(17) 1956

In the Privy Council.

No. 37 of ~~1955.~~

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

GEORGE FRASER ... ... (*Plaintiff*) *Appellant*

AND

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

RECORD OF PROCEEDINGS

DOCUMENTS INCLUDED IN THE RECORD

LIST OF ORIGINAL EXHIBITS SENT WITH RECORD

Exhibit Mark.	Nature of Exhibit.
1	Document headed " Form for Signature before undertaking work on overhead Lines " signed by Plaintiff on 31st October, 1950. (*Not printed—Original document.*)
2	Booklet : Overhead Electric Lines. Safety Regulations and First Aid Procedure. Page 9. (*Not printed—Original document.*)

LIST OF FORMAL DOCUMENTS OMITTED FROM THE RECORD (NOT TRANSMITTED TO THE PRIVY COUNCIL WITH THE EXCEPTION OF DOCUMENT NO. 13.)

No.	Description of Document.	Date.
1	Writ	22nd November 1951
2	Appearance	17th December 1951
3	Declaration	23rd January 1952
4	Particulars under Rule 517	13th February 1952
5	Pleas...	18th February 1952
6	Replication	26th February 1952
7	Præcipe for Trial	25th March 1952
8	Mutual Discovery Order	11th September 1953
9	Motion for Leave to Appeal to Privy Council	13th July 1954
10	Affidavit of Maurice Arthur Simon in support of application for Conditional Leave to Appeal to Privy Council	13th July 1954
11	Affidavit of Maurice Arthur Simon in support of application for Final Leave to Appeal to Privy Council ...	27th July 1955
12	Certificate of Prothonotary on due compliance with Conditional Order	27th July 1955
13	Certificate of Prothonotary verifying transcript reccrd	24th August 1955

In the Privy Council.

No. 37 of 1955.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES

BETWEEN

GEORGE FRASER ... ... (*Plaintiff*) *Appellant*

AND

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

RECORD OF PROCEEDINGS

In the Supreme Court.

No. 1. Issues for Trial. 25th March, 1952.

No. 1.

Issues for Trial.

IN THE SUPREME COURT OF NEW SOUTH WALES.

No. 4712 of 1951.

WRIT ISSUED : 22nd November, 1951.
APPEARANCE ENTERED : 17th December, 1951.
DECLARATION DATED : 23rd January, 1952.
LISMORE TO WIT.

GEORGE FRASER by MAURICE ARTHUR SIMON his Attorney sues THE COUNCIL OF THE CITY OF LISMORE a Corporation sole and liable to be sued in and by its said corporate name and style for that at the time of the committing of the grievances hereinafter alleged and at all material times the Plaintiff was employed by the Defendant to work as an electric linesman in connection with the dismantling of certain electric power lines and the poles and equipment thereof and the said electric power lines and the said poles and equipment were at all such times as aforesaid under the care control and management of the Defendant AND THEREUPON

In the Supreme Court.

No. 1. Issues for Trial. 25th March, 1952— *continued.*

the Defendant by itself its servants and agents so negligently carelessly and unskilfully conducted itself in and about the care control management maintenance and inspection of a certain electric light pole and in and about the carrying out of certain dismantling operations in relation thereto and in and about failing to provide reasonable and proper equipment for the carrying out of the said operations and in and about failing to take and provide reasonable and proper safeguards and safety precautions to prevent bodily injury to the Plaintiff in the course of his employment as aforesaid and in and about failing to adopt and maintain a safe system of working THAT the said electric light pole collapsed whilst the Plaintiff was working thereon in the course of his said employment WHEREBY the Plaintiff was thrown to the ground and seriously wounded and permanently injured and the Plaintiff suffered great pain of body and mind and the Plaintiff was put to expense for medical and surgical attendances and for medicines nursing massage x-rays hospital and ambulance charges and the Plaintiff was for a long time and still is unable to follow his usual occupation and lost the moneys he otherwise could and would have earned AND the Plaintiff was otherwise greatly damnified AND the Plaintiff claims the sum of five thousand pounds (£5,000).

PLEAS DATED : 18th February, 1952.

The Defendant by FINLAY PATRICK MCRAE its Attorney says that it is not guilty.

2.—And for a second plea the Defendant as to so much of the Declaration as depends upon the allegations that at the time of the committing of the grievances thereinafter alleged and at all material times the Plaintiff was employed by the Defendant to work as an electric linesman in connection with the dismantling of certain electric power lines and the poles and equipment thereof and the said electric power lines and the said poles and equipment were at all material times as aforesaid under the care control and management of the Defendant denies the allegations and each of them.

REPLICATION DATED : 26th February, 1952.

The Plaintiff by MAURICE ARTHUR SIMON his Attorney joins issue with the Defendant on the Defendant's Pleas herein.

Dated this 25th day of March, 1952.

M. A. SIMON,
Attorney for the Plaintiff,
109 Pitt Street,
Sydney.

No. 2.

Transcript of Evidence.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Coram : CLANCY, J. and a jury of four.

Monday, 14th September, 1953.

FRASER *v.* COUNCIL OF THE CITY OF LISMORE.

Mr. PILE appeared for the Plaintiff.

Mr. BEGG appeared for the Defendant.

PLAINTIFF'S EVIDENCE.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff).

(1) George Fraser (Plaintiff). Examination.

Sworn, examined, deposed :

To Mr. PILE : My name is George Fraser. I am 57. I live at 82 Conway Street, Lismore. I have been with the Council for 14 years in all. When I started with the Council I had had previous experience with wires and lines ; I worked with the Clarence River Council for nearly 12 months at a place called Kyogle.

Q. Apart from that had you had any experience with telephones ?—*A.* I was with the P.M.G.

Q. Any experience in handling telephone wires or poles ?—*A.* On the P.M.G. and on the electric light.

I joined the Council as a linesman, right from the start of the Lismore Council. I worked round the locality here, around this City until this accident happened.

Q. Was there anything wrong with your legs or your back at that time ?—*A.* Nothing whatever. The time the accident occurred I was earning I think roughly about £12.

On the 11th January 1951, I was working in the morning, at 8 o'clock Mr. Anderson the leading hand in the presence of the engineer instructed me to go on street lights, as there was a lot of street lights had been out. I was doing street lights with one man named Mr. Tulk. I was doing that all the morning. I went back to the job at lunchtime and Mr. Poynton, the insulation inspector gave me instructions to go to Mr. Borton's house and take down wires so as they could lop tree. I had a council motor lorry for the purpose of going there. I went with Mr. Tulk who was driving the truck.

Q. Before going did you possess yourself of anything in the way of equipment ?—*A.* No, I looked around for pikes and there were no pikes

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff). Examination—*continued.*

there—the other gang had the pikes. Those pikes are a pole with a fork on the top.

Q. On previous occasions was it your experience with the Council when you had to go up poles, had any practice been followed about what you would do before you would go up a pole ?—*A.* Yes, you always tap the pole, and pikes round it.

Q. What do you mean by tap the pole ?—*A.* You usually just go round like that with a hammer, tap round the pole, to see if it is solid, and if you think it is solid you put the pikes round it and go up.

Q. By putting the pikes round it, how many pikes do you use ?— *A.* Usually four.

Q. How did you put those in ?—*A.* One each side—two that side and two this side (*indicating*).

Q. Four pikes from four different directions ?—*A.* Yes, that is right.

Q. You jam the spike in at the top and firm the heel to the ground ?—*A.* That is so. Then you put your belt on and climb the pole, and put your belt round the pole and commence your work.

Q. You go up by ladder ?—*A.* Yes.

Q. What is the average height of those poles ?—*A.* Service poles, a pole like these are usually round about 15 to 20 feet, I would say roughly, service poles.

Q. On this occasion, the 11th January, you have told us you looked round the depot and there were no pikes ?—*A.* Yes.

Q. And you went out in the truck with Mr. Tulk ?—*A.* Yes.

Q. To Mr. Borton's house ?—*A.* To Mr. Borton's house.

Q. Now, was there a pole carrying electricity into his house just inside his boundary fence on the street ?—*A.* Yes.

Q. And I think the wires ran from his house over to a pole and from that pole right across the other side of the street, outside ?—*A.* Yes.

Q. To the convent, was it not ?—*A.* To the footpath.

Q. What did you do when you got there ?—*A.* First of all I went to the footpath side and deadened the wires in the first place before I dropped them.

Q. From the street end ?—*A.* From the street end, then Mr. Tulk and I went over and Mr. Tulk took the ladder and I walked over with my hauling-line and I picked up the hammer out of the tool bag as I went and when I got there I tapped the pole.

Q. Tell us what you did about the tapping. Did you tap it once or more than once ?—*A.* Three or four times around the pole. I went all around the pole. Sometimes you get a weak part on one side of a pole.

Q. You tapped all around it ?—*A.* All around it.

Q. Did you notice anything in your tapping ?—*A.* No, it sounded fairly solid, as solid as anything I. . . .

Q. What did you do ?—*A.* Then I put my foot on the third rung of the ladder. The ladder was extended by the laborer. I put my foot on the third rung and gave it a push, like that, against it. Nothing happened, it only shook a little bit, and I thought it was quite safe then to try it.

Q. So you then went up the ladder, did you ?—*A.* I went up the ladder.

Q. There was a cross-arm on top, was there not ?—*A.* Yes.

Q. Within nine or ten inches of the top ?—*A.* That is correct.

Q. And to that wires were attached ?—*A.* They were.

Q. What did you do then ?—*A.* I took first the red wire. The negative wire was bridged over with a clip. I undid the clip and unscrewed the red wire and dropped them down at each end. Then I took the neutral wire and the neutral wire was not broken. It went right through to the other pole. It was only tied on.

Q. That is the wire that runs across from Mr. Borton's land ?—*A.* Mr. Borton's land right to the other pole but it is not broken at the surface pole. I undid it. I started to, and as soon as I did it just flew up in the air and the pole went.

Q. It crashed down to the ground ?—*A.* Yes.

Q. How far from the top were you ?—*A.* I was right at the top.

Q. How did you land ?—*A.* Well, I landed outside somewhere but I am afraid I cannot say.

Q. Outside in the street ?—*A.* Somewhere.

Q. Did you lose consciousness ?—*A.* I did.

Q. I think you were taken away by ambulance, was it ?—*A.* Yes, by ambulance.

Q. Up to the Base Hospital ?—*A.* Base Hospital.

Q. And you were there until the 10th April 1951 ?—*A.* Yes.

Q. That is just on three months. In your stay there what treatment was given you ?—*A.* I had a plaster jacket on from my neck to my hips. I had a plaster on my leg with a pin through my ankle and a 12-lb. weight hanging from the end of the bed.

Q. You were lying on your back for three months ?—*A.* I was three months like that.

Q. When you were discharged did you come out with the plaster jacket on you ?—*A.* I did.

Q. On the leg too, or just the upper part ?—*A.* I had the plaster jacket on and a piece of plaster on my leg with a sponge rubber on my heel and two walking sticks.

Q. Were you told to exercise it, or stay still, or what ?—*A.* I walked around the house a little but not too much.

Q. That continued for how long ?—*A.* That continued from April to I think about somewhere about June. I am just not quite sure about that.

Q. After that was the plaster taken off ?—*A.* The plaster was taken off a month after I got home.

Q. A month after discharge ?—*A.* Yes.

Q. Then, I suppose you walked around to get exercise to get back as far as possible to normal after that ?—*A.* Yes, I walked round with one stick and then discarded that.

Q. When did you first get back to work ?—*A.* In October.

Q. Do you remember the date in October ?—*A.* I think it was round about the 10th October.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff). Examination—*continued.*

Q. When you went back to work you resumed work with the Council did you ?—*A.* I did.

Q. In what capacity ?—*A.* When I went back first, a month before I went back, the doctor sent me back with light duties and the Council refused to give me light duties, so the doctor put me off for another month and when I went home I started pottering around the place and found that my back was getting sore trying to do things and by the time it was time to start work on 10th October I found that my back was that sore that I could not even think of standing about on it. It was an impossibility. I also had trouble with my foot.

Q. Where was the back broken ?—*A.* Somewhere here (*indicating*).

Q. Around about the middle back. What work did you actually do then ?—*A.* I did then a linesman's assistant job.

Q. That means you were on the ground all the time ?—*A.* On the ground all the time.

Q. You did fetching and carrying for the linesman ?—*A.* Tying things on the hauling-line when they were up the pole.

Q. When you went back to work in October 1951, as a linesman's assistant how much was your pay less than that of a linesman ?—*A.* I think roughly about 23s. per week.

Q. Just before this accident happened do you remember there were some changes in the personnel that worked there ?—*A.* Yes, there were.

Q. Did you have a conversation with the engineer, Mr. Jackson ?—*A.* I did.

Q. What position did he occupy ?—*A.* Electrical engineer.

Q. And what was his position in Council ?—*A.* Electrical engineer.

Q. What had he to do with the staff promotions. Anything ?—*A.* He was the head man of the whole electrical department.

Q. What conversation did you have with him about your job ?—*A.* He had then advanced younger men with less experience and less service in the Council than we had and I went to him and told him that I thought it was unfair that we should not have our promotion and before I left he assured me that he was then. . . .

Q. Mr. Begg would like you to tell us as far as you can say what he said. Do not tell us what he assured you ?—*A.* I told him that I was not satisfied with the condition of younger men being promoted ahead of me and that I was prepared to leave and he told me not to be silly, that he would have another gang within a fortnight and he would make me leading hand of that gang of men.

Q. I suppose, being in hospital, were you in a position to say whether another gang was put on ?—*A.* There was.

Q. You went on working. Since that you have been working all the time with the Council as an assistant to the linesman, is that right ?—*A.* Up till about six months ago.

Q. What happened then ?—*A.* Over the period of being a linesman's assistant the Council then were doing work outside the city in the country areas and I found that by travelling over the rough ground irritated the

injury in my spine and when I came home I was unable to sleep and it got so bad that I just had to give it up and go back to the doctor and tell him I was unable to do it.

Q. Did you give the work up or what ?—*A.* No, I did not give it up. I stuck at it as long as I possibly could and then after that I went to the doctor and told the doctor that I could not carry out these duties.

Q. Were the nature of your duties changed ?—*A.* Yes, when I had to take time off because I was too sore in the back, and when I came back they put me in as helping the storeman in the store for a certain time.

Q. That is what you are still doing, is it ?—*A.* No. They told me there were too many men in the stores and I would have to go into the power house as assistant there. Tradesman's assistant.

Q. You are assisting a tradesman, a fitter, in the power house ?—*A.* Yes.

Q. Can you do that work all right ?—*A.* Provided there is no heavy lifting. I cannot do heavy lifting.

Q. How do you get on in the morning going to work as a fitter's assistant and getting home ? Do you notice anything about yourself ?—*A.* The only thing I find is that if I walk too far that under my heel gets sore or if I am on uneven ground. If I am on uneven ground I am very sore in the foot.

Q. You mentioned before " heavy lifting." There is no heavy lifting for you to do in this particular job, is that it ?—*A.* Yes, there is.

Q. How do you get on with that ?—*A.* The other men, they have all done it for me.

Q. The workmates carry you in that respect, do they ?—*A.* Yes.

Q. What is your present wage ?—*A.* My present wage is £13 6s. 0d., I think.

Q. The wages today of the linesman are £15 9s. 0d. approximately ?—*A.* Something like that.

Q. You have told us everything about how your back affects you on uneven ground or prolonged walking ?—*A.* Yes, too much walking. The back is practically always sore in the winter, specially in the cold weather or if I do heavy lifting, if I continue heavy lifting I get so sore on the back I have to be up half the night and I cannot lie in bed.

CROSS-EXAMINATION :

Mr. BEGG : How long had you been engaged working with overhead lines and poles up to the date of this accident, how many years ?—*A.* I had been I think somewhere around about 12½ with the Lismore City Council and about a year with the Clarence River County Council.

Q. You mentioned the P.M.G. ?—*A.* I was a linesman with the P.M.G. previous to that in Lismore, at the depot at Lismore.

Q. For how long had you worked with the P.M.G. Department ?—*A.* I think round about 5 or 6 years or something like that.

Q. As a linesman ?—*A.* As a linesman.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff). Cross-examination—*continued*.

Q. Had you done any work on lines before that ?—*A*. Not before that.

Q. So you had nearly 20 years' experience as a linesman up to the date that this accident took place ?—*A*. I did.

Q. Did you tell the Court that on other occasions you climbed the pole previous to this accident you used pikes ?—*A*. Whenever there were pikes I always used them, I always used them.

Q. Did you say " whenever " or " wherever " ?—*A*. Whenever there was pikes I always used pikes.

Q. On this day did you ask anybody for pikes before you went out ?— *A*. There was nobody there to ask.

Q. You got your instructions from Mr. Poynting at the depot ?— *A*. At the depot.

Q. Is that the depot where the equipment is kept ?—*A*. It is.

Q. Is there normally somebody in charge of the equipment there ?— *A*. No.

Q. You are permitted to take out whatever equipment you need when you go on the job ?—*A*. Yes.

HIS HONOR : There was nobody there to ask ; but Mr. Poynting had instructed you to go out ?—*A*. Mr. Poynting is an insulation inspector and he does not have anything to do with any equipment or gangs.

Q. When you say there was no one to ask, Mr. Poynting was still there but you did not consider he was the man—— ?—*A*. No, there was no foreman there.

Mr. BEGG : Mr. Poynting merely passed on a message for you ?— *A*. That is what he——.

Q. The message was there were some lines out at Borton's, would you go out and see what needed to be done ?—*A*. Yes, taken down.

Q. They did not know precisely what had to be done ?—*A*. Yes, they told me there was a tree to be lopped and the wires had to come down.

Q. You had to see what wires had to come down and from where ?— *A*. That is correct.

Q. I suppose you in your 20 years' experience as a linesman are familiar with the A.B.C. safety precautions about going up poles are you ?— *A*. Well I suppose average, the same as any other man.

Q. Would you agree that it is a reasonable safety precaution that an employee before ascending a pole which is subject to decay or deterioration shall satisfy himself that there is no danger of the pole collapsing ; if such danger exists the pole shall be effectively secured before an ascent is made ; do you agree with that as to what might be called the one of the A.B.C. or elementary safety precautions ?—*A*. I do.

Q. If there was any danger you make sure that the pole is secure before you go up it ?—*A*. I do.

Q. You actually have received written instructions along those lines from the Council haven't you ?—*A*. I have.

Q. You had a little book issued to you on safety instructions ?— *A*. I did.

Q. Which you signed for ?—*A.* I did.

Q. And, I take it, that you read through the instructions ?—*A.* I did.

Q. And adhered to them ?—*A.* I did.

Q. Was the precise instruction in the little book that you were given under the heading of " Soundness of Poles or Structures, No. 12 "—" No " employee shall ascend the pole or structure which has suffered visible " deterioration due to decay or which is visibly cracked or split to a degree " which might cause such pole to collapse until such pole or structure has " been effectively secured." You were aware of that instruction ?—*A.* I was aware of that.

Q. I suppose it has also been part of your duty over your 20 years of experience as a linesman to go out on inspections of poles ?—*A.* I have been that.

Q. On many occasions ?—*A.* No, on one occasion.

Q. On that occasion you paid particular attention to the pole—the series of poles, you did some others I suppose ?—*A.* I did.

Q. What did you do on that occasion when you went out and inspected all these poles ?—*A.* I was assisting the linesman then ; that was after the accident ; I was assisting the linesman after the accident——

Q. I am not concerned with that ?—*A.* That is the only time I have been on pole inspection.

Q. In all your 20 years ?—*A.* Yes.

Q. Have you seen inspections carried out ?—*A.* I have.

Q. Before ?—*A.* Yes.

Q. Have you seen what has been done at inspections ?—*A.* I have.

Q. What would normally be done at inspections ?—*A.* A man would do as I said ; tap all round and if he thought it was real hollow or if he thought there was a hollowness on it he would take a brace and bit and bore it and find out how hollow it was and then he would dig down 6 to 8 inches around the butt of the pole and examine that very carefully and if it was condemned he would chop a cross in the pole.

Q. You knew all that ?—*A.* I knew all that.

Q. When you went out to see this pole ?—*A.* I did.

Q. You had in mind that instruction that you were not to go up the pole if it looked in any way decayed ?—*A.* I did.

Q. When you went out to see this pole did you then look to see if it was deteriorated ?—*A.* I did.

Q. Or decayed in any way ?—*A.* I did.

Q. Did you give it careful inspection ?—*A.* I looked around the pole and tapped it with a hammer and in my opinion the pole was sound enough to go up.

Q. In other words it was a sound pole ?—*A.* In my opinion.

Q. So may I take it that if you had been sent out by the Council on this day to see if it was a sound pole and no other piece, that is the opinion you would have formed ?—*A.* No, I would have dug around the butt.

Q. Did not you tell me a little while ago that the normal procedure for inspection is to hit it and if there is no suggestion of hollowness or rottenness that is all right ?—*A.* Yes.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff). Cross-examination—*continued*.

Q. It is only if you hit a hollow ring or a sense of something wrong with it that you do the digging around underneath ?—*A*. That is correct, you dig round the pole if there is any doubt whatsoever.

Q. This pole when you inspected it, you carried out the first part of the operation and tapped it ?—*A*. I did.

Q. And you formed the opinion then there was no need to do the second part of the business ?—*A*. I had no tools to do it with.

Q. I asked you whether you formed the opinion whether it was unnecessary to do it ?—*A*. I did not. I did not that part of it.

Q. Did you think it was necessary to dig round the bottom or didn't you ?—*A*. I could only judge the top part of the pole out of the ground.

Q. I asked you did you consider it necessary to dig round the bottom ?—*A*. No.

Q. You did not consider it necessary ? So the fact is you had no tools had nothing to do with it, you did not consider it necessary ; is that right ?—*A*. Yes as far as I could see the pole was sound on the top.

Q. So you felt there was no need then to dig around or inquire about underneath ?—*A*. Underneath.

Q. A few inches underneath ?—*A*. No.

Q. No need at all ?—*A*. I did not think so.

Q. If you had been sent out by the Council for the purpose of inspecting this pole and to do nothing else you would have tapped it the way you did with the hammer all round ?—*A*. Yes.

Q. And having formed the opinion that it was a solid pole you would have passed on to the next one ?—*A*. No, I would not do that, not in a proper pole inspection. If a man was put on a proper pole inspection he was there to make positively sure that underneath the ground is secure for a man to climb up at other times.

Q. If you were exercising due care for your own safety would not you have been a wise man to have taken the additional precaution of digging a little bit underneath this pole ?—*A*. I had nothing to dig it with.

Q. Is that the reason why ?—*A*. That is one. The other was it was on other people's land.

Q. Was it, or in the garden ?—*A*. Lawn or grass I would call it.

Q. I suggest to you that it was—the pole was actually in the garden and the lawn ran up alongside it ?—*A*. It was 18 inches in from the fence at the edge of the grass I would say.

Q. So that you had a garden with ordinary garden soil around the base of the pole ?—*A*. Not all round.

Q. Substantially all round ?—*A*. One side of it.

Q. How did you get one side ?—*A*. The garden was here and this is the pole here and this is the lawn, all round three sides (*demonstrating*).

