SUPREME COURT OF QUEENSLAND

CITATION:	*Hillcoat v Keymon & Anor* [2002] QSC 023
PARTIES:	**GRAHAM CHARLES HILLCOAT** (plaintiff) **v** **KEYMON PTY LTD ACN 010 624 245** (first defendant) **PERPETUAL TRUSTEES QUEENSLAND LIMITED** (second defendant)
FILE NO/S:	S 662 of 1995
DIVISION:	Trial Division
PROCEEDING:	Civil Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	14 February 2002
DELIVERED AT:	Brisbane
HEARING DATE:	26 – 28 September 2001
JUDGE:	Philippides J
ORDER:	**Judgment be given for the defendant against the plaintiff**
CATCHWORDS:	NEGLIGENCE – liability for negligence of others – non-delegable duties – Pl/licensee injured when faulty lift collapsed – commercial premises – whether landlord in control of premises – special vulnerability of plaintiff – renovations conducted by tenant – negligent construction of lift device – whether owner owed non-delegable duty to ensure safety of premises – damages assessed. *Property Law Act* 1974, s 121(2) *Workplace Health and Safety Act* 1989, s 6, s 18, s 23 *Burnie Port Authority v General Jones Pty Ltd* (1994) 179 CLR 520 *Cavalier v Pope* [1906] AC 428 *Jones v Bartlett* (2000) 75 ALJR 1 *Kondis v State Transport Authority* (1984) 154 CLR 672 *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 75 ALJR 164 *Meyers v Easton* (1878) 4 VLR 283 *Northern Sandblasting Pty Ltd v Harris* (1997) 188 CLR 313 *Percy v Central Control Financial Services Pty Ltd* [2001] QCA 226

W D & H O Wills (Australia) Ltd v State Rail Authority of New South Wales (1998) 43 NSWLR 338; *State Rail Authority of New South Wales v TNT Management Pty Ltd* (1998) 43 NSWLR 338

COUNSEL: G R Mullins for the plaintiff
S C Williams QC for the defendant

SOLICITORS: Shine Roche for the plaintiff
Gadens Lawyers for the defendant

PHILIPPIDES J:

The Plaintiff's Claim

[1] This is an action for damages for personal injuries suffered by the plaintiff on 2 May 1992 at the Queens Hotel at Maryborough as a result of the collapse of a lift device which the plaintiff used in order to travel from the ground floor of the premises to the first floor.

[2] At the hearing of the trial, it was agreed that at all material times the first defendant was the owner of the Queens Hotel and that the action should proceed only against that defendant. It is therefore convenient to refer to that party as "the defendant".

[3] It is not in dispute that the defendant had leased the hotel to Venacorp Pty Ltd ("Venacorp") for a period of 10 years from 1991, that Venacorp conducted the business of a hotelier on the premises and that a Mr French was a director of Venacorp.

[4] The plaintiff alleged in his Statement of Claim that:

(a) at the time he sustained the injuries, the plaintiff was engaged by Venacorp as a licensee of the hotel and acted as a resident caretaker of the premises;
(b) at the time the injuries were sustained, the premises were the subject of renovations which were being carried out by the lessee, which included the installation of a device in the nature of a lift;
(c) the lift device had previously been in use as a dumb-waiter in a café or restaurant;
(d) the proper function of the lift device was to carry goods from the lower floor of the premises to the floor above and not to carry persons between floors;
(e) at the time of the incident the lift device provided the only means of access to the upper floor within the premises;
(f) on that occasion Mr French used the lift to gain access to the upper floor of the premises and requested the plaintiff to join him on the upper floor, causing the lift to return to the lower floor for use by the plaintiff;

(g) the plaintiff entered the lift and caused it to carry him towards the upper floor, but the mechanism of the lift failed before it reached the upper floor causing it to crash to the ground, thereby injuring the plaintiff.

[5] The plaintiff alleged that the renovations proceeded with the knowledge and consent of the defendant and for its benefit in that:

(a) the defendant was entitled to the property of the renovations at the conclusion of the lease;
(b) one Jeffrey Williams ("Mr Williams") on behalf of the defendant regularly visited the premises prior to 2 May 1992 and was aware of the existence of the lift;
(c) the defendant had copies of plans and submissions made to the Maryborough City Council for approval of the renovations;
(d) the defendant was aware or ought to have been aware that unconditional Council approval for the renovations had not been obtained prior to 2 May 1992 and/or that the engineer's reports requested by the Council had not been obtained.

[6] The plaintiff claimed that the defendant owner and lessor of the premises owed the plaintiff a duty of care to ensure that the renovation work was properly and safely carried out or, alternatively, that there was a duty to ensure that competent tradespeople were employed to carry out the renovation work, which duties could not be delegated.

[7] The plaintiff claimed that the defendant was negligent in breach of its duties in:

(a) causing or permitting there to be on its premises a lift which had the deceptive appearance of being safe for use by persons, when in fact it was safe only for the carriage of goods and which was in a dangerously defective condition, of which the defendant knew or ought to have known;
(b) failing to place any warning or notice that persons should not use the lift to travel between floors;
(c) failing to ensure that competent and skilled tradespersons were employed to construct the lift.

[8] The plaintiff also alleged that the renovations constituted a project within the meaning of that term as defined in s 6 of the *Workplace Health and Safety Act* 1989 ("the Act") and that the defendant was the owner of the project and, by reason of its failure to appoint a principal contractor, became the principal contractor for the purposes of the Act. As a consequence, it is alleged that the defendant was obliged to ensure that every employer and employee engaged in occupation at the workplace complied with the provisions of the Act. The various regulations in respect of the maintenance of the lift are described in paragraph 25 of the Statement of Claim. No independent cause of action based on the Act is pleaded or claimed, but rather the alleged breaches of the Act are relied upon as evidence of breach of the standard of care which it is alleged the defendant owed.

The Defence

[9] The defendant, in its defence:

(a) admits that renovations were proceeding with its knowledge and its conditional consent in terms of its letter of consent dated 19 February 1992;
(b) denies that it was aware before the incident that the renovations included the construction of a lift;
(c) admits that at the conclusion of the lease, the leased property including the renovations would revert to the defendant, if the lease was not renewed;
(d) admits that Mr Williams visited the premises, but denies that that occurred on a regular basis, and says that occurred on two occasions only during the course of the renovations at the invitation of Mr French;
(e) says that on the first visit by Mr Williams the demolition stage of the work was underway and on the second visit the work was at virtual completion;
(f) denies that Mr Williams was aware of the existence of the lift;
(g) admits that the defendant had a copy of a plan with respect to the renovations but denies that it held a copy of any specifications for the renovations;
(h) says that the plan held by the defendant did not show the presence of the lift device;
(i) says that it had been informed that Council approval had been granted to the renovations;
(j) alleges that the plaintiff voluntarily entered, remained in and operated the lift device with full knowledge that it was intended for the conveyance of goods, and not intended for the conveyance of persons, did not have the safety features of the passenger lift and had a limited capacity;
(k) alleges that it was unnecessary for the plaintiff to travel in the lift device and that the plaintiff voluntarily did so and thereby assumed the risk of travelling in it;
(l) alleges contributory negligence against the plaintiff.

