Privy Council Appeal No. 23 *of* 1964.

Sinclair Eugene Swan – – – – – – – *Appellant*

v.

Salisbury Construction Company Limited – – – – *Respondent*

FROM

THE SUPREME COURT OF BERMUDA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 1ST FEBRUARY 1965

Present at the Hearing
LORD MORRIS OF BORTH-Y-GEST.
LORD PEARCE.
LORD UPJOHN.
[*Delivered by* LORD MORRIS OF BORTH-Y-GEST]

This is an appeal *in formâ pauperis*, by special leave, from a judgment and order (dated the 10th June 1963) of the Supreme Court of Bermuda (The Honorable Sir Allan C. Smith, Assistant Justice) whereby the claim of the appellant against the respondents was dismissed. The appellant was employed by the respondents and on the 28th September 1959 he suffered injuries owing to the collapse of a crane on which he was working. By a writ issued on the 31st October 1962 he brought an action claiming that his injuries resulted from the negligence of the respondents in failing to provide a safe system of work and effective supervision.

At the time of the accident the respondents were driving piles for the foundations of a warehouse on a site in Pembroke. The piles (in groups of three) were to be driven into the ground to depths varying from 14 to 27 feet and a crane was used for the process. The crane was capable of lifting five tons with the boom swung out to a radius of 10 feet. It was mounted on a chassis supported by four wheels. Each wheel had double tyres. The boom was about 35 feet long. The lead for driving the piles was about 26 feet long and consisted of a three-sided frame with a heavy maul. The total weight of the lead and maul was about three tons. The piles were up to 30 feet long and weighed approximately three-quarters of a ton.

The method of pile driving was as follows. The crane was moved or manoeuvered near to the point where a pile was to be driven and the lead (with the maul on it) was then lifted to a vertical position but with its main weight resting on the ground. By the use of a second wire which was attached to the upper end of a pile such pile was then lifted to a vertical position with its lower (and pointed) end resting on the ground at the point on the ground into which it was to be driven. At that stage one man of the crew engaged in the process climbed up the lead. The lead with the man on it, was then hoisted to such height as would bring the maul above the top of the pile. The man then manoeuvred the pile into the slot of the lead after which he inserted bolts across the open side of the lead. So that pile driving could thereafter take place he disconnected the wire from the top of the pile and connected it to the top of the maul. He then made his way down to the ground. Pile-driving then commenced.

Pile-driving had taken place at the site for some days before the date of the accident. About 12 piles had been driven during those days.

On the 28th September 1959 further pile-driving took place. The work in the morning was done by a crew consisting of four people. One was the foreman Correia, another was the crane-driver, Philpott, and the remaining

two (of whom the appellant was one) were labourers. Three piles were driven during the morning. Just before the mid-day break the crane was moved to a new position in readiness for the driving of a further group of piles and before work stopped the lead was brought into position for the first pile of the new group and that pile was lifted up to a vertical position with its lower end resting on the ground at the point into which it was to be driven. When the mid-day break ended and the time came for work to be resumed the crane-driver (Philpott) and the second labourer did not re-appear. Only Correia (the Foreman) and the appellant were present. Correia was an experienced and competent crane operator and was recognised by the appellant to possess skill superior to that of Philpott. As the crane and the lead and the one pile had been positioned before the mid-day break in readiness for the driving of the pile Correia decided that the best plan was that he and the appellant should proceed to drive that one pile but should not thereafter (in the absence of the other two) continue with pile-driving operations. Correia took charge of the crane and he asked the appellant to climb up the lead in order to get the pile into position under the maul. The appellant had not previously undertaken that part of the work involved in the pile-driving process. After the appellant had climbed up the lead it was hoisted by the crane. After it had been hoisted up some distance the crane began to " shake " or to " tremble ". It was Correia's opinion that the boom was then extending to a radius of about 10 feet. Correia's evidence was that the right front wheel sank with a sudden drop into the ground, that the crane vibrated and that the boom and lead swayed over to the right. He called out to the appellant to jump. The appellant however did not hear him. Thereafter the crane veered to the side and toppled over on to the ground. The appellant who was on the lead was brought to the ground and received injury.