Q. That is the position was it not (*demonstrating*), the pole sticking up at the edge of the lawn ?—*A*. Yes, the white paper would be the lawn.

Q. If you wanted to you could have scooped round the sides of the pole and the garden, if you wanted to ?—*A*. I could have done with my hands but it is not the usual procedure.

Q. You have a truck there you take out whatever equipment you want ?—*A.* That is correct.

Q. You were in charge of the truck as a little unit ?—*A.* I was just sent by the leading hand.

Q. Once you leave the depot you go out as a team and you are the senior man in the team, you and Mr. Tulk ?—*A.* Yes.

Q. You were in charge of the vehicle and all the equipment ?—*A.* Not the vehicle.

Q. You told him where to go ?—*A.* Yes.

Q. He was under your instructions and you could take out whatever equipment you want ?—*A.* I could have, if it is there.

Q. Did you ask—was Mrs. Chisholm there when you went out there ?—*A.* I never saw Mrs. Chisholm.

Q. Or Mr. Borton, was he there ?—*A.* No, I never saw him. There was some man cutting the trees.

Q. Did it occur to you to say, " Have you got a bit of a spade " handy ? "—*A.* No, I did not.

Q. Because you did not think it was necessary ?—*A.* I didn't—I never made a practice of borrowing tools.

Q. Would you prefer to go up an unsafe pole rather than ask the householder if they had a garden spade handy ?—*A.* No.

Q. You would not ? I put it to you that, you did not really give the safety instructions full thought when you went out to do this job on this day, do you agree with that ?—*A.* No.

Q. You did give it full thought ?—*A.* I gave it to my opinion.

Q. You had been instructed well about the safety precautions ?—*A.* Yes.

Q. And 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.

Q. In the garden soil—you had a hammer ?—*A.* I had.

Q. Could you have scraped 6 inches round the base of the pole with the hammer ?—*A.* I could, but I would have disturbed the people's garden and I would soon be in trouble.

Q. For disturbing the garden ?—*A.* I think so.

Q. If you had a spade there you would not have dug around there because you would have been disturbing their garden ?—*A.* I would have gone and asked the people.

Q. If you were going to scrape round with your hammer you would not have gone and asked permission to ?—*A.* It is hard to dig round with a hammer, in my opinion you could do it but not with satisfaction.

Q. So you took the risk did you ?—*A.* No.

Q. If you did not take the risk of going up the pole, why didn't you scrape round it ?—*A.* I did not know that the pole was faulty underneath the ground.

Q. You never took any steps to find out ?—*A.* I have no tools to do it with.

In the Supreme Court.

No. 2. Transcript of Evidence, 14th September, 1953.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff). Cross-examination—*continued.*

Q. That is your only reason ?—*A.* I did not have the equipment.

Q. If you had been made foreman is that the way you would have instructed your men to work ?—*A.* No.

Q. Not if you had been made foreman ?—*A.* No.

Q. I suppose you would have instructed them if they did not have the right tools never to take risks but to go and get them ?—*A.* No.

Q. Would not that have been a wise instruction ?—*A.* I would have gone and seen the Engineer and had things differently to what they was.

Q. Why didn't you on this occasion ring up the engineer or go back—you had a truck—go back and say, " I want some further tools for this job." Why didn't you do that ?—*A.* I did not know you could do anything, the pikes were 3 miles away, and it has never been a practice for anybody to ring up the engineer, in my opinion, I have never known a linesman to ring up the engineer.

Q. Do you say you prefer to take risks than to ring up the engineer ?—*A.* No.

Q. Did you feel when you went up this pole you were not going up as safely as you should—did you feel tnat ?—*A.* No.

Q. By reason of the lack of equipment ?—*A.* No, I thought it was safe after I tapped it.

Q. Even if you had pikes there they would not have entered into the picture ?—*A.* I would still have used them.

Q. Were you going up poles replacing light globes earlier in the day ?—*A.* I was.

Q. Did you use pikes on those poles ?—*A.* We have never been supplied with pikes for street lights.

Q. I suppose you would inspect all the poles before you went up them ?—*A.* Roughly the same as I did on this occasion.

Q. I suggest to you that pikes are not used on these types of jobs unless the pole is obviously dangerous ; I suggest to you that pikes are only used when you are putting up new poles or taking out old ones ?—*A.* They are always used on all occasions whatever you are doing.

Q. In this Council ?—*A.* Yes, in the Lismore Council.

Q. I suggest to you that the pikes are usually with the construction gangs ?—*A.* Yes, that is correct.

Q. The gangs are putting up poles or taking poles out ?—*A.* That is correct.

Q. And that is the normal equipment when you are handling poles like that ?—*A.* That is.

Q. For going up ordinary poles to change globes or for the purpose of removing wires you do not normally ever have pikes with you ?—*A.* Not in the Council.

Q. And for 12 years that was the position ?—*A.* That was the position.

Q. So pikes never entered your head on this occasion, is that right ?—*A.* They did.

Q. Did they enter your head—how many poles had you gone up earlier that day for the globes ?—*A.* Probably about roughly a dozen or 15. I would not like to be certain of the number.

Q. Did you use pikes on those poles ?—*A.* There was none.

Q. You left at 8 o'clock in the morning to go out on that job ?—*A.* That is correct.

Q. Had you ever used pikes when you were doing this job, changing globes ?—*A.* Yes, if I thought the poles faulty.

Q. You would only use pikes if you thought the poles 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.

Q. Did you tell His Honor and the gentlemen of the jury that you cut the live wire or the red wire on both sides before you went to the neutral one ?—*A.* No, across the street on the convent side of the footpath I deadened both wires, took it off the line, also the neutral wire, dropped them both down in the ground, cleared the street for traffic and then went over to the other pole and was then——

Q. You has taken the two wires off the pole which was going across the street ?—*A.* That is correct.

Q. They had been released on the far side of the street ?—*A.* Yes.

Q. And they had fallen to the ground ?—*A.* And been cleared for traffic.

Q. When you were up the pole did you lean against the wires that were then attached from the pole to the house—did you put your ladder on that side of the pole or did you put it on this side ?—*A.* I put it on the other side.

Q. Are you sure that you cut the neutral wire across the other side of the road ?—*A.* I am positive, pulled the wires, I took them and dropped them both down.

Q. On the far side of the road ?—*A.* Yes.

Q. How many times did you say you hit the base of this pole to test it ?—*A.* Three or four times round like that (*demonstrating*).

Q. With the hammer ?—*A.* Yes.

Q. Did you get a solid ring ?—*A.* Quite solid enough, I mean on the average on what you get on any average pole.

Q. Didn't this pole appear to you to be a pretty old one ?—*A.* It did.

Q. It did appear to be subject to decay ?—*A.* No.

Q. The pole is still out there ?—*A.* It is still out there.

Q. When did you last have a look at it ?—*A.* I have had a few looks at it.

Q. When did you last look at it, a few days ago ?—*A.* Yes, I have measured and looked at the pole.

Q. The pole looks very much in the same condition today ?—*A.* Oh no, it does not.

Q. Does it look more deteriorated ?—*A.* Yes. It is two years and eight months since that fall.

Q. Will you agree that when you went out and had a look at it there was decayed sapwood on the outside of it ?—*A.* Very little sapwood.

Q. To all intents and purposes if you had gone out to do an inspection

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff). Cross-examination—*continued.*

you would have regarded this as a reasonably good pole ?—*A.* I would still have to tap round the pole to make sure.

Q. You would still have regarded it as a reasonably good pole ?—*A.* Reasonably, yes.

Q. There has been a recent reconstruction of the electricity undertaking in this city—in 1952 there was a reconstruction from the Northern Rivers County Council ?—*A.* Yes. They took over the electricity undertaking.

Q. You transferred from the Lismore Council to the Northern Rivers along with all the other staff ?—*A.* Yes, correct.

Q. Were not you taken on by the Northern Rivers County Council as a linesman ?—*A.* No, I was an assistant linesman when they took over.

Q. You were taken on as—— ?—*A.* Assistant linesman, I was helping in the store.

Q. You are still classified at present as assistant linesman ?—*A.* No, tradesman's assistant I am now.

Q. Is that the same rate as a linesman's assistant ?—*A.* The same rate as assistant linesman.

Q. You told my friend that your back sometimes gives you a bit of trouble still ?—*A.* Gives me trouble.

Q. I suggest that you saw a Dr. Woodlands in Sydney and did you tell him, in July, 1951, that your back was fully recovered except that it feels stiff during wet weather?—*A.* At that time I thought——

Q. In July, 1951, six months after the accident you told the doctor that you fully recovered except that it feels stiff in wet weather ?—*A.* At that time, yes.

RE-EXAMINATION

Re-examination.

Mr. PILE : I want you to clear this up for us. I think you said to my friend first of all that you invariably did, it was the practice, to have pikes when you went out. You made a test and put the pikes up when you were changing globes ?—*A.* Yes.

Q. I think you rather suggested later that you did not invariably use pikes when changing globes or wires, unless the pole was faulty ? Or unless the pole appeared faulty ?—*A.* Yes, unless it appeared to be faulty.

Q. But when you were changing globes if the pole appeared sound it was not usual to use pikes ?—*A.* That is correct.

Q. My friend asked you whether you did not know certain instructions about tests to make and so on. Had you ever been around either doing yourself an inspection of poles for the purpose of exclusively making an inspection for soundness, before the accident ?—*A.* No, not officially.

Q. Have you ever been instructed to do it ?—*A.* No, never been instructed.

Q. What instruction did you get ? My friend asked you about instructions on testing, did the Council give you any instructions, show you or tell you what you should do ? Before a pole was climbed for the purpose of, say, changing the wires ?—*A.* No, the Council itself has never given us any instructions until we were issued with these books after my accident. Those books were issued after my accident.

Q. Leaving out what you were told after the accident, did you receive any instructions of how to go about it from the Council before ?—*A.* Never at any time.

Q. As far as you are concerned have you ever had any training from the Council, or apart from the Council, in detecting defects and rot in wood ?—*A.* I have, from men with more experience than myself.

Q. What you picked up from the others with more experience in the service ?—*A.* Yes.

Q. Did you get any instructions before this accident about the safety precautions that had to be taken with regard to possible defects in poles ?—*A.* None at all.

Q. As far as the appearance of poles is concerned, you were asked if it appeared to be possibly decayed or possibly deteriorated, I think my friend used to you, what was the appearance of the pole to the eye ?—*A.* To the eye the pole seemed to me to be what we call a three-grain pole. That it it has got little cracks right up it, which you get a lot of them, and they are perfectly sound although they have these cracks of the grain of the wood. Three-grain you call them, and I tapped the pole and as I tapped it it was, I thought it was, safe and the pole was quite safe.

Q. " It sounded " I think was the way you put it. You formed an opinion it was sound ?—*A.* Yes.

Q. Did you see any evidence in it of dry rot ?—*A.* No I did not.

Q. You were examined, I think, on behalf of the Council by one of their doctors, were you not ? Drs. Lennox, Teece, and Nicholls of Sydney, who examined you on behalf of the Council ?—*A.* They have.

RE-CROSS-EXAMINATION.

Re-cross-examination.

Mr. BEGG : Did I understand you just to say that the books were only issued after your accident ?—*A.* That is correct, I never received——

Q. Have you got a good memory ?—*A.* An average memory.

Q. I thought you told me that you did receive instructions before the accident, when you were giving your evidence to me ?—*A.* Received instructions only from the leading hands.

Q. From leading hands ?—*A.* That is all.

Q. The same instruction as appears in the written book that I read to you ?—*A.* Yes, something similar to that.

Q. Similar to that ?—*A.* Something similar to that.

Q. Whether you got the book before or after you knew the contents of it was safety precautions. An A.B.C. safety precautions ?—*A.* I knew a safety precaution.

Q. (*Document handed to Witness.*) Is that your signature ?—*A.* Yes.

Q. " Received handbook of regulations and first-aid." That is the book we have been talking about, is it not ?—*A.* That is right.

Q. What is the date of your signature ?—*A.* The 8th December, 1950.

Q. That is the date you signed for this book is it not ?—*A.* Yes, I never received that book until after the accident.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(1) George Fraser (Plaintiff). Re-cross-examination—*continued.*

Q. The 8th December, 1950, of course, is the year before this accident took place ?—*A.* Yes.

Q. Do you say that you got the book on the day you signed this document ?—*A.* I am not too sure. I do not even remember signing any document. In fact the book is not signed at home yet.

Q. But you have no doubt that is your signature I have shown you on the back of the document ?—*A.* That is my signature.

Q. Might I show you another signature on the front of it. Is that your signature on the front of the document I show you ?—*A.* It is. That is my signature.

Q. And that is dated 31st October ?—*A.* Yes.

Q. On the front ?—*A.* Yes.

(Document tendered, m.f.i. " 1.")

Q. What I read out to you and asked you to agree with was clause 12 (*approaches Witness with booklet*) ?—*A.* Yes, that is correct.

Q. That is the one. You read that now. That is the one that I asked you about before ?—*A.* Yes.

Q. And that appears in the booklet that was issued to you ?—*A.* Yes.

(Booklet m.f.i. " 2.")

(Witness retired.)

(2) Dr. N. E. Brand. Examination—

(2) Nugent Elliot Brand.

Sworn, examined, deposed :

To Mr. PILE : My full name is Nugent Elliot Brand. I am a duly qualified medical practitioner, practising at Lismore. The Plaintiff is a patient of mine.

Q. Right from the beginning ?—*A.* Quite so.

Q. You saw him in hospital when he was taken in there ?—*A.* Not when he originally went into the hospital. I was away at that time, but shortly afterward.

Q. You saw him within a few weeks of the accident ?—*A.* Yes.

Q. Have you been seeing him since from time to time ?—*A.* Yes.

Q. What injury did he suffer ?—*A.* He suffered two fractures, one was a compression fracture of the first lumbar vertebra.

Q. What does that mean ?—*A.* That means a fracture of one of the bones of his back in about the region of the small of the back.

Q. What does the compression ?—*A.* That means that the bone was compressed, pushed together.

Q. What else ?—*A.* A compression fracture of the heel bone of the right foot.

Q. I used the word " os calcis." Would that be right ?—*A.* That is true.

Q. What is that ?—*A.* That is the bone of the heel.

Q. The one you walk on ?—*A.* Yes, the one you walk on.

Q. First of all, he was away from work until October ?—*A.* Yes.

Q. The accident was in January, do you remember ?—*A.* That is so.

Q. In your opinion was he fit to work before then ?—*A.* It depends what you mean by work. He was not fit to do the work that he had been doing.

Q. When was he fit to do any work in your opinion ?—*A.* Of what nature ?

Q. Any sort of work involving work doing 40-hours a week, five days a week ?—*A.* Manual work ?

Q. Manual work ?—*A.* I would say he was fit in October to do that.

Q. Will you tell us what you think the effect of the accident to be on his back ?—*A.* I think that the effect of his back is manifest now as to what it will be in the future. Although the fracture has healed and I do not think from the fracture myself he is getting any great disability, because of the nature of the injury he is getting back pain related more to aggravation of arthritis in his back and disturbance of the ligaments of his back, from that injury.

Q. You mean that he had then, before this accident arthritis in the back ?—*A.* Yes, on the original X-rays there was evidence of arthritis in the back at the time of the injury.

Q. Was that normal for a man of his age ?—*A.* Yes.

Q. Up to that time, a man of 57, normal of his age ?—*A.* Yes.

Q. Did you get a history from him whether he had complained of back pains ?—*A.* He had not complained of back pains before that.

Q. What was the history after that ?—*A.* Briefly I think you could class it as an increase or bringing forward that he would have had in years to come from the arthritis in his back, produced first of all, by the compression and secondly by disturbance of the joint surfaces by that compression.

Q. By how many years do you think those symptoms were advanced, as far as you can say ?—*A.* Well, it would only be a guess. I could not say exactly. I would say that in the normal course of events he may not have expected to get any back pains for 10 or 15 years.

Q. Having had that back pain come on 10 years or 15 years in advance, what is his future, is it going to get better or worse or stay the same ?—*A.* That will depend on what use he makes of his back.

Q. Assuming he just makes normal use of it and avoids excessive lifting ?—*A.* He won't have a great increase in his symptoms but I think there will be some increase over the years.

Q. Can it get better ?—*A.* No.

Q. No matter what he does ?—*A.* No.

Q. That means he is going to have back pain more or less severe as time goes on ?—*A.* True.

Q. For the rest of his life ?—*A.* I would say so.

Q. Is that all you can tell us about the back and its effect on the future ?—*A.* Yes, I think so.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(2) Dr. N. E. Brand. Examination — *continued.*

Q. Now, can we deal with the heel. What is its position ?—*A.* Well, this partiular type of fracture never gives a good result. The patient was seen by two specialists in Sydney, I think in 1951.

Q. Just tell us your own views, will you ?—*A.* His result is better than average but that does not make it a good result. He would always have pain in the heel with long standing and he will always have pain in the foot if he has to walk over uneven surfaces.

Q. So far as the heel is concerned is the state of injury like that ever affected by arthritis developing from it ?—*A.* I think he will develop arthritis in the sub-taloid joint. That particular joint is the joint between the os calcis, the heel bone, and the bone which articulates with the leg bone. It has two surfaces and in walking on uneven ground that is a certain rocking movement at that joint and because of the shock of the joint surfaces he will get arthritis there.

Q. You say " will " positively. That is your view, is it ?—*A.* I would say so, yes.

Q. When he gets arthritis there how will that affect him ?—*A.* It will make the bone in the foot worse.

Q. Is that subject to the same future as arthritis in the back ? Never get better, can get worse ?—*A.* It will certainly not get better.

Q. It can get worse with it ?—*A.* Yes.

Q. Had he had any accident at all at the heel, doctor, would the ankle become the site of arthritis necessarily ?—*A.* There is no evidence to suggest that it would, no.

Q. Arthritis from the heel is different causation from the arthritis in the back ?—*A.* That is right. There is no evidence to suggest that he should ever have developed arthritis at the heel.

Q. So far as work as a linesman is concerned, I think you know what is involved in that ?—*A.* Yes.

Q. Could he do that work ?—*A.* He would not be able to do that again.

Q. What would you say as to his fitness for work in future is ?—*A.* I would say that he could do manual not involving bending, the lifting of heavy weights or walking on uneven surfaces or long standing.

Q. I think you rendered an account of your treatment to him ? (*No reply.*)

Mr. BEGG : I am prepared to make this formal admission. I am not stating that the Defendant Council is obliged to pay any part of that account but I agree that it is a reasonable figure if the Council were required to pay.

CROSS-EXAMINATION.

Cross-examination.

Mr. BEGG: *Q.* This arthritis that you speak of in the back, that is a type of thing that sometimes pains and sometimes does not ?—*A.* That is so.

Q. It is intermittent ?—*A.* Not quite that interpretation. You could have two patients with identical X-rays of their back, showing what we believe to be osteoarthritis, one of them suffering from pain and the other not doing so.

Q. Is the history you have got from this patient that he always had pain ?—*A.* What do you mean by always ?

Q. Not intermittent. That is since the accident ?—*A.* No, he does not always have the pain.

Q. I mean, it goes away and is away for some period ?—*A.* That could be so, yes.

Q. Did you see him in July, 1951, about July, 1951 ?—*A.* (*Witness permitted to refer to notes*). Yes, I did.

Q. Now, he has agreed with me that at that date he stated that his back was now fully recovered except that it felt stiff during wet weather. He has agreed with me that that was the position of his back as at 19th July, 1951 ?—*A.* Yes.

Q. Now that indicates does it not that this arthritis was the type of arthritis which there might be long periods of pain-free and then it would get a flare-up and pain for a while and then subside again ?—*A.* There is only one point there, that in July, 1951, he had not returned to any laborious work.

Q. But you will agree with me it indicates it was that type of arthritis. It was likely to have long periods pain-free ?—*A.* In a general sense yes.

Q. And providing he did not indulge in work which would aggravate it there is no reason to believe that it should not continue in that way ?—*A.* Yes, I think the important thing there is the work which might aggravate it.

Q. So that if he refrains from lifting very heavy weights or matters of that, heavy laborious work, then that is the type of thing that might excite it and make it painful ?—*A.* Yes, it will.

Q. You have expressed a view that this arthritis when you saw the X-rays was well marked at the time when he was initially X-rayed ?—*A.* Marked enough to be recognised on the X-rays, yes.

Q. It was well marked, was it not ? Do you remember the X-ray findings ?—*A.* I think there was a report of moderate osteo-arthritis in the spine.

Q. He was over 50 then. 54 to 55 years at that stage ?—*A.* Over 50.

Q. And doing laborious work ?—*A.* Yes.

Q. It was likely at any time that he would start getting a painful back ?—*A.* That is a supposition, yes.

Q. It is just as good a supposition as your other one about 10 or 15 years, is it not ?—*A.* True. I made that point when I gave you the estimate.

Q. Yours was a guess when you made that 10 or 15 years estimate ?—*A.* I should think yours was, too.

Q. I have science on my side. When you get a moderate development of spondylitis or oster-arthritis visible on the x-ray at the time an accident happens you know scientifically that if he then starts indulging in heavy work it is probable he is going to develop a painful back ?—*A.* Yes.

Q. So science is on my side to that extent, is it not ?—*A.* Yes, I think there is a little play on words there. I will say yes.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(2) Dr. N. E. Brand. Cross-examination—*continued.*

Q. I want you to be frank about it doctor. If you think I am putting something to you that is not right, you let us know ?—*A.* I would say this, sir, that the symptoms that he is getting from what we shall call the osteo-arthritis in his spine now is affected very considerably by alteration of joint surfaces which were osteo-arthritic before the injury, yes, but with the alteration of the knuckles of those joint surfaces interference with the ligaments which hold the bones together, he will get pain.

Q. He is more prone now ?—*A.* Much more prone.

Q. But, on the other hand, I put to you if this accident had not happened it is also probable that engaging in heavy manual work he was likely to develop a pain in the back ?—*A.* Yes, I will agree with you there.

Q. That is what I wanted you to agree with doctor, without any play on words ?—*A.* Yes.

Q. The X-rays of which we have spoken were X-rays taken when seen after the accident had taken place ?—*A.* Yes.

Q. And then they showed arthritic changes ?—*A.* Yes.

Q. And you know scientifically again that such changes take a great number of years to develop. They could not have developed by the accident itself, could they ?—*A.* Oh no. No.

Q. So we are quite clear that the arthritis that he had when the X-rays were taken was existing arthritis at the date of the accident ?—*A.* Most certainly, yes.

Q. One other thing to make abundantly clear. This break, or compression fracture of the lumbar vertebra was not a break through and through in the sense that there was any interference with the spinal column or the nerves ?—*A.* No, there was no interference with the nerves at all.

Q. It was not what one gets with a broken back in that there is a break through and through and the number of the lumbar vertebræ nor interference of the spinal void and spinal nerve ?—*A.* The same thing can occur in this particular type.

Q. In this case it was not such a fracture ?—*A.* I do not like the word " broken back " that you have used there.

Q. I do not like it either. This is not a broken back in the ordinary sense of the word where a man is paralysed by interference with the nerves of his spine ?—*A.* No, there was no interference of the nerves of the spine at all.

