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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.

CASE FOR THE APPELLANT

RECORD

1.—This is an appeal, by leave of the Full Court of the Supreme Court of New South Wales granted on the 2nd August, 1955, from the judgment and order of the said Full Court (Street, C.J., Roper, C.J., in Eq. and Brereton, J.) dated the 1st day of July, 1954, allowing the appeal of the Respondent setting aside the verdict of a jury given for the Appellant and judgment thereon in the said Supreme Court on the 14th day of September, 1953, awarding the Appellant the sum of £5,000 as damages against the Respondent.

2.—The Appellant, the Plaintiff in the action, claimed the said sum of £5,000 from the Respondent, the Defendant, as damages for personal injuries suffered by the Appellant in an accident in the course of his employment due to the negligence of the Respondent, his employer.

3.—The Respondent at the material time supplied electricity in the City of Lismore and the Appellant was employed by the Respondent as a linesman. On the 11th day of January, 1951, a request was received by one George Dudley Jackson the Engineer in charge of the Respondent's undertaking that the Respondent's Installation Inspector, Charles Leonard Poynting, should go to a property in the City to see if it was necessary to remove certain electricity wires in order that some trees should be lopped. On the same morning Poynting went to the property and decided that the wires would have to be removed. At about mid-day on the same day Poynting instructed the Appellant to do the work. The Appellant first looked round the Respondent's premises for some pikes (poles with forked p. 41, l. 7 p. 51, l. 11 p. 3, l. 37

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tops) to take on the job but failed to find any. The Appellant then drove to the property in a lorry with his assistant, Milton Tulk. The wires in question connected a private house on the said property to the main supply
p. 4, l. 28 in the street. The wires went from the main lines across the street to a pole just inside the garden of the house and from there to the house itself. The lines were thus affording support for this pole. The Appellant first
p. 4, l. 3 disconnected the wires from the main lines and let the ends of these wires down and then cleared the wires off the street. The Appellant then turned to the pole in the garden. The Appellant tested the pole for soundness by
p. 4, l. 5 tapping it with a hammer around the base. He also examined it. The
p. 9, l. 9 pole appeared to be sound. The Appellant then placed his ladder against
p. 4, l. 44 the pole and gave it a push. As it still seemed to him to be safe, he climbed
p. 5, l. 5 the ladder. There were two wires on this pole. The Appellant disconnected
p. 5, l. 11 the first one without incident, but when he disconnected the second wire
p. 5, l. 16 it flew up in the air and the pole collapsed. The Appellant fell into the
p. 16, l. 32 street and suffered two compression fractures, the first of the first lumbar
p. 16, l. 38 vertebra in his back and the second of the heel bone of his right foot. The
p. 18, l. 30 Appellant was at the time of the trial, and would remain, unfit for his work
p. 18, l. 32 as a linesman and could only do light manual work not involving bending, lifting heavy weights, walking on uneven surfaces or standing for long periods.

p. 28, l. 37
p. 29, l. 8
p. 37, l. 34
p. 31, l. 2

4.—The pole in question had been installed in 1924 and was therefore about 27 years old at the date of the accident. The evidence called by the Appellant (and not contradicted by the Respondent) was that the normal life of such a pole would be 15 to 20 years. The pole had by the date of the
p. 37, l. 9 accident rotted underneath the ground and the break occurred some distance below the ground level. The exact measurement of the distance below the ground level was not given in evidence but it seems that the lowest point
p. 32, l. 23 of the break was about 10 inches and the highest about 5 or 6 inches below the ground. There was a dispute in the evidence whether the condition of the pole could have been ascertained by visual examination of the surface of the pole above ground or by tapping the pole with a hammer. The
p. 42, l. 20
p. 49, l. 20
p. 42, l. 30
p. 49, l. 3
p. 4, l. 42
p. 9, l. 38
p. 23, l. 13
p. 25, l. 41
p. 32, l. 28
p. 37, l. 42
witnesses for the Respondent asserted that the cracks which they allege should have been visible above ground level and the sound made by the hammer should have warned the Appellant that the pole was dangerous. None of these witnesses examined the pole before the accident. The Appellant and his assistant said that in fact there was nothing either in the appearance or in the sound given off by the tapping, to indicate that the pole was dangerous. The Appellant's expert said that he would not have expected the appearance or tapping of the pole to give any warning of its true condition.

5.—The Appellant's complaints of the negligence of the Respondent can be conveniently set out under three heads.

