No 45 of 1940

IN THE HIGH COURT OF AUSTRALIA.

THE SYDNEY COUNTY COUNCIL

v.

HUGHES

REASONS FOR JUDGMENT.

Judgment delivered at SYDNEY

on THURSDAY, 5th DECEMBER, 1940.

H. J. Green, Govt. Print., Melb.

C.11235

SYDNEY COUNTY COUNCIL V. HUGHES.

O R D E R

APPEAL DISMISSED WITH COSTS.

THE SYDNEY COUNTY COUNCIL -v- HUGHES.

JUDGMENT. RICH, A.C.J., McTIERNAN AND WILLIAMS, JJ.

On the 29th October, 1937, C.H.Hughes was in the employment of certain contractors who were erecting a building for Danger Gedye & Co. Ltd. on land situated between Harris Street and Bulwarra Lane, Ultimo. On that date a crane on which he was working came into contact with some live overhead electric wires belonging to the appellant, the Sydney County Council, and he was electrocuted and died.

His widow on behalf of herself and their two children sued the appellant for compensation under the New South Wales Compensation to Relatives Act, 1897-1928. The jury returned a verdict for £2509-10-0d but on appeal the Full Court of New South Wales ordered a new trial. On the second trial the jury returned a verdict for £2,759-3-0d. The appellant appealed to the State Full Court, which dismissed the motion. This Court is now asked to enter a verdict for the defendant or alternatively to order a third trial. Before a third trial is ordered the Court must be satisfied the second trial took a course clearly prejudicial to the appellant and so erroneous that the verdict cannot justly be allowed to stand: see Australian Brokerage Ltd. -v- Australian and New Zealand Banking Corporation Ltd. (52 C.L.R. 430 at 442).

The material facts are shortly as follows: the appellant is a statutory body which was incorporated by the Gas and Electricity Act, 1935-1936, to acquire the electricity undertaking previously carried on by the Municipal Council of Sydney. In October, 1937, R.C.Coleman was its district foreman in the area where the building was being erected. According to his evidence he went to the job on October 22nd in connection with the erection of a bracket in lieu of an existing pole. He saw the general foreman, who was in charge of the work, named Jones, but had no recollection of having seen one Little until the Coroner's inquest which was held after the accident. Noticing that the street lamps were on at the time, and seeing men lifting steel girders

with the crane and manhandling them he immediately called their attention to the fact the wires were alive as they could see from the lamps being alight. On the 4th November, 1937, he made a report to the appellant, in the course of his duty, in which he said that on the 22nd October he received a message from Head Office to see the foreman on the job in connection with the bracket, that he went to the job, and, while there, stressed the danger of the mains becoming alive and pointed out that all care should be taken to see that no one came into contact with them.

It was the practice at the time to switch the current off during daylight hours except when it was turned on for testing purposes. There would have been no difficulty in keeping it cut off at the local power sub-station and only the street lighting in the lane would have been affected.

A witness named Little gave evidence for the plaintiff. He said he was the foreman on the job in charge of the crane, Jones being the general foreman, and that he had a conversation with Coleman, apparently on the 22nd October. He said that when the crane had been completely erected and was ready to operate, he saw ~~and heard~~ Jones using the telephone, and, after he had done so, that Coleman appeared on the job and said he had come down in response to a telephone call about some wires being dangerous. Coleman then referred to the street wires near the crane and said they were de-energised through the day and there was not much chance of the current coming on. Little said to Coleman that they wanted a definite answer that it would not come on during working hours because they were working the crane all day, and Coleman said he would see that the current was cut off during these hours. Little told him they were 7.30 A.M. to 5.0 P.M.

On the appeal to the Supreme Court from the first verdict the learned Chief Justice had said that "It was necessary that evidence should be adduced on behalf of the plaintiff which would enable the jury to infer, inter alia, (1) that Coleman had given the intimation in question, (2) that he had authority from the defendant Council to do so, (3) that it had been communicated to the deceased, (4) that the wires had been made "live" (at a time when the deceased was entitled to assume that they would be

"dead"), and (5) that it was this which caused his death, (by leading him to omit to take precautions which he would otherwise have taken)."