Events Leading to the Incident on 2 May 1992

[10] At the request of Mr French, the plaintiff became the nominated licensee of the Hotel in August 1991 and resident caretaker residing on the ground floor.

[11] On 12 February 1992, Mr French, on behalf of Venacorp, made an application to the Licensing Commission to renovate the first floor of the Queens Hotel and enclosed plans stated to have been already approved by the Council.

[12] Mr Caldwell, a building surveyor with the Maryborough City Council, gave evidence that the alteration of the first floor of the Queens Hotel from accommodation to a nightclub, required both town planning and building approvals and that, before demolition and renovation work could have been undertaken, building approval was needed from the Council.

[13] By letter dated 14 February 1992, Venacorp wrote to the Maryborough City Council enclosing an application form, plan, fee and owner's letter of authorisation for the proposed change of classification to the upper storey of the Queens Hotel and sought Council's approval for the project, which envisaged the complete removal of all existing partitions from the upper floor and turning that area into a lounge for evening use.

[14] By letter dated 14 February 1992, Mr French on behalf of Venacorp wrote to "W H Williams Settlement" seeking approval in respect of a plan for a proposed "upper floor lounge" at the hotel and enclosed plans therefor. It appears that these plans did not indicate that a lift was to be installed as part of the renovations.

[15] By letter dated 18 February, H Williams & Sons acknowledged Mr French's letter of 14 February 1992 together with a plan of conversion of the first floor of the hotel from its existing use to that of a lounge. The letter stated:

> "We acknowledge your letter of 14 instant, together with a plan of conversion ... It is noted that structural alterations will occur as part of the alteration, and whilst the plan in our possession has not been stamped nor signed by the Licensing Commission nor Local Authority, we have been informed that both statutory bodies have in fact approved the said plan.
>
> If that is the case, and the builder has adequate Insurance with a reputable Insurance Company to cover any damage that may occur during the alterations, and you as Lessee accept that the total costs of the alterations are to be met by you, we have no objection to the project being completed as per the plan supplied to us."

[16] It appears that Venacorp lodged with the Council an "Application for an Approval for Building Work or Change of Classification" on 18 February 1992 specifying W H Williams & Sons as the owner and J Marstella Builders as the builder. The document on the Council's file is not signed by the landowner nor by the building or structure owner.

[17] An "Application for Approval to Additions, Alterations, or Rebuilding of Licensed Premises" was lodged with the Licensing Commission. The application was dated 25 March 1992 signed by the plaintiff as licensee and by Mr Williams, as agent for the owner, indicating the owner consented to the application. It appears that, while the plaintiff completed and signed the application for approval of alterations to the hotel at Mr French's request, he did not become involved in any of the renovation works.

[18] On 2 April 1992, the Maryborough City Council wrote to the Queensland Licensing Commission advising that the Council had resolved to approve the proposed alterations, subject to conditions.

[19] It appears that plans dated 5 April 1992 and drawn by T Baade,[1] which referred to a lift, were lodged with the Council. These plans appear to have accompanied

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[1] See Exhibit 4 Drawing Nos 640/1, 640/2.

detailed specifications dated 5 April 1992 by T & E Baade Drafting Service, also lodged with the Council, which referred to the construction of a lift shaft. Mr Caldwell was unable to locate any earlier plans detailing the lift.

[20] On 21 April 1992, it was resolved by the Council to grant building approval for the application for change of classification of the second floor of the Queens Hotel, subject to conditions.

[21] The plaintiff gave evidence that the demolition of the first floor commenced at the end of January or early February 1992, with building work commencing in February 1992. Work commenced on the lift shaft about 3 to 4 weeks before the accident in the location shown on the plan dated 5 April 1992, with 6 to 8 people working on a regular basis on both the ground and first floors. By 2 May 1992, the renovation work was fairly advanced and the internal stairs had been removed.

[22] Mr Caldwell gave evidence that the Council's file indicated that the plans were approved by the building inspector on 7 May 1992[2] and that typically approval was granted on the same day. Until that day no demolition or renovation work was permitted to be carried out. On 7 May 1992, a building permit was issued by the Council to Venacorp as "owner" and specified the builder as being "J Marstella". Mr Caldwell indicated that typically the persons to whom those documents were sent were the specified owner and builder, which in this case were Venacorp and J Marstella.

The Incident on 2 May 1992

[23] On the afternoon of 2 May 1992, Mr French approached the plaintiff and asked him whether he would be prepared to assist with the management of the night club. The plaintiff indicated that he was interested. After the hotel closed at 2.00 pm Mr French invited the plaintiff to discuss the proposal over a couple of drinks. They visited a few hotels over the period of 3 to 4 hours. The plaintiff indicated that he consumed about 8 half scotches. They returned to the Queens Hotel at about 8 pm.

[24] Mr French then asked the plaintiff to join him on the upper floor of the hotel to have a look at the renovations stating that he wanted to show the plaintiff how to properly lock up. The plaintiff agreed. As the internal stairs had been removed, Mr French said they should use the lift. The plaintiff asked whether it had been tested and was safe. Mr French advised him that it was and said that it had been tested to carry a man and 24 cartons of liquor. Mr French, who was about 16 stone, as opposed to the plaintiff who was 18 stone, then proceeded to use the lift and sent the lift back down for the plaintiff to use. Before the lift reached the upper level with the plaintiff in it, it failed and crashed to the ground, thereby causing injury to the plaintiff. The plaintiff's evidence was that he did not know the lift had not been tested and that, had there been a sign which indicated that the lift was only a good's lift, he would not have travelled in it.

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[2] Exhibit 7.

The Lift Device

[25] Mr Hungerford, a consultant building manager with experience in installing lifts, was asked to inspect the Queens Hotel on the day of the accident. He described the lift structure as a metal angled frame with timber bolted between it and a metal A-frame on the top with the pulley and the cable. He estimated the base of the lift to be about five foot square, and the height of the lift to be roughly 1,800 or six foot. It appeared big enough for a person to stand in. He said that the lift had no front and three sides, which he thought were made of plywood.

[26] Immediately above the lift was a metal A-frame with brackets, which had been very badly welded. The cable itself had snapped and was frayed. His observation of the cable was that it was covered in oil and was fairly old. He considered that, if the cable had not snapped, the welds would have given way if subjected to a heavy load. There were no overriding safety cables on top of the lift in addition to that cable. Mr Hungerford stated it was normal for there to be a safety cable, which had to be designed, lodged and approved by a relevant body.

