

~~P.C.~~  
~~GN4 G.2~~

*Judgment*  
*A*, 1965

IN THE PRIVY COUNCIL

No. 23 of 1964

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

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SINCLAIR EUGENE SWAN

(Plaintiff) Appellant

-and-

SALISBURY CONSTRUCTION COMPANY  
LIMITED

(Defendant) Respondent

---

RECORD OF PROCEEDINGS

HATCHETT JONES & CO.,  
90, FENCHURCH STREET,  
LONDON, E.C.3.

SOLICITORS FOR THE APPELLANT

POTHECARY & BARRATT,  
TALBOT HOUSE,  
TALBOT COURT,  
GRACECHURCH STREET,  
LONDON, E.C.3.

SOLICITORS FOR THE  
RESPONDENT

P.C.  
GN#-G.2

UNIVERSITY OF LONDON  
INSTITUTE OF PHYSICS  
- 8 FEB 1966  
25, BEDFORD SQUARE  
LONDON, W.C.1.

80917

## ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

SINCLAIR EUGENE SWAN

(Plaintiff) Appellant

- and -

SALISBURY CONSTRUCTION COMPANY  
LIMITED(Defendant) RespondentRECORD OF PROCEEDINGSINDEX OF REFERENCE

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EXHIBITS transmitted

<u>Exhibit Mark</u>	<u>Description of Document</u>	<u>Date</u>	
A	One bundle of 22 cheques from Defendant/Respondent to Plaintiff/Appellant during period of absence from work	28th September 1959 to 9th March 1960	Not reproduced
B	One bundle of 39 cheques. Same parties paid prior to accident	1957 to 1959	Not reproduced
C	One bundle of 32 cheques. Same parties paid after return to work	9th March 1960 to January 1961	Not reproduced
D	Birth Certificate of Eugene Sinclair Swan		Not reproduced
D.1.	Six photographs of Crane and Leads		Not reproduced
D.2.	Sketch plan of piles upon location		

DOCUMENTS TRANSMITTED BUT NOT REPRODUCED

Motion on Notice for Conditional leave to appeal	11th June 1963
Order on Motion granting conditional leave to appeal	1st July 1963

DOCUMENTS NOT TRANSMITTED

<u>Description of Document</u>	<u>Date</u>
Notice of Entry of Appearance	7th November 1962
Summons for directions	25th January 1963
Order for Directions	5th February 1963
Notice of Trial	
Notice of Intended application for leave of Appeal	26th June 1963
Notice of intended application for leave to Appeal to H.M. in Council in forma pauperis	21st October 1963

1.

IN THE PRIVY COUNCIL

No. 23 of 1964

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

SINCLAIR EUGENE SWAN

(Plaintiff) Appellant

- and -

SALISBURY CONSTRUCTION COMPANY  
LIMITED

(Defendant) Respondent

RECORD OF PROCEEDINGS

No. 1

WRIT OF SUMMONS

In the Supreme  
Court of Bermuda

No. 1

Writ of Summons

31st October  
1962

10

IN THE SUPREME COURT OF BERMUDA

1962 : No.241

B E T W E E N

SINCLAIR EUGENE SWAN

Plaintiff.

and

SALISBURY CONSTRUCTION COMPANY LIMITED Defendant.

20

ELIZABETH THE SECOND by the Grace  
of God of the United Kingdom of  
Great Britain and Northern Ireland  
and of Her other Realms and Terri-  
tories Queen, Head of the Common-  
wealth, Defender of the Faith.

TO: Salisbury Construction  
Company Limited

OF: Wesley Street, Hamilton,  
Bermuda.

In the Supreme  
Court of Bermuda  
            
No. 1  
Writ of Summons  
31st October  
1962  
(continued)

We COMMAND YOU that within eight days after the service of this writ on you, inclusive of the day of such service, you do cause an appearance to be entered for you in an action at the suit of Sinclair Eugene Swan and take notice that in default of your so doing the plaintiff may proceed therein and judgment may be given in your absence.

WITNESS the Honourable Myles John Abbott, Chief Justice of our said Court the Thirty-first day of October in the year of our Lord one thousand nine hundred and sixty two.

10

N.B. - This writ is to be served within twelve calendar months from the date thereof, or, if renewed within six calendar months from the date of the last renewal, including the day of such date, and not afterwards.

The defendant may appear hereto by entering an appearance, either personally or by attorney, at the office of the Registrar of the Supreme Court at the Sessions House, Hamilton.

20

THE PLAINTIFF'S CLAIM IS for damages for injury to the Plaintiff owing to the negligence of the defendant its servants or agents while the plaintiff was employed by the defendant as a pile driving lead man on a crane and in the course of such employment.

(SGD.) E.A. JONES.  
Attorney for the Plaintiff.

This writ was issued by ERIC A. JONES, of Burnaby Street, Hamilton, Attorney for the plaintiff whose address for service is the same.

30

The plaintiff resides at Middle Road,  
Devonshire,  
Bermuda.

No. 2

STATEMENT OF CLAIM

In the Supreme  
Court of Bermuda

No. 2

Statement of  
Claim

14th November,  
1962

IN THE SUPREME COURT OF BERMUNDA

1962 : No. 241

BETWEEN

SINCLAIR EUGENE SWAN Plaintiff.

and

SALISBURY CONSTRUCTION COMPANY LIMITED Defendant.

STATEMENT OF CLAIM

10 1. On the 28th day of September, 1959, the plaintiff was employed by the defendant as a skilled labourer and was ordered by the defendant to work on the leads of a crane that was driving piles in the process of the construction of a building.

20 2. Whilst the plaintiff was so employed in working on the said leads the said crane toppled over causing the plaintiff to be thrown to the ground and pinned under the said leads and suffer severe injuries.

PARTICULARS OF INJURIES

(a) A comminuted compound fracture of the lower end of the right humerus with involvement of the ulnar nerve.

(b) A dislocation of the 5th left metacarpal-phalangeal joint.

(c) A fracture of the superior ramus of the left ischium without displacement.

(d) A fracture of the left 11th rib.

30 3. The defendant as an employer impliedly agreed with the plaintiff or alternatively it was the duty of the defendant as an employer to provide a safe system of work and effective supervision of the said driving of the piles. The defendant or

In the Supreme Court of Bermuda its servants or agents committed breaches of the said agreement or were negligent in that it or they:

No. 2

Statement of Claim

14th November, 1962  
(continued)

- (1) Failed to ensure the stability of the said crane in relation to the nature of the operation and of the surface of the ground;
- (2) failed to provide a sufficient number of workmen for the pile driving operation, including a workman to give signals to the crane operator;
- (3) failed to provide a means of ascertaining the degree to which the jib of the crane could be safely extended having regard to the weight of the leads of the said crane;
- (4) during the said pile driving operation extended the jib of the said crane excessively, causing it to over-balance and topple over;
- (5) failed to take any or any proper precaution for the safety of the plaintiff.

10

20

4. By reason of the matters herein complained of the plaintiff has endured pain and suffering and suffered loss.

PARTICULARS OF SPECIAL DAMAGE

Loss of earnings during recuperation approximately 23 weeks @ £10.1.3. per week	£231.8.9.	
Loss of earnings from 9th March, 1960 to present approximately 139 weeks @ £3.2.6d. per week	<u>434.7.6.</u>	30
	<u>£665.16.3.</u>	

And the plaintiff claims damages.

(SGD) E.A. JONES  
of Counsel for the Plaintiff

Delivered the Fourteenth day of November, 1962, by Eric Arthur Jones, of Burnaby Street, Hamilton, Bermuda, Attorney for the Plaintiff.

To the Defendant and to  
Messrs. Madeiros & Deil, of Reid Street,  
Hamilton, its attorneys.

40



No. 3

DEFENCE

In the Supreme  
Court of Bermuda

No. 3

Defence

7th December,  
1962

IN THE SUPREME COURT OF BERMUDA

1962 : No.241

BETWEEN

SINCLAIR EUGENE SWAN

Plaintiff.

and

SALISBURY CONSTRUCTION COMPANY LIMITED Defendant.

DEFENCE

- 10 1. The defendant admits that the plaintiff was in the employ of the defendant as a skilled labourer on the 28th day of September, 1959.
2. (a) The defendant admits that the plaintiff was working on pile driving leads during the process of construction of a building being carried out by the defendant.
- (b) The defendant denies that the plaintiff was ordered to work on the said pile driving leads.
- 20 3. The defendant avers that the plaintiff voluntarily and freely with full knowledge of the nature of the risk he ran expressly or impliedly agreed to incur it:
- (a) The Plaintiff was well aware of the conditions of work and the lack of workmen on the job site throughout the afternoon of the said 28th day of September, 1959.
- (b) The plaintiff had full knowledge of and was familiar with the manner in which the crane was to be operated and the piles driven.
- 30 (c) The plaintiff upon being requested to work on the said pile driving leads voluntarily agreed to do so.