Q. You said this result Mr. Fraser has received in the union of the fracture is better than average ?—*A.* Yes.

Q. Will you agree with me that if he was to wear a rubber pad underneath his heel that he would get an alleviation of symptoms ? Would you recommend that ?—*A.* No, sir . . . He wears a special type of shoe now. An extension of the heel, which is the only way that he is able to comfortably use his foot.

Q. Did you design that for him ?—*A.* No, I think it was designed in Sydney.

Q. He has the specially designed pad which makes it comfortable for him to walk ?—*A.* More comfortable, yes.

Q. For normal walking around ordinary surfaces like roads and streets you do not anticipate any trouble with the foot. It is only if he has to walk on the uneven broken surfaces or out in the country or something of that nature ?—*A.* Yes, anything that will make the bone roll one on the other. I think if he walked all day, I think there is reasonable assumption he would have some pain in the foot at night.

Q. With this complaint of pain by the patient for an injury of this nature, the doctor is not able to feel the pain himself ?—*A.* No he is not.

Q. When the patient says that he is getting pain in this area the doctor has to take his word for it ?—*A.* He takes it more or less knowing the patient, yes.

Q. And the extent of pain that he suffers is known only to the patient. The doctor cannot scientifically determine what pain he gets or what pain he does not get ?—*A.* No.

Q. You have to rely on his word ?—*A.* Partly on his word and partly by knowing the patient himself and in this case I had that opportunity previously.

Q. Had you attended him before ?—*A.* Yes, I have.

Q. He is a bachelor, is he ?—*A.* Yes.

Q. And he had had a fall before, had he not ?—*A.* That was in 1948.

Q. In 1948 ?—*A.* Yes.

Q. And again he had injured his foot ?—*A.* No, not his foot, the fibula of his right leg. That is the small bone on the outside of the right leg.

Q. Was that a fall from a pole ?—*A.* I do not think so. All I have here is that he had an adduction injury to the right ankle at work, which means that his foot turned in.

RE-EXAMINATION.

Mr. PILE : *Q.* I think my friend may have left a misconception. You said that in the X-rays there appeared to be changes in the bones which you say were arthritic in nature before the accident occurred ?—*A.* They must have been there before the accident.

Q. After the accident the X-ray picture would appear to be much the same as that was ?—*A.* Yes.

Q. As one taken before, if one had been taken ?—*A.* Yes.

Q. Although it does not appear differently, the difference is that before it gave no symptoms but afterwards it gave symptoms of pain due to the accident ?—*A.* That is so. He never made complaint of pain before and he does since.

Q. I think on the basis ot you being a medical adviser and knowing him you might be able to assist whether you would accept that statement ? (*Objected to : rejected.*)

Q. Is it necessary for them to have physiotherapy as part of the treatment ?—*A.* Yes, I think it was for six weeks after he went from hospital he had physiotherapy.

(Witness retired.)

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(3) M. Tulk Examination

(3) Milton Tulk.

Sworn, examined, deposed :

To Mr. PILE : My full name is Milton Tulk, I am staying at 72 Victoria St., Lismore.

Q. I think you were employed as a labourer or linesman's assistant from some time in early 1950 until you left in October, 1951 ?—*A.* I was made a linesman in January, 1951.

Q. Linesman in January, 1951. You became linesman in 1951, is that it ?—*A.* That's right.

Q. Were the other dates I gave you correct. Altogether, how long were you with the Lismore Council ?—*A.* Approximately 19 months.

Q. And for 10 months of the time you were a linesman yourself ?—*A.* Yes.

Q. Before that you were assisting Linesman Fraser, the Plaintiff in this case ?—*A.* Yes.

Q. And you went out with him as assistant to do the job of taking the wires down in Borton's place, did you not ?—*A.* Of the service, yes.

Q. When you got out to the job there did you see what he did, what Mr. Fraser did ?—*A.* I was with him most of the time.

Q. You were with him most of the time ?—*A.* Yes.

Q. Were you there when he did anything about taking the wires down across the road ?—*A.* He deadened the wires and dropped them from the Cathedral side of the road and then proceeded across to the service.

Q. He deadened the wires at the Cathedral side of the road, dropped them on the ground and then came over to the Borton side of the road ?—*A.* Yes.

Q. And then what did he do ?—*A.* He tested the pole wires and I put the ladder up for him.

Q. You brought the ladder over yourself. You carried the ladder ?—*A.* Yes.

Q. What was the first test that he did if he did any test ?—*A.* He hit the pole with the hammer.

Q. Can you tell us anything more about that. I want you to have in mind whether he did it once or more ?—*A.* I say he struck it two or more times. Say, several times.

Q. Then what did he do ?—*A.* I put the ladder up for him.

Q. You put the ladder up ?—*A.* Yes, and he tested the ladder before he went up.

Q. He put the ladder up against the pole ?—*A.* I put the ladder up against the pole for him and then he got on the ladder and tested it by shaking it.

Q. He shook the ladder ?—*A.* Yes.

Q. What happened after that ?—*A.* He proceeded to mount the ladder and belted on. He dropped one wire, that was the negative wire with the line over, untied the other wire, and he started to undo the tie and from then the pole it just seemed it went.

Q. The pole went down ?—*A.* It went down.

Q. Before you took on that job yourself as linesman's assistant had you ever had any experience of that kind before, dealing with poles ?—*A.* The only practical experience I would say was on the farm fencing.

Q. I mean of the electrical poles, on the lighting poles around the street ? Did you have anything to do with them ?—*A.* No.

Q. But in the short experience you had with them were you able to tell anything about the pole from the test he performed by hitting it at the base ?—*A.* You could surmise from the sound, a fair idea what the condition of the pole would be.

Q. I am speaking of yourself. You formed an opinion did you when you heard him hit the hammer ?—*A.* Yes.

Q. What did you think about the pole ?—*A.* It sounded quite sound.

CROSS-EXAMINATION.

Mr. BEGG : *Q.* This pole was in a garden was it not ? The base of it in the garden ?—*A.* Inside ?

Q. Inside the fence in a garden about 18 inches from the fence ?—*A.* Yes.

Q. In the garden ?—*A.* I would say it was surrounded by grass.

Q. That is your recollection is it, that it was surrounded by grass ?—*A.* Yes.

Q. Did you see Mr. Fraser dig around the base of the pole ?—*A.* No, he did not dig around the base of it.

Q. He did not dig around the base of the pole ?—*A.* No.

Q. I am suggesting to you that your recollection of the pole being in the grass was wrong. I am suggesting to you that the pole was in a garden at the edge of the lawn. Do you agree with that ?—*A.* I would say that the grass was around it.

Q. Around it ?—*A.* Yes.

Q. Would you say that the pole was in the lawn ?—*A.* Yes.

Q. That is your recollection, is it ?—*A.* Yes.

Q. I am suggesting to you that if this white piece of paper that I hold up, that that is the edge of the lawn and the pole is like that ?—*A.* I would say it was in the lawn itself.

Q. You would say it was in there like that (*demonstrating*) ?—*A.* Yes.

Q. How far back from the edge of the garden and the lawn would you say was the pole ?—*A.* I would say about 18 inches from the fence.

Q. Do you say the lawn was right up to the fence ?—*A.* I could not recollect that.

Q. How far was the pole in from the edge of the lawn ?—*A.* I am afraid I could not tell you.

Q. You could not tell me ?—*A.* No.

Q. Don't you think your recollection might be a bit astray as to whether or not the pole was in the lawn or in the garden ?—*A.* I remember there being grass around the pole.

Q. You remember ?—*A.* I remember there being grass around the pole.

Q. That is the lawn grass ?—*A.* Yes.

Q. Are you sure of that ?—*A.* Yes.

Q. And how much lawn are you sure was around the pole ?—*A.* I could not say.

Q. Are you sure how many times he hit the butt of the pole?—*A.* I never counted them.

Q. How many times do you think he hit ?—*A.* I would say several times.

Q. What do you mean by several times ?—*A.* About two or three times.

Q. About two or three times ?—*A.* Yes, it could be more.

Q. Whereabouts did he hit ?—*A.* Roughly about between 6 inches and the base of the pole, round about that height. I was standing behind him when he did that.

Q. You were standing behind him ?—*A.* With the ladder.

Q. Did you have the ladder up in the air ?—*A.* I had the ladder standing on the ground. It was not extended. I was holding it ready to put up.

Q. He was bending down in front of you ?—*A.* Yes.

Q. And you could not see where he hit the pole ?—*A.* No.

Q. And he hit it and then stepped aside and you put the ladder down ?—*A.* Yes.

Q. That is all he did, is it ?—*A.* When the ladder was extended he said " It seems to sound O.K." He said " Extend the ladder and I will test it," and he shook the ladder.

Q. Tell us what he looked like when he was bending over tapping the pole. Was he leaning forward, a bit stooped, or what angle was he standing at ?—*A.* I would say he would be a bit stooped.

Q. A bit stooped ?—*A.* Yes.

Q. And he stood in the one position with the hammer ?—*A.* No, he moved.

Q. You say that he moved ?—*A.* Yes.

Q. Where did he move ?—*A.* To the left, to the bottom side of the left.

Q. What did he do when he went round there ?—*A.* Hit it again there.

Q. So he only hit it on one side and went round the back and hit it from the other side, is that right ?—*A.* He could have hit it from the other side, but I was not watching all the time.

Q. You did not see him hit it from the other side ?—*A.* No.

Q. You were not watching all the time ?—*A.* No.

Q. You were not paying much attention to what he was doing ?—*A.* Yes, I was concerned with getting the ladder up, to put it up for him.

Q. Were ropes on the ladder for the extension ?—*A.* Yes.

Q. You would be concerned with your ladder ?—*A.* Yes, but not all the time, because I was not ready to put it up.

Q. You said you were not watching him all the time ?—*A.* That is right.

Q. What were you watching on other occasions, or doing on other occasions ?—*A.* Had a look to where the ladder was——

Q. You could not say accurately what he did round the base of the pole ?—*A.* I could see that he hit it, yes.

Q. Two or three times ?—*A.* Yes.

Q. On that do you say that you could really venture an opinion as to what the pole sounded like ?—*A.* If it was not sound he would not have passed it——

Q. You were asked to express an opinion yourself, as I have understood you have done so, that in your opinion it was a sound pole. Did you mean to say that ?—*A.* Yes.

Q. Did you mean to say that ?—*A.* Yes.

Q. You expressed the opinion it was a sound pole because you heard him—although you were not watching him all the time—you heard him tap it two or three times ?—*A.* Yes.

Q. On that you are prepared to express the opinion that it was a sound pole ?—*A.* No, not alone on that but putting up the ladder and testing it that way too.

Q. Would you describe the pole to me, did it look like a new or old pole ?—*A.* No, I would say it would be an old pole ; it looked like an old pole.

Q. Why did it look like an old pole ?—*A.* Everything had to age.

Q. Why did you consider this was an old pole, what signs were there ?—*A.* It had the appearance of being old.

Q. With a bit of rotted sapling on the outside—— ?—*A.* It looked old.

Q. Why did it look old ? Did it have bits of decay round it ?—*A.* No.

Q. What other signs of oldness were there ?—*A.* The timber looked old.

Q. Was it split ?—*A.* There would be small splits in it.

Q. Cracks ?—*A.* I would not say cracks.

Q. What do you mean by splits, you mean long cracks ?—*A.* No, rather small lines.

Q. Was that the only thing you had that made it look as if it was old ?—*A.* Also the cross-arm and the two metal supports from that.

Q. How old would you think it looked as you looked at it ?—*A.* I could not form any opinion on that.

Q. You were a linesman ?—*A.* Not at that time, no.

Q. You did 10 months as a linesman. Casting your mind back to the experience you now had how old did the pole look ?—*A.* I'm afraid I could not tell you.

Q. Did it have weather deterioration about it ?—*A.* From what I saw on it I do not know how exactly to describe that.

Q. You know where a wood gets scarred with the weather and bits decay out ?—*A.* It looked like solid wood although it had aged and looked rather shiny.

Q. When the pole went down would it go slowly or quickly ?—*A.* The minute it—it started slow and finished up fast ; started to go slow and seemed to go with a rush.

Q. Did you have a look at the pole after it had broken ?—*A.* I glanced at the bottom of it.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(3) M. Tulk. Cross-examination—*continued.*

Q. It had broken off about earth level ?—*A.* No, I would say it would be down in the earth about 10 inches.

Q. That is judging by the earth mark on the pole ?—*A.* By the earth mark on the pole and also by one sign of the earth—by one side of the earth that is still there ; that was there.

Q. Is that what you mean, it was broken off about 7 to 10 inches underneath ?—*A.* Yes.

Q. You had been working under Mr. Fraser ever since you joined the Council or substantially the whole of the period ?—*A.* I had been with him different times.

Q. Been out with him on inspections of poles ?—*A.* No, I have never been on the pole inspection.

Q. I suppose you have seen them on pole inspection, have you ?—*A.* Not to my recollection.

Q. You had been going up—do you remember what you were doing that morning ?—*A.* We had street-light lamps—we were doing street lights, replacing globes that had been blown.

Q. And going up the poles for that purpose ?—*A.* Mr. Fraser was.

Q. Did he take the same precautions at each of these poles ?—*A.* Some of the lamps were in the middle of the street.

Q. The ones that he was going up did he in fact knock all of them with the hammer ?—*A.* No.

Q. He did not knock all of them ?—*A.* No.

Q. Did he just look at some of them ?—*A.* He looked at them.

Q. They looked all right ?—*A.* He put the ladder up and tested them that way.

Q. Was that the main test he was using, to put the ladder against them ?—*A.* Not all the time, he used that in conjunction.

Q. Some of the poles that he climbed up that morning he did not bother to hit ?—*A.* Yes.

Q. You mean no, that he did not bother to hit them ?—*A.* Yes.

Q. Where did you leave from on this particular job ?—*A.* Left from the depot in Carrington St.

Q. Were you driving the truck ?—*A.* Yes.

Q. And loaded with your equipment was it ?—*A.* We had ladders yes.

Q. What equipment did you have in the truck ?—*A.* We had the ladders the lamps and the tool kit.

Q. You left from the store did you ?—*A.* In Carrington St., yes.

Q. Did he collect any gear before he went ?—*A.* No.

Q. Just used the same gear he had in the morning ?—*A.* Yes.

Q. Did you see a shovel in the truck ?—*A.* No.

Q. You did not see it ?—*A.* No.

Q. Would you swear there was not one there ?—*A.* Yes.

Q. You will swear there was not one there ?—*A.* Yes.

Q. Did somebody else ask you before you went into the witness box whether or not there was a shovel or is this the first time anybody has inquired of you whether there was a shovel ?—*A.* No.

Q. Somebody else has inquired about that ?—*A.* Yes.

Q. Before you came into the box ?—*A.* Speaking to——.

Q. You say there was no shovel in the kit ?—*A.* Yes.

Q. Because I suppose you realised that it would be a safe practice to dig round the base with the pole which looked obviously old before you went up ?—*A.* It would be, yes.

Q. It would be a safe procedure ?—*A.* Yes.

Q. Which side of the pole, the street side or the house side ?—*A.* Towards the house and a little to one side.

Q. The ladder was inside Mr. Borton's property ?—*A.* Yes.

Q. As the pole was, of course ?—*A.* Yes.

Q. And put up on which side as you look at it, facing the pole, on the left or the right ?—*A.* Facing the pole from the house side, I would say a little to the left.

Q. How far to the top of the pole did the ladder—did you place the ladder ?—*A.* To the bottom of the arm braces.

Q. I suppose you have been out with Mr. Fraser on many occasions gathering up poles for this type of job ?—*A.* We did a few fair connections.

Q. Connections and disconnections ?—*A.* Yes.

Q. You always took the same equipment with you as you took this time ?—*A.* It all depends, whether we were with the rest of the other gangs or not, with the other trucks.

Q. When you went out by yourselves you and Mr. Fraser on other jobs you took this equipment that you had this day ?—*A.* If the other was available we had it, yes ; if other equipment was available we took that.

Q. Did you hear Mr. Fraser ask anybody at the depot before he left for other equipment ?—*A.* We had a look around in the yard——.

Q. Did he ask for it ?—*A.* Yes.

Q. Whom did he ask ?—*A.* He asked Mr. Poynting.

Q. For other equipment ?—*A.* Yes.

Q. What other equipment did he ask for ?—*A.* For some pikes.

Q. Quite sure of that ?—*A.* Yes.

Q. You heard him say to Mr. Poynting, " We want some pikes " ?—*A.* I was in the truck when he said it.

HIS HONOR : *Q.* You were asked did you hear him say it and you said you were in the truck ; you mean that you were in the truck and you could not hear it ?—*A.* No, I was sitting in the truck.

Q. Did you hear him ask Mr. Poynting for pikes ?—*A.* Yes.

Mr. BEGG : *Q.* When you had been shinning up the other poles that morning changing the globes, did you have pikes with you then ?—*A.* No.

Q. You normally never had pikes for these types of jobs did you ?—*A.* If they were available.

Q. When you went out that morning, did you hear him ask for pikes to go up the light poles to change the globes ?—*A.* No.

Q. Did you hear him ask for them then ?—*A.* No.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(3) M. Tulk. Cross-examination—*continued.*

Q. You did hear him ask for pikes when you went out at 12 o'clock ?—*A.* 1 o'clock.

Q. What did Mr. Poynting say when he asked for these pikes ?—*A.* We looked round the yard for them.

Q. What did Mr. Poynting say ?—*A.* I did not hear that.

Q. You did not hear what Mr. Poynting said ?—*A.* No.

Q. Did you know when Mr. Fraser went up this pole that he should have had pikes against it ?

Q. You knew that he should have had them ?—*A.* Oh now that he fell.

Q. It would have been better if he had secured the pole before he went up ?—*A.* If he had the means, yes.

Q. Did you know the safety instruction about going up poles unless they were secured, you were a linesman, you have told us ?—*A.* Yes.

Q. You knew the safety instruction about not going up poles if there was any chance of them falling ?—*A.* Yes.

Q. Until they were secured ?—*A.* Yes.

Q. That is sort of elementary if you want to live long as a linesman is it ?—*A.* Yes.

Re-examination

RE-EXAMINATION.

Mr. PILE : *Q.* My friend asked you about the two jobs. What job were you doing in the morning ?—*A.* Replacing lamp globes around the town.

Q. Right in the city here ? In the morning had you anything to do with poles on private property ?—*A.* No.

Q. You were asked how you knew it was old. In your experience that you have told us about on the land did you find there was any distinction between a new pole and one that was not new ?—*A.* Yes.

Q. Did you find any difficulty in recognising what was a new pole or an old one ?—*A.* No.

(Witness retired.)

(4) A. E. Borton. Examination.

(4) Arthur Edwin Borton.

Sworn, examined, deposed :

To Mr. PILE : I live at 2 Dawson Street, Lismore. I was living in the cottage on that land in 1924. It was not my land, but my sister's. I have lived there, with intermissions when I have been away from time to time, ever since. I remember the electric light going on to the premises in 1944. It was necessary to put up a pole to carry the wires to the property. We would not get the electric light onto the property only by supplying poles. It was provided by my father, actually, and erected by myself and the men.

Q. After that the supply was connected by the Council ?—*A.* Yes. (*Objected to.*)

Q. Originally it was a company supplying the electricity ? And they supplied until the whole undertaking was taken over by the Lismore Council some years ago and they continued supplying until then ?—*A.* Yes.

Q. Do you remember when the Lismore Council took over ?—*A.* On the 7th—they agreed to take over on the 7th January 1924, the Lismore Council.

Q. Since that date has the pole remained there until it fell down ?—*A.* It has been there ever since.

Q. It is lying now on the footpath outside your property ?—*A.* At the present time.

Q. During that whole period did you ever see anybody come and make an inspection of it from the Council ?—*A.* I cannot say that I have myself, but they could have done because I have been away at different times.

Q. You mean in the periods when you were away for two months at a time ?—*A.* They could have been there and I have not seen them.

Q. When you were there did you ever see any inspection made by the Council ?—*A.* I have seen them there but I could not say if they were inspecting the pole, because I took no notice of them, only when they were doing the work at the house.

Q. What work was done at the house ?—*A.* They got a point in and they had to have new wires for the point. That was in the house.

Q. On that occasion you put the new point on was anything done to the wires or the pole that passed over the land ?—*A.* They had to put a new wire across—a service wire.

Q. Could you tell us whether the pole was touched at all on that occasion ?—*A.* It could have been——. (*Objected to.*) I did not see it.

CROSS-EXAMINATION.

Cross-examination

Mr. BEGG : *Q.* You say on the 7th January 1924 the Council agreed to put in the electricity service ?—*A.* The Council agreed to put the electric plant supply.

Q. Do you remember the electric light undertaking in Lismore was first run by a limited company ?—*A.* Yes, I remember that.

Q. And it was not until later, after your electricity had gone in—— ?—*A.* By the father's diary the City Council agreed——.

Q. I didn't ask you about that. Do you remember that subsequently after the pole had been put up by you in the property there that the company which was supplying the electricity went out of existence and that undertaking was taken over by the Council ; do you remember that ?—*A.* All I can say is——.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(4) A. E. Borton. Cross-examination—*continued.*

Q. Do you remember ?—*A.* Yes I remember the Council taking it over from the company but I could not say what date.

HIS HONOR : *Q.* Was it after the pole was put up, that is the question ? —*A.* I could not say that ; but Council had agreed to buy the plant—— (*Objected to.*)

Mr. BEGG : *Q.* I take it through the years you have seen council since go there but you have not watched what they have been doing ?—*A.* Yes.

Q. One other matter and that is this, this pole was in the garden, was it not, at the edge of the lawn ?—*A.* Just inside the fence, 18 inches about.

Q. In the dug up garden ?—*A.* Just dug up, there has not been persevered with because it was too close to the camphor tree.

Q. The pole was actually planted in the garden and not in the lawn ?—*A.* Just in the 18 inches.

Q. Garden strip ?—*A.* Yes.

Q. The hole is still there is it not ?—*A.* It is still there.

(Witness retired.)

(5) L. J. Reynolds. Examination

(5) Lionel John Reynolds

Sworn, examined, deposed :

To Mr. PILE : I am a Bachelor of Engineering. At Sydney University. I am a member of the Institute of Engineers (Australia), a registered professional engineer, Queensland. I am a consulting engineer practising at 55 Lower Hawk Street. I have been in practice myself for 35 years. Prior to that before World War I, I was on the staff of Mr. George Julius, in his surgery. My experience has included a large amount of experience with electricity reticulation. I am engaged in the design and supervision and carrying out of electricity undertakings since 1944 and I have done some 19 altogether. I have also acted as valuer in the taking over of various undertakings for both Councils and electric light undertakings ; that includes Hillston recently, Moree, Armidale, Hay, Barmedman and Gunning.

Q. Did those particular jobs include examination of individual light poles ?—*A.* They involved examination of the whole of the assets of an undertaking including poles, wires, cables, the whole of the reticulation, in power houses where they existed.

Q. Your professional knowledge is such as to equip you to express an opinion upon the correct way of managing an electricity undertaking, the correct way of fitting up, taking down and maintaining poles ?—*A.* I consider I could express an opinion on it.