[27] Mr Hungerford said that when he first saw it, he would not have thought that it was a passenger lift because it had no closing front and no overriding controls, but just an up and down switch. Mr Hungerford said that the carriage within the shaft of the lift looked home-made and 'like a real bodgie job'. He noted that in the shaft there were two metal guides, with four greased angles for the lift to slide up and down on, but no runners such as other lifts have, and described the lift as a 'shell' without a front door. He also noted that there were partitions around the angles, which were independent of the walls above the lift itself, and which were 'ordinary metal stud frames and just gyprock on the face'. There were no signs indicating whether or not the lift had been tested, nor any signs indicating whether it was a goods or passenger lift, nor signs indicating what capacity the lift should have to undertake. Mr Hungerford gave evidence that had the lift been tested, it would not have passed the required standard. He gave evidence that the renovations as a whole were 'substandard', and showed 'poor workmanship'.

[28] It appears from the evidence that Mr French dishonestly used the registered number of Mr Marstella without his knowledge or approval.

[29] In my opinion, the evidence clearly shows that the lift device was constructed negligently and not in a competent and skilled fashion. It is clear that the device was unsafe for the carriage of people. I accept the plaintiff's submissions that the lift was completely unsafe for use and that no signs were displayed on the lift warning that it should not be used nor stating its capacity.

[30] The issue for determination is whether the defendant bears liability in respect of the injuries sustained by the plaintiff from the use of the lift devise.

Evidence as to the Defendant's Involvement in the Alterations

[31] Mr Williams is a member of a family from the Maryborough area which conducted several businesses, one of which was that of the defendant, an investment company that purchased several investment properties in Maryborough from H Williams' estate, or Perpetual Trustees, the trustee of the estate. One of these properties was

the Queens Hotel. This sale occurred a couple of days prior to the plaintiff's accident. For a considerable time before the incident, H Williams & Sons had managed the property. At the time of the incident, Keith Williams, Mr Williams' father, was a director of the defendant, and Mr Williams was secretary. He subsequently became a director.

[32] Mr Williams met Mr French and had quite some contact when negotiating the lease, after which they were in contact on the fortnightly visit. A ten-year lease was given over the premises commencing in July 1991.

[33] Mr Williams recalled receiving a letter on 14 February 1992 from Venacorp seeking consent to some proposed alterations to the upper floor of the building, and attaching a plan. His understanding was that a nightclub was proposed. He confirmed that in response a letter was written by his father on 18 February 1992, on the letterhead of H Williams & Sons, which had a management role in relation to the property, stating that there was "no objection to the project being completed as per the plan supplied". According to Mr Williams, at that stage, the only plan which the owner had was the plan attached to the letter dated 14 February 1992 to "WH Williams Settlement", which did not show the renovations as incorporating the construction of a lift.

[34] Before the renovations commenced, Mr Williams became aware that the plaintiff was the licensee, and had reason to believe that the plaintiff was living at the hotel as licensee. It also appears that Mr Williams was aware that the hotel was in operation during the renovations.

[35] Mr Williams' evidence was that he could not recollect when the demolition work at the hotel actually commenced, but that he would not have been surprised if it had begun before the defendant was asked for approval, as Mr French "did things fairly impulsively". He stated that he believed that commencement of the work would have required the owner's consent. He did not recall the defendant receiving any building approval from the Maryborough City Council, nor any certificate of completion or similar document. Mr Williams said he made no inquiries with the Licensing Commission or the Council to see that Council approval had been given, nor had he been to the hotel to ensure that there was a registered builder on site doing the renovation work.

[36] Mr Williams gave evidence that he signed the application to the Licensing Commission for 'Permission to Undertake Alterations' dated 25 March 1992 consenting on behalf of the owner to the application. He was aware when he signed that form that demolition work had already commenced. It also appears that the defendant would then have been aware that, contrary to the information relayed by Mr French and noted in the letter of 18 February 1992, the plans had not then been approved by the Licensing Commission and therefore one of the bases for the giving of consent as recorded in the letter of February 1992 was incorrect.

[37] Mr Williams gave evidence that he and his father usually visited the various hotel property interests of the defendant roughly fortnightly, to speak to the tenants and ask how the business was going. Mr Williams said that the fortnightly visits to the Queens Hotel were purely to discuss how the business was progressing and were not property inspections. A property inspection was carried out yearly.

[38] Mr Williams' evidence was that on two occasions he and his father did visit the hotel to look at the alterations, at the invitation of Mr French. One such occasion occurred after the alterations commenced and the other was towards the completion of the project.

[39] The plaintiff gave evidence that he had seen Mr Williams at the hotel on a number of occasions and that on one of these occasions, he observed Mr Williams standing at the Kent Street entrance speaking to Mr French at a time when the lift shaft was in the process of being constructed. The plaintiff gave contradictory evidence as to whether Mr Williams would have had a view of the lift construction on that occasion, conceding in cross-examination that the lift shaft was in fact being constructed within the confines of a small store room and would not have been apparent to someone standing at the Kent Street entrance of the hotel.

[40] Mr Williams' own evidence was that he was not aware at any time that it was proposed as part of the renovations that a dumbwaiter or lift be installed, that he had never seen the dumbwaiter/lift construction before the accident and that he did not become aware that such a structure had been installed until after the accident. He said that it was only after Mr French had sold the lease to another lessee that he saw what he believed to be a shaft that related to the dumbwaiter. Mr Williams recalled that this was located inside a storeroom, not far from where the original stairs were. I accept Mr Williams' evidence on these matters.

LIABILITY

Plaintiff's Submissions

[41] As it developed at trial, the plaintiff's case was that the defendant, as landlord, owed the plaintiff, as a resident licensee, a non-delegable duty to ensure that competent tradespeople were employed to carry out the renovation work which it breached, and a further non-delegable duty to ensure that the work was carried out safely, which was also breached. The plaintiff's counsel relied on the principle, identified in *Kondis v State Transport Authority ("Kondis")*[3] and restated in *Burnie Port Authority v General Jones Pty Ltd ("Burnie")*[4], concerning when a non-delegable duty will arise as applicable in this case. In particular, it was said that the following criteria concerning the relationship between the defendant and the plaintiff were satisfied:

> (a) the defendant was in control of premises and took advantage of that control to allow another to undertake thereon a dangerous activity;
> (b) the other party to the relationship, being the plaintiff, was a person, outside the premises and without control over what occurred therein whose person was thereby exposed to a foreseeable risk of danger.