In the Supreme  
Court of Bermuda

          
No. 3

Defence

7th December,  
1962  
(continued)

4. The defendant admits that the crane holding the said pile driving leads toppled over causing the said pile driving leads to fall, and further admits that the plaintiff was pinned under the said leads and was thereby injured.

5. The defendant denies that the crane toppling over was the sole cause of the plaintiff being pinned under the said pile driving leads.

6. The defendant does not admit that the plaintiff sustained the injuries set out in the Statement of Claim. 10

7. (a) The defendant denies that the defendant by any act of itself or any of its employees or agents committed any breach or breaches of the agreement of employment between the defendant and the plaintiff.

(b) The defendant denies that the defendant by any act of itself or any of its employees or agents was negligent in the system of work provided and/or in the supervision provided. 20

(c) The defendant denies each and every allegation contained in sub-paragraphs numbers 1, 2, 3, 4 and 5 of paragraph number 3 of the Statement of Claim.

8. The defendant avers that the cause of the accident was due to the ground under one of the wheels of the crane giving way. The defendant further avers that the defendant or its employees 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. 30

9. The defendant avers that the said accident in which the plaintiff received injuries was caused or contributed to by the negligence of the plaintiff.

PARTICULARS

(a) The defendant's employee the crane operator endeavoured and did manipulate and manoeuvre the said crane in such a manner after the said wheel sank into the ground that the 40

plaintiff was deliberately provided with sufficient time to jump clear of the slowly falling leads.

In the Supreme Court of Bermuda

No. 3

Defence  
7th December,  
1962  
(continued)

10

(b) The plaintiff ought reasonably to have known that the crane was so manipulated and manoeuvred in order to provide an opportunity of escaping or lessening injury to himself and was negligent in not immediately jumping from his position on the said pile driving leads to the ground when the said wheel sank into the ground.

(c) The plaintiff would have fallen clear of the said pile driving leads had he jumped to the ground when the said wheel first sank into the ground.

20

(d) The plaintiff by his negligence in not jumping from the said pile driving leads when he should have done caused him to come down in such a position that the said leads fell on his arm.

Dated the Seventh day of December, 1962.

(SGD) L.J. MADEIROS  
L.J. Madeiros  
of Counsel for the Defendant

Delivered the Seventh day of December, 1962, by Messrs. Madeiros and Diel, Reid Street, Hamilton, Bermuda, Attorneys for the Defendant.

To: Eric A. Jones, Esq.  
Attorney for the Plaintiff.

30

PLAINTIFF'S EVIDENCE

No. 4

JOHN MONIZ PERRY

Plaintiff's Evidence

No. 4

John Moniz Perry  
25th March 1963

IN THE SUPREME COURT OF BERMUDA

CIVIL JURISDICTION

1962 : No.241

In the Supreme  
Court of Bermuda

BETWEEN:

Plaintiff's  
Evidence

SINCLAIR EUGENE SWAN

Plaintiff

and

No. 4

SALISBURY CONSTRUCTION COMPANY

Defendant

John Moniz Perry  
25th March 1963  
(continued)

Mr. E. A. Jones for the Plaintiff.

Mr. L. J. Madeiros for the Defendant.

Before:- The Honourable Sir Allan Chalmers Smith,  
Kt., M.C., Assistant Justice

9.30 a.m. Monday 25th March, 1963.

Jones: Plaintiff claims defendant in breach of duty to provide a safe system and that defendant or its servants were negligent in carrying out the operation. Defendant contrib., negl. Volenti and inevitable accident. 10

Examination

JOHN MONIZ PERRY S/S: Assistant Exchange Superintendent of Bermuda Telephone Company. Knows Sinclair Eugene Swan, now employed by Telephone Company as night watchman and janitor. Eastern Exchange, Baileys Bay. Engaged 19/1/61. Fit with exception of hand. Starting salary £15 per week. 6 nights a week 5.00 p.m. to 8.00 a.m. On 19th April raised to £16 a week. In November 1962 wages raised to £17 time 8.00 p.m. - 8.00 a.m. Comes on duty at 6.00 p.m. and gets time and a half for the two hours to 8.00 p.m., but this is only temporary while some defect at station being rectified. Rate unknown but estimated 5/8d. Overtime will continue until about mid-summer. Permanent job. 20

Cross-  
examination

I think that change in hours effected about the same time that his wages were raised about November 1962, but not certain. Swan under my direct supervision for about 4 months. Duties to keep the exchange clean, and notify head exchange if anything goes wrong. 30

I noticed that his right hand had been injured. He kept exercising his right hand and could use it to a certain extent, but he couldn't write with

his right hand. He had to use his left hand for any precision work.

Re-examined:

Exchange has heavy doors and he can't turn key with right hand and that makes it awkward.

In the Supreme Court of Bermuda

Plaintiff's Evidence

No. 4

John Moniz Perry  
25th March 1963  
(continued)

Re-examination

No. 5

SINCLAIR EUGENE SWAN

SINCLAIR EUGENE SWAN S/S, Night watchman,  
Telephone Company.

No. 5

Sinclair Eugene  
Swan

25th March 1963  
(part)  
Examination

10 Present basic pay £17 a week, plus 22 hours overtime. Total wage week to £23.19.0. In September 1959 working for Defendant Company and had been working for them steadily for over 2 years.

20 On 28th September 1959, I was working on a job for the Gas and Utility Company, driving piles for the foundations of a new building near the main gate of Electric Light Company, Serpentine Road. Driving the piles into marshy ground, wooden piles about 60 feet long. Using a crane with a pile driving maul and there were leads to hold the pile in place while it was being driven. Crew was a foreman and 3 men. The photos show type of crane and lead, but a different site. My job, with another boy was to climb up the frame and pull the pile into the lead and secure it in place. To fit the pile the lead is lifted about 40 feet with me and my mate in it and the pile is then hoisted with another cable in the crane until it is standing on end. Our job to fit it with the lead and secure it and then we go across to boom and descend to the ground.

30

On this particular morning the crane driver was at the controls, Philpott, man with me was Edgar Perinchief, foreman Joseph Correia on the

In the Supreme  
Court of Bermuda  
Plaintiff's  
Evidence

No. 5

Sinclair Eugene  
Swan  
25th March  
(part)  
Examination  
(continued)

ground giving signals to the crane driver. When pile fixed in lead, crane is manoeuvred either by moving the boom or the mounting to position the pile for driving. This is done while my mate and I are still on the lead.

Although I had been in a pile driving gang before, this was the first time I had been up on the lead. My mate had a lot more experience. The foreman and driver were also experienced.

Worked safely all morning and stopped for lunch at noon and resumed at 12.30 p.m. After lunch gang consisted of the foreman and myself alone. Foreman said he didn't know where the other two had got to, said Philpott might have gone to a funeral and the two of us would have to carry on. When working on marshy land on previous occasions I have seen them put planks for the wheels of the crane to run on, but that day there were no planks, yet during the morning everything went smoothly.

10

20

The two of us started work on a new pile. I felt it was a little dangerous only two of us working. With me alone on the lead, adjusting the pile I thought I might get my fingers jammed. Didn't anticipate any other risk. Correia at the controls of the crane and he hoisted up the lead with me on it and the whole machine started to tremble. I was then about 40 feet up. I got frightened and just hung on. I next remember coming to in Hospital. I was told that the whole crane had tipped over. I had one or two fractured ribs. Fractured pelvis. Cut across left palm and my little and 3rd fingers, left hand were stiff for a while. Cut close to my left eye and the whole of my right arm badly damaged and in hospital kept suspended for about a month in a plaster cast and I had a plaster cast round my lower ribs. When cast taken off after about a month right arm very stiff and difficult to get down to my side and it was quite sometime before I could bend my right elbow, and I had to go to the physiotherapist twice a week for massage of my arm. The process of getting my arm to move was painful and I was unable to work for about 6 months. My hospital and doctors bills paid under an Insurance Policy taken out by defendant company

30

40

and defendant company paid the physiotherapist. And the company paid me half pay £10.1.3. a week to March 9th 1960, when I went back to work for defendant company. Company asked me to go back to them, but I didn't want to go back, because my right hand was still disabled and I felt I wasn't capable of working. They put me on to light work for a while, but paid me the same wages I had been receiving before the accident.

10

Before the accident and after I went back to work the amount of my weekly wages varied according to whether I worked short, full or overtime. Normal work  $5\frac{1}{2}$  days at 9 hours. Don't know what hourly rate.

