SUPREME COURT OF QUEENSLAND

CITATION:	*Dickson & Anor v Creevey* [2002] QCA 195
PARTIES:	**PETER GREGORY DICKSON** (first plaintiff/first appellant) **ANN JANETTE DICKSON** (second plaintiff/second appellant) **v** **DAN CREEVEY** (defendant/respondent)
FILE NO/S:	Appeal No 9230 of 2001 SC No 8800 of 1999
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	6 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	12 April 2002
JUDGES:	McPherson JA, Helman and Mullins JJ. Separate reasons for judgment of each member of the Court, each concurring as to the orders made.
ORDER:	**Appeal dismissed with costs**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – WHERE ECONOMIC OR FINANCIAL LOSS – CARELESS ADVICE, STATEMENTS AND NON-DISCLOSURE – PARTICULAR PERSONS AND SITUATIONS – PROFESSIONAL ADVISORS – where first plaintiff leading hand on work gang developed mental disorder as a result of harassment by fellow employees – solicitor failed to advise plaintiffs of opportunity to sue employer – whether solicitor would reasonably advise plaintiffs to sue prior to expiration of limitation period – whether plaintiffs would have taken that advice – whether plaintiffs would have been successful in that action *Bourhill v Young* [1943] A.C. 92, considered *Chappel v Hart* (1998) 195 C.L.R. 232, considered *Heydon v NRMA Ltd* [2001] Aust Torts Reports 66,275 (¶81-588), considered *Jennings v Zihali-Kiss* [1972] 2 S.A.S.R. 493, considered *Johnson v Perez* (1988) 166 C.L.R. 351, considered

Kitchen v Royal Air Force Association [1958] 1 W.L.R. 563, considered
Neagle v Power [1967] S.A.S.R. 373, considered
Queensland Corrective Services Commission v Gallagher [1998] Q.C.A. 426, considered

COUNSEL: J S Douglas QC, with J.M. McDougall, for the appellants
R N Traves for the respondent

SOLICITORS: Murphy Schmidt for the appellants
McInnes Wilson for the respondent

[1] **McPHERSON JA:** This is a particularly unfortunate case for both Mr and Mrs Dickson, and one that in its facts reflects no credit at all on Mr Dickson's former fellow employees, or on the solicitor who mishandled it in the first place. Nevertheless, I feel bound to agree with the reasons of Helman J in saying that the appeal should be dismissed with costs.

[2] **HELMAN J:** The appellants Mr and Mrs Dickson brought claims in the Supreme Court against their former solicitor Mr Creevey alleging that he was guilty of negligence and, or alternatively, breach of contract as a result of which each was denied the chance of recovering damages from Mr Dickson's former employer, the Noosa Shire Council. Mr Dickson alleged that he had lost the chance to recover damages for personal injuries and Mrs Dickson that she had lost the chance to recover damages for loss of consortium brought about by Mr Dickson's personal injuries. Mr Dickson's claim to damages for personal injuries would have been founded on allegations of failure to ensure that he was not subjected to harassment by fellow employees of the Council as a consequence of which he suffered a disabling mental disorder.

[3] The learned trial judge dismissed both claims and Mr and Mrs Dickson have appealed asserting various errors in his Honour's fact-finding and reasoning.

[4] On 11 November 1993 Mr Dickson, then thirty-five years old, was employed by the Council as a leading hand. His Honour found that on that day another employee of the Council, Mr Peter Riley to whom I shall refer again later, thrust a bricklayer's trowel in the direction of Mr Dickson's groin and said things that Mr Dickson found offensive. Mr Dickson was very upset about the incident and told Mrs Dickson about it after he returned to their home. Mrs Dickson was concerned about him, and the next day made enquiries about worker's compensation. She also spoke to a member of parliament and an employee of the Council. Mrs Dickson's actions in speaking to those people aggravated Mr Dickson's distress, and, believing that his fellow employees would learn what Mrs Dickson had done, he determined not to return to work and did not do so.