[42] Counsel for the plaintiff also relied in support of its submissions on *Northern Sandblasting Pty Ltd v Harris ("Northern Sandblasting")*[5] as being analogous to the present case, by reason of the introduction of a dangerous defect to the

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3 (1984) 154 CLR 672.
4 (1994) 179 CLR 520 at 550-551.
5 (1997) 188 CLR 313.

premises, although it was conceded that its authority has been questioned in *Jones v Bartlett*[6] and *Modbury Triangle Shopping Centre Pty Ltd v Anzil ("Modbury")*.[7]

[43] The plaintiff's case as presented by his counsel centred on five "features":

1. The Queens Hotel was a commercial premise upon which the public was invited to enter, which served liquor and food and where employees were required to work.

2. The renovation work was extensive and involved substantial alteration to the premises and was, of itself, an inherently dangerous activity.

3. The defendant, by its leasing arrangement, retained absolute control over whether the renovation work could proceed. Although the tenant was entitled to request permission to conduct the works, the defendant retained absolute discretion, subject to reasonableness, as to whether to allow the work to proceed, and on what terms and was entitled to sole and absolute ownership of the renovations at the termination of the lease.

4. The plaintiff was living and working at the hotel as licensee/caretaker during the course of the renovation work and was not a party directly involved in the renovation work.

5. When the defendant chose to exercise its control in favour of allowing construction work to proceed, on a conditional basis, it did so knowing that the hotel would operate during the course of the construction work.

[44] The plaintiff submitted that these features show that there was an element of control on the part of the defendant and a feature of special vulnerability on the part of the plaintiff, which are the touchstones of the non-delegable duty recognised by the authorities. Further, it was said that allowing the lessee to introduce on to the premises an inherently dangerous activity imposed upon the defendant a non-delegable duty to ensure that competent contractors and tradesmen were employed, which duty could not be discharged simply by delegating that task to Venacorp or to Mr French.

[45] Counsel for the plaintiff also emphasized the following as matters of importance in establishing a non-delegable duty:

(a) The defendant knew that people might be injured at the premises if the renovation work was not conducted safely;
(b) Before granting the conditional consent, it did not investigate the lessee's ability to pay for the premises, or whether it had insurance;
(c) The defendant, having granted consent, did not follow up to ensure the conditions upon which it was granted had been complied with;
(d) The defendant was placed on notice that the lessee had misled it in respect of the Licensing Commission approval, which should have alerted it that the lessee may not be reliable and to thereby follow up to ensure that the conditions had been complied with.

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6 (2000) 75 ALJR 1.
7 (2000) 75 ALJR 164.

[46] In relation to these matters, I find that the defendant did know that the premises were to be in use during the renovations, and could reasonably be expected to know that people might be injured if the renovations were not carried out safely. It is also clear from the evidence that the defendant did not in any real sense investigate the lessee's ability to pay for the premises. Nor, after granting conditional consent, did the defendant ensure that the conditions upon which it had granted consent had been complied with. Furthermore, it was also apparent from the evidence that the defendant was aware when, by its agent Mr Williams, it consented to the application dated 25 March 1992 for licensing approval that the lessee had misled it as to the Licensing Commission's approval having been obtained already.

[47] Further, the plaintiff alleged these facts indicate that the defendant knew or ought to have known that the contractors and builders were incompetent and, as a consequence, owed a non-delegable duty to the plaintiff to ensure that:

(a) the work was carried out competently;
(b) the lift was not in a dangerously defective condition and was safe for use by the plaintiff.

The Defendant's Submissions

[48] Counsel on behalf of the defendant submitted that there is no authority which supported the plaintiff's contentions that the defendant was under a duty of care to the plaintiff or that the defendant's duty was "non-delegable". It was submitted, relying in particular on dicta in *Kondis,*[8] that the relationship of landlord and tenant *per se*, whether of residential or commercial premises, does not give rise to a non-delegable duty as there is no "relationship between the parties which generates a special responsibility or duty to see that care is taken". It was further submitted that *Jones v Bartlett*[9] and *Modbury*[10] also fail to support the notion of a special relationship between the defendant and the plaintiff, so as to give rise to the duty of care alleged.

[49] As regards the five features relied on by the plaintiff as indicative of a non-delegable duty, the defendant maintained that those five features, alone or in combination, do not support the existence of a duty of care.

[50] As regards the first feature, it was submitted that the fact that the Queens Hotel was a commercial premise upon which people worked and were invited to enter was of no particular relevance. As regards the second matter, it was submitted that there was nothing "inherently dangerous" about properly undertaken building or renovation work, and that the plaintiff did not seek to establish through its expert, Mr Hungerford, that the renovation work was "inherently dangerous".

[51] As regards the third matter, counsel for the defendant submitted that the central plank in the plaintiff's case, that "the defendant retained absolute control over whether that work could proceed or otherwise", was a misstatement of the defendant's contractual and legal positions. It was submitted that the defendant did no more than consent to the renovations as it was contractually bound to do, unless

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8 (1984) 154 CLR 672 at 685-688.
9 (2000) 75 ALJR 1.
10 (2000) 75 ALJR 164.

it had valid and proper objections and that once its consent was given, the defendant's capacity for control of the work ceased so that it was impossible to cast upon the defendant the duties owed by a principal who employs an independent contractor.

[52] As regards the fourth feature relied on by the plaintiff, the defendant contended that although the plaintiff was living and working at the hotel and was not a participant in the construction work, that did not constitute any basis for a "special" relationship, nor a "vulnerability". It was submitted that, if the plaintiff was placed in such a position, that occurred because of the actions of Mr French in assuring him that the lift was safe and inviting him to enter it. It was submitted that the plaintiff suffered no vulnerability so as to require the protection of the landlord and that in any event, vulnerability *per se* even if recognized, did not support a duty of care.

[53] As regards the fifth feature, the defendant maintained that nothing flowed from the fact that the defendant allowed the work to proceed knowing the hotel would operate during construction. It was submitted that in the present case, the arrangement between the landlord and tenant was documented in an extensive lease document detailing the powers, duties, responsibilities and liabilities of the parties in respect of the commercial premises. The use of the premises as accommodation for guests and/or the licensee was not inconsistent with the lease, but was a decision and use made by the tenant, Venacorp, and in respect of which the landlord's knowledge was irrelevant.

[54] It was submitted that in the present case, the complaint made by the plaintiff was in effect that the defendant failed to ensure, by a variety of means, that the premises were safe. The defendant contended that the plaintiff's case amounted to one that there was a duty to take whatever steps were necessary in all circumstances to ensure the safety of every person on the premises at any time for whatever reason or purpose, who might suffer injury as a result of the renovation work – that is, a duty to control fully all aspects of the work and the activities of all persons engaged upon it.

[55] Relying on *Modbury*,[11] it was submitted that the defendant should not to be held to be under a duty to prevent a future occurrence involving the actions of third parties over which it had no direct or indirect control. It was further submitted that it was not "fair, just and reasonable" that so extensive a duty of care be imposed upon every landlord of commercial property – that is, a duty involving strict liability for any adverse consequence of any action sanctioned by the lease (with or without direct consent) in respect of which it is established that reasonable care on the part of someone would have avoided the injury.