I worked for defendant company until I joined Telephone Company in January, 1961. About 3 days before I left defendant, Mr. Diel the manager said he was going to lay off some fellows pretty soon and I would be one of the first, because I was now not much use, but he told me he would get me another job if I wanted to accept it. He got me the Telephone Company job and I accepted it, starting at £15 a week for a 90 hour week. Light work, but uncomfortable hours.

20

Arm more or less got it's strength back, but movement still restricted, but fingers stiff in a curled position and use of right hand very restricted and hand gets painful and tired if I use it too much. I use it as much as I possibly can to try to restore it.

30

When I first started with company I was a deck hand on the crane barge and later I became the fireman of the steam engine of the crane, and was only taken off to do a few days work in the pile driving gang. Correia and Perinchief normally worked on the barge and Philpott normally worked on the land crane. One morning when I was a fireman on the barge, 1959, I raised steam up to about 20 lbs and one of the boiler tubes started to leak. I told Correia about it, but he insisted I should keep steam in the boiler. Normal working pressure 80-85 lbs. He insisted I keep up steam for one lift. Stoked up boiler to increase pressure to 50 lbs and when Correia

40

In the Supreme  
Court of Bermuda

Plaintiff's  
Evidence

No. 5

Sinclair Eugene  
Swan

25th March 1963  
(part)

Examination  
(continued)

In the Supreme Court of Bermuda  
Plaintiff's Evidence

No. 5

Sinclair Eugene Swan  
25th March 1963  
(part)  
Examination  
(continued)

turned the steam on to start the lift, the tube blew and blew the burning coal out of the fire box on to my chest and face and set fire to my clothes and I had to jump overboard. Although I thought it dangerous I felt I had to obey Correia's orders or I might lose my job.

No. 6

Paul Bryan Counsell  
25th March 1963  
Examination

No. 6

PAUL BRYAN COUNSELL

2.15 p.m. Resumed. All present.

PAUL BRYAN COUNSELL S/S. Registered Medical Practitioner. Surgeon. 10

Knows Swan. Saw him 28th September 1959 at Hospital. He was suffering from several injuries.

1. Comminuted compound fracture lower right humerus with involvement of ulnar nerve.
2. Dislocation of 5 fingers, knuckle joint, left hand.
3. Fracture of bone in pelvis.
4. Fracture left 11th rib.

Discharged hospital 3rd November 1959, Saw him periodically after. Last 5th of Sept. 1962. Before that 3rd of August, 1960. He had physiotherapy of right arm and hand. Stiffened hand result of injury to nerve. Elbow joint at first rigid. Later achieved extension of arm and 50° flexion. Further improvement unlikely to right arm and hand. Other injuries completely healed. He would never be able to use tools effectively. Couldn't do heavy work. An inefficient labourer. 20

Cross-Examination

CROSS-EXAMINED: Damage to ulnar nerve, patient himself can do little. Inefficient at holding tools. Could drive motor vehicle with simple controls, but not complicated. 30



RE-EXAMINATION:

Might have some discomfort in hand with excessive use.

In the Supreme Court of Bermuda

Plaintiff's Evidence

No. 6

Paul Bryan  
Counsell  
25th March 1963  
Re-examination

No. 7

SINCLAIR EUGENE SWAN (Contd.)

SINCLAIR EUGENE SWAN: CROSS-EXAMINED:

Present wages with overtime to £23.19.0d. Basic £17.

No. 7

Sinclair Eugene  
Swan (contd.)  
25th March 1963  
Cross-examination

10

Never been up a pile driving lead before this day. Seen pile driving done before. Drove three piles in the morning. Not on the job the day before. I think some piles had been driven before that day.

Sure I have seen them put planks under crane wheels in marshy or soft ground, but can't remember just where. Surprised to hear piles only 22 feet long. I was 40 feet up. I went up the lead to guide pile into the open side of lead.

20

I know Joe Correia very well, one of the best crane operators that construction company have. He is better than Philpott. Can't remember if pile already held upright when resumed after lunch. Can't say if lead already round pile. After pile fitted into lead, I had to unshackle lead from pile and attach this lead to the cable to the maul. To do this, I had to get to top of lead. Did come down from lead via boom. Didn't go down the lead and then drop to ground. I consider that two men should be on the lead. Dangerous for one man alone. Cause of accident because no one on ground to give crane operator directions. Operator's vision restricted. I don't think crane standing on road when accident happened. Correia didn't say as pile already set

30

In the Supreme Court of Bermuda up we would finish it off, but wouldn't do any additional work.

Plaintiff's Evidence

No. 7

Have to put points on the piles. Crane made a loud noise when it was shaking. Didn't hear Correia say anything. I didn't jump. Told lead fell on me.

Sinclair Eugene Swan (contd.)  
25th March 1953  
Cross-examination (continued)

Exhibit B: Cheques for pay before accident.  
Exhibit C: Cheques for pay after return to work.  
Not tried to get another job since employed Telephone Company.

10

No re-examination.

No. 8

Gladwin Henry Trott

25th March 1963  
Examination

No. 8

GLADWIN HENRY TROTT

GLADWIN HENRY TROTT S/S

Live Hermitage Road, Devonshire. Linesman, Electric Light Company.

In September 1959, I was working as a linesman across the road from where Salisbury Construction Company crane working. Saw Swan there. He was up the boom near the top. When I looked again I saw the boom falling with Swan still on it. I think boom fell forward, but I am not quite sure. I was about 95 feet away. When boom fell we all went to the spot and found Swan's arm crushed under the boom. He was making a noise and about 30 of us lifted the boom off him. He lay without moving. Not sure which way the crane was lying. I think there was a hole near where crane was standing. Pit looked fully close to where crane was.

20

Cross-examination

CROSS-EXAMINED: I was about length of Court from crane. I am sure Swan nearly at top of boom. Don't know why boom fell. I know the road into the property used by gas trucks. I don't think crane standing on the road. Crane could have been in an area that trucks use to come in and out.

30

Re-examination

RE-EXAMINED: I am not sure if crane was in the pit or close to it.

No. 9

EDWARD SALTREN FOUGH

EDWARD SALTREN FOUGH S/S

Skilled labourer. Employed Post Construction Company. Live Parsons Road. My wage £20 a week for 5 days week of 10 hours each.

In September, 1959 working on Gas Company premises. I was digging the holes to start the piles in. The place was muddy and marshy.

10

For each pile, dug a hole about 5 feet across and about 6 feet deep. Ground soft in some places and hard in others. The chassis of crane would come up to within about 20 feet of the hole into which the pile was to be driven. 3 or 4 piles driven into each hole. Holes sited in a line 8 - 10 feet apart. We dug holes in advance and pile driver followed behind us.

9.30 a.m. Tuesday 26th March, 1963 (continuing)

20

Jones applies to amend Particulars of Special Damages as per copy produced.

Madeiros: No objection.

Court: Amendment allowed.

Edward Saltren Fough: continuing:-

Surface of ground dry, but came to water at about a depth of 3'6". No planks laid under the wheels of crane. Piles 25' - 30' long, estimate.

30

Initially there was a crew of 4 men with the crane. One was driving, two men at the boom to put the shackles over the piles and 4th man on the ground giving signals for movements of the crane. Equipment similar to what is shown in the photo. Each pile before being driven was hoisted up on end and fitted into the lead and then hammered into the ground. Didn't notice if the pile was longer or shorter than the lead. When men fitting pile into lead they would climb up the lead and guide the pile into the trough.

In the Supreme Court of Bermuda

Plaintiff's Evidence

No. 9

Edward Saltren Fough

25th and 26th March, 1963

Examination

In the Supreme  
Court of Bermuda

Plaintiff's  
Evidence

No. 9

Edward Saltren  
Fough  
25th and 26th  
March, 1963  
Examination  
(continued)

Sometimes they would climb up the boom to get onto top of lead. Sometimes they came down by the boom and at others down the lead. When men were fitting the pile into the lead they would be about 30 feet off the ground. They were certainly more than 7 feet up. Men standing on top of lead. All four men working in morning. After lunch only two men on the job. Correia driving the crane and Swan went up to fit the pile. He was on the top of the lead. It looked a bit dangerous for him and I remarked on it. I was about 30' - 40' feet from crane. I then noticed that the rear left wheel of crane come up off ground and go down again and I saw Correia lock up at Swan who was trying to get the pile into position. Correia was moving the control levers, trying to get the pile into place. I went on with my work in the hole with a jack hammer and then I heard a noise and looked up and saw the crane falling over onto its right side. As the crane was falling I saw Swan hanging on to the boom near the top and he let go and fell before the boom hit the ground. I and my mate went to scene and found Swan lying face down with his right arm out and the boom lying on his arm. I could see that his arm was injured. I think he was unconscious. Crane nowhere near any of the holes I had dug. Don't know why crane toppled over, but I could see that right wheels had sunk into the ground a bit. 10 20

Cross-  
Examination

CROSS-EXAMINED: Hard crust on ground was about 14" thick. I remember seeing 3 piles in the 1st hole. The crane fell away from me. At time of accident I was on far side of new building from Electric Light Company. At time of accident I was standing at ground level. I think the whole lead lifted clear off ground when pile being fitted into it. 30

No re-examination.