On this appeal senior counsel for the appellant conceded that if the first two points mentioned by the Chief Justice were established the other three would follow. It is evident that the jury accepted Little's evidence on the first point. He was interviewed by the police immediately after the accident and gave evidence at the coroner's inquiry. He did not mention the above conversation to the police or in this evidence. It is plain that there were very serious reasons why the jury should not have accepted his evidence but it is not possible for this Court to say that these reasons were so cogent that the jury as reasonable men were bound to disbelieve him. It was argued that the learned trial judge should have stressed these reasons in his summing up. It is true that he did not refer to them specifically, but they were fully adverted to by counsel and the attention of the jury was particularly drawn to the support given to Coleman's evidence by the report of the 4th November, 1937. His Honour emphasised to the jury the importance of the conversation, referred to the conflict of evidence between Little and Coleman, the criticism directed against each of them, and said he did not propose to deal with the evidence in detail because counsel on each side had already gone through it at great length. We consider His Honour gave the jury a sufficient guide to enable it to come to a right decision on the first point.

The main argument related to the authority of Coleman to undertake on behalf of the appellant that the current would be kept switched off during working hours, and the admissibility of the evidence of the witness O'Dea on this point.

O'Dea had been an alderman in the Municipal Council of Sydney for about two and a half years when that body controlled the electricity undertaking and he was also a member of the appellant Council for some unspecified time. He purported to give general evidence of the authority of a district foreman. It was part of the plaintiff's case in chief to prove this authority so that by calling him in reply she split her case but no

objection appears to have been taken on this ground. His evidence was objected to on the ground that he had no personal knowledge of a district foreman's duties and in our opinion this objection ought to have been upheld and his evidence rejected. If we thought the finding of the jury depended on his evidence we would be of the opinion that a new trial should be granted. A perusal of the ~~evidence~~ transcript has, however, satisfied us that there was other evidence to justify the finding. Mr. Bulcock, the engineer in charge of the district in which Bulwarra Lane is included, gave evidence of the duties and authority of a district foreman. The district is divided into three areas each under such a foreman. His main duties are to supervise the work of the men under his control. They construct and maintain the overhead lines. Bulcock said a foreman could not order the cutting off of the power, and that only the general manager could do that; but the general manager, who also gave evidence, said it was ridiculous to refer such a matter to him and that the mains manager, who was above the district engineer, could order it. In cross examination Bulcock said that if information was required about the lines by anyone engaged on a job and he telephoned the appellant, the district foreman would be the person who would be sent to the spot. If information was sought as to when the wires in Bulwarra Lane would be energised he would have authority to give this information. Bulcock went on to say that the foreman would have no authority to undertake to keep the wires de-energised during working hours and that to give such an undertaking would be right outside the scope of his authority. His evidence and that of the general manager show that Coleman did not have express authority to promise the current would be kept switched off during working hours, but we think there is ample evidence, omitting that of O'Dea, on which the jury could have found that Coleman was held out by the appellant as having ostensible authority to give this undertaking. The crane had been erected and was ready for work. The foreman on the job realised that it was dangerous to commence operations until he could be certain that the current would be kept switched off. He telephoned the appellant. Coleman arrived on the job and the

conversation to which we have already referred took place. Coleman was the only person with whom the foreman would come in contact on such a matter. When he telephoned for the information he would be switched through to Coleman if he was in. If it became necessary for a servant of the appellant to go to the job Coleman would do so. It was only a trivial matter that had to be arranged, namely, the switching off of the current for the street lighting in the lane during daylight between 7.30 a.m. and 5.0 p.m. In other words it was only necessary to arrange that no testing should take place in that short length of wire between those hours. The arrangement was one into which the appellant could reasonably be expected to enter as representing its usual practice under such circumstances. Whether Coleman's statement is referred to as an intimation or as information appears to us to be immaterial. His employment ostensibly included within its scope authority to make it; the workmen dealt with him in good faith; and, in such a case, the apparent authority is equivalent to the real authority and binds the principal; Uxbridge Permanent Benefit Society -v- Pickard (1939 1 K.B. 266; 1939 2 K.B.248).