[56] It was further submitted that, even if the defendant were found to owe the plaintiff a a duty, there was not on the evidence any breach by the defendant in the circumstances of this case and that for such a finding to be made, it must be concluded that the defendant ought to have known or foreseen, and taken precautions against the following:

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11 (2000) 75 ALJR 164 at par 113.

(a) that the lessee and Mr French would engage totally incompetent workmen as the evidence of Mr Hungerford showed;
(b) that the lessee's supervising engineer would also be grossly incompetent;
(c) that the lessee would construct a lift/dumb waiter, although it was not shown on the plans the lessor approved, and the defendant had no knowledge of it;
(d) that the dumb waiter would be constructed as incompetently as Mr Hungerford's evidence indicated;
(e) that it would be used illegally to carry a person, there being no evidence it was so used until the night of the accident;
(f) that it would be so used by the plaintiff on that night.

Is the Defendant Liable?

Non-delegable duty

[57] In *Burnie*,[12] the majority discussed the dicta in *Kondis* concerning the issue of when a non-delegable duty arises and said:

> "In *Kondis* … Mason J identified some of the principal categories of case in which a duty to take reasonable care under the ordinary law of negligence is non-delegable … In most, though conceivably not all, of such categories of case, the common "element in the relationship between the parties which generates [the] special responsibility or duty to see that care is taken" is that "the person on whom [the duty] is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation that person or his property as to assume a particular responsibility for his or its safety, in circumstances where the person affected might reasonably expect that due care will be exercised". It will be convenient to refer to that common element as "the central element of control". Viewed from the perspective of the person to whom the duty is owed, the relationship of proximity giving rise to the non-delegable duty of care in such cases is marked by special dependence or vulnerability on the part of that person. …"

[58] The majority also explained that such a duty would arise where:

> "One party to the relationship is a person who is in control of premises and who has taken advantage of that control … to undertake thereon a dangerous activity or to allow another person to do [so]. ... The other party to that relationship is a person, outside the premises and without control over what occurs therein, whose person … is thereby exposed to a foreseeable risk of danger. … He or she is specially vulnerable to danger if reasonable precautions are not taken in relation to what is done on the premises. He or she is specially dependant upon the person in control of the premises to ensure that such reasonable precautions are in fact taken. Commonly, he or she

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12 (1994) 179 CLR 520 at 550-551.

> will have neither the right nor the opportunity to exercise control over, or even have foreknowledge of, what is done or allowed by the other party within the premises. Conversely, the person who … undertakes (or allows another to undertake) the dangerous activity on premises which he or she controls is 'so placed in relation to [the other] person … as to assume a particular responsibility for his … safety'."

[59] The issue of a non-delegable duty was considered in *Northern Sandblasting*[13] where the High Court held that a landlord was liable for injuries sustained by the child of the tenant of the residential premises. Although Toohey and McHugh JJ found the landlord to be liable on the basis that there had been a breach of a non-delegable duty of care, that proposition was rejected by the other five members of the court. Brennan CJ and Gaudron J both relied upon breach of a duty of care which involved a pre-letting inspection, but expressed the duty in different terms. As was discussed in *Jones v Bartlett*,[14] there is much confusion as to what majority ratio emerges from *Northern Sandblasting*. Nevertheless, the decision is authority for the principle that *Cavalier v Pope*[15] no longer represents the common law in Australia, so that it is no longer correct to say that a landlord never owes a duty of care to occupants in respect of the condition of residential premises.[16]

[60] However, neither the duty of care recognised by Brennan CJ in *Northern Sandblasting*, nor that recognised by Gaudron J avails the plaintiff in the present case, because that recognised by Brennan CJ was confined to defects and that recognised by Gaudron J was to put and keep the premises in a safe state of repair. The present case does not involve a defective state of repair, but rather renovation works that were being carried out on the premises. Accordingly, the plaintiff seeks to argue that the defendant was under a non-delegable duty of two types in respect of those works, that is, a duty to ensure that the renovation work was undertaken by reasonably skilled competent tradesmen, and a duty to ensure that the premises were safe for use by the plaintiff.

[61] *Jones v Bartlett*[17], like *Northern Sandblasting*, was concerned with the obligations of a landlord of premises let for residential purposes. In that case, all the judges of the High Court appear expressly, or by implication, to have proceeded on the basis of having rejected the notion that the duty of a residential landlord was "non-delegable".[18] Nor does *Modbury*,[19] advance the plaintiff's case. It concerned whether the owner/occupier of a shopping centre was liable in negligence to an employee of a tenant of the shopping centre who was attacked in the car park of the shopping centre, which was unlit at the time, a majority finding no breach by the

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13 (1997) 188 CLR 313, per Brennan CJ at 329-333; per Dawson J at 344-346; per Gaudron J at 360-362; per Kirby J at 396-404.

14 (2000) 75 ALJR 1, per Gaudron J at [84], per Gummow and Hayne JJ at [202]-[207], per Kirby J at [230], per Callinan J at [278].

15 [1906] AC 428.

16 *Jones v Bartlett* (2000) 75 ALJR 1, per Gleeson CJ at [53], per Gummow and Hayne JJ at [165]-[166], per Kirby J at [230], per Callinan J at [278].

17 (2000) 75 ALJR 1.

18 See *Jones v Bartlett* (2000) 75 ALJR 1, per Gleeson CJ at [57], per Gaudron J at [88-92], per McHugh J at [100], per Gummow and Hayne JJ at [190-194, 202] and per Kirby J at [252]

19 (2000) 75 ALJR 164.

owner/occupier. Gleeson CJ[20] while confirming the principles identified in *Kondis*, did not consider that the case in question was relevantly one of assumption of responsibility such as to attract a special duty of care.

[62] As was accepted by the defendant, the relationship of landlord and tenant may give rise to a "personal" duty, in certain circumstances, as for example where the landlord itself agrees to undertake certain repairs. Thus in *Meyers v Easton*,[21] a landlord who undertook to replace the roof at the request of his tenant, and who used a contractor, was held liable for water damage to the tenant's goods caused by rain. That case was described by Mason J in *Kondis*[22] as one where the undertaking by the landlord was seen as impliedly involving the assumption of an obligation of care of the property of the tenant, and thereby the creation of a sufficient relationship to give rise to an enforceable duty. Thus, it may be that a landowner may be subject to a special responsibility or duty where it has undertaken expressly or impliedly the care, supervision or control of the person or property of another.[23] The present case however is not such a case.