Exhibit D: Birth Certificate of Swan. Age 30.

Case for Plaintiff

No. 10

In the Supreme  
Court of Bermuda

AMENDED STATEMENT OF CLAIM

No.10

IN THE SUPREME COURT OF BERMUDA

Amended Statement  
of Claim

1962 : No.241

26th March, 1963

BETWEEN

Amended during trial this 26th day of March, 1963  
SINCLAIR EUGENE SWAN Plaintiff  
and

10 SALISBURY CONSTRUCTION COMPANY LIMITED  
Defendant

AMENDED STATEMENT OF CLAIM

1. On the 28th day of September, 1959, the plaintiff was employed by the defendant as a skilled labourer and was ordered by the defendant to work on the leads of a crane that was driving piles in the process of the construction of a building.

20 2. Whilst the plaintiff was so employed in working on the said leads the said crane toppled over causing the plaintiff to be thrown to the ground and pinned under the said leads and suffer severe injuries.

PARTICULARS OF INJURIES

- (a) A comminuted compound fracture of the lower end of the right humerus with involvement of the ulnar nerve.
- (b) A dislocation of the 5th left metacarpophalangeal joint.
- 30 (c) A fracture of the superior ramus of the left ischium without displacement.
- (d) A fracture of the left 11th rib,

3. The defendant as an employer impliedly agreed with the plaintiff or alternatively it was the duty of the defendant as an employer to provide a safe

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Amended State-  
ment of Claim

26th March, 1963  
(continued)

system of work and effective supervision of the said driving of the piles. The defendant or its servants or agents committed breaches of the said agreement or were negligent in that it or they:-

- |     |   |    |
|-----|---|----|
| (1) | Failed to ensure the stability of the said crane in relation to the nature of the operation and of the surface of the ground;   |    |
| (2) | failed to provide a sufficient number of workmen for the pile driving operations, including a workman to give signals to the crane operator;                            | 10 |
| (3) | failed to provide a means of ascertaining the degree to which the jib of the crane could be safely extended having regard to the weight on the leads of the said crane; |    |
| (4) | during the said pile driving operation extended the jib of the said crane excessively, causing it to over-balance and topple over;                                      |    |
| (5) | failed to take any or any proper precaution for the safety of the plaintiff.  | 20 |

4. By reason of the matters herein complained of the plaintiff has endured pain and suffering and suffered loss.

PARTICULARS OF SPECIAL DAMAGE

Loss of earnings during recuperation: approximately 23 weeks @ £10.1.3. per week	£231. 8. 9.	
Loss of earnings from 9th March, 1960 to 19th January, 1961; approximately 45 weeks @ £1. 2. 6d. per week	50.12. 6.	30
Loss of earnings from 19th January, 1961, to 19th April, 1961; approximately 13 weeks @ £5. 2. 6d. per week	66.12. 6.	
Loss of earnings from 19th April, 1961 to 14th November, 1962; approximately 82 weeks @ £4. 2. 6d. per week	338. 5. -. <hr style="width: 100%;"/>	
	686.18. 9.	

And the plaintiff claims damages.

(SGD) E.A. JONES  
of Counsel for the Plaintiff. 40

Delivered the Fourteenth day of November, 1962, by Eric Arthur Jones, of Burnaby Street, Hamilton, Bermuda, Attorney for the Plaintiff.

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To the Defendant and to Messrs. Madeiros & Diel, of Reid Street, Hamilton, its attorneys.

Amended Statement of Claim

26th March, 1963  
(continued)

Re-delivered as amended the 26th day of March, 1963, by Eric Arthur Jones of Burnaby Street, Hamilton, Bermuda, Attorney for the Plaintiff.

10

DEFENDANTS EVIDENCE

Defendant's Evidence

No. 11

No.11

DAVID DIEL

David Diel

DAVID DIEL S/S

26th March, 1963  
Examination

Director Salisbury Construction Company. Director and Superintendent of work. In construction business about 26 years. Crane operator Joseph Correia one of my crane operators, one of the best. At least 8 years experience.

20

Know Swan, an employee. Semi-skilled. 28th September, 1959 accident. After accident called to scene.

Exhibit D.1: 6 photos of crane and lead.

Crane same, lead different, similar type. Found crane lying on its side and Swan lying near the lead unconscious. By right front wheel a hole in ground into which wheel had sunk. Axle bolts had broken, as result of fall.

30

Examined hole, about 11" deep. Ground round hole and at bottom of hole was firm. Ground gave way under the weight of the wheel. Crane in a roadway, unpaved. Road ran through site of present building. Place where crane was is outside new building. I inspected site before I put crane on it and ground appeared firm enough to take weight of crane. From position of boom when I saw it, I am of opinion crane working at about 10 feet radius and boom nearly perpendicular. Lead and hammer about 3 tons. Pile about  $\frac{3}{4}$  ton.

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Defendant's  
Evidence

No.11

David Diel  
26th March, 1963  
Examination  
(continued)

Normally wouldn't lift lead, hammer and pile in one lift. Sometimes use planks, but mainly for levelling the crane. 15-18 piles had been driven before the accident and no trouble over footing for the crane. If crane overloaded from front it would fall to front. If crane fell through wheel going into hole, Correia could have released weight on end of boom in time to prevent crane capsizing. Crew 4 - 5 men.

Assuming pile already fitted into lead, two men sufficient to connect up hammer and drive pile. If pile had to be fitted and put in position, more men desirable. To fit pile into lead only one man required on the lead. If the pile is a long one the lead has to be lifted for the pile to be fitted into it. Lead about 26 feet high. To fit a 30 foot pile would have to lift lead about 10 feet off ground. Need a foreman in this operation. When pile being fitted to lead, signals pass between operator and man on lead. Signals from man on ground to operator required when pile is being driven.

10

20

Weight already on the lead when lead lifted to fit pile, but weight of pile still on the ground.

Cross-  
examination

CROSS-EXAMINED: Pile moved into the lead. Lead swinging freely. Tip of pile resting on ground and top of pile can be moved. Operator could have released weight of lead to stop crane capsizing. If man on lead he would go down with lead.

Operator explained to me that he didn't release the weight of the lead so as to give Swan an opportunity to get clear.

30

Man on lead has to go to top of pile to fit it into lead. Having done so, then has to go to disconnect cable holding pile and connect it to hammer at top of lead. Then releases shackles which secure hammer, then descends. Lead would have to be high up near top of boom before top of lead was near enough to boom for man to cross over from top of lead to boom.

40

If Swan had been near the top of the boom he wouldn't have been lying where I found him. The boom was not lifted off Swan. I found him lying with his hand under the lead and about 40 feet from



top of boom. Didn't see about 30 men lift anything off Swan, I got to scene about 1½ minutes after I was informed of accident.

Crane couldn't confine itself to beaten track.

Examined surface before crane went there. Didn't know piles required because of swampiness of ground under surface crust.

10 Saw water in holes at sometime before the concrete was laid. Didn't know water being struck at about a depth of about 3½ feet. Don't remember seeing men working there in thigh boots. There was rock at the bottom of some of the holes. By the time holes dug and 18 piles driven foreman had opportunity to appreciate nature of the soil.

20 Crane would have to move for each cluster of piles. Boom might have been swung slightly off centre. Not consistent but possible that extra weight put in right front wheel. If planks under wheels, it is possible they wouldn't have sunk.

No automatic indicator in the cranes, but I have a table showing angles and weights. No specific instructions as to safety angles. Angle of boom measured by eye.

2.15 p.m. continued:

30 Absence of automatic indicator or quadrant does not detract from the safety of the operation. Operator has to use his own judgment with a quadrant. If there is an automatic indicator which would tell the operator what is happening it would be good and would lessen the danger of overload causing the crane to topple. Never seen such an indicator advertised.

Minimum for lifting and driving pile 2.  
Minimum for whole operation 3.

40 Operator may have to move the boom to manoeuvre pile into lead, but man on ground not required to signal for this. If wheel lifted and man on ground saw it, it would have helped if he had warned the operator. Lifting left rear wheel

In the Supreme Court of Bermuda

Defendant's Evidence  
No.11

David Diel  
26th March, 1963  
Cross-examination  
(continued)

In the Supreme Court of Bermuda

would indicate excessive weight on right front wheel. Excessive weight on this wheel could have caused it to make a depression in the ground.