[5] Mr Dickson, a committed Seventh Day Adventist from the time of his marriage to Mrs Dickson in January 1986, began employment with the Council in June 1989. He was first employed as a labourer and was later appointed a leading hand of a gang of workers. His Honour was satisfied that while Mr Dickson was employed

by the Council he was subjected to harassment and bullying by a number of other employees. He was given a derogatory nickname and was subjected to other offensive and degrading behaviour - 'confronting him about his beliefs with sexual innuendos or questions about sex, leaving magazines around and displaying pictures which it was known he would find offensive', to quote his Honour. His Honour found Mr Dickson had 'a vulnerable personality with avoidant, obsessional and dependent traits reflected in low self esteem'; his personality traits were well established when he began work for the Council and they had the consequence that he 'was not a person of normal fortitude'. Mr Dickson's response to the offensive conduct was withdrawal, thus drawing attention to his vulnerability and encouraging those responsible to persist.

[6] His Honour found that the incident of 11 November 1993 'was the straw which broke the back of a vulnerable personality'. As a consequence Mr Dickson now suffers from 'chronic generalised anxiety and depression, he exhibits avoidant, obsessional and dependent traits'. There were some differences between the experts as to the characterization of Mr Dickson's condition, his Honour said, but he was satisfied that Mr Dickson had 'a long term recognized psychiatric disorder'. Mr Dickson's earning capacity was substantially and terminally impaired, and the consequences of his condition had had a major adverse impact on the quality of the relationship between Mr and Mrs Dickson as husband and wife.

[7] His Honour found that the harassment and bullying Mr Dickson suffered at work 'was a significant, probably the most significant, contributor' to his condition, although it was likely that 'other stresses were operating on his personality'.

[8] There was no issue at the trial that Mr and Mrs Dickson had retained Mr Creevey or that Mr Creevey was obliged to take reasonable care to provide accurate and timely legal advice to protect their interests. His Honour found that Mr and Mrs Dickson attended on Mr Creevey together, their prime concern being the re-opening of Mr Dickson's worker's compensation claim, but that they had asked in January 1996 for advice about a claim against the Council alleging negligence. That advice was promised but never given. The relevant limitation period expired with no step taken to pursue any claim the Dicksons might have had. His Honour was satisfied that Mr Creevey was in breach of the obligation he owed to the Dicksons. The trial was conducted on the premisses that the limitation period expired on 11 November 1996, and that, had it not done so and a proceeding had been instituted, the trial would have been held by 5 December 1998.

[9] The Dicksons' claims failed because his Honour was not satisfied that they would have received advice leading them to decide to sue the Council. His Honour doubted that a competent solicitor could reasonably have advised them that their prospects of success were 'better than being of the order of 40-50 per cent.' and that the Dicksons, having been so advised, would have sued. His Honour's analysis of the evidence as to the Dickson's response to the advice of a competent solicitor was set out in his paragraphs 29, 38, and 39:

> [29] In practical terms whether or not the plaintiffs would have successfully sued the Noosa Council depended on their receiving and accepting legal advice which they regarded as offering them sufficient prospects of success to justify taking action. It would have been a joint decision, noting

> that the first plaintiff was reliant on the second in matters of this kind.
> . . .
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> [38] As I have said, whether or not the plaintiffs would have sued depended on their receiving and accepting legal advice which they regarded as offering them sufficient prospects of success to justify taking that course. The plaintiffs in their evidence, perfectly understandably, had difficulty in addressing the hypothetical question of how they would have acted in deciding whether or not to sue prior to November 1993. Their evidence was in my view fairly equivocal.
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> [39] The first plaintiff did not know if he would have sued if advised he had a "weak but arguable case". "You would have to know how good a chance you had". He would probably not have sued if advised he "would probably lose . . but might win". The situation that he had a reasonable case but couldn't be guaranteed a win, would have to pay his own solicitors only if he won and the other side $30,000-$40,000 if he lost was put. He answered "I may have taken it up. It would have to be at the time to understand that, but I may have taken it up". The second plaintiff said it would depend on "the confidence of the solicitor . . . if we had reasonable prospects I believe we would have gone ahead". "Reasonable was at least better than 75-80 percent chance". Less than that she was at best equivocal.

I see no flaw in that analysis. ('1993' in paragraph 38 is of course a misprint for '1996'.)