Examination after the accident revealed two important facts. One was that at the spot where previously the right front wheel of the crane had been standing there was after the accident a hole in the ground. It was about 11 inches deep according to Mr. Diel a director of the respondents who was called to the scene: according to Correia it was some 12 to 18 inches deep. The other fact was that it was found that all the bolts connecting the right front wheel of the crane to the axle had been broken or sheared off.

In his action the appellant's claim for damages was based upon allegations that the respondents (his employers) had in five ways failed to provide a safe system of work and effective supervision. They may be summarised as follows:

(1) in not ensuring the stability of the crane in relation to the nature of the operation and of the surface of the ground,

(2) in not providing a sufficient number of workmen including one to give signals to the crane operator,

(3) in not providing means to ascertain the degree to which the jib (or boom) of the crane could be safely extended having regard to the weight being carried,

(4) in extending the jib (or boom) excessively, and

(5) in not taking proper precaution for the safety of the appellant.

Having in mind some of the submissions advanced on appeal to Their Lordships' Board it is necessary to refer briefly to the course of the trial. Apart from evidence relating to the injuries sustained by the appellant and evidence relating to his financial loss there was the evidence of the appellant himself and there was the evidence, called on his behalf, of a linesman named Trott who was working nearby and who saw the crane falling and of a labourer named Fough whose work was that of digging preparatory holes into which the piles could be inserted and who also saw the crane falling. The evidence called on behalf of the respondents was that of Mr. Diel the Director (who had 26 years' experience in construction work) and that of Correia. The trial took place in March 1963. The evidence on behalf of the appellant was given on the 25th and 26th March: the evidence on behalf of the respondents was given on the 26th and 29th March. The learned Judge gave judgment on the 10th June 1963.

Certain defences pleaded in the respondents' defence (that the appellant voluntarily ran a risk, that the accident was an inevitable one, that the appellant was negligent in a manner contributing to the accident) were either abandoned at the trial or were negatived by the learned Judge and need not be further mentioned or considered. The respondents also pleaded that the cause of the accident was that the ground under one of the wheels of the crane gave way. They averred that they " had no reason to suspect that the ground which gave way under the said wheel would in fact give way and further that normal and reasonable inspection and precautions pertaining to the site of operation of this kind did not reveal the existing condition of the ground under the said wheel ".

Their Lordships think that it is important to observe that it would appear that all the available evidence in regard to the occurrence was placed before the Court and all the theories, surmises and suggestions which either party wished to advance were apparently put forward.

In a very careful judgment the learned Judge examined the evidence in order to arrive at a conclusion as to the cause of the collapse of the crane. Having come to a conclusion on that matter he then proceeded to consider whether the respondents had been negligent.

In investigating the cause of the collapse of the crane the learned Judge considered a number of possible causes. The collapse could have resulted from extending the boom further than it should have been extended having regard to the weight that was being lifted. On the evidence that he accepted the learned Judge ruled out that possible cause. Likewise he ruled out as a possible cause that Correia had started the lift too quickly and had applied a jerking force to the crane. These findings were essentially findings of fact. They were not challenged on appeal. Two other possible causes were examined and having regard to the argument before Their Lordships it is necessary to state them. One was " that some part of the mounting of the crane was too weak and gave way under the strain of the lift ". The other was " that the ground under the wheels was not sufficiently solid and gave way under the weight of the lift". The learned Judge ruled out the first of these two. In doing so he referred to the evidence that the bolts securing the wheel to its mounting on the axle had all sheared off. He accepted the view which Mr. Diel had put forward that the shearing off of the bolts was caused by the sudden dropping of the wheel into the hole. That view was supported by the fact that the bolts had all been broken off together. He rejected the view that the wheel had been broken off by a twisting force as the crane toppled over: had that been what had happened the expectation would have been that the bolts would have been broken off unevenly. In dealing with this matter the learned Judge said that he had had no evidence from any disinterested witness as to the condition of the bolts " to contradict or correct Mr. Diel's evidence, nor was there any evidence suggesting that the bolts had become weakened or loosened by wear or neglect before the accident ". On behalf of the appellant this passage in the judgment was criticised. It was submitted that as the collapse of a crane is something that should not happen it was for the respondents to explain the occurrence and to show that the cause of the collapse, if ascertained, did not involve any negligence on their part. It was submitted that the respondents should have called positive evidence to establish that the bolts had been properly maintained and had not, before the accident, been in a weak state and had not been neglected. It was submitted that in the words quoted above the learned Judge was placing an onus on the appellant which properly fell upon the respondents. Their Lordships consider that when read in their full context the words of the learned Judge do not show error of approach. The respondents were at the trial calling evidence to explain what had happened. Mr. Diel gave his views and they were subject to testing by cross-examination. His view was that the ground under the wheel gave way and that in consequence the wheel suddenly dropped and that as a result the bolts securing the wheel to its mounting on the axle sheared off. It was implicit in his evidence that the sudden dropping of the wheel was the only reason why the bolts sheared off. The learned Judge was saying no more than that there was no evidence which