Defendant's Evidence

No.11

David Diel  
26th March, 1963

Cross-examination  
(continued)  
Re-examination

If the foreman thought he was short handed he could have got more men from the yard within an hour or so. Once pile in place two men ample to connect hammer and drive the pile. That was the last pile he was going to drive that day.

RE-EXAMINED: One part of Swan's hand under the lead. I don't think lead had to be lifted to release his hand. If I had realised water table 3'6" down I would still have put the crane on it. My opinion is the wheel dropped in the hole and the shock sheared the bolts connecting wheel to axle. If the bolts had sheared first, the wheel wouldn't have made a hole.

10

Swan lying about 30 feet clear of boom and close to the lead. Crane on this road at time of accident.

To Jones: Fact that all bolts sheared off suggests a jolt rather than a steady pressure. Lead lying on ground when I got there.

20

No.12

Joseph Madeiros  
Correia

26th and 29th  
March, 1963

Examination

No.12

JOSEPH MADEIROS CORREIA

JOSEPH MADEIROS CORREIA S/S

Live Paget. Salisbury Construction Company Limited. Foreman crane operator for past 10 years about.

28th September, 1959, at work with Swan at Bermuda Gas and Utility Building Serpentine Road. Driving piles.

30

In morning crew of 3 labourers, 1 crane operator and self. Swan one of them. Philpott operating crane. After lunch only Swan and myself. By then one pile standing in position, but not yet in lead. Pile held up by cable from crane.

I said to Swan, "We'll go ahead and drive this pile, then go ahead and point some more". Swan agreed and climbed up the lead, which was beside

the pile. The bottom of the pile was inside the lead and I had to lift the lead higher so that the top of the pile would be in the guide and under the mast. Swan climbed to top of guide and I hoisted the lead to clear the top of the pile so that he could pull it into the lead. Lead about 9-10'6" from the foot of the boom. Hoisted lead about 9 feet off the ground. The weight of the pile still resting on ground.

In the Supreme Court of Bermuda

Defendant's Evidence

No.12

Joseph Madeiros Correia  
26th and 29th March, 1963  
Examination  
(continued)

10           Lead and hammer approximate weight 3 ton. Maximum weight at that angle 5 ton.

          I finished hoisting and Swan was getting ready to pull the top of the pile into position in the lead and then the right front wheel sank into the ground and the lead and the boom started to go away from the crane. Wheel went with a sudden drop and the boom and everything vibrated. Boom and lead swayed over away a little to the right I called out to him "Jump Swan". At that time I noticed he hadn't jumped and I had to decide whether to drop the lead and save the crane or hold the lead and let boom swing to the right so as to slow down the rate of fall, I decided to do the latter and the whole thing went over and I fell jammed among the levers. Swan went down with the lead, so far as I could see. So far as I know he was never hanging onto the boom. If he had been I would have seen him.

30           Swan was about 8 - 10 feet below the top of the lead and from there he couldn't have got on to the boom. Boom turned approximately fore and aft. Didn't swing boom to lift lead, it was a straight lift. When crane started to topple I released the swing brake, but kept cable brake fixed. To release brake of cable I only had to lift my foot. That would have saved the crane, but the lead would have fallen, probably on Swan.

40           I consider Swan had time to jump clear when lead started to fall over and before it crashed. He was on the opposite corner to the direction in which lead was falling. Didn't actually see lead hit the ground. Before starting work after lunch I asked Swan if he would go up the lead. I didn't give him an order.

In the Supreme Court of Bermuda  
Defendant's Evidence

No.12

Joseph Madeiros Correia  
26th and 29th March, 1963  
Examination (continued)

I had inspected the site where I was going to manoeuvre the crane several days before and the ground appeared to be safe. I had driven piles round the edge of Pembroke Marsh before. I had driven piles on this building site a few days before the accident.

Exhibit D.2: This is site plan of the piles. Not seen it before. Marked piles driven. Piles being worked on at time of accident. Road through site and position of crane on this road. Pile driving crew 5 men, including pointing the piles.

10

To get pile into lead, need only one man on lead plus operator. I say accident caused by ground giving way under right front wheel. Ground gave way suddenly and jolted the whole crane. Swan's hand under lead. Swan unconscious. A number of men lifted lead to clear Swan's hand, but they didn't need to, as his hand could have been pulled out without lifting. Hole under wheel 12" - 18" deep. It looked soft at the bottom but I didn't dig to test it. I assume it was soft. Wheel had come out of the hole when crane turned over. Bolts attaching wheel to axle had sheared off. Swan had worked on pile driving job before and had been up the lead, but this was the first day he had worked on this particular site. He had worked in my gang for sometime, doing pile driving and erecting steel.

20

Crane standing on same spot, had lifted the lead and maul and also the pile before lunch.

30

Cross-examination

CROSS-EXAMINED: New building in a large yard area. South side of building about 6-8 feet from Serpentine Road.

When wheel dropped considerable vibration, but not a lot of noise. I didn't hear the noises of the bolts shearing off. I think hole deeper than 11 inches. If the bolts had sheared first the axle would have gone into the ground first. I think it was the vibration from boom and lead that sheared off the bolts, and not the drop into the hole, or bolts could have sheared when capsized and all the weight on that wheel. Remember men there digging holes, to mark where piles were to be driven and bigger holes being dug round the piles that had been driven. Didn't occur to me that crane

40

might sink in. Pile at accident was the first of its group. Boom was slightly to right with added weight on that wheel.

9.30 a.m. Friday the 29th March, 1963.

Correia- Cross-examination continued:.

10 That morning when pulling the lead in one of the rear wheels of the crane lifted off the ground. Had to change the lead closer to the crane, before lifting it. Normally having got lead upright, keep it in that position while working. When finished lie it flat on ground. When wheel lifted in the morning I was on the ground and I saw the wheel lift. I didn't tell Philpott wheel had lifted, because he could feel it himself.

20 If boom at 18 feet to drive pile, that is maximum reach for driving and you have to have someone on the ground watching the wheels to warn the operator if they come up. If wheels rise 18" at 18 feet, crane will topple if weight not relieved. If booming out slowly, operator doesn't necessarily feel wheels come off the ground.

I say the left wheel, in the afternoon, did not raise and settle. If it had done that I would have felt it, as the crane would have gone forward and dropped back.

30 If Fough saw wheel rise and drop, I don't say he was right. I am positive he didn't do this. I can't be more positive than Fough as I was not on the ground and couldn't see the wheel. He could see what happened, but I would have to feel it.

40 For driving piles, if back wheels lift, put more weight on back of crane, to keep wheels down, but if wheels lift when pulling the lead, don't add more weight. Under certain circumstances it is not dangerous for the wheels to lift. If crane properly levelled on firm ground and weight within capacity, wheels should not lift.

Never heard of anchoring this type of crane.

In the Supreme Court of Bermuda

Defendant's Evidence

No.12

Joseph Madeiros  
Correia  
26th and 29th  
March, 1963  
Cross-  
examination  
(continued)

In the Supreme Court of Bermuda As far as I was concerned crane was safe. Driven many piles with it and it had never happened before.

Defendant's Evidence

No.12

Joseph Madeiros Correia  
26th and 29th March, 1963  
Cross-examination (continued)

If left rear lifted, indicates greater weight on right front. Area where I was working was filled land. Didn't know it had been marsh originally. If extra weight put on one of the wheels, wouldn't expect that wheel to sink on the type of ground I was working on. Shearing of wheel bolts caused either by vibration or by too much weight coming on that wheel when crane capsized. I think the capsizing the more likely cause.

10

I called to Swan to jump as soon as the right front wheel dropped. Swan 18-25 feet up in the air when I shouted "Jump". I would have jumped. I have jumped 40 feet in emergency and not hurt.

Lead about 8-10 feet off ground when accident happened. Main weight of pile on ground. Little effort to move top to fit into lead. Not doing a lift at time of accident, just holding lead and maul up.

20

Hole by wheel looked soft at bottom. Last pile to be driven that day, because the other piles weren't ready for driving. Dangerous for two men only to do the whole job.

Swan broke his arm by falling to the ground, not by the lead falling on it. I don't remember going to the yard to call Diel after the accident. I know he arrived shortly after it happened. So far as I remember I didn't leave the site until he came.

30

Lead fell away and to the right. Ground where lead fell, slightly uneven. Swan's hand in a soft spot and had sunk into ground, but when I saw it the lead was not touching it. His left hand. He was lying face down.

Re-examination RE-EXAMINED: Crane at most 2" right of centre of chassis.