Q. You are acquainted with the type of pole used by electricity undertakings generally throughout the State ?—*A.* Yes.

Q. What is the average life of the pole ?—*A.* The average life of a pole for North Coast Hardwoods is from 15 to 20 years ; some of the western hardwoods possibly would have a longer life. This morning I had a look at two portions of a pole outside Mr. Borton's property which I was given to understand was the pole which had collapsed when the Plaintiff was on it.

Q. Could you tell from its appearance today what sort of wood that was ?—*A.* I could not be absolutely sure, but it looks like either ironbark or small-leaf stringy bark.

Q. Where you have, as in this case, a man required to go up a pole to test the wires, the cross-arm and the pole, is of unknown age to him but is of obviously not new timber, what in your opinion is the proper practice to employ ?—*A.* In my opinion the proper practice is : a man should be supplied with some gear whereby he can secure the top of the pole. He should either have a spar single derrick ; if the Council has not a lifting truck with a derrick mounted on it, or if it is impossible in this case, it would be extremely difficult to get the derrick up to there on account of the rise in the ground, the man should have at least a spar pole which would enable him to secure that pole in the top third. The pole should be secured at a point not lower than a third of its height from the ground, that is from the cross-arm coming downwards, so that if anything happens at the bottom that pole is stable, it cannot fall.

Q. How do you propose to secure it at the upper third, by means of what ?—*A.* By means of rope. I would explain that the derrick pole that I am talking about would be a straight stick possibly 5 × 5 or 6 × 6 and around the top, at the top, would be four guy lines which would be let out and secured to four appropriate points so that the top of that pole—it does not matter which way it wants to sway—is secure. A little bit below that that pole would be secured to the other pole which the man is going to let the wires go on, to the electric light pole, and if nothing happens to the pole when he lets go he has just had the work of putting the guy on ; if it carries away it cannot let him down.

Q. The Plaintiff himself spoke of there being available pikes for some occasions—not on this occasion—with which I presume you are familiar ?—*A.* Yes.

Q. In your opinion would they provide a measure of security, if they were put in on either side, on four sides ?—*A.* No. Pikes have a very definite job to do, and that is in putting up new poles or lowering a sound pole when a man is in charge of each pike. The pikes push in from the side and are then grounded at the heel and are in my opinion of no value unless they are long enough to also reach up to that top third, and even then they are very doubtful.

Q. To be effective they have to be up to the upper third of the post, to provide sufficient purchase to hold it up ?—*A.* Yes.

Q. Will you tell us something about the sounding. We were told by the Plaintiff that he tapped several times around the base of the pole on all sides for defects. What is the usual and the proper way to make a test for

the soundness of the pole ?—*A.* The proper way is to bore the pole. A hammer test is apt to be very misleading. It is a somewhat of an indication of a pipe in the centre of the pole in that you may get a slight hollow sound. If it is extremely hollow-sounding when you strike it with the hammer you know you have a thin shell ; but the proper way to handle the pole in my opinion is to have a brace and bit, an augur, and bore just above the " wind and water," just where the line of the ground is, and bore diagonally into the pole. That will give you a true indication of the thickness and soundness of the wood. It will also indicate to you where there is a pipe in that pole below the ground.

Q. What about dry rot and white ants ?—*A.* If there is any dry rot taking place that will indicate, also you will see that generally where the sapwood is just meeting the heartwood, little incipient cracks, or wider cracks show up on a pole and you can see if there is any dry rot occurring there. White ants unless they are of very recent attack generally manifest themselves by some kind of exudence, also from cracks on the pole ; but I have seen white ants go right up the pole and leave the pole itself untouched, and do the cross-arm—and you could not see a sign of them.

Q. We are told in this case that the pole broke off some 7 to 10 inches below the level of the ground. I think you had a look at what remains of the pole this morning ?—*A.* I had a look at it and I put the rule on it to see what the distance was.

Q. Is there any evidence on the pole from which you could determine whether that would be rotted around for seven inches to 10 inches underground ?—*A.* Yes, the evidence is there at the break, it shows that it was an uneven break.

Q. Could you tell from what remains of the pole this morning, whether hammer test would necessarily put a man on to inquiry or not ?—*A.* I would say that the hammer test on that pole, when it was standing, would give an entirely wrong impression. That pole is still—except for weather cracking which has opened and caused the pole to split along the grain, that—that pole has a tremendous lot, in fact nearly all its heartwood is sound, and the only outside stuff that has gone is the very thin sapwood. That has generally been what we have called a dressed pole, the sapwood is down probably not more than half an inch of it.

Q. You said but for the weather cracking. Did that take place—before or after the accident ?—*A.* I would say that the cracking that is obvious now is due to it lying on the ground and being exposed to sun, rain and weather being able to get in, which you would never have got while it was standing up.

Q. Would you tell us this also, in the light of the experience that you have had on the reticulation system, from the point of view of the sound pole, taking into account that a man from time to time had to ascend the pole to do work on it, is there any regular or proper practice with regard to making inspections of the pole ?—*A.* Yes.

Q. Most undertakings—— ? (*Objected to ; allowed.*)

Q. What were you about to say ?—*A.* What I was going to say was

this that most Councils institute a roster of inspections and they regularly inspect poles from time to time.

Q. At what intervals ?—*A.* They vary, depending upon the location and what they find at a previous inspection ; but where I have advised the Council I invariably ask them to make their first inspection within two years of the erection of the poles ; after that at least at determined intervals when they test them open the ground and they treat them with Anti-Ant or creosote, sump oil or some preservative oil of that nature.

Q. When you said the ground you only meant a certain distance ?—*A.* You only open about a foot.

Q. Make the examination and treat that with creosote if necessary ?—*A.* Yes.

Q. Some distinction was made about going up to change a globe on a pole and going up to release wires. Does that involve any differential factors, that you can tell us about, the difference in those two jobs relative to the stability of a pole ?—*A.* I do not quite get the question.

Q. Taking wires off or going up to take globes out. Does that involve the same thing—to change the globe is distinct from taking the wires down ?—*A.* No, I think they are two entirely different undertakings. In one case a man goes up the ladder and he goes up generally in the direction in which he is nearest to his leg,—assuming that it is a bracket and not a centre suspension—and leans his ladder against the pole which would normally be supported by the old reticulation wires or street lighting wires, and unless it was at the very end of a section where he might take a little more care but removing wires is quite a different proposition because very often the fact that the wire is attached to the pole, the wire is supporting the pole—the pole is not supporting the wire—and the moment that he lets it go something happens : the pole comes down. That is why I say that when a man has to release wires unless either some responsible officer has told him that that pole is perfectly sound after tests, or it is obvious from the appearance of the pole that it is a new one, then he should have some means of securing that pole against the falling because they are always strained up—the wires are—and very often you will let one go and the other one has a tail and it tends to twist the pole.

Q. You heard the Plaintiff say that he had taken the wires off that came across the road and as soon as he cut the wire leading to the house the wire whipped up and the pole fell to the ground. Does that indicate anything to you ?—*A.* Yes, that indicated to me that the wire which was released—not the first one he said was the active—that wire, there was no strain from that one, the other one was obviously the neutral and would undoubtedly be bare wire coming across from the pole across the street and supported that pole and attached at the point of attachment and that from his description what was happening was there was a strain from that pole and that wire which was tied still around the insulator, and the moment he let the wire go, the tension in that wire caused it to whip. That is what I gather from the evidence.

Q. There was tension in it and when the tension was released ?—*A.* It let the pole go.

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Plaintiff's Evidence.

(5) L. J. Reynolds. Cross-examination.

CROSS-EXAMINATION.

Mr. BEGG: *Q.* In your qualifications that you have given us you have not told us that you have ever been in charge of maintaining an electrical undertaking. Is that sufficient—you did not have that experience ?—*A.* No, I did not do that.

Q. So you are speaking not as a man who has had the responsibility of looking after and running electrical assistants but one who has been to the University and has studied the problems from the technical point of view and knows what is right or wrong ?—*A.* Not exactly. I have acted for the Council and advised the Council where the Council has had an electrical engineer and——.

Q. On maintenance ?—*A.* Yes, on maintenance.

Q. Whom did you last advise on maintenance ?—*A.* The Molong Council.

Q. On how to maintain telephone poles—electric-light poles ?—*A.* Yes.

Q. And when did you advise them how to maintain them ?—*A.* I think about 1935, 1936.

Q. Since that time you have not had any practical experience in actually issuing orders for maintenance assistants or directing any assistants ?—*A.* No.

Q. You have not had to face up to the problem of a local council which has 5,000 poles under its jurisdiction and a squad of 10 men ? You have never had to face up to that physical problem ?—*A.* Not in the way of managing those men.

Q. You have never had to work out the economic factors of how you run an electrical undertaking, by a corporation, such as this Council ?—*A.* Yes, I have.

Q. From the point of view of how long you keep the men doing this job and that and how long you do inspections and new insulations and how to split up the available labour—you have had experience of that ?—*A.* Yes.

Q. Where ?—*A.* I have had that on several occasions when councils have asked me to advise them in regard to labour required, the method of operation.

Q. That is for new undertakings or alterations to undertakings ?—*A.* Sometimes it would be for alterations, sometimes for new undertakings.

Q. What I put to you is that, if you were a County Council electrical engineer and you got a number of so many men—you have never been confronted yourself personally with the problem of how to distribute them with all the work that has to be done in such an undertaking ?—*A.* No.

Q. Your knowledge is what we might call a theoretical knowledge from that point of view ?—*A.* I do not agree with that. I consider if I had to advise the council on how it should run an undertaking, there is quite a lot of practice involved in it.

Q. You have not had the practice in that very problem I have just put to you ?—*A.* I have not handled the men, no.

Q. You describe yourself as a consulting engineer ?—*A.* Yes.

Q. May I take it that you are considering ?—*A.* Yes.

Q. You have come up in this case at the plaintiff's request, I suppose, to express an opinion ?—*A.* Yes.

Q. Did you know the facts about which you were going to be asked to express an opinion before you came up here ?—*A.* I think I did, so far as I had copies of statements.

Q. You said that pikes, are not what you regard as proper equipment for doing this type of job that we are concerned with today ?—*A.* I think I can very simply describe that or demonstrate that to you.

Q. You have already said that pikes are not proper equipment ?—*A.* They are not the proper equipment for securing a pole when wires are to be let go.

Q. I envisage some other form of equipment. I think you told us that this pole was at the top of a cutting ?—*A.* It is at the top of a bank.

Q. And you could not get one of those derricks that you have spoken of into operation there could you—even if the council had one ?—*A.* You could not get a mobile truck up, no.

Q. So this matter that you have spoken of about a four-sided head on the derrick could not even apply in this case—even if they had one ?—*A.* Yes of course it could. That is only a pole with four ropes from it.

Q. Not a mobile one ?—*A.* That is simply a strut and four guys.

Q. That would be common procedure, you say, every time linesmen have to go up a pole, they would have to repeat this derrick ?—*A.* Yes.

Q. How many men would it take to rig that derrick ?—*A.* Two.

Q. Have you ever seen it rigged with two men ?—*A.* Yes.

Q. When ?—*A.* I do not know when, I cannot say specifically any particular time, but it is a very common type of support for taking down various kinds of gear.

Q. How thick would this derrick be that you envisaged ?—*A.* About 5×5.

Q. How tall ?—*A.* That would depend upon the size of the pole but I would say it would need to be somewhere in the order of 16 to 18 ft.

Q. And you would need various sizes, if you were deailng with various poles ?—*A.* Yes. If you were trying to adapt that method of securing poles you would want a longer one for a longer pole.

Q. Do you know what sized poles—the varying sizes of poles there are in this council area ?—*A.* I do not know but I could make a pretty good shot at it I think.

Q. Would they run 20 ft. up to 60 ft. ?—*A.* They, I believe would be 20s, 25s, 30s, 35s, 40s, 45s, 50s—there might even be a few taller ones.

Q. A few up to 60 ?—*A.* Very possible, depending on the crossings they have to make.

Q. Are you familiar—you have never been a linesman, I take it ?—*A.* No.

Q. Have you ever instructed linesmen personally ?—*A.* No.

Q. Do you know the different duties and responsibilities that linesmen

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Plaintiff's Evidence.

(5) L. J. Reynolds. Cross-examination—*continued.*

and assistant linesmen, leading hands and foremen have ?—*A.* I know the duties they have and the regulations.

Q. You know the regulations—*A.* They have recently been promulgated.

Q. I suppose you have been sitting in Court all day and you heard the cross-examination of the two men who were out on this pole when the accident happened ?—*A.* Yes.

Q. I suppose you would agree that the first principles of safety are that you do not go up a pole unless you have made sure it is a good pole ?—*A.* That is a reasonable thing to do.

Q. And I suppose you would agree with me that a man who has had 20 years' experience as a linesman, if he applies his mind to the problem and if he is careful and goes about his problem properly, he can tell whether he is going up a good or a bad pole ?—*A.* I do not think so.

Q. Of course you know that you have to disagree with that question to support your case don't you ?—*A.* I do not know that I have to agree or disagree but I do disagree.

Q. You say that a man who has 20 years' experience as a linesman would not be able to tell whether it is a good or a bad pole ?—*A.* I do not think he could tell with a hammer and a ladder.

Q. Suppose you got a brand new pole and you go along with a hammer and hit it, what do you find ?—*A.* The sound is very solid.

Q. A resounding solid ring from the hammer and a jumping back of the hammer head ?—*A* Possibly.

Q. Any doubt about it ?—*A.* It largely depends on the sapwood of the pole.

Q. Take a dressed pole that has not any sapwood and you are there with solid wood like this table, eight or ten inches through, when you hit it with a hammer you get an unmistakable solidarity about it ?—*A.* Yes, you do.

Q. Take it by degrees to the lesser good condition of poles and get it down to the condition that this pole must have been in. Won't you agree with me if you had gone round hitting this pole properly you would have had reason to doubt whether or not this pole was good or otherwise?—*A.* No, I won't agree with that.

Q. You won't agree that it was probable that you would have ?—*A.* No.

Q. You say that it was impossible ?—*A.* No, I do not say that but I do say this——

Q. Where do you draw the line between probable or impossible ?—*A.* I was looking at the condition of this pole as I saw it and as I can visualise it was when it was standing, that would give you an entirely false impression with a hammer. Its heartwood is still sound.

Q. Did you observe in this pole as it lies on the ground out there now that there is a core of dry rot in the centre of the pole ?—*A.* There is now a very small one.

Q. A substantial area of dry rot ?—*A.* No.

Q. What did you envisage it would be like the day that it fell down when the mere weight of a man against it toppled it over, what would you think it would be like now ?—*A.* Everything you could see of that pole would have looked grey in appearance with lime or haircracks along the face of it.

Q. Not what you looked at from the outside, what would you expect it would have looked like as soon as it fell over—it broke because it was rotten didn't it ?—*A.* It broke below the ground line, yes.

Q. Because it was rotten ?—*A.* It was rotten under the ground, yes.

Q. And rotten because of dry rot in the centre of the pole ?—*A.* No.

Q. Why not ?—*A.* Because I do not think that dry rot was even there when it fell, not piped in the centre of the pole—I think that has come since. I will agree that there is dry rot below the ground.

Q. Won't you agree that this pole as it stands out there today is obviously a dangerous pole—obviously ? If you saw that pole stuck up in the air would you say, " Obviously this is a dangerous pole which I have to be careful about," today ?—*A.* If I saw that pole stuck up now, yes.

Q. Obviously it would be a dangerous pole ?—*A.* In the condition it is in now, yes ; it is split ; it is almost in halves.

Q. I asked you this : that pole would have fell over, must have been obviously in a bad state of ageing ?—*A.* Below the ground, yes.

Q. I put it, above the ground as well ?—*A.* The condition today, there is not any sign of it above the ground.

Q. Is there not ?—*A.* No.

Q. No decay of the sapwood ?—*A.* Yes, there is some decay.

Q. Lots of splits in it today ?—*A.* All the splits that are there are due to the weather that has taken place since it fell.

Q. That is your opinion ?—*A.* Yes.

Q. Are you founding on the proposition, your opinion, that you heard put by the Plaintiff that on his inspection they were only small cracks—you have accepted that as a fact ?—*A.* No, I do not accept that altogether as a fact. My own experience tells me what that pole would be like.

Q. We have been told that it was put in in 1924 ?—*A.* Yes.

Q. That means it would have been 27 years old approximately at the date the accident happened ?—*A.* Yes, that is right.

Q. You told us that the average life of a pole is about 15 to 20 years of the North Coast Hardwood ?—*A.* That is the average.

Q. As this pole stood out there on 11th January, 1951, it was 27 years of age, it was over the average life of the pole, and do you say then it would not be obviously an old pole ?—*A.* I cannot think of anything that would make it obviously old unless you knew it was put in.

Q. What about the cross beam at the top ?—*A.* The cross-arm would look possibly old.

Q. It shows as it stands out there at the moment that it had never been cut round the base, the way you see some of the poles in the street done—you know, chipped out at the base and creosoted ?—*A.* There is no

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(5) L. J. Reynolds, Cross-examination—*continued.*

sign of any cutting. There is only a sign it has obviously not only been bored at some time and oil put in it——

Q. There is a hole where it has been bored ?—*A.* Yes, I think that is what has been done.

Q. In the pole ?—*A.* Yes.

Q. Of course the part of the pole—the end of the pole where it actually broke is no longer there is it ? Did you dig down into the earth to see if the bottom of the pole is still there ?—*A.* There is the sign of something——

Q. Did you dig ?—*A.* I did not dig anything but it was pointed out to me where it came from, the hole in the garden.

Q. I suppose you would agree with me that just below the surface of the ground is probably the area where a pole is likely to go from dry rot ?—*A.* Yes, that is the worst place where they do go, just below ground level.

Q. Would not you expect or would not you feel that a man who was going to climb a pole without any securing equipment might reasonably take a bit of the earth away round the sides and inspect the hole just under the earth's surface ?—*A.* Yes, he might have done that.

Q. That would be a prudent thing to do, that is what you would do ?—*A.* I would do more than that ; I would have a brace and bit and bore it.

Q. If you had not had a brace and bit may I take it you would have gone to your superior and said, " I want something to secure this pole before I climb it ? " ?—*A.* I would have done more than that ; I would have gone to him and asked him to take the responsibility that it was safe to climb.

Q. You said that poles do not support wires, that wires support the poles. Do you remember saying that ?—*A.* I said that does happen very frequently.

Q. That is what you meant. Primarily poles are there to support wires are they not ?—*A.* Yes, that is what they are there for.

Q. But occasionally you find that poles get so rotted or bad that they are in fact supported by the wires ?—*A.* That is correct.

Q. Did you observe that there was an angle between the house, the pole and the pole across the street ?—*A.* No, I did not. No, I did not know where the point of attachment on the house was.

Q. Did not you see the piping where it went in at the corner of the house ?—*A.* It is there now.

Q. Assume that that is where it went in two years ago would you agree that there is an angle between that point of the house, the pole, and the pole across the road ?—*A.* Yes, if it went in there there was an angle.

Q. So that if you had the pole standing up as the apex of two angular wires it would be unlikely that the wires would be supporting the pole ?—*A.* I doubt it ; the angle at the pole was an obtuse angle.

Q. It was still an appreciable angle was it not ?—*A.* There is an angle there, yes.

Q. Just to put it on paper, can you see that little sketch from there or shall I bring it over ?—*A.* I can see it.

Q. Take that as the pole across the street, that is the street inside the

garden and this is the corner of the house. Those wires could not be regarded then as supporting the pole, could they ?—*A.* No, if it was like that I would not think so, but it was not like that, of course.

Q. Would you say it was not like that ? That angle may be a little exaggerated ?—*A.* Extremely exaggerated.

Q. Of course the degree of the angle does not matter a great deal, does it ?—*A.* The degree of angle ?

Q. Yes ?—*A.* It matters.

Q. The acuteness of the angle or the obtuseness of the angle does not matter a great deal ?—*A.* Yes, definitely.

Q. If you have a pole to get supported by two strings, you have to have a straight pull on either side of the pole to keep it supported. Would you not agree with that ?—*A.* Provided there is no other support, yes.

Q. And if the pull is not straight but if it is at a slight angle, the tendency of the pull of the wires would be to pull the pole out, to straighten ?—*A.* It would tend to do that, yes.

Q. I think those were elementary principles ; do you agree ?—*A.* Yes.

Q. So I put it to you again that the degree of the angle does not make a great deal of difference, does it, as long as it is off straight ?—*A.* As a pretty broad principle I will agree with you.

Q. So will you agree with me that it is quite possible that the wires were not supporting the pole ?—*A.* It is possible.

Q. And would you agree with me that it is quite possible that the fact that the wire whipped away was due to the fact that the pole was then on its downwards course ?—*A.* Yes, possibly.

Q. That is exactly what you would expect, was it not ? If the pole was going, you would expect the wire to whip away straight away ?—*A.* It depends which way it was going.

Q. You know which way it is going. It went away over the fence ?—*A.* Yes, it went over the fence but I do not know which way it went in relation to the wire.

RE-EXAMINATION.

Mr. PILE : *Q.* Would you tell us whether in your opinion its own present state is any indication in view of the lapse of 2½ years of its appearance straight after the accident ?—*A.* Yes, I think that that pole prior to falling and being shattered by the drop, that pole must have had quite a great appearance, and the big cracks that are obvious now have opened up due to the impact and partly due to the weathering, rain and sun.

Q. It is now on the ground and it is cut ?—*A.* Into two pieces.

Q. We do not know that the whole pole is there. Would you know that from the present appearance ?—*A.* I would think that the two bits that are left would be the total amount of the pole above ground.

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Q. And the large splits, you say, are due to weathering since ?—A. Shattering and weathering, but the sapwood on that pole even now is very, very little. It is certainly rotting, but that pole had hardly any sapwood on it at all when it went off. It was almost cleaned right off in the dressing.

(Account for the sum of £21, representing cost of X-rays by Drs. Burn and Cook, produced by Mr. Pile.)

(Witness retired.)

Plaintiff's Evidence

(6) George Fraser (Plaintiff) Recalled. Examination.

(6) George Fraser (Plaintiff)

(Recalled) : On former oath.

Mr. PILE : Q. Would you look at this. Can you tell me whether that is a statement from the chemist and what was it for ?—A. Liniments for the back and for medicines to make me sleep and help me sleep and ease the pain.

Q. Did you have certain treatment from J. A. & I.M. Bendich ?—A. Yes.

Q. Are they registered physio-therapists ?—A. They are.

Q. What did you have treatment for ?—A. For the leg and the back.

Q. Following on this accident ?—A. Yes, I was ordered that.

Q. Did you get an account for the amount shown to you ? (*No reply.*)

Mr. BEGG : Your Honor, I am making this admission in the same form as before. We do not agree that we are obliged to pay any of them.

Mr. PILE : Q. The mixture you say was something which was to enable you to sleep at night ?—A. That is my back.

Q. That is the liniment. What about the mixture ?—A. I rub on the liniment and take a mixture at the same time.

Q. I think over the luncheon hour, in fairness to my friend who cross-examined you, you thought over those books ?—A. I made a mistake in that book. I remember it now, when we went for the first-aid treatment I was issued with that small book. I got mixed up with another one we got later on.