contradicted or corrected the evidence of Mr. Diel. In the result the learned Judge rejected the view " that some part of the mounting of the crane was too weak and gave way under the strain of the lift " and he came to the conclusion " that the crane toppled over because the ground suddenly gave way under the right front wheel ". It seems clear that he was deciding that that was the cause and the only cause of the accident.

That cause being established it was undoubtedly for the respondents to absolve themselves from liability. The crane was under their control and it was their duty to take all reasonable care to ensure the safety of the appellant (whom they required to mount the boom of the crane) and to avoid subjecting him to unnecessary risks. There was clearly a duty in the respondents to take all reasonable care to see that the crane was not positioned on insecure and unstable ground. There was an onus upon them at the trial to show that they had taken all such proper and reasonable care. Had the learned Judge been of the opinion that they had not discharged the onus his decision would doubtless have been difficult to attack.

There was much evidence on this issue (which Their Lordships need not fully state) which might have led the learned Judge either to conclude that the respondents had been negligent or to conclude that they had not. The site where the pile-driving was taking place was on the fringes of Pembroke Marsh. Some years previously the site had been filled by the dumping of rubble on it. There was evidence that the place was muddy and marshy. The ground was soft in some places though hard in others. There was water at a depth of about 3 feet 6 inches below the surface. The very circumstance that piles were being driven in order to make it possible to erect a building was an indication that the site could not or might not sustain much weight. All these considerations were present to the mind of the learned Judge. There was evidence however that the respondents had given thought to the question whether the ground was sufficiently solid for the operation of the crane without having extra supports, such as planks, under the wheels. Before the work commenced on the site both Mr. Diel and Correia had inspected it. Before the 28th September 12 piles had been driven without incident. During the morning of the 28th three piles had been driven. The crane had then been moved to a new position which was on a roadway which trucks had made across the site. Before the mid-day break the crane had lifted the lead and pile into position. The learned Judge said in his Judgment " in the light of all this was it reasonable to anticipate that there might still be some danger of the ground giving way and that extra precautions should be taken to guard against it? In my opinion the answer to this question is no". Their Lordships are not able to say that this conclusion cannot stand. The respondents had shown to the satisfaction of the learned Judge, or on an examination of the whole of the evidence he was satisfied, that they had not failed to take reasonable care.

In the submissions presented to Their Lordships on behalf of the appellant it was said that the learned Judge had ignored the principles which are summarised in the phrase " *res ipsa loquitur* ". It was urged that in the circumstances of the case a burden lay upon the respondents either to show that they had not in any potentially relevant way been negligent or that the accident was due to a specific cause which did not involve negligence. If the view was accepted that the ground gave way and that the bolts sheared when the wheel jolted into the bottom of the hole, even then, so the argument ran, it was for the respondents positively to prove that the bolts were in good condition and had been well maintained: the bolts may have been neglected and may have been in bad condition: had they been in good condition they might not have been sheared off: if they had not been sheared off the crane might not have collapsed: the respondents had not shown that the crane would be liable to topple over simply because one wheel fell into a place where the ground gave way and had not shown that there would have been a collapse whether the bolts had been sheared off or not. Hence it was argued that in the absence of evidence that the bolts had been properly inspected and properly maintained the respondents had failed to show that the collapse of the crane had taken place without any failure of due care on their part.

Because the appellant had specified certain particulars of negligence the learned Judge, so the argument continued, had fallen into the error of failing to require the respondents to show that they had taken all due care.

