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IN THE HIGH COURT OF AUSTRALIA.

McSORLEY

V.

THE METROPOLITAN WATER SEWERAGE
AND DRAINAGE BOARD

REASONS FOR JUDGMENT.

Delivered at SYDNEY

on 3rd DECEMBER, 1945.

McSORLEY

v.

THE METROPOLITAN WATER SEWERAGE AND DRAINAGE BOARD.

JUDGMENT.

Appeal from an order of the Supreme Court of New South Wales refusing a new trial in an action for negligence in which a verdict was given for the defendant by direction of the learned trial Judge.

The action was brought by ^athe widow for herself and her children for damages for the death of J.J. McSorley, her husband. It was alleged that the death was caused by the negligence of the defendant, his employer. McSorley was engaged in excavating a trench in Cowper Wharf Road on 2nd May 1944. The negligence charged was that the defendant failed adequately to warn McSorley of the presence of an electric high tension cable in the place where he was working. McSorley put his pick into the cable and was killed.

The learned trial Judge ^{and} in the Full Court held that the evidence of the plaintiff showed that the presence of the cable was evident and visible to McSorley before the accident happened, and that therefore ~~any~~ absence of sufficient warning ~~could~~ could not be regarded as the cause of the injury to McSorley.

As we think that a new trial should be ordered, we consider it inadvisable to examine the evidence in detail. But in our opinion it was open to the jury to regard the evidence relied upon for the conclusion stated as relating only to the condition of the trench after the accident had happened, and as not necessarily showing that the cable or the covering of the cable had been exposed by McSorley in the course of working before the occurrence of the accident.

But the respondent contends that, even if this be the case, there was no evidence fit to go to a jury of insufficient
warning /

warning, and that upon analysis it is plain that the evidence of a warning which was given for the plaintiff related to other persons than McSorley, and that upon the plaintiff's case there was no evidence for or against of any warning to McSorley.

The defendant called evidence, and we must consider the case upon the whole of the evidence which was available for the consideration of the jury. Watts, the defendant's foreman, gave evidence of a warning given to McSorley before he started working in the locality of the accident - when he was working in Forbes Street. It was open to the jury to take the view that this evidence was, having regard to all the circumstances, and particularly to the knowledge of Watts hereafter to be mentioned, an insufficient and inadequate warning. In the second place, Watts gave evidence that he did, immediately before McSorley started working in the place where the accident happened, warn McSorley in a precise and accurate manner by informing him of the location of the cable. The jury was not bound to accept ~~this~~ evidence or to accept it with all the details deposed to by Watts which, if accepted, would render the warning sufficient and adequate in all respects. In the third place, evidence was given by a witness named Bourne of a warning given to some of the workmen on the day when the accident took place in terms which ~~it was~~ *it was* ~~were~~ open to the jury to regard as inadequate. Watts gave evidence that he had a plan which showed the precise position of the cable at the spot where McSorley was working. It was contended for the defendant that the warning last referred to, which was only a warning that electric cables were in the vicinity, was directed to men other than McSorley. It was, we think, open to the jury to take the view that this was ^{given} a warning given to McSorley, and that, in the circumstances, it was inadequate.

Therefore we are of opinion that there was evidence upon which the jury might find for the plaintiff. We are therefore of opinion that the appeal should be allowed and that a new trial should be ordered. The plaintiff appealed in forma pauperis, *and*

There will be no order as to the costs of the appeal. The defendant should pay the costs of the appeal to the Full Court of the Supreme Court, and the costs of the first trial should abide the costs of the new trial now ordered. The order of the Court is as follows:-

Appeal allowed. Order of Full Court of Supreme Court set aside. Substitute for that order an order setting aside the verdict and the judgment thereon and an order granting a new trial. Respondent Board to pay costs of appeal in Supreme Court. Costs of former trial to abide the ^{result of the} new trial. No order as to costs of appeal to this court.

A handwritten signature in dark ink, appearing to be 'J. H. S.', is located below the text of the court order.