The real pivot on which the whole case turned was whether the jury belived Little or Coleman as to whether the intimation was made or not. O'Dea's evidence was immaterial on this point. For these reasons we do not think the verdict should be upset when there was sufficient evidence other than that of O'Dea on which the jury could find that Coleman had authority to make it.

Strong exception was taken to the charge of the learned trial judge to the jury that they must ask themselves the question whether or not it was within the scope of Coleman's authority to give information to the public as to the time when the current would or would not be cut off from the wires. It was argued that the jury could only answer such a question in the affirmative . We think the argument seeks to lay too much stress on the suggested difference between the meaning of the words intimation and information. An intimation or information that the current would be kept switched off during working hours in the future would each amount to a promise that

this would be done. When the jury were told to ask themselves the above question they could only answer it in the affirmative if they were satisfied that the making of such a promise was within the actual or apparent scope of his authority. In either case the promise was not intended to be contractual but only a statement as to what the appellant would do in the circumstances.

The appeal should be dismissed with costs.

SYDNEY COUNTY COUNCIL V HUGHES.

JUDGMENT. STARKE J.

Appeal from a judgment of the Supreme Court of New South Wales dismissing a motion on the part of the appellant - the Sydney County Council - to set aside a verdict in favour of the respondent in an action brought by the respondent against the appellant and for a new (third) trial of the action.

The action was brought under the Compensation to Relatives Act 1897-1928 of New South Wales in which the respondent, the widow of one Hughes, for herself and her children sued to recover compensation for the pecuniary loss sustained by them through the death of her husband, caused by the negligence of the appellant.

The Gas and Electricity Act 1935-1936 constituted the appellant an authority for generating and supplying electric power and authorised it to delegate to a General Manager its powers, authorities, duties, and functions, with some exceptions.

The negligence charged against the defendant was in livening or energising its electric supply wires or in allowing them to be livened or energised at a time when it had intimated or undertaken to employers who were erecting a building or to the foreman in charge of the work and on which the deceased was employed that the wires would be dead. A crane with a steel rope was in position on the work and was being worked close to the electric supply wires of the appellant. It was pointed out to a district foreman in the employ of the appellant that it was dangerous to work the crane in close proximity to these wires. The district foreman intimated or assured or gave an undertaking to the foreman in charge of the deceased and other workers on the building and in connection with which the crane was being worked that the electric supply wires would be cut off or would be dead during working hours; namely from 7.30 a.m. to 5 p.m. After this assurance the deceased, who knew of it, was

working at the crane, during working hours, and the steel rope on the crane accidentally touched the electric supply wires, which were energised or live and by contact electrified the steel rope and crane, whereby the deceased was killed. The jury found a verdict for the respondent, which the Supreme Court refused to disturb; hence this appeal.

The arguments in support of the appeal were:-
First that the intimation assurance or undertaking given by the district foreman that electric power would be cut off or that the wires would be dead during working hours was outside his authority of the scope of his duty. The argument is ill founded. According to the evidence, a district foreman of the Sydney County Council is in charge of a district and supervises the work of the men in his district. Further, he may give assistance, information, or advice to the public in connection with the Council's electric supply. Thus the District Engineer of the Council, under whom is the District Foreman, deposed that his duties comprised mainly the supervision of work; that is, of the men and overhead line construction and maintenance. During his examination, the following questions were asked, and answered:-

"Q. Is it not a proud boast of the County Council that officers such as Mr. Coleman (the District Foreman) are in duty bound to give advice and information to the vast public of this metropolis?

