

George Fraser - - - - - *Appellant*

v.

The Council of the City of Lismore - - - - - *Respondent*

FROM

THE SUPREME COURT OF NEW SOUTH WALES

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE
OF THE PRIVY COUNCIL, DELIVERED THE 14TH MAY, 1956.

Present at the Hearing:

EARL JOWITT
LORD OAKSEY
LORD TUCKER
LORD KEITH OF AVONHOLM
LORD SOMERVELL OF HARROW

[*Delivered by* LORD SOMERVELL OF HARROW]

The appellant claims damages from the respondent, his employer, for personal injuries alleging negligence. The respondent pleaded contributory negligence. The action was heard before Clancy J. with a jury. The jury found for the appellant and awarded £5,000. The respondent appealed and the Full Court of the Supreme Court set aside the verdict of the jury and entered judgment for the respondent. The appeal is brought by leave of the Supreme Court.

The appellant submits that the verdict of the jury should be restored. The respondent submits first that the order of the Supreme Court should stand; alternatively that a new trial should be ordered on liability and damages or alternatively on damages alone.

The powers of the Full Court in an appeal from a trial by jury are to be found in the Supreme Court Procedure Act 1900 section 7. "In any action, if the Court in Banco is of opinion that the plaintiff should have been non-suited, or that upon the evidence the plaintiff or the defendant is as a matter of law entitled to a verdict in the action or upon any issue therein, the Court may order a non suit or such verdict to be entered."

That section was considered by their Lordships' Board in *Hocking v. Bell* 75 C.L.R. 125. Viscount Simon in the judgment pointed out that there was no power as there is under English procedure (O.58 r. 4) for the appeal tribunal to draw inferences of fact.

To succeed the appellant must establish that there was evidence on which the jury could reasonably find for the appellant.

The respondent supplied electricity in the City of Lismore and the appellant was employed as a linesman. He had had many years experience.

On 11th January, 1951, the appellant received instructions from an officer of the respondent to go with an assistant to the house of Mr. Borton and to take down some wires to enable some trees to be lopped. The wires were supported by a pole which was on Mr. Borton's land. The appellant decided that the wires should be taken down from the

pole. There was some suggestion that he might have taken them down from where they were attached to the house but there were plainly objections to this. The appellant said that he first tapped round the pole to see if it sounded solid. It did. The ladder was then put up against the pole. He pushed it with his foot against the pole, which only shook a little bit. The pole appeared old but not subject to decay. He thought it was safe and went up the ladder. He unscrewed one wire and dropped the two ends. The other wire was continuous. He undid it, "it just flew up in the air and the pole went." He fell and sustained injuries.

The appellant gave evidence that it was usual for pikes to be put round poles which had to be ascended. There was apparently nothing in this from the point of view of safety.

Witnesses on both sides agreed that a full inspection for safety involves more than tapping and looking at the part of the pole above ground. The pole should be bored diagonally where the line of the ground is and the earth should be dug down so that about a foot of the pole below ground level can be seen.

The appellant's expert Mr. Reynolds said that most Councils had a regular inspection of poles. The respondent's Electrical Engineer said that the respondent had its poles inspected every 2½ years, but no record was kept. It was suggested in argument that the respondent's servants would not be able to inspect this pole as it was on private property. The Engineer gave no support to this suggestion.

The pole had been in the ground for 27 years. Mr. Reynolds gave the average life as from 15 to 20 years though some hard woods lasted longer. The pole broke off below ground and Mr. Reynolds said that the decay which led to its collapse might not have been disclosed by tapping.

The age and the condition of the pole and the absence of any evidence as to its inspection were accepted by the Full Court, their Lordships think rightly, as evidence on which the jury could find that the respondent had been negligent in failing adequately to inspect the pole. If it had been adequately inspected it would have been replaced, or at any rate secured if anyone had to go up it. If the respondent had established that the inspection had been impossible owing to the pole being on private property, its age and the absence of inspection might well have imposed a duty to warn the appellant of these facts. The Full Court entered judgment for the respondent on the ground that there was no evidence on which a jury could reasonably find that the appellant had taken reasonable care for his own safety. There was clearly evidence on which the jury could find that the pole appeared to the eye to be safe and that the appellant had tapped as he said. The suggestion is that he should have obtained the necessary tools and made a full inspection by boring and digging.