Mr. PILE : The total amount of those accounts is £216 7s. 0d.

(Witness retired.)

Mr. BEGG : I make the same admissions, Your Honor.

(Case for Plaintiff Closed.)

DEFENDANT'S EVIDENCE.

(7) George Dudley Jackson.

Sworn, examined, deposed :

To Mr. BEGG : My name is George Dudley Jackson. I reside in Lismore. At the time of this occurrence I was the Council Electrical Engineer. I was in charge of the electrical undertaking.

Q. I think on 11th January 1951 did you get a message over the phone that some work had to be done out at Dawson St. ?—*A.* Yes, I received a request that some trees were to be lopped and they wanted the installation inspector to see if it was necessary to remove the wires.

Q. Did you pass the message on to Mr. Poynting ?—*A.* I passed the message back and Mr. Poynting, he was the only man available. He took the message and later relayed it to Mr. Fraser.

Q. And you know that Fraser went out and you know that the accident took place ?—*A.* Yes.

Q. I want to ask you at the outset, do you have equipment for taking out poles that need to be taken out ?—*A.* Yes, we have pole-lifting equipment quite capable of handling up to 45 ft. to 50 ft. poles.

Q. What is that, in the nature of a derrick ?—*A.* Steel sheer legs on a four-ton truck operated by a power winch.

Q. What about the derricks Mr. Reynolds has spoken of, are they available ?—*A.* A temporary mast was sometimes referred to as a gin pole. We do not use it if the pole is defective, it is either lifted out with the pole-lifter or it is cut off at the ground.

Q. How many years have you had as a practical man running this type of matter ?—*A.* I have been since I commenced with the Brisbane City Council in 1925. I have been associated with Local Government Electricity Undertakings for the whole of that period and in our training we had to do 6 months with the line construction and maintenance unit.

Q. When did you start serving your time ?—*A.* 1925.

Q. And you have been engaged practically the whole of that time ?—*A.* The whole of that time.

Q. Do you say you have the whole of the proper and available necessary equipment ?—*A.* Yes, Lismore Council always have available proper equipment.

Q. There have been safety rules for Lismore ?—*A.* Yes, that is correct.

Q. Have you made it your business to see that your linesmen have been instructed in those matters ?—*A.* They have been properly instructed. In Queensland for the last 20 years linesmen have to be licensed : that will be so in N.S.W. within the next 12 months. I assisted and put quite a number of linesmen through for the linesmen's examination in Queensland about the middle thirties.

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Defendant's Evidence.

(7) G. D. Jackson. Examination — *continued.*

Q. So far as the instruction to your linesmen is concerned, you say their instruction has been full and adequate ?—*A.* Yes, all that correspondence was available. We had that roneoed by the Lismore Council. That was available, and it is in the store now and available to all those linesmen. I am pretty sure that Mr. Fraser never drew one.

Q. There is a book that he got in December of the instructions on the safety precautions ?—*A.* Yes.

Q. If he had communicated with your depot and asked for equipment it was available for him ?—*A.* Yes, his duty, of course, would have been to report that the pole was unsound. From then on the foreman would have taken immediate control.

Q. He was only a small team ?—*A.* That is right. A condemned pole was not within his capacity to handle, a condemned pole, because he did not have equipment.

Q. You got a message and did you inspect the pole ?—*A.* Yes, about 2 o'clock in the afternoon I got the message.

Q. You went straight out ?—*A.* I was out in that direction. I went straight to the site. I had a look at the pole.

Q. What was your opinion of the condition of that pole on a visual inspection then ?—*A.* I would say immediately that an experienced linesman would not climb the pole. The condition it is in today is not a true indication. It had a lot of loose sap and decayed wood when the thing fell off. Even then I could see the stuff was scattered around on the ground. It was not much worse then than it appears now.

Q. So far as the rotting on the outside ?—*A.* Yes.

Q. How would you assume it looked if it stayed in the ground ?—*A.* A pole that you would suspect immediately that could be a dangerous pole.

Q. What do you think of hitting it with a hammer ? What do you think would be the effect of that ?—*A.* When I examined it I would say there was only one-third of the circumference that was actually sound and the decay was close to the ground line and when the pole broke it broke away with a lot of long fingers which probably had been broken or weathered away, but the dry rot extended for quite a distance. So if you went in and hit it at the ground level at three different points you would only get sound timber on one side.

Q. Do I understand that the proper practice is that if you are testing them you tap them at the ground level ?—*A.* Yes, that is right. That is where the dry rot is most prevalent.

Q. To summarise, do you express the view that if it had been tapped at the ground line he could not fail to detect it ?—*A.* Yes, he must have.

Q. In those circumstances to climb such a pole would be in breach of all your safety regulations ?—*A.* That is correct, yes.

Q. And you heard Mr. Fraser say in his evidence this morning that you had said to him that you would make him a leading hand within a fortnight ? *A.* No, that is not correct. In December 1950 the then leading hand was getting very near retiring age and his health was failing and during the

Christmas vacation I suggested to him that he would be wise if he accepted a job in the store rather than go out on a line, which he agreed to, so that for some time we had been considering various men at our disposal to get a chap that would possibly make a leading hand and the chap that we selected was a much younger man. He was not a senior man. He was a young man whom we considered would make an ideal leading hand in time. In the meantime we had to get somebody away from the main gang to do small jobs, and Mr. Fraser was the man selected. He was given an assistant and he went along on his job and he could not get on with this man and he came to me and asked me would I return him to the gang, which I did. He went back to the gang; obviously such a man was no use as leading hand if he could not agree with one labourer.

Q. For a number of reasons I do not want to go into the various reasons why you would not select Mr. Fraser to be a leading hand, but I want to ask you this, in your opinion was there any chance of him ever being a leading hand in your Council ?—*A.* No, he returned to the gang and that was the end of it.

Q. Did you ever promise him ?—*A.* No.

CROSS-EXAMINATION.

Mr. PILE: *Q.* Do you remember him coming to you after you appointed the younger man and saying "We have been here longer than him and we "feel it should go to the senior man" ?—*A.* That is correct, he did approach me.

Q. And he brought you his grievance that you had appointed a younger man over him ?—*A.* That is correct.

Q. And he demanded the job, or asked why he had not been given the job of leading hand ?—*A.* That is right.

Q. What assurance did you give him ? What reply did you give him ?—*A.* He came to me at the outset and said that he would not work under the other man——

Q. You tell us what you said to him after he made his grievance clear ? —*A.* That if the time ever came when he had to work under the other man and he refused then there would be nothing for it but for us to dismiss him.

Q. This is some time ago the conversation occurred ?—*A.* Yes, it is.

Q. I do not suppose you made any note of it in writing ?—*A.* No.

Q. Was it about that time another gang was formed ?—*A.* No, there was no other gang formed until quite some time after that.

Q. Shortly after was it not ?—*A.* No, I do not know that it would be shortly after it—it would be quite a number of months, anyhow.

Q. It could be a few weeks ?—*A.* It would not be a few weeks. It would be longer than that, I am sure. We could check up on that.

Q. Did you not tell him you were going to form a new gang and when

the new gang was formed he could take the job of leading hand in that ?—*A.* No.

Q. Anything like that ?—*A.* A man who could not discipline the labourer, and this was prior to that——

Q. Did you say anything to that ?—*A.* Possibly that——

HIS HONOR: *Q.* I think Mr. Pile is suggesting to you that this grievance was stated before you sent him out with the one man ?—*A.* No, it was subsequent to that.

Mr. PILE: *Q.* I am referring to the conversation in which he came to you to complain about the fact that you appointed the younger man and he was more entitled to the job than the younger man ?—*A.* I think that is wrong. He was sent out on the job on his own. At his own request he was returned to the old gang, that is while the other leading hand was in charge of the gang, that is the other man who retired. I have not got it mixed. I think Mr. Fraser has got it mixed.

Q. You say you said nothing to him whatever to justify his opinion that he would get the leading hand's job ?—*A.* No, I said we were considering getting another leading hand but it was subsequent to that discussion that he was returned to the gang when he failed to discipline a man obviously unsatisfactory.

Q. When you told him that you were thinking of commencing another gang, a leading hand in that, did you give him any reason to hope it would be him ?—*A.* No.

Q. Or any reason to believe it would be him ?—*A.* No, because he asked to be returned to the main gang at a subsequent date, therefore in that case he obviously was not——

Q. You told us about there being in the place a gin pole ?—*A.* That is the timber mast that has been referred to where you put four guys down and you lower the top of the pole to it if you suspect the pole is already rotten.

Q. There was one there at the time ?—*A.* We do not use them.

Q. Was there one there at the time ?—*A.* No, we do not use them.

Q. You do not use them ?—*A.* No.

Q. No employee was ever encouraged to think that it would be used ?—*A.* No, because he knows how to do the job. We do not use those poles.

Q. You say the linesman is left to rely upon such knowledge he can acquire through experience and instructions ?—*A.* Through instructions and experience, yes.

Q. What instructions do you mean ? What instruction did he get ?—*A.* Over a period of 20 years ?

Q. Yes ?—*A.* We had printed a copy of a correspondence linesman's course which goes right through from the very elementary principles to the staying, the erection of poles, and method of testing them, the method of treating them, and that was available free of cost to every member of our staff who was interested.

Q. But do you say that Mr. Fraser was ever instructed by anybody, either by being handed material or by being told by somebody personally how to recognise a good pole from a bad one, and what to do about it and

find out the difference ?—*A.* Yes, the leading hand would show him how to do that. A man that comes to you as a fully fledged and qualified linesman is naturally——

Q. What are you saying ? Do you assume that he is a qualified linesman and does not have to be told ? Or are you saying that you in fact instructed him ?—*A.* He would receive elementary instruction before he was employed. I did not engage him.

Q. Was he told anything or was he not ?—*A.* He was not actually told it because I did not engage him.

Q. I am only asking you what you know, and as far as you know you gave him no instruction about how to recognise a good pole from a bad one ?—*A.* We made information available and he did not avail himself of the opportunity.

Q. All that was done was you made available literature to him ?—*A.* That is correct.

Q. What literature ?—*A.* Instructions.

Q. Have you got a copy of that ?—*A.* Back in our depot there is probably two or three dozen copies.

Q. How do you know he got them ?—*A.* He did not. The notice was placed on the notice board that the copies were available. In N.S.W. it is not compulsory for a linesman to do that course, but it will be in 12 months. It is not at the present time and he did not do it.

Q. Have I got it correct when you say he got full and complete instructions, the word was my learned friend used, what you mean all the instruction he ever got was a notice on the board that he could get information and read it himself ?—*A.* Do not confuse that booklet there which we are required to give them in law and which they are required to sign. This other one is purely a voluntary thing to anybody that is interested in it.

Q. Was I right in what I put to you ? That the only instructions so far as your council is concerned was that if he read the board there was literature ?—*A.* He was instructed in accordance with Regulation 51.

Q. And that is the one which my friend read out this morning ?—*A.* That is right.

Q. If there is some possible defect you do not go up a pole ?—*A.* That is right.

Q. Was any instruction made available about the nature and quality of the timbers and defects—and the defect timbers of poles. Anything of that sort given to him ?—*A.* He would acquire that.

Q. Were any given to him ?—*A.* I do not think there would be any given to him.

Q. You expressed the view that any experienced man would have been able to tell this pole was defective ?—*A.* That is correct.

Q. He was an experienced man, was he not ?—*A.* I would say that he would have acquired quite a lot of knowledge over that time.

Q. I think you were telling us that you fully instructed him. Now you say he would have acquired some. How long was he there ?—*A.* He commenced with the Lismore Council in 1939.

In the Supreme Court.

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Defendant's Evidence.

(7) G. D. Jackson. Cross-examination—*continued.*

In the Supreme Court.

No. 2. Transcript of Evidence. 14th September, 1953.

Defendant's Evidence.

(7) G. D. Jackson. Cross-examination – *continued.*

Q. So he was there 13 years and was not dismissed ?—*A.* That is correct.

Q. He gave satisfactory service over thirteen years as a linesman ?—*A.* Yes.

Q. Do you say that he was not a satisfactory employee ?—*A.* No, I would not say that he was not satisfactory at all.

Q. And I suppose that means that he at least would have carried out his work in the way in which you expected any employee to do it who had given satisfaction ?—*A.* Yes.

Q. It means that, does it not ?—*A.* Yes.

Q. In other words, he would have done the thing in the usual way ? (*Objected to ; allowed.*)

Q. The fact that he gave satisfaction according to you for a number of years means that he did the work the way you would expect him to do it ?—*A.* Yes, I did not have any complaints from his leading hand.

Q. And this rot in the pole was below the surface of the pole ?—*A.* Not a great extent. It was very near the surface.

Q. It broke off seven to nine inches below the surface ?—*A.* I did not make that statement.

Q. Would you agree with me, or dispute it ?—*A.* I would say the break extended from about 7 inches below the ground. All that was holding the pole was about one-third of the circumference. When it broke away it pulled away and left a lot of long broken fingers and the distance over which the rot extended was at least 7 inches, I would say, from the surface of the ground down below.

Q. But the rot started below the surface of the ground ?—*A.* It invariably starts at the ground line and apparently went below.

Q. Did the rot start at the ground line ?—*A.* I would say at the ground line.

Q. The gin pole was not used and no employee was ever instructed to use it ?—*A.* No.

Q. Or invited to ?—*A.* No, it is only a method, and we do not use the method.

Q. You agree that the derrick on the truck could not have been taken to this point on account of the nature of the ground there ?—*A.* No, I would not say that, but I would not have taken it there. I would have just dropped it over with an axe. That is the easiest way.

Q. There were not enough pikes, to supply more than one working gang at a time ?—*A.* Yes, we have two sets of pikes at least but we would not use pikes.

Q. At this time ?—*A.* At that time.

Q. You are not trying to force any opinion on me are you ?—*A.* No, I am just telling you what I consider good principles.

RE-EXAMINATION.

Mr. BEGG : *Q.* You heard it said by Mr. Fraser that he was normally issued with pikes when he was going to poles ?—*A.* No, that is not the practice at all. The pikes are used, as the previous witness told you, mainly in the erection of new poles. All the pikes in the world put around the pole that is rotten at the bottom would not make it stable and safe.

Q. When did you first become engineer for the Council ?—*A.* In 1945.

Q. So you did not engage Fraser. He had been working for a number of years when you took over ?—*A.* Yes.

Q. We have been told by Mr. Fraser that he cut the line from across the street. Was there anything to stop him cutting the line at the house and stay away from the pole ?—*A.* No, that was the obvious thing to do.

Q. You climb the one across the road and cut it over there and you won't drop the wires. They could have been dropped from the house ?—*A.* That is right. Cut the wires from both sides and if there is any doubt you could do as you like from then.

Q. He was not sent there to take the pole down at all ?—*A.* No, that is correct.

Q. He was only sent there to take the wires down and leave the pole there so the tree could be lopped ?—*A.* That is his direction.

Q. And the tree was right up near the top where the pole was. He had to take the wires down from there ?—*A.* Not necessarily.

Q. That was a practicable way of doing it ?—*A.* That is one way of doing it.

RE-CROSS-EXAMINATION.

Mr. PILE : *Q.* Would you consider it the best way to do it?—*A.* No, under the circumstances it was obviously the wrong way.

Q. You mean he should have left the wires draped on the pole ?—*A.* That is right.

HIS HONOR : *Q.* Wouldn't the branches of the tree get in amongst the wires as they were being lopped ?—A. That could have been the case. The way the ladder was up on the pole—the service to the house actually stabilised the pole, you see.

Mr. PILE : *Q.* He had already chopped the wires across the street so he had one set of wires hanging from the pole anyway ?—*A.* Having cut two sets of wires then you could have a look at the pole and test it, and if it sounds weak you could go and see if it is safe to go on a pole that still has attachments on it. He did not do that. He got on a pole that still had attachments on it and the pole fell.

Q. There is an angle is there not ?—*A.* There is an angle of approximately 30 degrees between the line on to the road and that way (*demonstrating*), tending to pull the pole over.

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Q. That is the angle between the pole and the house and the pole in the garden and the pole across the street ?—A. Yes, approximately 30 degrees.

(Witness retired.)

(8) Leslie Gilchrist Todd.

Defendant's Evidence.

(8) L. G. Todd. Examination.

Sworn, examined, deposed :

To Mr. BEGG : My full name is Leslie Gilchrist Todd. I reside at Lismore. On the date of the accident involving Mr. Fraser I was the foreman in charge of the electrical undertaking part of the Council's work. I have been foreman for about 5 or 6 years but prior to that I was installation inspector with the Council and have actually been connected with electrical work for about 20 years.

Q. Now, I think the date this accident happened you were away from Lismore ?—A. That is correct.

Q. And you did not hear anything about it until some days later ? —A. Yes.

Q. And I do not think you have actually seen the pole, have you ?— A. No, I have not.

Q. I just want to ask you this : If you have got a pole two poles, one across the street and a line of wire across to another pole in the garden and then at an angle to it off to the corner of the house a line goes through. Have you got that picture ?—A. I think so.

Q. Then the first operation that you have undertaken is to cut the wires across the street and let them fall. As a matter of normal practice what would you next cut if you wanted to drop the wires ?—A. You are meaning to drop the wires between the intermediate pole and the termination ?

Q. Yes ?—A. If there was any doubt I think I would drop them from the termination.

Q. On the house ?—A. Yes.

Q. Have you had experience in the examination of poles, inspecting them and that sort of thing over the years ?—A. I have done some measure of it.

Q. With a hammer. Are you familiar with the tests that you apply when you knock the base of a pole with the hammer ?—A. Yes, there is a definite sound, like if the pole is hollow.

Q. If it is rotten ?—A. Yes.

Q. Where do you normally knock it with the hammer ?—A. Fairly low down.

Q. Near the earth line ?—A. Towards the ground line, yes.

Q. In your experience have you had a pole which fell over in the circumstances which you have heard of in this case when a man is up the

ladder ? Would you normally expect that if that pole were properly hit at the ground level that you would have indication it is faulty ?—*A.* I would have thought that there would have been some indication.

Q. I think that there are instructions issued about climbing poles that are in any way considered visibly deteriorated or decayed and those regulations were in fact issued to Fraser ?—*A.* Yes, they were issued to all linesmen.

Q. Issued to all linesmen ?—*A.* Yes.

Q. Would you regard that as being one of the very elementary safe practices for linesmen to take ? (*Objected to ; pressed ; rejected.*)

Q. That is an elementary precaution is it ?—*A.* I think it is a necessary precaution, yes.

Q. Have you been a linesman yourself ?—*A.* No.

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Defendant's Evidence.

(8) L. G. Todd. Examination—*continued.*

CROSS-EXAMINATION.

Cross-examination

Mr. PILE : *Q.* You expressed your views about using the hammer test, with a great deal of diffidence. With reluctance ?—*A.* I do not think so.

Q. My friend asked you if you could get some indication by tapping and the way you answered was " I would have thought it would have given some indication " ?—*A.* In regard to that particular part.

Q. You said that because you have never been a linesman and you do not know ?—*A.* I was never a linesman.

Q. You are not sure whether you would get an indication by tapping a pole at the base ?—*A.* Yes, I feel quite confident on that point.

Q. You feel that although you have never done it ?—*A.* Yes, on occasions I have done it.

Q. You see, I suppose you will agree, that on the other point you have given evidence that you could have dropped the line on the termination end. Would you agree with me that was contrary to the instructions given to the linesmen ? (*Objected to.*)

Q. What I am suggesting to you is that as a foreman in charge of installations the general rule with which all linesmen were made acquainted was that they must not go to the termination of the house installation and interfere with it unless absolutely required ?—*A.* No, I do not think that is an instruction at all.

Q. Are you quite sure about that ?—*A.* I am quite sure that is not an instruction at all.

Q. You would not suggest that there would be anything wrong or improper about what he did by disconnecting the wires at the post which led to the house, would you ? Nothing wrong with that ?—*A.* To disconnecting the wires at the pole ?

Q. Yes. Presuming his instructions were that he had to take down the wires to the house to enable them to lop a tree over the post. You do not suggest there was anything wrong in going to the post and dis-

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Defendant's Evidence.

(8) L. G. Todd. Re-examination

connecting them there ?—*A.* No, I think he would have had to be governed by what he saw.

Q. And in taking them down at the post there was nothing wrong with that ?—*A.* Not to my knowledge there was not.

RE-EXAMINATION.

Mr. BEGG : *Q.* It has been suggested by Mr. Fraser in this case that he used to use pikes whenever he used to go to poles to do disconnections or matters of that nature. He said that was the usual practice if pikes were available. What do you say about that ?—*A.* I should say the pikes would not be normally used except in the case of a very dangerous pole.

Q. Was it suggested that it was normal practice for him to have pikes whenever he was even going up poles to change lights when they were available. What do you say about that ?—*A.* I would not think that would be normal practice at all.

Q. It is not your experience ?—*A.* No.

Q. Who were the pikes mainly used by ?—*A.* Mainly used in the erection of poles.

Q. In the construction gangs ?—*A.* In the construction gangs, yes.

Q. That is a separate section is it ?—*A.* Mr. Fraser did work in the construction gang at various times.

Q. But when he was working with Mr. Tulk as a separate group ?—*A.* No, he was not in the construction side of it then.

(Witness retired.)

(9) C. L. Poynting. Examination

(9) Charles Leonard Poynting.

Sworn, examined, deposed.

To Mr. BEGG : *Q.* My full name is Charles Leonard Poynting. I reside at Lismore. On 11th January 1951 when Mr. Fraser was involved in this accident I was the inspector of installations. That position is a different category, type of employment, to the lines and poles and matters of that nature. Installation inspectors would only be concerned with buildings, inside wiring. When the private contractors have finished the wiring inside it is my responsibility to go in and inspect the house and that sort of thing. I am not concerned with the lines or the poles. On the date in question I received a message from Mr. Jackson. He said that the place in Dawson Street, they intended lopping some trees, and would I go along and have a look at the exact requirements of the job and pass it on to the first linesman that came into the depot.

Q. Then you were at the depot when Mr. Fraser came in were you not ?—*A.* Yes, I was working at the depot.

Q. And did you pass that instruction on to him ?—*A.* I passed Mr. Jackson's information on to him.

Q. Did he ask you for any equipment ?—*A.* No.

Q. Did Fraser ask you for any equipment ?—*A.* No.

Q. Were you the person who would normally issue equipment or have anything to do with that equipment ?—*A.* No, not in that department. Nothing to have connections with lines or poles.

Q. Nothing was said to you asking for pikes or things of that nature ?—*A.* No.

CROSS-EXAMINATION.

Mr. PILE : *Q.* You did not tell us what instruction you gave him ?—*A.* I went to the place in Dawson Street and saw that it was necessary to remove the lines from the building to permit the lopping of the tree. When Mr. Fraser came in at lunch time the instructions I issued to him were to see to this address and remove the lines and permit the lopping and re-erect them on completion of the lopping.

Q. It would have been perfectly proper for him to go along and if the pole appeared to be normal to go up the pole, disconnect the wires and let them fall to the ground and reconnect them up. (*Objected to : rejected.*)

Q. Being Inspector of Installations, would you know what would be the proper thing to do in proceeding about the work that you instructed him to do ?—*A.* In connection with lines work ?