[63] What is alleged by the plaintiff is a duty owed by virtue of the relationship not between the landlord and the tenant, but between the landlord and the plaintiff. In my opinion, the relationship between the defendant and the plaintiff did not generate a special responsibility nor a duty to see that care was taken in respect of the lift structure. Further, no issue of assumption of responsibility arose from the fact that the defendant gave its consent to the renovations. As was submitted by the defendant's counsel, the defendant did not:

(a) let any part of the premises to any guest, licensee or anyone else;
(b) design the renovations;
(c) engage the builder;
(d) participate in the work in any way;
(e) plan or supervise the work.

[64] More particularly, the defendant was not advised that it was proposed that a lift be installed as part of the renovations and consequently did not give its consent to the lift renovations and, in those circumstances, clearly cannot be said to have undertaken expressly or impliedly by virtue of the consent that was given, any responsibility for the lift works.

[65] In my opinion, the plaintiff's case proceeded largely on a misconception as to the alleged element of control, which it was contended the defendant exerted in respect of the renovations. The control was said to stem from the fact that the defendant was able to give or withhold its consent. However, as the defendant's counsel correctly submitted, clause 24.01 of the lease, in conjunction with s 121(2) of the *Property Law Act* 1974 made it clear that the defendant's consent had to be sought and could not be unreasonably refused. It was not alleged that there was any reasonable basis for refusal of consent. Nor was there any allegation that the defendant's consent was negligently given. Consequently, the defendant was

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20 (2000) 75 ALJR 164 at 168, with whom Gaudron J agreed at [42]. Hayne J also considered the issue of control to be a significant aspect which was absent at [113]-[115], [116].

21 (1878) 4 VLR 283.

22 (1984) 154 CLR 672 at 685, 687.

23 *Kondis* (1984) 154 CLR 672 at 687.

contractually and legally obliged to give the consent (or have it extracted by legal process). Accordingly, in my opinion, there was no relevant element of control exerted by the defendant and in any event, there could be no element of control present after the consent was given. As was stated by Mason P in *W D & H O Wills (Australia) Ltd v State Rail Authority of New South Wales*,[24] "the lessor who has given up possession of premises to a tenant has significantly relinquished capacity to control activities taking place within them."

[66] Furthermore, I do not accept that the plaintiff was in a position of vulnerability. He was aware of the nature of the renovations and on occasions made complaints about the manner in which they were being carried out as is revealed from the following extract from the transcript of the plaintiff's evidence:[25]

> "And could the work that you saw being done shoddily have been done safely?—I certainly think it could have been done in a better manner, more tidy manner.
>
> In other words, things wouldn't be thrown into trucks from the upper floor in Kent Street; is that right?—Well, I guess that's right, yes.
>
> That could be done differently, and protection could be undertaken to make sure there were no falling bricks?—Yes.
>
> Is that right?—Well, I guess it is. I mean, I just handled what I had to handle and passed that information on. It wasn't up to me to give the builders any direction, or anyone else direction other than the staff that was under me in the bar.
>
> Did you as licensee intervene in relation to such matters?—Such matters as the untidiness?
>
> Yes?-- Only through Mr French.
>
> It wasn't your responsibility as licensee of the hotel to see it was properly managed?-- It's my responsibility as licensee of the hotel to make sure that the hotel runs correctly and efficiently, but as for the building or outside, I thought there was enough authorities to see that those things are done properly. There was a consulting engineer there nearly everyday, and Mr French, and if I saw anything that I didn't feel as though should be taking place in the hotel, I told Mr French about it.
>
> Because he was my immediate boss. When you are a licensee of a hotel, you are a nominee licensee and you still answer to people that run the hotel, or lease it, or own it, or whatever; in that case it was Mr French.

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24 (1998) 43 NSWLR 338 at 357.

25 Transcript at 357.

> Did you at any time raise these matters with the consulting engineer?—No. I raised them with Mr French.
>
> But there was times when – maybe on the ground and maybe on the floor there was things left there which I remember raising with Mr French on one occasion that I didn't like timber being around the floor because in the event of any trouble in a hotel, someone can pick one piece up and hit someone else with it, or do damage, and I didn't like those sorts of things."

[67] As regards the other features relied on by the plaintiff in this case, the fact that the premises in question were commercial premises may in some cases be a factor which introduces a higher standard of care. Thus in *Jones v Bartlett*,[26] Gummow and Hayne JJ noted that what is reasonable for premises let for the purpose of residential housing may be less demanding than that for premises let for such purposes as the conduct of a hotel or a club serving liquor. However, I do not accept that a non-delegable duty arose because the defendant was aware that the plaintiff was living on the premises during the renovations, or because the defendant was aware that the hotel would operate during the works. Nor do I consider the fact that the renovations were extensive and involved work which may have included dangerous activities created such a duty.

[68] To paraphrase the comment of Gaudron J in *Jones v Bartlett*,[27] for the plaintiff to succeed in this case, there must now be recognised a duty on the part of the landlord that the premises are as safe for use as reasonable care on the part of anyone can make them. In effect, the imposition of a non-delegable duty in this case would result in the landlord being responsible for negligent renovations carried out by the tenant, to which it had not consented and of which it did not know or have reason to know.

***Workplace Health and Safety Act* 1989**

[69] The plaintiff did not seek to rely on any independent cause of action based on the provisions of the *Workplace Health and Safety Act* 1989 ("the Act") as that section does not create a civil cause of action.[28] Rather, it was submitted that the alleged breaches of the Act amount to evidence of breach of duty and that the obligations imposed by the Act go to the issue of control.

[70] The plaintiff submitted that the renovations constituted a project within the meaning of that term as defined in s 6 of the Act and that the defendant was the "owner" of the project and, by reason of its failure to appoint a principal contractor, became the principal contractor for the purposes of s 18 of the Act. As a consequence, it was alleged that the defendant was obliged to ensure the health and safety of the plaintiff and ensure that every employer and employee engaged in the occupation at the workplace complied with the provisions of s 23 of the Act. It was alleged that the defendant failed to discharge this duty. The relevant regulations concerning the maintenance of lifts are found in paragraph 25 of the Statement of Claim.

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26 (2000) 75 ALJR 1 at [173] – [175].

27 (2000) 75 ALJR 1 at [90].

28 *Percy v Central Control Financial Services Pty Ltd* [2001] QCA 226.

[71] The defendant contended that the plaintiff's pleading was not maintainable, because the defendant was not the "owner" of the project as defined in s 6 of the Act and that the "owner" and "principal contractor" for the project was either Venacorp or Mr French upon whom the duties in s 23 fell. Further, it was submitted that a breach of that section could not be evidence of negligence, since the section imposes a different duty from the common law duty, and postulated circumstances of breach which might not amount to a breach of the common law duty.