These submissions, skilfully developed and presented, seem to involve a greater concentration upon some parts of the evidence and upon some lines of enquiry than was directed to them by the appellant at the trial. As cranes ought not to collapse it was essential for the respondents to explain why the collapse occurred on the 28th September if they were to absolve themselves from those indications of negligence which could arise from the very fact of the occurrence itself. It was therefore necessary for the respondents to deal not only with any specific allegations of negligence which the appellant formulated against them but to show that they were not otherwise at fault. The evidence that they adduced was however subject to all such testing and probing as the appellant desired. When therefore Mr Diel gave evidence to the effect that the front wheel of the crane sank into the ground and that the bolts broke as a result of the jolt it was open to the appellant to suggest that the breaking of the bolts was not solely due to the sudden jolt but was at least partly due to some poor condition which existed because they had not been properly looked after. Mr. Diel could have given his views in regard to the suggestion. It would seem however that the bolts received more attention in the argument upon appeal than at the trial. As Their Lordships have earlier stated the evidence of Mr Diel unless challenged and unless wholly or partly rejected can fairly be regarded as stating that the sudden dropping of the wheel was the only reason why the bolts sheared off. In the result on evidence which he was entitled to accept the learned Judge decided that the real cause of the accident was that the ground gave way under the right front wheel. As this conclusion was not reached as the result of any wrong approach Their Lordships are unable to accept the submissions advanced on behalf of the appellant which they have indicated.

Their Lordships have likewise been unable to accept certain additional contentions which were advanced. It was contended that the work ought not to have been continued after the mid-day break on the 28th in the absence of a full crew. A consideration of the evidence shows however that having regard to the limited work that was to be undertaken it was legitimate for Correia to proceed as he did. Further it was contended that there should have been a third man on the ground to give to the crane operator early warning of any signs of instability. Their Lordships can see no error in that part of the judgment in which the learned Judge gave his reasons for rejecting this contention.

Criticism was made of the following sentences in the judgment: "The onus lies on the plaintiff to establish a balance of probability that he sustained his injuries as a result of some failure of duty by his employer to take proper precautions for his safety. The fact that the crane toppled over speaks for itself up to a point: but this by itself is not sufficient. Taking the evidence as a whole I am not satisfied that the Plaintiff has proved that he was injured as the result of any failure in the duty which his employer owed to him and give judgment for the Defendant." When read in their context the words of the learned Judge do not reveal error. They occur almost at the end of a long judgment in which the issues had been fully and minutely examined and conclusions clearly expressed. The appellant as Plaintiff had to prove his case but once he had proved that he was injured by the collapse of the crane he was well on the way to proving it. *Res ipsa loquitur*. The mere fact that the crane fell did not however establish that the case must inevitably succeed for the respondents were only liable if they were negligent. As however cranes do not ordinarily collapse a *prima facie* case was made out against the respondents and the burden was on them to show that they had not been negligent. As Lord Simonds said in *Woods v. Duncan* [1946] A.C. 401 at p. 439—"But to apply this principle" (of *res ipsa loquitur*) "is to do no more than to shift the burden of proof. A *prima facie* case is assumed to be made out which throws upon him" (that is a defendant) "the task of proving that he was not negligent". So also in *Barkway v. South Wales Transport Co. Ltd.* [1950] 1 A.E.R. 392 Lord Porter in speaking of the maxim *res ipsa loquitur* "said

at p. 394—" The doctrine is dependent on the absence of explanation, and although it is the duty of the defendants if they desire to protect themselves to give an adequate explanation of the cause of the accident yet if the facts are sufficiently known the question ceases to be one where the facts speak for themselves and the solution is to be found by determining whether on the facts as established negligence is to be inferred or not " and Lord Normand said at p. 399 . . . " The maxim is no more than a rule of evidence affecting onus. It is based on commonsense and its purpose is to enable justice to be done when the facts bearing on causation and on the care exercised by the defendant are at the outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant ".

In his judgment the learned Judge recorded a conclusion as to the cause of the collapse of the crane and decided on the evidence that such cause did not connote negligence on the part of the respondents.

In Their Lordships' view the main issue which arose in the case was whether the respondents showed that they had taken all due and reasonable care in the positioning of the crane. The learned Judge held that they had. His conclusion on this difficult matter was a conclusion of fact and was not based on any error in law. However sympathetic they may be for the appellant Their Lordships are unable to interfere with it. Accordingly Their Lordships will humbly advise Her Majesty that the appeal should be dismissed.

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In the Privy Council

SINCLAIR EUGENE SWAN

v.

SALISBURY CONSTRUCTION COMPANY LTD.

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