6.—The Appellant's first contention was that the Respondent had not properly inspected and/or maintained the pole before the accident. The

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Appellant's expert witness, who was a Consultant Engineer, having considerable experience in the supervision and carrying out of electricity undertakings, said that the proper practice was that an electricity undertaking should carry out periodical inspections of the poles in its area. He said that at such inspections the soundness of the heartwood should be inspected by boring a hole in the pole with an auger at ground level, and that the pole's condition below the ground should be inspected by opening the ground round a pole and that then the butt should be treated with a preservative. The witness said that the interval between the inspections varied depending on the location and what was disclosed at a previous inspection, but that the first inspection should becarried out within two years of the erection of the pole. The Respondent did not tender any evidence of their practice but in cross-examination the Respondent's Engineer, Jackson, said that inspections were carried out every two and a half years and that on that basis a "complete inspection" would have been carried out twice since 1945 when he was appointed Engineer. He said, however, that no record of such inspections was kept and that therefore he could not say whether this particular pole had been inspected. The Respondent did not call any employee who carried out these inspections. There is nothing in the evidence to suggest that it was the practice of the Respondent's inspectors to treat the pole with a preservative, and there was no evidence that the pole in question had ever been so treated. Indeed it was the Defendant's case that there was no obligation to inspect this particular pole, as it was on private property. The Appellant submits that on this evidence and from the actual state of the pole at the time, it was clearly open to the jury to find that it was the duty of the Respondent to inspect and maintain the pole in question and that this duty had not been properly discharged. There was no satisfactory evidence that the pole had been inspected in the last two and a half years before the accident or at any time. If it had been inspected, no record had been kept of its condition at the time of the inspection and therefore the Respondent had no idea whether it should have been inspected again within a shorter period than two and a half years. Further if the evidence of the Appellant's expert was accepted, the work had not been properly done as the pole had never been treated with a preservative. There was no evidence or suggestion that a properly inspected pole might so unexpectedly deteriorate as to collapse in the interval which might properly elapse between inspections.

p. 30, l. 26
p. 32, l. 47
p. 32, l. 1
p. 33, l. 7
p. 33, l. 3
p. 51, l. 35
p. 52, l. 1
p. 51, l. 36
p. 52, l. 4
p. 67, l. 20

7.—The Appellant's second contention was that the Respondent should have instructed him to make a full inspection of this particular pole and should also have instructed him how to do so and given him the tools to carry out the inspection. The evidence was that the Appellant was not instructed to carry out a full inspection nor at the date of the accident had the Appellant ever performed such an inspection although he had been present when some were performed. The Appellant was not

p. 9, l. 18
p. 10, l. 30

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provided with the means of inspecting the pole nor given any direction to do so or instructions how to do so. If the Respondent's argument that this pole being on private property there was no duty on the Respondent to inspect or maintain the pole is accepted, the Appellant's second contention is strengthened. The Appellant should have been warned that the pole was likely to be particularly dangerous as it had not been inspected or maintained by the Respondent and the Appellant should have been expressly instructed to carry out a careful inspection of the pole before climbing it.

8.—The Appellant's third contention was that he should have been provided with a derrick spar pole which when placed in position would have made it impossible for the pole in question to have collapsed. The
p. 31, l. 10 expert called by the Appellant said that such a derrick spar pole should be provided in cases where the pole is not new or has not been properly inspected and found to be sound and it is the linesman's duty to release the wires. The Appellant himself had looked for pikes to put round the pole but it was common ground that pikes would not have prevented the accident. The
p. 46, l. 30 Respondent did not ever make use of a derrick spar pole as described by the Appellant's witness.

9.—The Respondent's case was :—

(1) There was no duty to inspect or maintain the pole as it was on private property.

(2) That the Appellant need not have released the wires from the pole. He could have released them from the house.

(3) That the Appellant in climbing the pole was acting contrary to instructions given to him in writing.

10.—The second point was not put to the Appellant in cross-examination.
p. 50, l. 3 It was conceded by the foreman in charge of the electrical undertaking called by the Respondent that there was nothing wrong in what the
p. 47, l. 30 Appellant did. The Respondent's engineer admitted that if the wires had not been removed from the poles the branches of the tree which was to be lopped might have become entangled with the wires. This would have defeated the whole object of the work.

11.—On the third point the only written instructions put in evidence were as follows :—

p. 72, l. 18 " No employee shall ascend a pole or structure which has " suffered 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."

The Appellant in evidence said that as far as he could see the pole
p. 9, l. 33–l. 41 had not deteriorated due to decay nor had it visibly cracked or split to the degree which might cause it to collapse. In this he was supported by the evidence of his assistant and the opinion of his expert. Further the

Respondent had no equipment by which the pole could have been effectively secured. The Appellant submits that none of the above points taken by the Respondent had any substance.

12.—Counsel representing the Respondent made no request to the Trial judge for a verdict by direction. The Trial judge summed up the evidence to the jury and the jury returned a unanimous verdict for the Appellant in the sum of £5,000.