[72] In my opinion, the Act does not advance the plaintiff's case either in respect of the "control" argument or by illustrating the standard of care required to be exercised by the defendant. The renovations were "alterations to a building or structure" and thus a "project" within the definition of s 6 of the Act. The defendant was not in my view the "owner" of the project, since it was not the person whose property the project was, nor the person for whose "direct benefit" the project existed or would exist on completion – that person was the lessee.

Conclusion

[73] The defendant is not liable to the plaintiff for the injuries sustained by him on 2 May 1992.

Contributory Negligence/*Volenti*

[74] For the sake of completeness, I should indicate my findings in relation to the issues of contributory negligence and *volenti*. I do not consider that the plaintiff was guilty of contributory negligence or that *volenti* (which was pleaded, but did not appear to be pressed at trial) arises because of the plaintiff's use of the lift. Counsel for the defendant referred to the circumstances in which the lift was built, that is, it was being homemade on the premises with workmen drinking at the premises between work. Furthermore, the lift clearly did not have all the features one would have expected. Nevertheless, the plaintiff was entitled to assume that the lift may have been missing some of the features usually expected because it was still in the process of being built. I note that it was large enough to transport the plaintiff comfortably. In addition, the plaintiff used the lift only after he observed Mr French travel safely in it, and after confirming with Mr French that the lift was safe to be used and in circumstances where there was no signage to warn against use of the lift.

[75] Nor do I consider that any issue of contributory negligence or *volenti* arises in the circumstances of this case from the fact that the plaintiff had consumed some alcohol prior to using the lift.

QUANTUM

[76] Notwithstanding my decision as to liability, I shall, for the sake of completeness, deal with the quantum of damages which I would have awarded had I found the defendant to be liable to the plaintiff for his injuries.

MEDICAL EVIDENCE

Maryborough Base Hospital Report

[77] The plaintiff was an inpatient in the Maryborough Base Hospital from 2 May 1992 to 5 June 1992. The hospital's report dated 14 October 1992, indicates that the plaintiff suffered fractures to both heels as a result of his fall with bilateral fractured os calculi and a fractured right lower fibula. The plaintiff was incapacitated for several months afterwards. Both of the plaintiff's feet were placed in backslabs, elevated, and antibiotics commenced. Three weeks after admission, the fractures were healing well and a walking plaster was placed on the left leg. The plaintiff was discharged in a left walking plaster and on follow up on 3 June 1992, was walking well. On 22 September 1992, continued stiffness and decreased range of movement of both ankles was noted.

Dr Pentis

[78] Dr Pentis, an orthopaedic surgeon, gave oral evidence at the trial and provided three reports dated 5 December 2000, 12 January 2001, and 31 July 2001.

[79] In his report dated 5 December 2000, Dr Pentis reported the plaintiff's difficulty in squatting, kneeling, and walking and indicated that these difficulties would remain long-term. The plaintiff could not walk on slopes or uneven ground, with pain and swelling in both ankles and feet. He indicated that the plaintiff had difficulty with stairs, and that he could not run, jump or jog, although he could do this before the injuries. Dr Pentis considered that the plaintiff sustained fractured calcanei from the accident, plus a fracture of lateral lower fibula of the right ankle which caused the plaintiff pain and inconvenience, and left him with an arthritic subtalar joint.

[80] Dr Pentis also referred to the plaintiff's fractured femur which he sustained on another occasion, namely 1 November 1999. Dr Pentis concluded that this injury 'subsequently occurred because he was unstable on his feet'. Dr Pentis stated that the plaintiff was going to have to have the fractured femur heal and unite, and then a decision made at a later stage as to whether he will need subtalar fusion. He noted that if the plaintiff continued to experience pain in the feet, this would be the long-term alternative.

[81] Dr Pentis estimated the incapacity in the plaintiff's right leg to be in the vicinity of a 60% loss of the efficient function of the leg, and the right leg to be a 30% loss of the efficient function of the limb. Dr Pentis indicated that if the plaintiff required operations on his subtalar regions, costings would be approximately $5,000 per operation with a recovery period of at least nine months to a year. Dr Pentis expressed the view that it was 'highly unlikely [the plaintiff] will return to any gainful employment', noting that 'especially at his current age it is unlikely that anyone would take him on. He may be able to carry out a sedentary occupation, but again because of his age and the length of time required for the lesions to settle as best as they will it is unlikely that he will be employable again'.

[82] In his report of 12 January 2001, Dr Pentis stated that the plaintiff would more than likely require operations on his subtalar joints if he continued to experience

problems and pain, as he was currently having. With regard to the plaintiff's likelihood of falling over, Dr Pentis stated:

> "I believe the fact that he has problems with both subtalar joints having sustained the injuries in this accident 2-5-1992, it made him susceptible to him falling over easier, i.e. more unstable on his feet and this has led indirectly to the fracture of his femur."

[83] He further noted the fact that the plaintiff had problems with the subtalar regions and that this would have made mobilising and healing difficult in relation to the femur. More specifically, Dr Pentis noted that aftercare would have been more of a problem, and it would have been difficult to mobilise and attain healing in the femoral fracture.

[84] At trial, Dr Pentis indicated that the plaintiff's injuries would affect his stability, and in particular his ability to traverse uneven ground, and that the plaintiff might even have difficulty on flat ground at times if he changes his position or if he is wearing shoes that are higher than normal. Problems with the subtalar area might mean that the plaintiff was not as able to correct a fall, and therefore might tend to fall over. Dr Pentis gave evidence that the fracture may be the result of the fact that the plaintiff could not balance as well as previously. Dr Pentis agreed with the proposition that the injuries to the ankle would significantly interfere with the plaintiff's ability to regain control should he commence to slip. When asked whether the risk of a slip happening would be higher for a person with damaged ankles, he replied "I think it would be but if you ask me what percentage it is, I couldn't tell you, but I would assume that it would be."

Dr Ahern

[85] Dr Ahern, Medical Registrar of Toowoomba Health Service District, gave a 'discharge summary' of the plaintiff in a letter to Dr P Nolan dated 18 June 2001. Dr Ahern noted that the plaintiff's mobility had been limited by non-union of a right femoral fracture, and that he was able to use crutches to move about. She also noted that the plaintiff's significant past medical history was that of child's B cirrhosis of the liver due to alcohol, but that he had been abstinent from alcohol for the past three years. She stated that his liver disease was complicated by portal hypertension and oedema of the lower limbs. In addition, she noted that the plaintiff's other medical problems included gastro-oesophageal reflux.

Dr Nolan

[86] Dr Nolan, a thoracic and general physician, noted in his letter of 8 August 2000 to Dr P Beeston that the plaintiff had suffered some peri-operative problems with significant blood loss requiring transfusion, in relation to surgery for non-union of his right femur. Dr Nolan stated that the wound had been healing well, but that the state of the bone repair was unknown at that stage. He noted that the plaintiff's previous bone density study showed evidence of osteopenia. Dr Nolan noted however that the plaintiff remained susceptible to progressive liver decomposition, particularly if there was any intercurrent stressor.