Q. Outside line work, you would not know ?—*A.* No.

(Witness retired.)

(M.f.i. " 1 " tendered and marked Exhibit " 1.")
(Regulation, m.f.i. " 2 "—(page 9), tendered, marked Exhibit " 2 ")

(10) George Dudley Jackson.

(10) G. D. Jackson. Recalled—Cross-examination

Recalled on former oath :

CROSS-EXAMINATION.

Mr. PILE: *Q.* You were the engineer in charge at this time ?—*A.* Correct.

Q. For how long before that ?—*A.* I was released from the army to take over the job ; I was in the Forces at that time. That was 1945. I had been previously assistant electrical engineer.

Q. Was there a record kept of inspections made of electric light poles in your areas ?—*A.* Yes, they were done every $2\frac{1}{2}$ years.

Q. No records were kept ?—*A.* No.

Q. Would you agree with this, in your time no inspection was made of

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this pole, since you were there in 1945 ?—*A.* In 1945, there would be two and possibly three complete inspections made——

Q. Of this pole ?—*A.* There would be no record of it, no.

Q. Any inspection made of this pole ?—*A.* There is no record, I did not do it myself, so I would know—not know of it.

Q. You say as there were no records you cannot say ?—*A.* That is right.

(Witness retired.)

Defendant's Evidence.

(11) R. W. Rees. Examination

(11) Robert Ward Rees.

Sworn, examined, deposed :

To Mr. BEGG : I live in Lismore. At the time of this accident in which Mr. Fraser was involved I was the assistant electrical engineer.

Q. I think you heard the accident had taken place and went straight out to the area ?—*A.* Not immediately, not that afternoon, but later on, to the best of my memory it would be a couple of days after.

Q. Did you inspect the pole ?—*A.* I inspected the pole and the position in which the pole stood.

Q. We are told that the base of the pole was in the garden just inside the fence in Mr. Borton's place ?—*A.* That is correct.

Q. When you inspected the pole did you form an opinion as to the apparent condition that it must have been in as it stood up before the accident happened ?—*A.* Yes, in my opinion I would say that the pole had shown signs of decay or weathering at the position where it entered the ground which would be visible from above the ground.

Q. If it were tapped properly with a hammer at the base line what in your opinion would have been the result ?—*A.* It should give a hollow sound indicating that inside of the pole was not sound.

Q. When you inspected the inside of the pole what did you see ?—*A.* Signs of decay.

Q. In other words the heartwood of the timber was not solid ? Was it dry wood ?—*A.* Yes, you would call it dry wood.

Cross-examination

CROSS-EXAMINATION.

Mr. PILE : *Q.* Did you put a ruler over the lower part of the pole at all ?—*A.* No, not a rule.

Q. Would you agree there was about seven inches to 10 inches of pole underneath the ground line ?—*A.* Yes, I would agree there would be between 7 and 10 inches.

Q. That was to some extent irregular towards the bottom, irregular in shape ?—*A.* I just do not understand the meaning of that.

Q. Irregular in the sense that it was something like that (*demonstrating*)? —*A.* The break, you mean, yes the break was irregular.

Q. The break had occurred at the lowest 10 inches from the ground and came back to about 5 or 6 inches below the ground ?—*A.* Yes.

Q. Above that it was apparently relatively solid ?—*A.* At the ground level it did show signs of openings running longitudinally.

Q. It is a very old pole ?—*A.* Yes, I know now that it was put up about 1934.

Q. Suppose I told you it was 1924; does it look that old ?—*A.* Yes, it is very hard to tell when a pole is that old.

Q. Would you expect weathering to take place in any pole that is up for any time ?—*A.* Yes.

Q. That does not necessarily indicate that the pole is not sound ?—*A.* I would say it to anyone experienced with handling poles continually that it would give a good indication.

Q. Are you such a person yourself ?—*A.* I have had considerable experience but I do not claim to be a first-class timber expert.

Q. If you walked down the street now you would find a number of poles about 10 or 13 years which would be grey in appearance and have lines down the outside due to weathering, won't you ?—*A.* No, not when the crack is very wide and penetrates the full depth——

Q. You said there were signs of weathering. I put to you weathering signs are those splits in the outer surface ?—*A.* They are referred to as shakes, actually.

Q. I put to you are these signs of weathering which turn it grey and put lines in it on the outside surface, tney do not indicate necessarily that the core is not sound ?—*A.* I do not agree with you there.

Q. The pole generally stands up, despite the weathering signs, for some years ?—*A.* Yes.

Q. And what causes the pole to fall is dry rot or white ant rot at the earth level ?—*A.* Yes, tnat would be a general assumption.

Q. What I put to you is this particular pole above the surface of the ground looked all right although it had weathering ?—*A.* No, I would say from the longitudinal cracks in the pole it would be a good indication that it was not sound.

Q. You told me that the longitudinal cracks were weathering cracks to me you said shakes, to me, you said the pole had shown signs of decay or weathering above ground ?—*A.* Yes.

Q. I put it to you that weathering decay is not an indication at all that the pole is unsound. What do you say about that ?—*A.* It would give you reason to conduct a fairly thorough examination of the pole around the base line.

Q. Because you will realise if there were weathering marks it was a pole that was not new—that is why you say that ?—*A.* Yes.

Q. It would not indicate of itself that the pole was ready to fall down ? —*A.* No, well, I do not think any pole would indicate that at all. You would have to make a test.

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(11) R. W. Rees. Re-examination

Q. To be reasonably sure of your tests you would have to make a boring in it ?—*A.* No, you do not even have to do that. It can be done by striking.

Q. If the tree is so rotten that it is drummy to the hammer, you know ?—*A.* Yes.

Q. A tree may appear to be relatively sound although not weathered and you, not being able to see it is completely rotten, then make the boring, is that right ?—*A.* No, I cannot agree with that either. I still maintain if a man strikes a pole and there is an indication that it is not sound——

Q. If he strikes it and it has a clear sound it can still be rotten a little lower down in the ground ?—*A.* Yes.

RE-EXAMINATION.

Mr. BEGG: *Q.* With those longitudinal cracks which you mention, whereabouts were they ?—*A.* They were from where the pole enters the ground in the direction towards the top of the pole.

Q. It cracked at the ground line ?—*A.* Yes.

Q. And that is the danger sign ?—*A.* That is the danger sign.

(Witness retired.)

CASE FOR DEFENDANT CLOSED.

(It was agreed that the parties were at issue.)

(Counsel addressed.)

No. 3. Summing up of Clancy, J. 14th September, 1953

No. 3.

Summing up of Clancy, J.

Coram : CLANCY, J.

Monday, 14th September, 1953.

FRASER *v.* COUNCIL OF THE CITY OF LISMORE.

HIS HONOR : Gentlemen of the jury, in this case the Plaintiff, George Fraser is suing the Defendant, the Council of the City of Lismore for damages in respect of injuries which he sustained while in the employment of the Defendant as linesman.

The claim is one for damages and, of course, it does not succeed only because he sustained injuries, and it does not succeed only because his injuries were sustained while he was working. It is not a case that is determined merely by the answer to the question whether he was working when he was injured.

This is a request by the Plaintiff that you award him in the form of a verdict in a lump sum compensation based on a definite legal claim: and that is the claim of negligence. He must establish the claim in law before he may succeed because he has claimed that the Defendant has been negligent. The negligence that he is claiming, it seems to me, is that the Defendant has been guilty of the breach of the duty which the Defendant owed to the Plaintiff. That the Defendant owed to the Plaintiff and to every other employee a certain duty is, of course, clear law. It is for you to inquire whether there has been a breach of any such duty.

The onus of proving his claim rests entirely upon the Plaintiff; he must weigh down the scales of evidence in his favour on all matters essential to his claim before he may succeed. His claim comes under two headings: first of all, whether he has any cause of action at all; secondly, as to what is the extent of the damages that he is entitled to recover. The phrase "onus of proof," of course, is used not only in this type of case, but in criminal cases, but there the onus to be discharged is a much heavier one. There the criminal prosecution, the Crown, must establish its case beyond reasonable doubt before a conviction should be recorded; but in civil cases the Plaintiff is entitled to succeed if he makes it appear merely on the balance of probabilities that those matters on which he relies have been established by the evidence.

The determination, of course, of those questions of fact which are involved in the claim are entirely matters for you. It is my duty to indicate to you certain principles of law by which you will be guided—and I have already referred to two of them namely, the nature of the action, the negligence, and where the onus of proof lies, it being on the Plaintiff. But those questions of fact, which will be determined in the light of certain principles of law are entirely your responsibility and your privilege to decide on behalf of the community.

The question as to whether negligence has been proved depends in every case upon its own circumstance. The circumstances here, as you have heard, are that the Plaintiff fell with a pole on which he was working—and that, of course, in our experience is comparatively an uncommon type of misfortune. But even if you have the ordinary types, such as running-down cases, collision cases, it is not possible for any court to indicate to the jury a golden rule which will solve the problem as to whether or not there has been negligence in a particular case in such a way as to cover all cases; the negligence has to be determined, as I have already told you, in the light of the evidence in each particular case.

Underlying the examination by the jury of the question there is this rule of law, however, and that is that negligence connotes a breach of a duty

In the Supreme Court.

No. 3. Summing up of Clancy, J., 14th September, 1953— *continued.*

to take care. The duty to take care here rests on the employer, to which I referred earlier, to make the conditions in which the employee is working reasonably safe. So far as he reasonably can he has to provide proper equipment, proper working conditions, and the question as to whether that standard which is imposed by law has, in fact, been departed from is to be decided by you. You will bear in mind the legal requirements, that is the reasonableness of the behaviour into which you are inquiring, the law sets that standard, but you will determine whether the Defendant, against whom the charge has been levelled, has omitted in the particular circumstances of the case to do something which a reasonable man should have done or has done something which a reasonable man should not have done—and when I say " reasonable man " that applies to the Defendant here, because although the Defendant is the Council of the City of Lismore, a corporation such as that is responsible for the acts of its employees, just as an individual is ; so don't be misled by the fact that throughout, and from now on, I will refer to the Defendant as though that corporation were a person ; and do not be misled by the fact that whatever charges are made against the Council, they are not made against the Council or aldermen personally, but they are made against the Council as a corporate body in respect of acts or omissions of its servants for whom in law it is liable. So there is no complication here by the fact that the Defendant is not an individual being charged in respect of his own wrongdoing. The same principles apply.

The specific act or acts, so far as I can discern them in the evidence,—although here I am perhaps trespassing on your ground, as the whole of the evidence is available to you to determine—is whether there has been some departure from the standard of conduct which should have been observed by a reasonably prudent man.

As I told you earlier, those acts are your responsibility alone. That is why I apologise for perhaps using the phrase " so far as I can discern." I have used it, and having given you that assurance, perhaps for the third time, that I have no wish to intrude into those questions of fact, let me without any further apology suggest to you as a point of view only what can be spelt out from the Plaintiff's evidence—and I am not suggesting that you should adopt any one or other of those allegations or charges. I am endeavouring to refrain as far as I can from indicating any opinion on the matter.

Coming back to where I was when I interrupted myself, it seems to me that the heading under which the Plaintiff's claim is made is in respect of two matters : the first is—so I gather from the statements made to you by learned Counsel for the Plaintiff—that the place in which he is working was not reasonably safe in that he was in fact—as we know now from the evidence—directed to work on this unsafe pole. The second heading is that he was not supplied with adequate tools and equipment which would safeguard him in the course of his employment. Well, there is a duty in law which can be described under those general headings. It is for you to examine the facts and see whether those charges have been made out.

The mere fact that the Plaintiff's claim can be compressed into a legal phrase does not necessarily mean that he succeeds. You have to bear in mind that the test is reasonableness. So that taking the faulty working base—if I might call it so—it seems to me that the standard which the Plaintiff asks you to adopt as being that of a reasonable man is to ensure that any pole upon which a linesman is directed to mount must be safe. Well, you will consider the claim and consider whether it is reasonable.

It seems to me, although it is entirely a matter for you, that the generally accepted position is that these posts rot in the course of time; Mr. Reynolds has said that local hardwood should last from 15 to 20 years. But there again I think all the witnesses agree that timbers vary and vary because of hidden defects. Is the standard that you are to accept such that the employer is automatically to ensure the safety of these poles? It is for you to say, judged by the tests of what a reasonably prudent man would do.

On the question of testing—and this, I take it, and you may differ if you wish to, is to claim that there should be inspections made on behalf of the Defendant at such regular intervals that no pole would ever be unsafe. Well you will have to ask yourselves is that a reasonable standard to expect?

The tests which can only be applied, apparently, from the evidence are those of first tapping, where the decision is made by the sound of the tap; and secondly, by boring into and downwards the pole itself somewhere near the ground-line in order to ascertain whether there is some defect which cannot be detected by tapping.

I suppose if I were to speak for a long time I could not think of any other way to put to you the act of omission which the Plaintiff claims existed there. He is claiming that the Defendant omitted adequately or sufficiently frequently to test these poles. When you come to the tapping test of course the matter is made rather interesting in that the Plaintiff himself says that he applied that test and that it was satisfactory. So that when you are considering the charge by the Plaintiff that the Defendant did not adequately test, it seems to me that you would find it difficult, would you not, to say "Well, the Defendant might have found this pole "was faulty by having it tested by somebody before Mr. Fraser mounted "it"; very well, the answer might be that Fraser himself tapped it, what could the Defendant do more? But the Plaintiff says they might have done more, and that seems to lead to the second head, the question as to the adequacy of the supply of proper tools and equipment in order to safeguard reasonably this working on these poles.

The suggestion appears to be that one type of equipment missing was some apparatus, a brace and a bit by which the Plaintiff himself could have made the inspection. That seems to be some matter that could be spelt out of the evidence, but whether you think that the evidence even goes so far as to formulate that charge is entirely a matter for you.

While you are considering that problem and considering it in the light of the evidence of Mr. Reynolds, the engineer, you may think that

In the Supreme Court.

No. 3. Summing up of Clancy, J., 14th September, 1953—*continued.*

Mr. Reynolds' evidence went only so far as this: that boring is to be undertaken only when a suspicion is raised by the tapping. However, it is not for me to say whether that is what Mr. Reynolds meant; it is not for me to say how far you are to accept without question Mr. Reynolds' evidence because it is entirely open to you to discard the evidence of any expert here and act on the evidence in the light of your own experience as men of the world.

If you are to gather from the evidence that the Plaintiff is claiming that before anyone mounts an apparently sound pole he is to bore it, then remember that you are applying the test of common sense and reasonableness all the time: would you expect that standard of conduct to be maintained by an employer? It is for you to say.

If you do not go as far as that but believe that boring should be undertaken by the employer's servants only when there is cause to suspect the pole, then again the plaintiff is in the position that the Defendant can say to him, "It is part of your case that you inspected it and could not see any ground for suspicion." The Defendant is entitled to say, "If you, "Fraser, could see no reason to cause you to refrain from mounting that "pole, what reason would any other employee have for carrying out the "further test of boring, or what reason would you have had yourself to "apply the test of boring with brace and bit on a pole which your tapping "satisfied you, on your own case, to be reasonably safe?" However, there is the problem for you.

If the pole was such that some other employee should have detected it would he have bored it, on this evidence that you have heard here—I will make no comment about it. It seems to be very wide as to what should be done. When you come as to what should be done or what the practice was, you meet a lot of conflict in the evidence here.

There is no doubt that Mr. Fraser on one aspect of his evidence here suggests that nobody should mount a pole unless it is surrounded by pikes. I do not know—there the difficulty arises. Mr. Reynolds says if the pole is rotten at or about ground level that the pike would have to be so long to be of any benefit that it would have to reach into the upper third of the pole; if a pole is rotten at ground level and you are going to prop it so that a man can mount to the top, you have to put your pikes pretty high, I should imagine, it is no use putting the props on ground level with a pike unless it reaches up there—and of the length of the pikes we have no evidence.

There is evidence that it is not the practice here when men mount poles to make use of pikes. The evidence of Mr. Fraser is to the contrary. You will have to consider it.

On this question of equipment Mr. Fraser suggested that he asked for pikes and that they were not there—Mr. Tulk said that Mr. Fraser asked for pikes and they were not there; and Mr. Fraser said that he did not ask because there was nobody to ask.

You may ask yourselves: Is the Plaintiff's real case the absence of pikes or some other form of equipment? It is for you to say. The admitted practice is set out in, I think, Regulation 9 of that booklet which

is Exhibit 2. Whatever the regulation is, it is to the effect that where a man suspects the soundness of a pole he is not to mount it until certain precautions are taken—and I will refer to that later under another heading.

But at this moment I am concerned only with this, that the defence is that where a pole is suspect there was equipment available and—I am speaking now purely as part of the defence to the Plaintiff's claim—that equipment was not provided ; the Defendant says, " Certainly there were " no pikes there with him, but they are not needed, they are not used." The defence says, " We agree with Mr. Reynolds that one method of working " on a suspect pole is to erect a gin alongside it," apparently some sort of supplementary pole and lash it to the old pole, secure it with ropes. But the Defendant says, " We do not use that method, we use the method of " sheer legs, a steel sheer legs mounted on a truck and operated by a power " winch to lift the pole out where necessary or to hold it there ; or where " the circumstances are different, as in this case," the engineer, Mr. Jackson said, " We would get an axe to it and topple it over." Of course you are more concerned with a man working on the pole as against the problem of removing an unsafe pole. I have referred to it only on the question of lack of equipment.

The defence is, " Pikes were not on the job because pikes in our belief " were no use," and on Mr. Reynold's belief they are no use as a safeguard to a man working on the suspect pole ; " had it become necessary to work " on a suspect pole at this time," the defence said, " we had within call " this metal sheer legs." The answer to the claim made by the Plaintiff that he was not supplied with equipment, under one heading, by the Defendant, is this : It was supplied certainly not to him on this job, but the defence is he was supplied with sheer legs, not that the Defendant suggests that every linesman carries around with him to work a steel sheer legs.

The Defendant claims he was, in effect, supplied with them because they were not far away and were available to him on call. So there is the conflict between them as to what equipment he was supplied with, whether certain parts of it were necessary or useful at all (that is the pikes) ; and then the other aspect that equipment was available, not on his lorry, but under the control of the foreman and available to him if he wanted it, if he suspected the soundness of a pole, and finally if he acted in accordance with safety precautions.

But of course all this presupposes that the man is working on a pole that he knows, or ought to know, is dangerous ; and on that, because this case is slightly complicated, one scarcely knows how to put it to you in separate compartments.

I am endeavouring at this stage to isolate as best I can the separate elements in this mass of evidence which has come out from various angles and at various levels. I will say no more on that first part than this : The charge is that the Defendant did something or omitted to do something which a reasonable man should have done, or failed to do. The omissions are failure to make sure that the pole was made safe ; failure to provide proper equipment—and the Defendant suggested answers to you I have discussed with you at adequate length I think.

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Applying both to that part of the case and to the next part, that is an additional defence which the Defendant is allowed to put on in a case such as this, that is contributory negligence, the whole thing seems to be bound up to a great extent in the question of fact as to whether Fraser the Plaintiff did in fact adequately test that pole by tapping.

It is all important in that part of the case with which I have dealt, namely, the Plaintiff's charge against the Defendant of negligence, and it is important in regard to the second part, namely a counter charge by the Defendant against the Plaintiff that he was negligent.

This counter charge comes before you in this way, that the Defendant in addition to denying, as he denies here, that he was negligent at all is able, if negligence is established in your minds against him, before he is called upon to pay damages, to invite your attention to this charge of contributory negligence which he levels against the Plaintiff; because while the Defendant is under a duty (which I have already and I think sufficiently discussed with you) the Plaintiff himself is also under a duty and that is a duty to take reasonable care to safeguard his own life and limbs.

The Defendant's charge in effect is, " Well, even if we were negligent, " you were negligent in that you did not take adequate steps to provide " for your own safety." That is why you will see I suggest that it is important to you to get to grips, as it were, with this question of fact as to whether the Plaintiff made adequate tests or not. If the Plaintiff has failed to prove negligence against the Defendant, then there is no need for you to go further in the case: you will return a verdict for the Defendant. But if the Plaintiff has made it clear to you on the question either of the state of the pole or the state of the equipment that there was negligence on the part of the Defendant you will not find for the Plaintiff yet until you consider this counter charge, because if the Defendant succeeds in establishing to you to the same extent as the onus was on the Plaintiff that the Plaintiff himself did not take adequate precautions for his own safety to the extent that you regard him in turn as having been negligent, then the Plaintiff cannot recover, notwithstanding the negligence of the Defendant, if your belief is that he himself was guilty of negligence which contributed to his misfortune.

So you see gentlemen, the importance of considering that evidence as to tapping.

The Plaintiff and Tulk are in the position of being able to say to you, " Well, we were there and this is what happened in regard to the tapping."

The Defendant's case in regard to tapping relies wholly on the opinion formed by others as to what tapping must necessarily have disclosed had it been done properly. They say—putting it broadly and endeavouring in one set of sentences to summarise the evidence of several witnesses—they say that the rot was so great and was of such a nature that it has jagged pieces and that it was so close to the surface that proper tapping would have disclosed it.

Mr. Rees, who saw it two days later, said that the tapping should have

given out a hollow sound, that is showed signs of decay that should have been visible above ground, and that tapping should have given a hollow sound. He was only one of the witnesses as to what was seen later. Mr. Jackson gave a similar opinion, and you have to consider it from the point of view of what their belief is should have happened. On the other hand you have the Plaintiff's version that he did give it an adequate tapping.

Then there is the corroborative evidence of Tulk, and that has been criticised by the defence as being evidence that you should not too readily accept in that it is suggested to you—and I am not supporting or disagreeing with the contention—that Tulk was not definite enough in his answers as to what actually took place in regard to the tapping in that when he was asked about it he would digress on to the manner in which he was holding the ladder, as to where he was looking, and so on ; and then the general complaint about Tulk is as the two of them had been working on other poles during the morning putting in gloves, is it likely that he would have remembered specifically the number of taps made here ? He said it was two or three, he would not say just where they were.

Well, gentlemen, I do not personally know how I would view the matter if I were a jurymen, I am sure you will be a little tormented by the thought that it is clear that no man in his right senses would have mounted that pole had he tapped properly and had the tapping given the results that some of the witnesses say it must necessarily have given.

On the other hand if you accept the Plaintiff's evidence that he did tap, and tapped competently, down at the danger level, the ground, then I am harking back to the original charge of negligence the more the Plaintiff insists to you the harder he tapped and the more thoroughly he tapped, the more the Defendant is entitled to say that if the engineer had gone out and done that he would have got the same result ; the less tapping which the evidence leads you to believe was done the more than, you may be inclined to believe, that the Plaintiff was negligent in not conducting a more accurate examination—and in putting it to you that way I do not suggest what your answer should be : I do not intend to. In fact I have not formed an opinion about the case, I have deliberately refrained from it.