After piles had been driven I supervised cutting them off to correct lengths. Holes dug round tops of piles to enable piles to be cut off below ground level. Had an opportunity then to see nature of ground. Had driven piles on filled

40

ground before. Similar jobs. Soil round the piles appeared to be well packed. Men who dug holes used jack hammer or pavement breaker. Men digging shallow holes to mark site of piles also used jack hammer. When lead fell, it fell across a couple of piles of soil that had been dug out of the small holes.

Case for the Defendant

No.13

COUNSELS ADDRESSES

(a) Madeiros for Defendant

Madeiros:-

Accident caused by sudden drop of right front wheels. Hole near right front wheel. Defendant's evidence, two men sufficient for the particular operation at time of accident. No evidence to contrary. Number of men engaged didn't affect the occurrence. Correia an efficient crane operator. Evidence of Fough and Trott that Swan on boom can't be accepted. Swan and Correia both say he was on the lead. New entrance since building erected. Correia said that day crane had to be moved to let trucks pass. Diel said inspected surface before crane started work. Correia said he also inspected. Surface packed crust. Fough says 14" thick. Had to be dug with jack hammer. No evidence that inspection of ground lax. Crane sited on track used by trucks. Diel's evidence that planks only used for levelling and not for support.

Abandon non Volenti defendant.

Contrib., negligence. Submits he had the opportunity to jump (nothing in this under the circumstances).

In the Supreme Court of Bermuda

Defendant's Evidence

No.12

Joseph Madeiros  
Correia  
26th and 29th  
March, 1963  
Re-examination  
(continued)

No.13

Counsels  
Addresses

(a) Madeiros  
for Defendant

29th March, 1963

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In the Supreme  
Court of Bermuda

No.13

Counsels  
Addresses

(a) Madeiros  
for Defendant

29th March, 1963  
(continued)

Submits accident happened by wheel suddenly falling into hole which no reasonable care could have foreseen.

Taylor v. Sims & Sims 1942. 2.A.E.R. p.375.

Unsafe premises, not belonging to employer.

Cilia v. H.M.James & Sons 1954. 2.A.E.R.p.9.

Davie v. New Merton Board Mills Ltd. 1958.  
1 A.E.R. p.67.

Jenkins L.J./Diss 79-80.

Christmas v. General Cleaning Contractors Ltd.  
& Ors. 1952 1. A.E.R. p.39.

10

Employer to take reasonable care to see that premises safe.

Denning L.J. p.41-2. Criticised Taylor's case.

Wilson v. Tyneside Window Cleaning Company.1958.  
2.A.E.R. p.265. At 269 L.J.Pearce criticised Denning L.J.

Submits Wilson's case states law correctly.

Did master take reasonable care. p.268? Should master inspect premises? Master must take reasonable care and not subject his employees to unnecessary risks.

20

Submits in this case reasonable care taken.

Plaintiff has not proved negligence to make employer liable to him.

Boom not over extended.

No other type of safety measure could have been taken.

If defendant liable.

4th item special damages. Swan's present basic salary not known. 5/8 per hour now, not proved.

30

Swan said didn't know his present basic salary.



(b) Jones for Plaintiff

In the Supreme  
Court of Bermuda

                      
No.13

Jones:-

Evidence that wheel lifted and fell back.  
Evidence of overloading or mishandling.

Counsels  
Addresses

Munkmans Employers'. Liability at Common Law  
p.110.

(b) Jones  
for Plaintiff

Christmas Case 1952. 2.A.E.R. 1110.

29th March,1963

Wilson & Clyde Coal Company Limited v. English  
1937. 3.A.E.R. p.628.

10 Ld. Wright p.640 S.B.  
p.641 S.H.

Munkman p.71. 117 System of work.

Paris v. Stepney Borough Council 1951. 1 A.E.R.  
42. 50.

Cavanagh v. Ulster Weaving Co. Ltd. 1959  
2.A.E.R. 745 750.

Master bound to ensure stability of crane.

Munkman p.380. Constr. Regs. 19(1).

2.15 p.m. Resumed:

20 Jones: (continued)

Correia's evidence that wheels lifted during the  
morning. Indicates company should have ensured  
rigidity of crane by extra weights or anchoring.

Insufficient men in crew.

30 If 3rd man on ground, he would have noticed  
wheels giving way in time to warn operator to  
take suitable action. Man on ground could see  
wheels lifting more quickly and more certainly  
than operator could feel them lifting. This is  
a reasonable safety factor to provide.

Wheels lifting and settling more consistent with  
an overload than with the ground giving way.  
Fough saw Correia at the control levers.

In the Supreme Court of Bermuda

No.13

Counsels Addresses

(b) Jones for Plaintiff  
29th March, 1963  
(continued)

No mechanical device on crane to measure angle of boom. Done by eye. Dragging lead with boom extended and causing wheels to come off ground, shows system of working not generally safe.

Fact that left rear wheel lifted indicates crane being operated beyond its safe capacity.

Gallagher v. Dorman Long & Co. Ltd. 1947, 2 A.E.R. p.38.

Wrottesley L.J. 39.

No device to measure stability, particularly in regard to the nature of the ground. 10

Reasonable for employer to take precautions against gradual subsidence of wheel or sudden break in crust.

Diel realised effect of sudden drop of 11 inches. Reasonably foreseeable danger even though it hadn't previously manifested itself.

Even if Correia reasonably competent, employer still responsible if Correia negligent.

Munkman p.79. 20

Novus actus etc. Munkman p.56 & 57.

General damages:- X.15.

Disablement. Pay and suffering.

Kempe & Kempe 2nd edition p.461, 462, 459.

C. A. V.

No.14

No.14

Judgment

JUDGMENT

10th June 1963

IN THE SUPREME COURT OF BERMUDA

Civil Jurisdiction

1962 : No.241

BETWEEN

SINCLAIR EUGENE SWAN

Plaintiff

and

SALISBURY CONSTRUCTION CO. LTD.

Defendant

In the Supreme  
Court of Bermuda

No.14

Judgment

10th June, 1963  
(continued)

Mr. E. A. Jones for the plaintiff.

Mr. L. J. Madeiros for the defendant.

Before: The Hon. Sir Allan C. Smith, M.C.,  
Assistant Justice.

10

On 28th September, 1959, the plaintiff was employed by the defendant Company working in a gang driving piles for the foundations of a warehouse on a site in Pembroke. During these operations the crane toppled over and caused severe and permanent injuries to the plaintiff, for which he now claims damages.

The matters in dispute fall under two general headings -

20

- (1) Were the injuries sustained as the result of any negligence on the part of the Company; and
- (2) If there was negligence, how are the damages to be calculated and assessed?

I will deal with the question of negligence first and start with a description of the site as revealed by the evidence.

The site, which belongs to the Bermuda Gas and Utility Company, borders on the Serpentine Road adjoining the Electric Light Station and on the fringes of Pembroke Marsh.

30

Quite a number of years ago the site had been filled, apparently by dumping rubble in it, and towards the back of the site there was an existing building in which the owners stand cylinders of gas, and the trucks, which carried the cylinders

In the Supreme  
Court of Bermuda

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Judgment  
10th June, 1963  
(continued)

to and fro, drove across this fill and had made a rough roadway which led through the site of the new building, though the evidence was that the trucks did not always follow this road but could and did drive over the general area and the rubble fill had apparently been firmly packed down by this traffic, so much so that a jack hammer had to be used to dig the shallow holes to form guides for the points of the piles where they were to be driven.

This crust of rubble fill, according to one of the men employed in digging the holes, was about 14 inches thick, and the water table was reached at about  $3\frac{1}{2}$  ft. in marshy sub-soil, though he did say that the hardness of the ground varied from one spot to another. The design of the new building called for a concrete floor and foundations supported on piles driven in to various depths from 14 to 27 feet in groups of three. 10

Mr. Diel, the Superintendent of Works of the Defendant Company, inspected the site before the pile driving was started and satisfied himself that the ground was firm enough for the mobile crane and its equipment to operate on it without taking any special precautions to prevent the crane from sinking in when it was working. Though, of course, the fact that the foundations of the new building had to be supported by piles plainly indicated that the crane would be working on filled ground and that there might be some danger of instability. 20 30

No evidence was led as to the weight of the crane, but I am told that it was capable of lifting five tons with the boom swung out to a radius of ten feet. It was mounted on a chassis supported by four wheels, each with double tyres on them, and the boom was about 35 feet long. The boom could be hoisted from horizontal to practically vertical and the whole crane could pivot round on its chassis. 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 being about three tons. There were no instruments on the crane for measuring the angle at which the boom may be set, or for levelling the crane and the operator had to judge such data by eye. The piles to be driven were up to 30 feet long and weighed approximately three quarters of a ton. 40

To drive a pile the crane was first manoeuvred close to the spot and the lead with the maul on it lifted into a vertical position near to the point where the pile was to be driven, the main weight of the lead resting on the ground. A second wire was then attached to the top of the pile and it was lifted into a vertical position with the point resting on the ground at the correct spot.

