no evidence that the Appellant had not been adequately instructed with regard to the safety precautions in carrying out this type of work. The Appellant admitted that he had been so instructed and had twenty years of practical experience in matters of this kind.

32. As to (d) namely, failure to maintain a regular system of inspection: firstly, it is submitted that the Respondent was under no duty to inspect periodically this particular pole on private property any more than it was under a duty to inspect the eaves of private houses to which electrical wires might be attached. The Respondent submits that had the Appellant been injured through an eave, against which his ladder was placed, breaking, the case would have been no different. In the case of private property, it is submitted that the experience and knowledge of the qualified person sent out to perform the work should protect him against such hazards.

33. Secondly, it is submitted that on the evidence in the case there was no evidence of any breach of such duty. And thirdly, it is submitted that even if there was evidence of any such breach the damage caused to the Appellant flowed directly from his own want of care for his safety.

34. The Respondent relies upon the reasons in this regard given by their Honours in the Court below.

35. It is further submitted that as it was admittedly the Appellant's duty to submit the pole to a proper inspection before he climbed it, he cannot complain of the lack of previous inspection as causing or contributing to his injury.

36. Fourthly, it is submitted that even if there was evidence from which the Jury were entitled to find that there was a duty to inspect periodically the poles, there was no evidence that a regular periodic inspection (when it should have been made) would have resulted in the defect in the pole being ascertained at that date. The Respondent's evidence was that poles were inspected every $2\frac{1}{2}$ years. There was no evidence that this was an improper period of inspection and no evidence as to what condition this pole would have been in had it been inspected $2\frac{1}{2}$ years prior to the date of the accident.

ALTERNATIVE SUBMISSIONS JUSTIFYING ORDER FOR NEW TRIAL.

A. On questions of Admission of Evidence and Misdirections.

37. The points taken in this connection are set out in grounds 2, 3, 5, 6 and 7 of the grounds of appeal filed by the Respondent in its appeal to the Full Court of the Supreme Court of New South Wales. With regard to the first ground, namely, wrongful admission of evidence as to practice with regard to periodic inspections of poles, it is submitted that such evidence was not admissible on the grounds of relevancy if the Respondent was under no legal duty to inspect a pole on private property.

p. 67.

p. 32, l. 41.

38. In the Respondent's submission this was a misdirection. It is submitted that where an employer, situated as the Respondent was, might receive calls from a very large number of private property owners requiring the services of linesmen in private properties, it would be unreasonable to assume a duty on it in each case to take reasonable steps to see that the places on such private property where its linesmen might be expected to work are safe. In the Respondent's submission where it employs qualified and experienced linesmen and gives them proper instructions in the detecting of hazards of unsafe places it fulfils its duty to such linesmen.

p. 73, l. 33.

39. The Respondent submits that the reasons of the Justices of the High Court of Australia in O'Connor v. The Commissioner for Government Transport correctly state the law on this point. It is submitted that the decision in Taylor v. Simms and Simms ((1942) 2 A.E.R.375) illustrates this principle.

40. In this matter the Respondent also relies on the decision of His Honour Mr. Justice Brereton in the Court below.

p. 65, l. 9.

41. With regard to the allegations that His Honour was in error in directing the Jury that the Respondent directed the Appellant to mount the pole it is submitted that the evidence in the case is to the contrary and having regard to the whole of the evidence, such directions might have wrongfully influenced the Jury. If in fact he had been instructed to climb this pole without taking any precautions to see whether it was safe or not, then a Jury might well find negligence on the part of the Respondent.

42. In the Respondent's submission what His Honour should have directed the Jury, in accordance with the facts disclosed in the evidence, was that the Appellant was not directed to climb this pole, but was directed to go out and inspect the pole and that it was his duty not to mount it unless it was safe. p. 65, l. 21.

43. In the Respondent's submission His Honour was expressly asked so to direct the Jury but declined to do so. p. 65, ll. 21-27.

44. It is submitted that on these grounds the real issues were not plainly put to the Jury by the Trial Judge and a New Trial should be ordered.

B. Alternative Submissions Justifying an Order for New Trial on the Excessiveness of Damage.

45. The nature of the Appellant's injuries were as follows: He suffered a compression fracture of the first lumbar vertebra and a compression fracture of the heel bone of the right foot. There was no interference with the nerves. He was off work from January, 1951 to October 1951. The fracture of the back healed and by the time of the trial was not causing any real disability. The Appellant when being medically examined by the Respondent's medical advisor in July, 1951, stated that his back had fully recovered except that it felt stiff in wet weather. His own doctor thought that the injury had caused an aggravation of arthritis in his back and a disturbance of his ligaments. The Appellant complained of pain from time to time in his back but it was of an intermittent pain and that it was likely he would have long periods pain-free, provided he refrained from heavy work and heavy weight-lifting. p. 16, l. 32. p. 20, l. 23. p. 5, l. 6. p. 17, l. 13. p. 14, l. 21. p. 17, l. 14.

46. In any event he had arthritis in the back at the time of the accident and it was probable that if he continued in engaging in heavy manual work he was likely to develop a pain in the back. p. 20, l. 20.

47. The fracture of the heel united. This particular type of fracture never gives a good result but the result in the Appellant's foot was better than average. As a result he would have a pain in his heel after long standing or walking over uneven surfaces. In his medical advisor's view he will get arthritic pains there in the future. p. 18, l. 4

48. A special type of heel for his boot was provided to enable more comfortable use of the foot. For normal walking on ordinary surfaces no trouble with the foot was anticipated but walking on uneven or broken surfaces might cause the bones to roll one on the other. p. 20, l. 39.

49. The Appellant's out-of-pocket expenses were £216 7s. 0d. p. 40, l. 32.

50. On his return to work he was re-employed about the 10th October, 1951, firstly on light duties for about a month and then as a linesman's assistant, which involved considerably less active duties and at about 23/- per week less pay. He continued to work for the Council in this capacity. p. 6, l. 18

51. At the time of his injury he was earning approximately £12 per week and his actual loss of wages whilst away from work was £468. p. 3, l. 27.

52. It is submitted that the award of the Jury of £5,000 was an extravagant one and so disproportionate to the actual injuries and disability as to be such that reasonable men could not find.

53. It is accordingly submitted that a new trial be granted.

SUBMISSIONS.

54. The Respondent humbly submits that the decision of the Supreme Court of New South Wales was correct and should be approved and that this Appeal should be dismissed or in the alternative that a new trial of the action should be directed to be had, for the following, among other,

REASONS.

1. Because as a matter of law there is no evidence to support a verdict in favour of the Appellant.
2. Because on all the evidence the Appellant was the author of his own injury.
3. Because on the evidence adduced the Respondent is entitled to a verdict and judgment in the action as a matter of law.

REASONS FOR ALTERNATIVE SUBMISSIONS.

1. That His Honour wrongfully admitted the evidence as set forth in the Respondent's Notice of Appeal to the Full Court of New South Wales and misdirected the Jury as therein set forth.
2. The verdict of the Jury was excessive and such that no reasonable men could find.

COLIN BEGG,
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No. 37 of 1955.

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ON APPEAL

FROM THE SUPREME COURT OF NEW SOUTH WALES.

GEORGE FRASER

v.

THE COUNCIL OF THE CITY OF LISMORE.

CASE FOR THE RESPONDENT.

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Electric Law Press Ltd., Law & Company Printers, Warwick Court, W.C.1.
31747