13.—The Respondent appealed to the Full Court of the Supreme Court of New South Wales. In the notice of Appeal the Respondent did not assert that the Trial Judge should have directed a verdict in favour of the Respondent. The grounds of appeal were that the jury verdict was against the weight of evidence, that the Trial Judge erred in admitting evidence of the Appellant's expert as to the proper practice in inspecting poles, that the Respondent had no duty to inspect a pole on private property, and that there was no evidence of any breach of that duty, that the Trial Judge made various misdirections on fact and was in error in directing that the jury should be locked up overnight while considering their verdict.

14.—The appeal was heard on the 7th and 10th days of May, 1954, and on the 1st day of July, 1954, the Full Court allowed the appeal and entered a verdict for the Respondent. Reasons were published by Roper, C.J. in Eq. and Brereton, J.

15.—Roper, C.J. in Eq. in the course of his reasons said :—

> " I think that the evidence would support a conclusion that p. 71, l. 34
> " the 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 (Appellant's) duty to
> " submit it to a proper inspection before proceeding to climb it
> " and he cannot complain of the lack of previous inspection as
> " causing or contributing to his injury."

16.—In this and in other passages of his judgment His Honour failed to make any distinction between the periodical inspections which the Respondent's servants were alleged to have carried out and the simple test which the Appellant did before he decided to climb the pole. The Appellant had not been instructed to carry out a full inspection of the pole. He was instructed to do some work which involved climbing the pole. Before doing this he tapped the pole and examined its surface above ground. There was no evidence that he was instructed to do anything else. The Respondent's foreman deposed that striking or tapping the pole was a p. 54, l. 2 perfectly adequate test for the Appellant to make. The Appellant himself made a distinction between the test he was doing and a proper inspection. According to him, in a test no further action need be taken if the pole when tapped appears sound. In an inspection the person carrying out the p. 10, l. 23 p. 9, l. 26

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inspection should dig round the pole and examine the butt even if the pole appears to be sound when tapped. Generally His Honour erected into a question of law for his own decision what was really a question of fact for the jury, namely, whether in the circumstances the Appellant took proper care for his own safety.

17.—Brereton, J. in his reasons held that there was a duty on the
p. 74, l. 13 Respondent to inspect the pole even though the pole was on private land. His Honour went on to say :—

> " 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 two and a half 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 Respondent had failed adequately to inspect " the pole, but it lies entirely in the third and fourth points. " The first two, taken alone, are quite inconclusive, but reading " them in conjunction with the other matters, it can be said that
> p. 74, l. " there is evidence of a failure to inspect, and hence evidence of " negligence."

18.—However, His Honour later said :—

> " 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 a 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 " own part. Unless what the Plaintiff says on that subject is " accepted by the jury there is no evidence of negligence, and if is " 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 p. 78, l. 5 " direction."

19.—It is submitted that in this passage His Honour erred in the following respects. He was wrong to put a duty on the Appellant to inspect the pole to see if it had previously been inspected by the Respondent's servants. There was no evidence that if any creosote which had been placed on a pole below ground it would be apparent on examination of the pole above ground. Further the Appellant gave evidence of the normal practice in periodical inspections by the Respondent's servants and this did not include stripping the pole or putting any creosote or other preservative on it. There was no evidence called by the Respondent to contradict this. Therefore the absence of such stripping or creosote, even if the absence was apparent, would be no indication that the pole had not been inspected by the Respondent's servants. Further the question whether the mounting of the pole by the Appellant was in the circumstances negligence on his part or a voluntary acceptance of a known risk was peculiarly a matter for the jury and not for His Honour. And finally, it is fallacious even as a point of fact to say that because a Court upon evidence given in a trial may conclude from the condition of the pole that it was not properly maintained, the Appellant as a workman entitled to rely on his employer's system of work and inspections did, and was bound to, conclude from the observable condition of the pole that it was in a dangerous condition.

The Appellant prays that his appeal may be allowed and the verdict of the jury be restored for the following (among other)

REASONS

(1) BECAUSE, there being evidence upon which a jury might so conclude, the verdict of the jury in favour of the Appellant on the issues of negligence and contributory negligence ought not to have been disturbed.

(2) BECAUSE the Full Court was wrong in holding that there should have been a verdict for the Respondent by direction.

(3) BECAUSE there was sufficient evidence of the Respondent's negligence to support the verdict of the jury. 10

(4) BECAUSE there was sufficient evidence to support a finding for the Appellant on the issue of contributory negligence.

(5) BECAUSE the Respondent did not ask the Trial Judge for a verdict by direction nor seek on appeal any leave to raise matters not taken before the Trial Judge.

G. E. BARWICK.
D. A. GRANT.

In the Privy Council.

No. 37 of 1955.

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BETWEEN

GEORGE FRASER
(*Plaintiff*) APPELLANT

AND

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

CASE FOR THE APPELLANT

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