[87] In his letter to Dr P Murray of 3 May 2001, Dr Nolan indicated that the plaintiff's problems included cirrhosis, portal hypertension, severe peripheral oedema, marked elephantiasis of both lower limbs and non-union of the fractured right femur. Dr Nolan noted that Dr Bob Ivers was considering further bone grafting to the non-union of the right femur. He also stated that the plaintiff had 'very few options open with respect to the fractured femur' and noted previous problems with peri-operative bleeding.

Dr Myers

[88] Dr Myers, a consultant physician, in his report of 18 July 2001 stated that hospital and medical reports indicated that the plaintiff had severe alcoholic liver disease with hepatic cirrhosis, portal hypertension and at least one episode of ascites requiring drainage of over six litres of fluid from his abdominal cavity. He also indicated that the plaintiff had osteoporosis due to alcohol abuse.

The injury to the femur

[89] The plaintiff sustained a broken femur in November 1999 when he was living at Gore. The plaintiff described how he had mopped the kitchen floor on the day in question. Normally, he would have waited for the floor to dry, however on this occasion he walked over a wet patch on floor to the sink and slipped. It appears that the plaintiff's right leg initially moved under him towards his left side, so that his right foot slipped towards his left side. The plaintiff attempted to arrest his fall by putting out his left foot, but that foot slipped too. The plaintiff's evidence was that because of the injuries to his ankle he walks in a very flat-footed manner and has no grip on the ground through use of his toes. He is unable to use the balls of his feet or walk on his heels.

[90] The plaintiff's counsel submitted that it was more probable than not that the plaintiff would not have suffered the second injury had it not been for his reduced ability to stabilise himself and regain control. In this respect he relied on the plaintiff's evidence that that when he attempted to regain his footing, he was unable to do so and slipped again. He also referred to evidence that the plaintiff was generally unstable following his injuries and to Dr Pentis, who agreed that the injuries to his ankles significantly interfered with the plaintiff's ability to regain control should he slip.

[91] On behalf of the defendant it was submitted that, on the whole of the evidence, it is impossible to conclude on the balance of probabilities that the plaintiff's fall was the result of the ankle disabilities, or that they made a material contribution to that event. I agree with those submissions. I am unable to conclude that in the circumstances of the fall on the wet surface of the kitchen in November 1999, the fall was on the balance of probabilities caused or contributed to by the injuries to the plaintiff's ankles.

[92] I accept the defendant's submissions that the fall in November 1999 represented a supervening event, the consequences of which included the plaintiff requiring additional care and terminating his capacity to work.

General Damages

[93] The plaintiff suffered a significant permanent injury to his ankles as a consequence of the accident of 2 May 1992, sustaining a bilateral fracture of the os calculi and a fractured right lower fibula. Both counsel submitted that for those injuries, the plaintiff should be awarded general damages for pain and suffering and loss of amenities in the order of $50,000. I consider that amount would have adequately compensated the plaintiff under this head of damage.

Interest on General Damages

[94] Counsel for the plaintiff submitted that interest should be allowed at the rate of 2% on approximately one-half of general damages for the period of 490 weeks. Counsel for the defendant submitted that interest should only be allowed for 5 years. I do not consider, given the fact that the injury to the femur was sustained in 1999, that there has been such delay in the progress of the action to warrant interest being awarded for 5 years only. Accordingly, I would have awarded interest at 2% on $ 25,000 for 510 weeks (9.8 years), being $4,900.

Past Economic Loss

[95] The plaintiff's tax returns disclose an earning capacity over the three years preceding the accident (year ended 30 June 1990 – year ended 30 June 1992) of approximately $343 net per week. It was submitted that a reasonable annual allowance (on a net basis) for wage increases was 2.5% or 22.5% over ten years, producing a current exercised net earning capacity of $420 net per week, or an average sum over the entire period of $381.50 net per week. Counsel for the plaintiff accepted that if the broken femur were unrelated to the prior injuries, the plaintiff would only be entitled to past economic loss up to 1 November, 1999. It was accepted that, after that time, he was significantly disabled as a consequence of his broken femur, but that some allowance should be made for the prospect that the plaintiff may have had a better recovery without the effects of the injury of 2 May 1992.

[96] The defendant conceded that the plaintiff was unable to work for about 12 months after the injuries and submitted that for this period the pre-accident average earnings of $16,000 should be allowed together with interest at 10 % for 5 years. As for the period from 1996 to 1999, it was conceded that the plaintiff's earning capacity was diminished and that the sum of $16,000 per annum for 3 years uplifted by 15% to reflect inflation, making a total of $55,200, would be appropriate compensation, together with interest. As to the interest, taking into account the receipt of $180 per week from the Department of Social Security from 1988, it was submitted that interest should be allowed on $26,000 for 5 years at 5%.

[97] I accept the defendants submissions as the more appropriate manner of calculating past economic loss, however, I consider that it would be appropriate to award interest over 9.8 years rather than the 5 year period contended for by the defendant. I consider that appropriate compensation would have been:

(a)	1992-93	$16,000
(b)	Interest at 10% for 9.8 years	$15,680
(c)	1996-99	$55,200
(d)	Interest on $26,000 at 5% for 9.8 years	$12,740
		$99,620

Future Economic Loss

[98] The plaintiff intended to work through until the age of 65. It is conceded that he had other health problems. On the basis that the injury to the femur was unrelated, an allowance of $10,000 is claimed for future economic loss.

[99] The defendant contended that the plaintiff would not be entitled to any award for future economic loss as any such loss stemmed from the broken femur. I consider those submissions to be correct and would have made no allowance.

Special Damages

[100] Special damages claimed of $16,971.20 are made up of a combination of the refund to the Health Insurance Commission, the refund to the Maryborough Base Hospital, the traveling schedule (reduced after November 1999 as the femur is not related) and the out-of-pocket expenses. I consider that these would have been recoverable in full.

Future Special Damages

[101] The plaintiff claimed an amount of $1,000 under this head. However, I do not consider that any amount would have been appropriate under this head.

Domestic Care

[102] The agreed rate for past care up to 1993 is $6.00 per hour. The defendant conceded that the plaintiff required care in the initial stages of his convalescence, but submitted that after September 1992 he required only limited assistance. The defendant conceded the amount of $2,070 being assistance for 5 hours per day for 2 months (as claimed) and for 5 hours per week for 3 months thereafter, a total of 345 hours. The plaintiff claimed $4,290 for the period up to 1 November 1999.

[103] In my opinion, the sum of $3,750 inclusive of interest would adequately compensate the plaintiff under this head.

ORDER

[104] I order that judgment be given for the defendant against the plaintiff. I shall hear the parties as to costs.