There is one further and important piece of evidence relevant to this issue. Statutory Safety Instructions had been issued to the appellant among others. "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." This would indicate that a visible inspection was in ordinary circumstances enough. If poles are regularly inspected it may well be that it is enough. The instruction plainly makes it difficult for the respondent to maintain that any reasonable linesman would, before ascending any pole, carry out the full inspection which would take up obviously an appreciable portion of his employer's time. The respondent sought to gain comfort from the fact that the instruction had only recently been issued. This would seem to make its case more difficult. If its officials had previously assumed that all linesmen did the full inspection before ascending poles they would, when they read the instruction have realised the necessity of supplementing it as insufficient. The appellant's evidence that the pole as seen above ground looked safe, was supported by Mr. Reynolds who had not of course seen the pole until after it had fallen. There are some answers given by the appellant and by Mr. Reynolds which in isolation might suggest that there

was a duty on all occasions to carry out the full inspection. On the evidence as a whole Their Lordships are clear that there was evidence on which a jury could reasonably find that the appellant had acted reasonably or rather that the respondent had failed to establish contributory negligence.

It is necessary to consider next the respondent's submission that there should be a new trial: The grounds on which this is based are numbers (2) (3) (5) (6) and (7) of the Notice of Appeal to the Full Court. The first two allege that the evidence as to inspection of poles was inadmissible. Their Lordships are clear that it was admissible. The last two allege that the learned Judge was in error in directing the jury that the respondent directed the appellant to mount the pole. There is nothing in this. The appellant was instructed to take down the wires and the mounting of the pole was the natural and reasonable way to do this. It is the fifth ground which requires consideration: "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."

Under O.22(15) of the Rules of the Supreme Court of New South Wales an objection to a summing up is not allowed, without leave, unless taken at the trial. In many cases no doubt the matter can be put right before the jury have concluded their deliberations. No leave was obtained in the present case. There are some sentences in the summing up which might be read as leaving to the jury the question whether the respondent was under an absolute duty to provide a safe pole for the appellant to climb. That would of course be wrong in law and might be covered by the fifth ground of appeal as set out above. The respondent's duty was to take reasonable steps for the safety of his workmen.

There are two passages on which special reliance was placed. "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 is of course the last sentence but one that is relied on. It may be said that the last sentence puts it right. Again a few lines lower down: "Is the standard that you are to accept such that the employer is automatically to ensure the safety of these poles?"

The first question is whether the point was taken. In the opening passages of his summing up the learned Judge emphasises more than once and very clearly that the plaintiff has to establish negligence: that the employers duty is to provide, so far as he reasonably can, proper equipment and working conditions. Again at the end of his summing up he says, "you have the plaintiff's claim that there was a departure from the standard of conduct which should have been observed by a reasonable man." The objection therefore would have been not to the case as put generally but to certain sentences which might have misled the jury. Their Lordships have carefully considered the objections taken by Mr. Begg on the conclusion of the summing up. The submission made by him and relied on is not in its context clear, but Their Lordships think it cannot be read as covering the objection set out above. Their Lordships are fortified in their conclusion by the fact that this point does not appear expressly in the respondent's case.

In dismissing the application for a new trial on the ground that the only point capable of argument was not taken Their Lordships are not deciding that if it had been taken it would have succeeded.

There remains the submission as to damages. On the evidence the figure was in Their Lordships' opinion a generous one, but the generosity was not on a scale which would justify a new trial.

Their Lordships will humbly advise Her Majesty that the appeal should be allowed and the judgment of the trial judge restored. The respondent will pay to the appellant his costs incurred in the Full Court of the Supreme Court of New South Wales and of this appeal.

In the Privy Council

GEORGE FRASER

p.

THE COUNCIL OF THE CITY OF LISMORE

DELIVERED BY LORD SOMERVELL
OF HARROW

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