A. Yes.

Q. So proud is the Council of it that it puts it on its letterheads?

A. We do not go so far as to give an undertaking of what we will do.

Q. Assistance, information and advice is to be given by men such as Mr. Coleman?

A. Yes.

Q. And if they sought information on such a technical matter as when the wires in this lane would be energised or de-energised, Coleman would give it?

A. Yes.

Q. He would tell them?

A. Yes."

It was contended that though the District Foreman had authority to give information, still he had no authority to undertake or decide when current would be on or off. The form of expression is unimportant if the District Foreman had, as appears from the evidence, authority to give information when power would be on or off. To promise or undertake that power would be on or off is only a more emphatic method of imparting that information; it had no contractual significance whatever.

Second, that the statement attributed to the District Foreman that power would be cut off during working hours was contrary to the evidence and the weight of evidence in the case. Indeed, the Chief Justice in the Supreme Court observed that, reading the evidence in cold print, he could not help feeling surprised that the jury believed that the statement attributed to the District Foreman was ever made by him. It was however a question of fact for the jury, and apparently two juries reached the same conclusion. The Supreme Court refused to disturb the verdict on this ground, and there is no sufficient reason for any interference on the part of this Court with that decision.

Third, that the evidence of Ernest Charles O'Dea was wrongly admitted. The deponent had been a member of the Municipal Council of Sydney and had served in the electrical department of that Council. See Municipal Council of Sydney Electric Lighting Act 1896-1935. The appellant took over the undertaking of the Municipal Council in connection with the generation and supply of electric power. According to the witness, he familiarised himself with

the activities and functions of the office of district foreman. During his examination, the following questions were asked and answered:-

"Q. Broadly speaking, how would you describe his function as between the public and the Council?

A. When some information is sought by the County Council they would send a district foreman to the person and he would go and listen to the complaint or ask them what they wanted to convey to the Council.

Q. A request perhaps?

A. Yes, and then they would tell them what to do.

Q. What do you mean by 'they'?

A. The district foreman, or whoever the person was. The Council always cooperated with the public and all users of electricity.

Q. You mean one of his jobs was to convey information?

A. Definitely.

.....

Q. How would a district foreman deal with that situation? (a crane fouling the wires during working hours).

A. If there was some impending danger the district foreman would advise the person what to do, when it would be unsuitable to go on with the practice that they were doing, or if they should discontinue it.

Q. Could he say anything about wires being de-energised? ..... What could he say in that regard?

A. The practice would be:- 'I will arrange to have it cut off'.

Q. And could he state when and so forth?

A. I don't think there is any doubt that he could state when. I would say from my experience that it would be a telephone job, that he would there and then get in touch with them, and he would say:- 'There is a crane likely to get

fouled; we will have to get that cut off from tomorrow'".
All this evidence was objected to and was in my opinion wholly inadmissible. The witness had been a member of the Municipal Council of Sydney but he had, as I understand, nothing to do with the appellant, the Sydney County Council, constituted under the Gas and Electricity Act. He knew nothing of the duties which it or its General Manager had assigned to its District Foremen. He knew nothing of the work they actually performed. He was only giving his interpretation of the duties of a District Foreman under the Municipal Council of Sydney and without reference to any direction of that Council or of the manager of its electrical department. It is obvious that the evidence was led for the purpose of influencing the jury and prejudicing the appellant. Litigants must not feel surprised if Courts use the only method in their power to correct such flagrant abuses of legal procedure; namely, new trials. But in this particular case a third trial would be deplorable. It would be a grave and serious miscarriage of justice because the evidence of the District Engineer of the appellant is to the effect that it would be within the scope of the authority of a district foreman in the appellant's employ to give the information or assurance or undertaking attributed to him in the present case.

No other objection was taken to the conduct of the second trial, or at all events none that need be referred to.

The result is that this appeal should be dismissed.