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Judgment  
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(continued)

10 One of the crane crew then climbed up the lead and the lead, with the man on it was hoisted until the top of the pile was below the level of the maul. The man then manoeuvred the pile into the slot of the lead, with the head of the pile directly under the maul. In this manoeuvre the crane operator made any necessary adjustments to the position of the boom to bring the pile and the lead together at the correct point. This being done, the man then inserted bolts across 20 the open side of the lead to keep the pile in position and then, having disconnected the wire from the top of the pile and connected it to the top of the maul, descended to the ground either down the lead or, if the top of the lead was close enough to the boom, by crossing over to the boom and descending by that route.

When the man was safely on the ground, the driving of the pile could begin.

30 The plaintiff, who had been employed by the Company as a semi-skilled labourer for about 3 years and latterly was normally employed as a fireman on a floating steam crane, had never before this day been called upon to climb up the lead and fit the pile into it, though of course as fireman of the floating crane he had participated before in pile driving operations and there was some evidence that he had been at times a member of the crew of a land based crane driving piles.

40 Pile driving had commenced some days before the 29th September and about a dozen piles had been driven without incident.

On the morning of the 29th the pile driving crew consisted of a foreman, Corriea, who had about 8 years experience of this type of work,

In the Supreme Court of Bermuda Philpott, the crane operator and 2 labourers, one of whom was the plaintiff.

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10th June, 1963  
(continued)

In addition to driving piles, each had to be pointed and some of the crew were engaged in doing this work.

During the morning three piles were driven without incident, with Philpott driving the crane and the foreman on the ground directing operations.

The crane was then moved into position for the next group of piles and the lead brought into position for the first pile of the new group and the pile hoisted to a vertical position with its point resting at the correct spot. 10

The lunch break came at this stage and after this Philpott and the other labourer disappeared, leaving the gang depleted to the foreman and the plaintiff.

A diagram of the groups of piles was put in evidence and on it the foreman marked the piles which had already been driven and sketched in the position of the rough roadway, already referred to, and the position of the crane and the pile material to this case. 20

The foreman said that before moving the crane to this new position, which was on the roadways he inspected the position and it appeared to be sufficiently solid.

After lunch the foreman decided that as the crane, lead and pile were already in position he would drive this pile with the sole aid of the plaintiff and then carrying on pointing other piles for the following day's work. 30

The foreman said he asked the plaintiff to climb up the lead while he operated the controls of the crane to hoist the lead, so that the plaintiff could fit the top of the pile under the maul. The plaintiff said that the foreman merely told him to do this.

It doesn't matter which version is correct as the defence of "volenti" has been abandoned. 40

The plaintiff's version is that he climbed up the lead and it was hoisted up about ten feet when suddenly the crane started to tremble. The plaintiff, who was then about 30 to 40 feet up in the air, hung on and the next thing he remembers is coming to in the hospital, seriously injured.

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(continued)

10 The foreman's version is that he hoisted the lead 9 to 10 feet up with the plaintiff on it so that the maul cleared the top of the pile, when the crane began to shake violently. The boom, according to the foreman, was at about 10 feet radius and a little to the right of the centre of its traverse. The lead began to swing away from the crane and towards the right. The foreman released the "swing" brake of the crane and shouted to the plaintiff to jump, and he decided that it would be more dangerous to release the brake of the hoist and let the lead drop and 20 save the crane, than to continue to hold the weight of the lead and let the whole thing topple over, which it did.

According to the foreman, his last view of the plaintiff as the crane and lead were toppling, was of the plaintiff clinging to the lead.

30 Two other witnesses who saw the crane toppling over, say that as it toppled the plaintiff was hanging on to the boom near the top and that after it fell, the boom was lying across his arm and a number of men lifted the boom to release him.

On the other hand, the foreman said that after the fall the plaintiff was lying with his arm under the lead. This version is corroborated by Mr. Diel who was called to the scene a few minutes after the accident, who said that the plaintiff was lying with his arm under the lead and about 30 ft. from the boom.

40 The plaintiff gave no evidence of transferring, or of attempting to transfer, from the lead to the boom as it toppled and from the foreman's description of the fall, I doubt very much if he could have done so. I therefore find that the foreman's version is the correct one.

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At the trial, criticisms were suggested, against the plaintiff for not jumping off the lead when the crane began to topple, and against the foreman for letting the crane swing instead of promptly dropping the lead, but I think that no useful purpose would be served by discussing them.

I have never myself been on a toppling crane, but I have been in a capsizing sailboat, plus a number of near misses, and I can readily appreciate the feelings of the plaintiff and the foreman in this predicament where it was a matter of split seconds to make agonizing decisions and to implement them and I consider it would be unfair to both of them to attempt to say that the one or the other might at this stage have avoided disaster or mitigated the gravity of its consequences by acting differently in the agony of the moment. 10

Now it appears to me that a number of factors, or a combination of any two or more of them, could have caused the crane to lose its stability and topple over. 20

1. That the boom was extended too far for the weight which it was lifting,
2. That the operator started the lift too quickly thereby applying a jerking force to the crane,
3. That some part of the mounting of the crane was too weak and gave way under the strain of the lift; and
4. That the ground under the wheels was not sufficiently solid and gave way under the weight of the lift. 30

As to the first factor, the plaintiff gave no evidence as to the angle of the boom.

For the defendant, the foreman said that the boom, by his estimation was at a 10ft. radius and a similar estimate was given by Mr. Diel who viewed the toppled crane shortly after.

When the crane toppled, the right front wheel made a hole in the ground, but no measurements were taken of its distance from the point of the pile, as a check on these estimates. 40



Therefore these estimates, which appear to have been honestly put forward by competent witnesses, stand uncontradicted and uncorrected and must be accepted.

I therefore rule out the first factor I have mentioned.

10 As to the second factor, I understand both from the plaintiff and the foreman that the crane began to shake when the lead was at or near the top of the lift. This appears to rule out any theory that there was any jerking in the hoisting of the lead and to eliminate this factor.

20 I will deal with the last two factors together. Both the foreman and the plaintiff said that the incident started by the crane beginning to shake violently. I infer from this evidence that this shaking was caused by a sudden jolt. When Mr. Diel came on the scene, he found a hole, estimated by him as about 11 inches deep, at the spot where the right front wheel of the crane had been standing. The foreman estimated this hole to be about 12 to 18 inches deep. Whichever estimate is correct, they both appear to think that if the wheel fell into this hole, it would be sufficient to topple the crane.

30 In addition to the hole, Mr. Diel found that the bolts securing the wheel to its mounting on the axle had all sheared off. This of course would add to the instability. Mr. Diel's opinion was that the shearing off of the bolts was caused by the wheel suddenly dropping into the hole and he added that if the wheel had been broken off by a twisting force as the crane toppled over, he would have expected the bolts to have been broken off unevenly and not all together as they appear to have been.

40 I had no evidence of the fact or opinion from any disinterested witness of 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.

From all this I can only conclude that the

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In the Supreme Court of Bermuda crane toppled over because the ground suddenly gave way under the right front wheel.

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I now come to the most difficult question of all: Did this happen as the result of anything done, or omitted to be done by the Defendant Company or any of its servants?

The plaintiff alleges that the defendant failed in two important respects:-

- (a) In failing to inspect properly the site where the crane was positioned to make sure that there were no weak spots on the surface which might give way under the crane, and even if such inspection did not reveal any weak spots, the fact that the crane was operating on filled ground which required piles to be driven into it to support a building, extra precautions, such as putting planks under the wheels of the crane, should have been taken to prevent the wheels breaking through any weak spots that might remain undetected even after careful inspection. 10 20
- (b) There should have been a third man on the ground to give to the crane operator early warning of any signs of instability.

As to the first point, both Mr. Diel and the foreman had inspected the site and formed the opinion that the ground was sufficiently solid for the crane to operate on without putting any extra supports, such as planks, under the wheels.

Before this day, 12 piles had been driven without incident and that very morning three more had been driven also without incident. 30

The particular place where the crane was standing at the material time was on the roadway which the trucks had made across the site, and the crane had already lifted the lead and the pile into position just before the lunch break.

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. 40

On the second point, the foreman admitted that sometimes the rear wheels of the crane lifted off the ground and settled back when the crane was working with the boom extended to drag the lead from one position to another, and that such an incident had occurred that very morning. The foreman was on the ground on this occasion, with Philpott operating the crane. He didn't tell Philpott that the wheels had lifted as he realized that Philpott himself had felt it.