Having gone as far as I have gone I have to remind you it is still part of the Plaintiff's case that another method of testing, namely boring, was not available to him. I fear that if I were to go into this evidence in greater detail I would find myself perhaps at times summarising the evidence in a way that might lead you to believe that I have formed certain opinions about it one way or the other and, if I did that and, if I realised or suspected I was doing it, I would be obliged to go into great detail in examining all the evidence which was given from the other point of view to such an extent, I fear, that if I were to discuss it after this with you at any greater length the only thing for me to do would be to read the whole of the evidence to you—and I will not do that.

All I will say on this question which I will leave finally now before I come to damages is this : you have the Plaintiff's claim that there was a departure from the standard of conduct which should have been observed

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by a reasonable man, a departure on the part of the Defendant; and on that charge he carries and has to discharge the onus of proof. If he succeeds he is not entitled to a verdict, until you consider this defence of contributory negligence—and the onus of proving that is on the Defendant. If you find that the Defendant has made out the charge of contributory negligence, or that the Defendant was not negligent at all, your verdict will be for the Defendant, and you will not be concerned about these matters to which I am now about to refer. That is the question of damages.

It is only if the Plaintiff has proved negligence against the Defendant and has survived this counter claim of negligence made against him in turn by the Defendant, that you will come to this question of damages at all.

If you do then your duty is to compensate the Plaintiff fully and finally, because, as learned Counsel told you, there is no means under our law by which either party can come back and have your verdict reviewed, either up or down. It is your task, one entrusted to you by the community, to determine this matter finally tonight.

You have first of all, for simplicity, to take his out-of-pocket expenses; if he is entitled to succeed at all he is entitled to that in the first place, and they amount to £216 17s. 0d., that covers hospital expenses, ambulance, x-rays—and the details of them will be before you because learned Counsel have examined the details of them and they have agreed that if anything is to be paid, that is the sum—although of course the Defendant in agreeing to that as the figure does not agree that he is liable to pay anything at all.

The next heading of damages will be the loss of wages which the Plaintiff sustained during the period that he was absent from his work. The medical evidence is that he was not fit to work on manual work of 40 hours a week, he could not do it till October; that covers the period from 11th January, 1951, until October in the same year, at the rate of £12 a week; so it is about nine or 10 months at £12 a week.

The uncontradicted medical evidence is that even after he resumed working that he was not fit since then, nor will he ever be, to perform the duties of a linesman. He is entitled to claim the difference between his present wage of £13 6s. 0d. a week and £15 9s. 0d., a difference of £2 3s. 0d. a week from the time when he resumed work until the time when his working day as a linesman would have been over, apart from this accident.

He made another claim that not only could he have expected to have been receiving, in any event, the wage of £15 9s. 0d. which a linesman is paid, but that he had prospects of promotion. But I will not go into that because the evidence in regard to it is fresh in your minds. He says that certain undertakings were given to him by Mr. Jackson, and Mr. Jackson said they were not and that in fact had he not been injured he would not have been promoted from linesman to leading hand.

In any case you are left in a difficulty there because there is no evidence as to what leading hands wages are, and you cannot guess. So far as wages are concerned, the actual out-of-pockets, there is that sum I told you of medical expenses, loss of wages from January till October, the decrease in

his wages of £2 3s. 0d. a week from October 1951 up to the present and continuing.

There only remains the not simple problem of your deciding how long that would continue from now on, had he not sustained the injury. There is evidence here that he was suffering from an arthritic condition in the spine at the time of the accident which, while not causing him any pain or disability at that time would inevitably—perhaps that is over-stating it—would possibly grow to such a condition. You can see it is a very difficult problem you have to decide there, you four gentlemen have to decide that. There is no doubt of course that whatever arthritic conditions existed they were aggravated and accelerated by this accident. But that is under another heading, the heading of pain and suffering to which I will come presently.

I do not want you to confuse it with this possibility of arthritis developing apart from the extent—they are two different matters. Gentlemen, I will tell you in a few moments that he is entitled to compensation for pain and suffering, he is entitled to compensation for the period that he spent in hospital in plaster, for the pain he gets in the back now, for the pain he gets in the heel. We are told that he will never get better, will not improve, that the accident, Dr. Brand said was bringing forward symptoms that he would have had later. He said it might be 10 or 15 years or any time, it was only a guess. He said that with normal uses, provided that he does not overstrain himself, there will not be a great increase in that condition, but there will be some, and as I say it will not improve.

He said that the heel is not a type of fracture that ever gives good results but this particular fracture is better than average. He said that he will always suffer pain in the heel with long standing and he will always get pain in the foot in walking over an uneven surface, that there is a likelihood of arthritis developing in the ankle, and of course that is in a different category altogether from the spine because there is no suggestion that there was a pre-existing condition there.

On the other hand the opinion that arthritis can develop there is only an opinion and there is no x-ray picture in existence nor is there any diagnosis by anybody that he has arthritis there or will get it for a certainty. The doctor said that he is not fit for walking on an even surface with long standing, or any work which would involve bending. He is entitled to compensation for that condition, for the pain it has given him and for any diminution it has occasioned him in his capacity to enjoy life generally.

I moved from the question of his earnings to that question of pain and suffering in order that I might emphasize the difference in the importance of them because you see that £2 3s. 0d. a week is a very definite sum and if you were to multiply that by the number of years that a normal man can be expected to work as a linesman, you would be doing it in the face of evidence that before the accident he had a condition which probably would cause him some day, apart from the accident altogether, to lose that £2 3s. 0d. a week; and if you are at the stage in your deliberations when you are computing any future losses and if you have solved to your

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future satisfaction how many years he would have worked as a linesman without the accident—as I told you before that is quite a difficult problem : please do not fall into the error of multiplying the number of weeks you have in mind and awarding him the resulting sum, because you have to appreciate that £2 a week for one year is not a verdict for £104, it is something less.

You see, if a man was earning £10 a week, £500 a year, and you were seeking to compensate him for the loss of earnings in the next 10 years, it would be a complete fallacy to award £5,000, because interest alone on that at the start is £5 a week, it has to be a decreasing sum. Be careful in your mathematics if you are going to work out periods of partial incapacity and bear in mind that even a linesman—and even apart from death—does have an end to his working days.

This man is 57, as far as my recollection of the evidence goes, and while I am not sure of it I think I heard learned Counsel suggest to you that he might be able to carry on his occupation for another 20 years, it may be, it may be that you have linesmen in Lismore able to ascend poles at 77—it is a matter for you. Apply the test of reasonableness, you have to bear in mind the possibility of this man continuing to earn this money. You have to think of all possibilities : illness or other causes, all those things are relevant, lack of employment, the possibility of accident elsewhere, these are all nebulous factors but they are there.

However it is entirely a matter for you. I do not propose to deal with it in any detail further with you. I merely want to point out to you, as I said at the outset, no matter how serious a man's injuries are, no matter how clear it was those injuries were sustained in the course of his employment when he brings an action at common law for damages based on negligence he must prove—and it is entirely your responsibility to say whether he has proved it, and whether the Defendant has proved his charge of contributory negligence, and it is then when you have formulated in your minds the answer to those problems, you come to the question of damages.

I did not read the regulation to you but it is on p. 9.

Please consider your verdict, gentlemen.

Mr. BEGG : There is one formal matter. I did mention to the Jury that they may take the view that there was no fault on Mr. Fraser and no fault on the Council, it was a case of accident. I ask Your Honor to direct if they did come to that conclusion they must give a verdict for the Defendant.

HIS HONOR : That was involved by implication in what I said.

Gentlemen : I mentioned that but I think, as learned Counsel put to me, I should have made it clearer. I might add that merely because a person is injured, damages do not necessarily have to be paid by somebody. It is not the law, because there are and there could be injuries sustained without blame being attachable to anybody. But I think I should have put it more specifically. If it was an inevitable accident, that is not negligence, it is bound up in what I told you earlier.

There is another matter that learned Counsel raised, and he has not asked me to give it to you in the form of a direction, and had he done so I would have refused it but I think he having mentioned it in the course of his address I ought to refer to it, as a legal submission has been made to you in regard to it.

It makes no difference in this case that the pole was on Mr. Borton's property or on the road, the reason being that there is an obligation on an employer who asks his man to work on the road to see that he is not unnecessarily exposed to unreasonable risk. In this case the employer directed him to mount this pole, and whether it was the employer's pole or Mr. Borton's pole makes no difference to the employer's liability, if any, in this type of case.

Please consider your verdict, gentlemen.

(At 8.8 p.m. the Jury retired.)

Mr. BEGG: Your Honor put to the jury that the place at which he was to work was not a safe place —

HIS HONOR: I safeguarded it as far as I could by pointing out to the jury it was for them to spell out from the evidence what was a safe place. I have not found a case in which it was more difficult to expressly put it to the jury.

Mr. BEGG: In my submission I would ask Your Honor to direct the jury that in this case he was not directed to climb the pole but was directed to go out and inspect and if he used reasonable care his duty under the regulation was not to go anywhere up the pole.

HIS HONOR: I think the tendering of the regulation answers that. Apart from that I would be against you, there is evidence here that he was told to go out and clear that pole of wires.

Mr. BEGG: There is another matter, in putting the obligation on the employer to render all poles on which he was to work reasonably safe, in my submission that is not a correct direction to the jury——

Mr. PILE: I do not think His Honor said that.

HIS HONOR: I think I said this pole.

Mr. BEGG: Your Honor referred to the particular pole. In my submission, that also is not a correct direction to the jury and Your Honor could not spell out of the Plaintiff's evidence that there was any allegation on the Plaintiff's evidence that there was any allegation on the Plaintiff's part that the Plaintiff was under a responsibility to see that this pole was safe before he did any work on it.

HIS HONOR: I gather that is the Plaintiff's case.

Mr. PILE: Your Honor said that to the jury.

HIS HONOR: I will add no more.

(At 10.20 the jury were brought back to Court.)

HIS HONOR: Gentlemen, I understand you have not yet agreed on a verdict. Would it assist you in any way if any of the evidence was read to you or any direction of law given to you ? Would that help you in

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No. 3. Summing up of Clancy, J. 14th September 1953— *continued.*

any way do you think ? Most of the evidence has been taken out and I can arrange to have any part that has not been typed read to you from the shorthand notes. Do you think it would be of assistance to you, otherwise you will have to remain together.

JURY : We have had a discussion on the matter and we seem to be divided in our opinions.

HIS HONOR : You do not think that by reading——

JURY : I do not think any sort of evidence would make any sort of difference whatsoever.

HIS HONOR : Do you think you are likely to have a majority verdict if you are allowed to go for a while, is that possible—I do not want to know which way it is. Do you think it might be 3 to 1 ?

JURY : I think something in that line might be worth considering.

HIS HONOR : That does not mean I can take that verdict now. I will ask you to retire and give it further consideration and I will discuss it with you in a little while from now. It does look as if you will have to remain together tonight.

(At 10.23 the jury again retired. At 10.26 p.m. the jury were brought back into Court.)

HIS HONOR : I have considered the matter and I regret that you have to follow the precedent set by your other fellow-citizens the other night and remain here. I will return tomorrow morning at 9 o'clock.

No. 4. Jury's Verdict, 15th September, 1953.

No. 4.

Jury's Verdict.

Tuesday, 15th September, 1953.

(At 9 a.m. the jury returned into Court.)

HIS HONOR : Have you agreed on a verdict unanimously ?

JURY : Yes, we have.

HIS HONOR : A unanimous verdict ?

JURY : A unaminons verdict.

(The jury returned a verdict for the Plaintiff in the sum of £5,000.)

(Mr. Begg asked for a stay of proceedings for 21 days on the usual terms ; there being no objection, the stay was granted.)

HIS HONOR : Judgment will be entered for the Plaintiff in the sum of £5,000.

No. 5.
Notice of Appeal.

TAKE NOTICE in this action which was tried before the Honourable Mr. Justice Clancy, Judge of the Supreme Court and a Jury of four persons sitting in Circuit at Lismore on the 14th and 15th days of September last past on which lastmentioned day the said Jury returned a verdict for the Plaintiff in this action for the sum of Five thousand pounds (£5,000.0.0) that motion will be made to this Honourable Court on the first day on which the Court sits in Banco after the expiration of sixteen days from the filing of this Notice or so soon thereafter as the Counsel can be heard in that behalf, for an order that the said verdict of the said Jury shall be set aside and a verdict entered for the Defendant or a new trial of the issues in this case be granted, and for such further or other order as to this Honourable Court may seem meet and just on the following amongst other grounds :—

(1) THAT the Jury's verdict was against the evidence and the weight of evidence.

(2) THAT His Honour was in error in admitting the evidence of Lionel John Reynolds of regular or proper practise with regard to making inspections of poles.

(3) THAT there was no evidence of any duty owed by the Defendant to the Plaintiff to make inspection of a pole on private property.

(4) THAT there was no evidence of any breach by the Defendant of any such duty.

(5) THAT His Honour was in error in directing the Jury that the Defendant owed a duty to the Plaintiff to make the pole on which the Plaintiff was working reasonably safe.

(6) THAT His Honour was in error in directing the Jury that the Defendant directed the Plaintiff to mount the pole.

(7) THAT His Honour should have directed the Jury that the Plaintiff was not directed to climb the pole but was directed to go out and inspect the pole and that his duty was not to mount the pole unless the pole was safe.

(8) THAT His Honour was in error in directing that the Jury be locked up at 10.20 post meridian on the 14th day of September until 9 ante meridian on the 15th day of September.

(9) THAT His Honour should have complied with Section 66 of the Jury Act, 1912-1951.

(10) THAT the damages awarded by the Jury were excessive.

COLIN BEGG,
Counsel for the Appellant.

THIS Notice of Motion is taken out by Ivan Garland Bondfield of 37, Molesworth Street, Lismore, Attorney for the Council of the City of Lismore, of Council Chambers, Lismore, the abovenamed Appellant, by his Sydney agents, Messrs. Clayton, Utz & Co., Solicitors, 136 Liverpool Street, Sydney.

In the Full Court of the Supreme Court of New South Wales.

No. 6.

Rule upholding Appeal.

No. 4712 of 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

No. 6. Rule upholding Appeal. 1st July, 1954

Between

GEORGE FRASER ... ... (*Plaintiff*) *Respondent*

and

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

The first day of July one thousand nine hundred and fifty-four.

UPON MOTION made to the Court on the Seventh and Tenth day of May last WHEREUPON AND UPON READING the notice of motion herein filed on the second day of October last and the appeal book filed herein AND UPON HEARING what was alleged by Mr. Begg of Counsel on behalf of the Appellant and by Mr. Pile of Queen's Counsel with whom were Mr. Cahill and Mr. Coleman of Counsel on behalf of the Respondent IT WAS ORDERED on the said Tenth day of May last that the matter stand for judgment and the same standing in the list this day for judgment accordingly IT IS ORDERED that the appeal herein be and the same is hereby allowed and that the verdict entered for the Plaintiff herein be set aside and a verdict and judgment entered for the Defendant herein AND IT IS FURTHER ORDERED that the costs of the Appellant of and incidental to this appeal be paid by the Respondent to the Appellant or to its Solicitor. 10 20

By the Court.

C. T. HERBERT [L.S.]

Deputy Prothonotary.

No. 7. Reasons for Judgment. 1st July, 1954.

No. 7.

Reasons for Judgment.

Coram : STREET, C.J.
ROPER, C.J., in Eq.
BRERETON, J. 30

Thursday, 1st July, 1954.

(*a*) Street, C.J.

(*a*) STREET, C.J.

In this case I am of opinion that the appeal should be allowed with costs, the verdict for the Plaintiff set aside and a verdict entered for the Defendant.

I have had the opportunity of reading the reasons prepared by my brother Roper and my brother Brereton, and desire to add nothing for myself.

ROPER, C.J., in Eq. : I agree with that order. I publish my reasons.

STREET, C.J. : Mr. Justice Brereton asks me to publish his reasons for him.

(*b*) ROPER, C.J. in Eq.

The Respondent recovered a verdict for £5,000 in an action for damages for injuries received by him, the cause of action being the alleged negligence of the Appellant. The Appellant is now seeking to have the verdict set aside and a verdict entered for it, or alternatively to have a new trial of the action directed.

The Respondent was employed by the Appellant in connection with its electricity undertaking as a linesman. He is 57 years of age and has had about twenty years' experience as a linesman, having had about six years' experience as an employee of the Postmaster-General's Department in that capacity before being similarly employed by the Appellant for some twelve years. As a linesman his work included looking after electric wires and for that purpose climbing poles carrying such wires and affixing and detaching wires at a height to poles.

On 11th January, 1951, the Respondent was told by an insulation inspector employed by the Appellant to go to a Mr. Borton's house and take down wires so as to permit of a tree being lopped without interfering with the wires. He went to the house with a Mr. Tulk, a labourer or linesman's assistant, in a motor lorry belonging to the Appellant, and taking a ladder and some tools. He found that the wires went from the house to a pole in Mr. Borton's garden, and from that pole to a pole on the footpath on the other side of a street. He deadened the wires at the pole on the footpath and dropped them between that pole and the pole in the garden. He then went to the latter pole, which obviously was an old pole and had been in position for a good many years. He tapped around it with a hammer three or four times and thought it sounded solid. He then had Tulk place a ladder against it and tested the pole by pushing at the ladder with his foot, and, feeling satisfied with the result, climbed up the ladder to where the wires were attached to a cross-arm near the top of the pole and "belted on," which means that he attached himself in some way to the pole by means of a belt. He undid one wire and dropped it to the ground. He then started to undo the second wire when it suddenly flew into the air and the pole fell to the ground with the Respondent who was seriously injured. The pole had broken some seven inches or thereabouts below the level at which it was inserted into the ground.

It is submitted for the Plaintiff that there is evidence in this case to support a finding by the jury of negligence against the Defendant in committing a breach of its duties to the Plaintiff in one or more of the following ways, namely, (*a*) that it failed to provide a safe system of work;

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(*b*) that it failed to provide the tools necessary for carrying out the work with safety; (*c*) that if failed to provide adequate instructions to the Plaintiff to enable him to carry out the work with safety; and (*d*) that it failed to maintain a regular system of inspection of poles or regular inspections of this particular pole for the purpose of ascertaining whether it was sound.

(*a*) The system of work which the linesman adopted was one which he could properly have been expected to adopt and, namely, was to place a ladder against the pole and climb up to the wires with which he had to deal. That system is reasonably safe apart from the degree of danger which is inherent in climbing a ladder and working at a height provided that the pole has been securely inserted into the earth and is sound. Other systems have been put forward by an engineer called as an expert witness on behalf of the Plaintiff, but I think that he concedes that provided the pole is sound the system adopted is a reasonably safe system. The question therefore comes down to that of whether the means for ascertaining the soundness of the pole under this system are adequate and reasonably safe. The safe system for inspecting a pole in order to ascertain its soundness, as appears from the evidence of the Plaintiff's expert, is to test it with a hammer, to bore a hole in it just where the line of the ground is with an auger and to dig around it for about a foot to observe its condition underground close to the ground level.

This is the system which the Defendant in fact adopted in inspections of poles. The system of work therefore appears to me to have involved, firstly, that the linesman should ascertain, according to the method which I have stated, that the pole is sound, and secondly, that he should then ascend the pole with the use of the ladder as I have indicated. If that system were carried out in full, it appears to me that there is no evidence to show that it is not reasonably safe.

(*b*) The Plaintiff states that in setting out from the Defendant's depot to do this particular work there were no pikes available to him for use on the job. He does not say that he could not have got pikes if he had wished to have them. He does say that he would not have used them even if he had had them, and his expert says that the use of the pikes referred to would not have prevented the accident which happened. There is no ground, therefore, for finding negligence on the part of the Defendant arising from the fact that pikes were not made readily available to the Plaintiff when setting out to do this work.

He also says, in reference to the facilities afforded him for making a proper inspection of the pole, that he did not dig around it because he did not have a spade. He does not say that he could not have obtained a spade if he had wanted one, and it is clear from his evidence that he would not have used one if he had had one. The evidence does not disclose whether he had available an auger for the purpose of boring the pole. He did have a kit of tools which contained the hammer used by him, but its other contents are not disclosed. Again it appears that he would not have used the auger if he had had one. The injuries which he suffered in my

opinion cannot be attributed, on the evidence, to the failure of the Defendant to supply any tools or equipment.

(*c*) In considering the instructions which have or might have been given by the Defendant to the Plaintiff, it is important to bear in mind that he was engaged by the Defendant as an experienced linesman. He had had a specific instruction, of which he was aware at all material times, that he must not ascend a pole which has suffered visible deterioration due to decay or which is visibly cracked or split to a degree which might cause the pole to collapse, until the pole had been effectively secured. But he says that this pole did not show visible deterioration or was not visibly cracked or split to the degree referred to and it was open to the jury so to find, so that the existence of that instruction has little bearing.

He did, however, know how to test a pole for its safety according to the method which I have indicated. In this case he was satisfied with the result which he obtained from the hammer test, but his own evidence indicates, I think, that he should not have been so satisfied. In reply to the question, " So may I take it that if you had been sent out by the Council " on this day to see if it was a sound pole and no other purpose, that is the " opinion you would have formed ? " he answered, " No, I would have " dug around the butt," and in answer to a further question as to what he would have done if he had been sent out for the purpose of inspecting the pole and to do nothing else, he said that he would have tapped it all round with a hammer as in fact he did.

Then, on being asked, " Having formed the opinion that it was a solid " pole, you would have passed on to the next one ? " his answer was, " No, I would not do that, not on a proper pole inspection. If a man was " put on a proper pole inspection he was there to make positively sure that " underneath the ground is secure for a man to climb up at other times." His instructions as to ensuring that the pole was fit to climb appear, therefore, to have been sufficient for the purpose. If he had, as I think it was his duty to do, assured himself that this pole was fit to climb, by the methods of which he was aware and which were available to him, this accident would not have happened.

(*d*) I think that the evidence would support a conclusion that this pole had not been regularly inspected to ascertain if it was a solid pole and safe to climb, but in the circumstances of this case I think that it was the Plaintiff's duty to submit it to a proper inspection before proceeding to climb it, and that he cannot complain of the lack of previous inspections as causing or contributing to his injury. In my opinion, if there was negligence in this case the Plaintiff was the author of his own misfortune, and on that view I think that a verdict should have been directed for the Defendant.

Counsel for the Defendant did not ask for a verdict by direction in this case, and no exception to the summing up was taken upon the ground that a verdict should be directed. It has been submitted for the Plaintiff that on this ground this Court should not now direct a verdict. I think, however, that if the Court comes to the conclusion that there was no evidence to support a verdict for the Plaintiff then, as a matter of law, a verdict should

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be directed for the Defendant (see Supreme Court Procedure Act, 1900, s. 7). Consequently, I think that the appeal should be upheld and a verdict entered for the Defendant.

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The Appellant Council is the supplier of electricity in the Lismore district and its electricity is reticulated to consumers by means of wires carried on poles. At a point where the main, carried on poles in the street, passed the house, of one, Mr. Borton, the supply was conveyed to that house by wires connecting the house to the line on the far side of the street *via* a wooden pole standing in Mr. Borton's land and belonging to Mr. Borton. It is with this pole, which was erected in 1924, that the present action is concerned.

The average life of a wooden pole is 15 to 20 years.