10

Fough, the man engaged in digging holes near the crane, said that when the crane was lifting the lead with the plaintiff on it he glanced up from his work and noticed that the left rear wheel of the crane lifted up and came down again and he saw the foreman look up at the plaintiff who was at the top of the lead trying to fit the head of the pile into it, while the foreman was moving the control levers of the crane trying to get the pile into place.

20

Fough then resumed his digging with a jack hammer when he heard a noise, looked up again and saw the crane toppling over. Fough did not give any estimate of the time intervals between these two incidents, but from his description, I do not conclude that they occurred with only a momentary interval of time between them.

On the other hand, the foreman said that at no time during the lift did he feel the wheel lift and settle back again and that if it had happened to any extent he was sure he would have felt it.

30

The incident as described by the plaintiff and the foreman is that the crane suddenly began to shake and tremble and then fell, and according to the foreman the lead began to sway away to the right. This is consistent with the right front wheel dropping suddenly and is confirmed by the hole and broken wheel.

40

Furthermore, Fough's memory or powers of observation are not too good, as according to him the plaintiff was on the boom when the crane fell and although this is supported by another witness who was on the adjoining property, I am satisfied from other evidence that they are both mistaken

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(continued)

as to this particular point. I conclude from this that even if there had been a third man on the ground to give warning of any instability, any such warning that he could have given would probably have been too late for the accident to have been avoided.

Counsel on both sides have referred me to a number of cases, the reports of which I have read. The cumulative effect of them appears to lay down that an employer is bound to take reasonable precautions to guard against his employees receiving injury, and that the matters in which he must be careful can be grouped under a number of heads, the chief of which are -

10

1. He must provide tools and equipment which are adequate for the job and as reasonably safe to use as can be devised,
2. He must provide competent and careful employees who will not injure one another by inefficiency or carelessness.
3. He must devise and enforce a safe system of work and where reasonably necessary give special instructions for the avoidance of any dangers which might reasonably be expected.

20

The onus lies on the plaintiff to establish a balance of probability that he sustained his injuries as the 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.

30

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.

This is undoubtedly a borderline case, and in the event of a different conclusion on the question of liability being entertained, I will give my views as to the damages to be awarded.

40

The plaintiff has proved the extent and nature of his injuries as pleaded. He must have endured

considerable pain and suffering and his right hand is permanently partially disabled. I accept the claim for special damages of £686.18.9d. as set out in the Statement of Claim as amended on 26th March, 1963. Under the headings for general damages, I would award the sum of £2,000 for pain and suffering, loss of amenities, and loss of future earning capacity.

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(continued)

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(Sgd.) A. C. SMITH  
Acting Chief Justice

10th June, 1963  
L.P.

No.15

COURT NOTE

No.15

Court Note

10th June, 1963

9.30 a.m. 10th June, 1963

Judgment read. Claim dismissed.

Madeiros:- Defendant made a payment into Court without an admission of liability.

Asks for costs.

20

Jones:- Can't object.

Court:- Costs to defendants.

No.16

ORDER IN COUNCIL GRANTING SPECIAL LEAVE TO APPEAL IN FORMA PAUPERIS TO HER MAJESTY IN COUNCIL

In the Privy Council

No.16

Order in Council granting Special Leave to Appeal in forma Pauperis to Her Majesty in Council

(L.S.)

AT THE COURT AT BUCKINGHAM PALACE  
The 20th day of December, 1963

PRESENT

20th December, 1963

30

THE QUEEN'S MOST EXCELLENT MAJESTY

Lord President            Sir Keith Joseph  
Sir Edward Boyle        Mr. Rippon

W H E R E A S there was this day read at the

In the Privy  
Council

No.16

Order in Council  
granting Special  
Leave to Appeal  
in forma Pauper-  
is to Her Majesty  
in Council  
20th December,  
1963  
(continued)

Board a Report from the Judicial Committee of the  
Privy Council dated the 12th day of December, 1963,  
in the words following viz:-

"WHEREAS by virtue of His late Majesty King  
Edward the Seventh's Order in Council of the  
18th day of October 1909 there was referred unto  
this Committee a humble Petition of Sinclair  
Eugene Swan in the matter of an Appeal from the  
Supreme Court of Bermuda between Sinclair Eugene  
Swan Petitioner (Plaintiff) and Salisbury  
Construction Company Limited Respondent(Defendant) 10  
setting forth: that the Petitioner desires to  
obtain special leave to appeal in forma pauperis  
to Your Majesty in Council against the Judgment  
and Order of the Supreme Court of Bermuda dated  
the 10th June 1963: that the Petitioner on the  
31st October 1962 issued a Writ of Summons  
against the Respondent in the Supreme Court of  
Bermuda bearing an endorsement that his claim  
was for damages for injury to himself; that on 20  
the 14th November 1962 the Petitioner filed a  
Statement of Claim stating that on the 28th  
September 1959 he was employed by the Respondent  
as a skilled labourer and was ordered by the  
Respondent to work on the leads of a crane that  
was driving piles in the process of the construc-  
tion of a building and that whilst so employed the  
said crane toppled over causing him to be thrown  
to the ground and pinned under the said leads  
and suffer severe injuries and that the Respondent 30  
as an employer impliedly agreed with the  
Petitioner or alternatively it was the duty of  
the Respondent as an employer to provide a safe  
system of work and effective supervision of the  
said driving of the piles but the Respondent or  
its servants or agents committed breaches of the  
said agreement or were negligent: that on the 7th  
December 1962 the Respondent delivered a Defence  
in which the accident and injury to the Plaintiff  
were admitted but liability for the accident was 40  
denied: that on the 10th June 1963 the Judgment  
of the said Supreme Court was given in favour of  
the Respondent: that the Petitioner obtained  
conditional leave to appeal to Your Majesty in  
Council from the Supreme Court of Bermuda but  
the Petitioner was unable to comply with the said  
conditions in that he was unable to give security  
in the required sums or to deposit the required  
sum with the said Court: And humbly praying Your

Majesty in Council to grant him special leave to appeal in forma pauperis against the Judgment and Order of the Supreme Court of Bermuda dated the 10th day of June 1963 or for further or other relief:

In the Privy  
Council

—————  
No.16

Order in Council  
granting Special  
Leave to Appeal  
in forma pauper-  
is to Her Majesty  
in Council  
20th December,  
1963  
(continued)

10

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and in opposition thereto Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioner to enter and prosecute his Appeal in forma pauperis against the Judgment and Order of the Supreme Court of Bermuda dated the 10th day of June 1963:

20

"And Their Lordships do further report to Your Majesty that the proper officer of the said Supreme Court ought to be directed to transmit to the Registrar of the Privy Council without delay an authenticated copy under seal of the Record proper to be laid before Your Majesty on the hearing of the Appeal upon payment by the Petitioner of the usual fees for the same."

30

HER MAJESTY having taken the said Report into consideration was pleased by and with the advice of Her Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor and Commander-in-Chief or Officer administering the Government of the Bermudas or Somers Islands for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

W. G. AGNEW.

Exhibits"D2"E X H I B I T SEXHIBIT "D.2"BERMUDA GAS & UTILITY CO. LTD.  
SERPENTINE ROAD, PEMBROKEDIAGRAM OF PILES IN PLACE  
(Not to scale)LIST OF DEPTHS DRIVEN

1.	(a) 26'0"	15.	(a) 14'0"
	(b) 27'0"		(b) 14'0"
	(c) 26'6"		(c) 18'0"
3.	(a) 25'0"	17.	(a) 15'0"
	(b) 25'0"		(b) 14'0"
	(c) 26'0"		(c) 16'0"
5.	(a) 23'0"	19.	(a) 18'0"
	(b) 22'0"		(b) 18'0"
	(c) 23'0"		(c) 18'0"
7.	(a) 17'0"	21.	(a) 27'0"
	(b) 18'0"		(b) 17'0"
	(c) 17'0"		(c) 17'0"
8.	(a) 17'0"	14.	(a) 27'0"
	(b) 17'0"		(b) 27'0"



IN THE PRIVY COUNCIL

No. 23 of 1964

ON APPEAL

FROM THE SUPREME COURT OF BERMUDA

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SINCLAIR EUGENE SWAN

(Plaintiff) Appellant

-and-

SALISBURY CONSTRUCTION COMPANY  
LIMITED

(Defendant) Respondent

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RECORD OF PROCEEDINGS

HATCHETT JONES & CO.,  
90, FENCHURCH STREET,  
LONDON, E.C.3.

SOLICITORS FOR THE APPELLANT

POTHECARY & BARRATT,  
TALBOT HOUSE,  
TALBOT COURT,  
GRACECHURCH STREET,  
LONDON, E.C.3.

SOLICITORS FOR THE  
RESPONDENT