Some twelve years before the incident which gave rise to this action the Appellant engaged the Respondent as a linesman and it continued to employ him in that capacity. He was given and he read a book of instructions, which included the following :—

> " No employee shall ascend a pole or structure which has
> " suffered visible deterioration due to decay or which is visibly
> " cracked or split to a degree which may cause such pole or
> " structure to collapse, until such pole or structure has been
> " effectively secured."

He was familiar at all relevant times with this instruction. His attention had also been drawn to the availability of other written information as to methods of distinguishing between sound and unsound poles, but he did not take advantage of it and was, in fact, familiar with what, on all the evidence, was the accepted method of testing and examining poles for soundness.

On 11th January, 1951, it became necessary to drop the lines carried on Mr. Borton's pole because a tree in the immediate vicinity was to be felled. The Appellant's installation inspector, whose job was concerned solely with wiring inside buildings, on receipt of the request went and looked at the situation and then, according to him, told the Respondent to " remove the lines and permit the lopping and re-erect them on completion " of the lopping." According to the Respondent, his instructions were " To take down wires so as they could lop the tree." I see no significant difference in these versions and can see no grounds for holding that the Respondent's discretion as to how he went about his task was in any way restricted or that he was in any way relieved of having regard to the safety instructions quoted above if the pole was in such a state as to render it applicable.

The Respondent on arrival disconnected the wires at the main on the pole across the street. He then went to the pole on Mr. Borton's property and tapped around it near the bottom with a hammer. This was an accepted test to determine whether a pole was suspect or not. Satisfied

by that test, he had a ladder placed against the pole and, after trying it again by pushing on the ladder he mounted the ladder. While he was engaged in disconnecting the wires at the top the pole fell and he sustained the injuries for which he now sues. On subsequent examination the pole was found to be extensively decayed at a point 8 to 12 inches below the surface of the ground.

The appropriate measures for testing a pole, at least if tapping gave rise to suspicion, were, as the Respondent knew, to bore a hole into it with an auger and then to clear the earth away for 6 to 8 inches below the surface, and to examine the butt there very carefully. There is also evidence that on such an examination the sapwood near the butt should be cut away and the butt then oiled or creosoted as a preservative measure.

The Respondent claims that it was the duty of the Appellant Council, as the employer, to ensure that this pole was safe for him to mount, and that even if the duty owed was not so high, none the less the Appellant failed in its duty to him, its employee, in that (1) it failed to carry out adequate periodic inspections of the pole and failed to warn him of the condition of this particular pole of which it ought to have known had it conducted proper periodic inspections; (2) it failed to instruct him in the susceptibility of poles to rot and in methods of detecting defects, and failed to warn him of the inherent risk of deterioration in wooden poles; (3) it failed to provide him with tools for carrying out a more searching test than tapping, or with equipment such as " pikes " or " gin poles " for securing a faulty pole.

The employer's duty has never been said to be to ensure the safety of his employee. But the employer must take such steps as a reasonably prudent man would take to make the place and circumstances of the employment as safe as the nature of the occupation permits, and the place and circumstances include, not only those in which the employee necessarily is, but those in which a man with reasonable foresight might expect a normally acting employee from time to time to find himself.

No question arises here about the condition of premises provided by the employer in which the employee must work, and no such question arose in *O'Connor* v. *Commissioner for Government Transport* (H.C.—not yet reported). In such case the High Court held the employer's duty to be discharged if it takes " reasonable care for the safety of the employee by providing proper " and adequate means of carrying out his work without unnecessary risk, " by warning him of unusual or unexpected risks, and by instructing him " in the performance of his work where instructions might reasonably be " thought to be required to secure him from the danger of injury." Cf. also *Taylor* v. *Sims & Sims* (1942 2 All E.R. 375). The Respondent was not *required* to climb the pole, as he could have carried out his duties, at his discretion, equally effectively by releasing the wires where they entered the house. It can, therefore, I think, be put with some force that the top of an unsafe pole was not a place where applying a realistic standard of reasonableness, it could be said that, bearing in mind the safety instruction, the fact that the Respondent was a qualified linesman, with 12 years'

experience in climbing poles, and the fact that he knew how to carry out the more searching tests, a normally acting linesman might by the use of reasonable foresight be expected to be, when on all the evidence any more than a superficial examination of the butt of the pole must have disclosed its condition. Such a conclusion would be sufficient to dispose of the matter.

But one must remember that it is impossible on the evidence to say whether or not the visible state of the pole was such that the safety regulation applied ; and although a careful examination would certainly have disclosed that it did, one must guard against reversing the onus of proof of contributory negligence. It must also be borne steadily in mind that a reasonably careful employer is required to foresee the possibility of fatigue, boredom, over-enthusiasm or acceptance of the familiar risk on the part of his employee.

I prefer therefore to proceed on the assumption that the Appellant should have foreseen that a linesman might climb a pole which was in fact in an unsafe condition. The inference then of a duty to guard against the possible results of such an act by making periodic and adequate inspections follows necessarily, even though the pole be on private land.

The only evidence as to non-performance of this duty is as follows : Firstly Mr. Borton said he had never seen anyone inspect the pole, though obviously an inspection might have been carried out in his absence. Secondly, the Appellant was unable to establish that this particular pole ever had been examined, although Mr. Jackson said that there was a routine examination of poles every 2½ years. Thirdly, there was evidence from which the jury could infer that had the pole been properly inspected its condition would have been apparent. Fourthly, though there is evidence that the pole had been bored at some time, it had not been stripped or creosoted.

In my opinion, there is evidence from which the jury could deduce that the Appellant had failed adequately to inspect the pole, but it lies entirely in the third and fourth points. The first two, take alone, are quite inconclusive, but reading them in conjunction with the other matters, it can be said that there is evidence of a failure to inspect, and hence evidence of negligence.

As to the second of the heads of negligence relied on by Mr. Pile, the duty of the Appellant is that laid down by the High Court in *O'Connor* v. *Commissioner for Government Transport.* The Respondent should be instructed in the performance of his work " where such instructions might " reasonably be thought to be required to secure him from the danger of " injury." The Respondent was engaged as a qualified linesman, and where a man accepts employment in a skilled or semi-skilled capacity, he holds himself out as having a sound working knowledge of his trade, its techniques and its hazards, and he is paid for that knowledge. His employer may have no such knowledge apart from common sense, to which virtue the employee has an equal claim, and I cannot subscribe to the view that an employer must also employ men even more skilled in the various trades which his business may encompass to instruct and supervise tradesmen and

then, presumably, someone to instruct and supervise the supervisors; this seems to me to go quite beyond the limits of what may be reasonable and practicable.

The General Cleaning Contractors v. *Christmas* (1953 A.C. 180) The House of Lords held that it was negligence for an employer not to provide a very simple device for the prevention of a common hazard which was not readily discernible on ordinary examination until it was encountered and quite inescapable; a hazard the worker was compelled to meet, and one against which he had nothing to protect himself, and it was a matter in which plainly authoritative guidance was necessary. His employment required him to encounter it, and he was left with no discretion in the matter; but it was not *necessarily* inherent in his task, as a simple device could overcome it. It was in such a context that Lord Oaksey, dealing with the duty to lay down a reasonably safe system of work, said, at p. 190:

> " Employers are not exempted from this duty by the fact " that their men are experienced and might, if they were in the " position of an employer, be able to lay down a reasonably safe " system of work themselves."

And Lord Reid, at pp. 193–194, said:

> " The Appellants say that their men are skilled men who are " well aware of the dangers involved and as well able as the " Appellants to devise and take any necessary precautions. That " may be so, but in my opinion it is not a sufficient answer."

But he continues:

> " Where the problem varies from job to job it may be " reasonable to leave a great deal to the man in charge, but the " danger in this case is one which is constantly found and it " calls for a system to meet it."

It is dangerous and unsound to tear dicta of this sort from their contexts and to endeavour to build them into a statement of general principle. It is clear that, despite their references to giving " instructions," Their Lordships were concerned only with the adoption of a safe system of working and with " instructions " in the sense of " orders " to implement such a system. They held, in effect, that although the employer was not negligent in failing to provide ladders and safety belts, apparently as these were regarded as being impracticable, it was the duty of the employer, not of the employee, to provide and to establish the use of wooden checks to prevent windows from closing. Nobody suggested that window-cleaners should be taught by their employers about the possible causes of falling from buildings. It is true that Lord Jowett quoted with approval the remarks of Denning, L.J., in the Court below, where he said:

> " If employers employ men on this dangerous work for their " own profit they must take proper steps to protect them, even if " they are expensive. If they cannot afford to provide adequate " safeguards they should not ask men to do the work at all."

The Respondent in the present case says that that means, in effect,

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that an employer may not employ a man unless it is safe to do so; that it must ensure his safety. It would follow logically that one could not employ a carpenter unless one could find some sure method of preventing him from occasionally hitting his thumb with his hammer. Such a state of affairs would be in the interests neither of the employer nor of the employee, and would rapidly bring to a standstill all forms of primary and secondary industry.

Reading the remarks of Denning, L.J., both in the context in which they are quoted and in the context in which he used them in the Court below, I am satisfied that he meant by an adequate safeguard a reasonably practicable one. He was dealing with this particular job, and with the way in which this particular hazard had to be met, and he meant, in my opinion, that if an adequate and reasonably practicable safeguard existed (and ladders and belts were held not to be reasonably practicable), then the employer could not be excused in failing to use it because the use of it would increase his costs or reduce his profits; or, in other words, that cost was not in that case a test of reasonable practicability.

It must be remembered, in every "system of work" case, that the Plaintiff carries the burden of proving that there is a safer system, that it is reasonably practicable, and that its use would, more probably than not, have prevented the accident. This is the view taken by Viscount Simon in *Colfar* v. *Coggins* (1945 1 All E.R. 328), by Sir John Latham and Sir Owen Dixon in *Bressington* v. *Commissioner for Railways* (75 C.L.R. at 347 and 357) and by Lord Normand in *Paris* v. *Stepney Borough Council* (1951 A.C. 367). It was in no way departed from in *Christmas'* case (*sup.*) except perhaps by Lord Oaksey (pp. 190–1), but was expressly adopted by Lord Tucker.

I am unable to come to the conclusion that in the circumstances of the present case it is open to hold that a reasonably safe system of work involved the teaching of the Respondent, or the immediate checking of all poles he was to climb, as suggested by Mr. Pile, or that there is any evidence that such teaching would more probably than not have prevented the accident. *Barcock* v. *Brighton Corporation* (1949 1 K.B. 339) is, in my opinion, clearly distinguishable because there the Plaintiff had been trained and promoted to a position of responsibility by his employer, the Defendant, and had in fact been trained in a dangerous method of doing the work in question. Under those circumstances Hilbery, J., held, not unnaturally, that the employer did not provide a safe system of work by merely handing to the employee a copy of the regulations when he was promoted and telling him to read them, when his whole course of training had involved a deliberate flouting of the regulation in question. The Respondent here was given an order in the form of a safety instruction, having been engaged as a qualified linesman. He was also given facilities to teach himself, if he wished to do so. Though the employer could lead him to the fountain of knowledge, he could not compel him to imbibe. The Respondent in fact had the necessary knowledge and the Appellant was entitled to assume that he did.

The Respondent, however, said finally that he was not given the tools with which to make use of his knowledge. There is no evidence that he could not have got a spade or an auger had he tried. He may not have been able to get pikes, but, in view of his own expert's evidence, it is impossible to say that the use of pikes would more probably than not have prevented the accident. The point is that the Respondent himself dispensed with the use of these articles and with any more searching test after he had tapped the pole and decided it was safe to climb and their absence was thereafter irrelevant.

He did not consider it necessary to dig around the pole so that on his own evidence, too, the only possible conclusion is that the fact that he did not have a spade, an auger, pikes or a gin pole with him did not in any way contribute to the accident.

As was said in O'Connor's case, " the party sent down was as expert " or competent to judge of that simple subject as anybody that could " reasonably be sent." He decided that any precautions additional to what he took were unnecessary, and it was that decision which was the immediate cause of the accident.

In my opinion, therefore, the only course which the Appellant could be said to have omitted and the only respect in which the system could be said to have been defective, insofar as it lay on the Appellant to carry it out and insofar as any failure in the system caused the accident, was the neglect to inspect the pole. The respondent's case as to this depends entirely, as I have indicated, in the absence of any direct evidence, on two matters—(1) condition of the pole, which he says a reasonable examination should have disclosed ; and perhaps (2) absence of one of the indicia of inspection, viz., stripping of sapwood. If these matters are accepted as evidence of negligence, they must be accepted for all purposes.

As the learned trial Judge pointed out, the more readily a defect in the pole was discernible on examination, then the more obvious it should have been to the Respondent ; and if the jury is entitled to assume from the absence of stripping and creosoting, though the pole had been bored, that it had not been properly inspected, it must at the same time conclude that the Respondent could have drawn the same inference. He was confronted with a pole which had, in fact, been in the ground for 27 years, and which must have borne some of the signs of age. It was for him to decide for himself whether he climbed it or released the wires at the house.

If its condition was such that the jury was entitled to conclude that that condition was evidence of failure to inspect, it was also such that the respondent could say that it was an old pole which had not been properly inspected and could have readily detected whether it was safe or not. Under these circumstances the case seems to me to fall within the class described by the late Chief Justice in *Packham* v. *Commissioner of Railways* (41 S.R. 152) as " exceptional." *Matterson* v. *Commissioner of Railways* (45 S.R. 110) is an illustration of this class of case, which arises where the only explanation of the accident and the only evidence of negligence is evidence which necessarily exhibits contributory negligence on the Plaintiff's

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own part. Unless what the Plaintiff says on that subject is accepted by the jury there is no evidence of negligence, and if it is accepted one must conclude that he was to a material extent the author of his own misfortune. My conclusion is, therefore, that there should have been a verdict for the Defendant by direction.

Mr. Pile has, however, argued that as no request for a verdict by direction was made to the learned trial Judge, the effect of Order 22, Rule 15, is that omission to direct a verdict cannot be allowed as a ground of appeal. The Rule is substantially the same as its predecessor, Rule 151 (*b*), which in turn merely put in rule form the effect of very many decisions both in England, in this State and in the High Court. Some of these decisions are referred to in *Mutual Life Insurance Co. of New York* v. *Moss* (4 C.L.R. 311) where Griffith, C.J., referred to them as establishing " that you cannot have " a new trial for misdirection unless the attention of the learned Judge has " been called at the trial to the alleged misdirection and opportunity has " been given to correct it." In *Nevill* v. *Fine Art etc. Insurance Coy.* (1897 A.C. 68 at 76) Lord Halsbury said, " Where you are complaining of " non-direction of the judge, or that he did not leave a question to the jury, " if you had an opportunity of asking him to do it and you abstained from " asking for it, no Court would ever have granted you a new trial ; for the " obvious reason that if you thought you had got enough you were not " allowed to stand by and let all the expense be incurred and a new trial " ordered simply because of your own neglect."

This Court was not referred to any case in which such a principle has been held applicable to a motion to enter a verdict and Lord Halsbury's remarks certainly do not cover such a case. Nor have I found any such case unless *Hardman* v. *McLeod* (26 S.R. 578) can be regarded as one, and in that case the Court gave leave. The whole principle upon which those decisions and the Rule were based is that if a matter can be remedied at the trial, then appropriate action should be taken there and then, and that the unsuccessful party may not rake over the ashes of the case and search the reports to found points of evidence or establish misdirections after a verdict has been given.

Quite different considerations apply to the question of a verdict by direction. In such a case the evidence must *ex hypothesi* be so thin that the jury may arrive at the correct conclusion in any event, and where there is doubt the proper course is to leave the matter to them, for even if they do not, a new trial should never result. In *Trafford* v. *Pharmacy Board* (2 S.R. 418), decided soon after the Supreme Court Procedure Act was passed, Stephen, A.C.J., said, " We have power now to enter a verdict for " the Defendant if we are of opinion that the Plaintiff should have been " non-suited or if we are of opinion that on the evidence the Defendant is " entitled to a verdict." In that case no motion for a verdict had been made at the trial nor was it a ground taken in the order *nisi* for a new trial, but the Court amended the latter and entered a verdict for the Defendant.

It seems to me that the class of case envisaged in s. 7 of the Supreme Court Procedure Act, 1900, which applied where a party is as a matter of

law entitled to a verdict, is quite distinct from those which fall within the field covered by the earlier decisions, by Rule 151 (*b*), and latterly by Rule 15 of Order 22. The latter field is concerned with directions or rulings on matters ancillary to the main issue and necessary for the guidance of the jury in coming to a decision on that issue in accordance with the law, and not, it seems to me, with the question whether or not there is any case to go to the jury at all.

Section 7 on the other hand, is concerned only with cases where, as a matter of law one party or the other must succeed, and the jury does not enter the picture. It should be noted that although the words " such notice of motion " in Rule 151 (*b*) would ordinarily, perhaps, be read with reference to Rule 150 so as to include notices of motion to set aside or enter a verdict, the new Rule substitutes the words " ground of appeal " for " ground for *such* notice of motion " and the altered phraseology of the other Rules in Order 22 removes any basis for inferring that Rule 15 was necessarily intended to include motions to enter a verdict. In my view, Rule 15 of Order 22 has no application to proceedings under Section 7 of the Supreme Court Procedure Act.

It becomes unnecessary to consider the other grounds of appeal.

In my opinion the jury's verdict should be set aside, and a verdict entered for the Defendant.

No. 8.

Order granting Conditional Leave to Appeal to Her Majesty in Council.

WEDNESDAY the fifteenth day of June One thousand nine hundred and fifty-five.

UPON MOTION made on the twenty-seventh day of July last past to this Honourable Court on behalf of the Appellant (Plaintiff) pursuant to Notice of Motion filed herein on the thirteenth day of July last past WHEREUPON AND UPON READING the said Notice of Motion and the affidavit of Maurice Arthur Simon sworn on the thirteenth day of July last past and filed herein AND UPON HEARING what was alleged by M. E. Pile of Queen's Counsel with whom appeared Mr. C. A. Cahill of Counsel for the Appellant and by Mr. Colin Begg of Counsel for the Respondent THIS COURT DID ORDER that the matter stand adjourned to enable the parties to confer on the terms of the order sought by the Appellant and the matter standing in the list for mention on the fourteenth day of June instant and this day

In the Full Court of the Supreme Court of New South Wales.

No. 8. Order granting Conditional Leave to Appeal to Her Majesty in Council. 15th June, 1955— *continued.*

WHEREUPON AND UPON HEARING what was alleged by Mr. C. A. Cahill of Counsel for the Appellant and by Mr. Colin Begg of Counsel for the Respondent THIS COURT DOTH ORDER that leave to Appeal to Her Majesty in Her Majesty's Privy Council from the Judgment and Order of this Court be and the same is hereby granted to the Appellant UPON CONDITION that the Appellant do within six weeks from the date hereof give security to the satisfaction of the Prothonotary in the sum of Five hundred pounds sterling for the due prosecution of the said appeal and the payment of all such costs as may become payable to the Respondent in the event of the Appellant not obtaining an order granting him final leave to appeal from the said Judgment and order or of the appeal being dismissed for non-prosecution or of Her Majesty in Council ordering the Appellant to pay the Respondent's costs of the said appeal as the case may be AND UPON FURTHER CONDITION that the Appellant do within fourteen days from the date hereof deposit with the Prothonotary the sum of twenty-five pounds as security for and towards the costs of the preparation of the transcript record for the purposes of the said Appeal AND UPON FURTHER CONDITION that the Appellant do within six weeks of the date hereof take out and proceed upon all such appointments and take all such other steps as may be necessary for the purpose of settling the index to the said transcript record and enabling the Prothonotary to certify that the said index has been settled and that the conditions hereinbefore referred to have been duly performed AND UPON FURTHER CONDITION that the Appellant do obtain a final order of this Court granting him leave to appeal as aforesaid AND THIS COURT DOTH FURTHER ORDER that the costs of all parties of this application and of the preparation of the said transcript record and of all other proceedings herein and of the final order do follow the decision of Her Majesty's Privy Council with respect to the costs of the said appeal or do abide the result of the said appeal in case the same shall stand or be dismissed for non-prosecution or be deemed so to be subject however to any orders that may be made by this Court up to and including the said final order or under any of the rules next hereinafter mentioned that is to say Rules 16 and 17, 20 and 21 of the Rules of the second day of April One thousand nine hundred and nine regulating appeals from this Court to Her Majesty in Council AND THIS COURT DOTH FURTHER ORDER THAT the costs incurred in New South Wales payable under the terms hereof or under any order of Her Majesty's Privy Council by any party to this Appeal be taxed and paid to the party to whom the same shall be payable AND THIS COURT DOTH FURTHER ORDER that so much of the said costs as become payable by the Appellant under this order or any subsequent order of the Court or any order made by Her Majesty in Council in relation to the said appeal may be paid out of the moneys paid into Court as such security as aforesaid so far as the same shall extend and that after such payment out (if any) the balance (if any) of the said moneys be paid out of Court to the Appellant AND THIS COURT DOTH FURTHER ORDER that pending the said appeal all proceedings under the said Judgment and verdict or otherwise in this cause be and the same are hereby stayed and that each party is to

be at liberty to restore this matter to the list upon giving two days notice thereof to the other for the purpose of obtaining any necessary rectifications of this Order.

By the Court

For the Prothonotary,

R. T. BYRNE, [L.S.]
Chief Clerk.

In the Full Court of the Supreme Court of New South Wales.

No. 8.
Order granting Conditional Leave to Appeal to Her Majesty in Council. 15th June, 1955— *continued.*

No. 9.

Order granting Final Leave to Appeal to Her Majesty in Council.

No. 9.
Order granting Final Leave to Appeal to Her Majesty in Council. 2nd August, 1955.

No. 4712 of 1951.

IN THE SUPREME COURT OF NEW SOUTH WALES.

Between

GEORGE FRASER ... ... (*Plaintiff*) *Appellant*

and

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

Tuesday the second day of August One thousand nine hundred and fifty-five. UPON MOTION made this day to this Honourable Court on behalf of the Appellant pursuant to Notice of Motion filed herein on the twenty-seventh day of July last past WHEREUPON AND UPON HEARING READ the said Notice of Motion and the Affidavit of Maurice Arthur Simon sworn herein on the twenty-seventh day of July last and filed herein AND UPON HEARING what was alleged by Mr. M. H. Byers of Counsel for the Appellant and Mr. Colin Begg of Counsel for the Respondent THIS COURT DOTH ORDER that final leave to appeal to Her Majesty in Her Majesty's Privy Council from the Judgment of this Honourable Court given and made herein on the first day of July One thousand nine hundred and fifty-four be and the same is hereby granted to the Appellant AND THIS COURT DOTH FURTHER ORDER that upon payment by the Appellant of the costs of preparation of the transcript record and despatch thereof to England the sum of Twenty-five pounds (£25) deposited in Court by the Appellant as security for and towards the costs of the preparation of the transcript record on appeal be paid out of Court to the Appellant.

By the Court.

R. E. WALKER [L.S.]
Prothonotary.

In the Privy Council.

No. 37 of 1955.

ON APPEAL FROM THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES.

BETWEEN

GEORGE FRASER
(*Plaintiff*) *Appellant*

AND

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

RECORD OF PROCEEDINGS

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