[10] There was no direct evidence before his Honour as to how a reasonably competent solicitor would have advised the Dicksons, the case having been conducted on the understanding that that was for his Honour to determine on his assessment of the evidence as it stood. Mr Creevey did not give evidence. His Honour found that the evidence did not sustain the conclusion that the Council, through its officers, was, or ought to have been, aware that Mr Dickson was being subjected to conduct which carried a real risk of precipitating a mental disorder. His Honour was not satisfied that the Council ought to have appreciated that Mr Dickson was at a greater risk of stress-induced mental disorder than a leading hand would normally be, the work of a leading hand not being inherently stressful. The conditions of employment under which Mr Dickson worked provided for complaints by an employee to an immediate supervisor, and furthermore Mr Dickson could have used his authority as a leading hand to deal with the unacceptable conduct. He took neither course, keeping his concerns to himself until after the incident of 11 November 1993.

[11] On behalf of the Dicksons the first argument advanced was that his Honour's finding that he was not satisfied that they would have received advice leading them to decide to sue was against the evidence and the weight of the evidence and unreasonable in light of the failure to call evidence from Mr Creevey as to what advice he would have given them.

[12] It was submitted that Mr Creevey bore the evidentiary onus once Mr Creevey's negligence had been established – as his Honour was satisfied it had, of course. Mr Creevey was required to explain his failure to advise the Dicksons, the submission continued, and in the circumstances to say what advice he would have given to them. On the question of the evidentiary onus counsel for the Dicksons referred us *inter alia* to a passage in the reasons of McHugh J. in *Chappel v. Hart* (1998) 195 C.L.R. 232, a case in which a patient had sued a doctor for negligence and breach of contract in failing to warn of a risk of injury from an operation. At pp. 247-248 McHugh J., who dissented as to the result of the appeal, set out the following conclusions concerning causation, which may be transposed to apply to that issue in this case:

> The foregoing observations lead me to the following conclusions concerning whether a causal connection exists between a defendant's failure to warn of a risk of injury and the subsequent suffering of injury by the plaintiff as a result of the risk eventuating: (1) a causal connection will exist between the failure and the injury if it is probable that the plaintiff would have acted on the warning and desisted from pursuing the type of activity or course of conduct involved; (2) no causal connection will exist if the plaintiff would have persisted with the same course of action in comparable circumstances even if a warning had been given; (3) no causal connection will exist if every alternative means of achieving the plaintiff's goal gave rise to an equal or greater probability of the same risk of injury and the plaintiff would probably have attempted to achieve that goal notwithstanding the warning; (4) no causal connection will exist where the plaintiff suffered injury at some other place or some other time unless the change of place or time increased the risk of injury; (5) no causal connection will exist if the eventuation of the risk is so statistically improbable as not to be fairly attributable to the defendant's omission; (6) the onus of proving that the failure to warn was causally connected with the plaintiff's harm lies on the plaintiff. However, once the plaintiff proves that the defendant breached a duty to warn of a risk and that the risk eventuated and caused harm to the plaintiff, the plaintiff has made out a prima facie case of causal connection. An evidentiary onus then rests on the defendant to point to other evidence suggesting that no causal connection exists. Examples of such evidence are: evidence which indicates that the plaintiff would not have acted on the warning because of lack of choice or personal inclination; evidence that no alternative course of action would have eliminated or reduced the risk of injury. Once the defendant points to such evidence, the onus lies on the plaintiff to prove that in all the circumstances a causal connection existed between the failure to warn and the injury suffered by the plaintiff.

The part of that passage relied on on behalf of the Dicksons was that beginning with 'However, once the plaintiff proves . . .' and continuing to the end of the following sentence.

[13] There is no reason to conclude that his Honour failed to approach his task of fact-finding on the issue of causation correctly, i.e., having found a breach of duty his Honour then considered the evidence suggesting no causal connexion between the

breach of duty and any loss the Dicksons may have suffered. There was clearly such evidence to which his Honour's attention was directed on behalf of Mr Creevey. His Honour's conclusion was that no causal connexion existed between Mr Creevey's breach of duty and any loss the Dicksons may have suffered because the Dicksons would not have sued the Council had Mr Creevey given the advice he should have given: *cf*., McHugh J's (2). His Honour's conclusion was in effect that a competent solicitor would have advised the Dicksons that their chances of failure in any proposed proceedings were at least of the order fifty to sixty per cent. The onus lay on the Dicksons to prove that in all the circumstances a causal connexion existed between Mr Creevey's breach of duty and any loss they suffered: see the last sentence in the quoted passage. As Wilson, Toohey, and Gaudron JJ. remarked in *Johnson v Perez* (1988) 166 C.L.R. 351 at p. 363, discussion concerning the damages to which a plaintiff is entitled in a proceeding against a solicitor often begins with a consideration of the judgment of Lord Evershed M.R. in *Kitchen v Royal Air Force Association* [1958] 1 W.L.R. 563. Their Honours then quoted the following passage:

> In my judgment, what the court has to do (assuming that the plaintiff has established negligence) in such a case as the present, is to determine what the plaintiff has by that negligence lost. The question is, has the plaintiff lost some right of value, some chose in action of reality and substance? In such a case, it may be that its value is not easy to determine, but it is the duty of the court to determine that value as best it can. (p. 575).

The court must then determine what the plaintiff has lost *by* the breach of duty. In this case his Honour found that nothing had been lost.

[14] The failure of Mr Creevey to give evidence was of course a matter upon which comment could properly have been made, but it does not follow from that failure that the Dicksons were then relieved of the onus that lay upon them; nor was it unorthodox for his Honour to act upon his own conclusion as to how a reasonably competent solicitor would have advised the Dicksons.

[15] Either side could have called a suitably experienced solicitor to give expert evidence on that subject, but since it was one encountered in the everyday work of the courts and as his Honour was sitting without a jury it was reasonable to act on the assumption that such a course was unnecessary: see *Neagle v. Power* [1967] S.A.S.R. 373, at p. 376 per Bray C.J., and *Jennings v. Zihali-Kiss* [1972] 2 S.A.S.R. 493 at p. 513 per Bray C.J. It must be borne in mind that it is for the court to determine what is the appropriate standard of care and whether it has been breached: *Heydon v. NRMA Ltd* [2001] Aust Torts Reports 66, 275 (¶81-588) at para. 152 (66,318) per Malcolm A.J.A.

[16] It follows that the first argument advanced for the Dicksons must fail.

[17] The second argument for the Dicksons was that his Honour should have assessed their prospects of success in proceedings against the Council at greater than fifty per cent., and found on the balance of probabilities that they had lost their chance of proceeding when it is borne in mind that the advice that would have been given to the Dicksons would have been based on evidence that was fresh in the witnesses' minds had Mr Creevey given timely advice. It was submitted that his Honour's assessment that the evidence did not sustain a conclusion that the Council was, or

ought to have been, aware that Mr Dickson was being subjected to conduct which carried a real risk of precipitating a mental disorder was erroneous. We were referred to the oral evidence of witnesses who had worked for the Council when Mr Dickson did: Mr Dean Roper, a labourer who worked with Mr Dickson 'on and off for a couple of months'; Mr Riley, now a ganger, who worked with Mr Dickson for 'a very short time'; Mr Darryl Dimmick, now a roller operator, who was a member of Mr Dickson's gang in about 1990; and Mr Rodney Huth, a senior foreman who began work for the Council on 13 September 1993 and who was Mr Dickson's immediate superior 'for a couple of weeks'. We were also referred to an affidavit sworn by Mr Ian Buchanan, a retired employee of the Council, who had been a senior foreman supervising road gangs of which Mr Dickson was a member. Mr Buchanan recalled that 'on occasion' he had observed some of the men in gangs in which Mr Dickson worked 'having a bit of a go at him' and that he appeared to take those incidents seriously. Mr Buchanan instructed the men to stop. Mr Buchanan was also aware of a nickname given to Mr Dickson but was not aware that it was objectionable to him. I should add that his Honour regarded Mr Buchanan's evidence as lacking detail and weight.

[18] On my assessment there was nothing in that evidence which should have led his Honour to conclude that the behaviour of other employees towards Mr Dickson was such as to cause him to be at risk of suffering a mental disorder. The evidence was of a workplace in which coarse language, name-calling, and mockery were common – not the most genteel environment to work in, Mr Riley agreed. But complaints could be made to superiors. Mr Dickson's habit of keeping his anxieties to himself and failure to complain to superiors not surprisingly led to his Honour's finding that the evidence did not sustain the conclusion that the Council through its officers was, or ought to have been, aware that Mr Dickson was being subjected to conduct which carried a real risk of precipitating a mental disorder.

[19] It was submitted that his Honour did not give sufficient weight to the evidence of Dr Ian Low, specialist in occupational medicine. In a report dated 6 July 2001 to the Dicksons' solicitors, Dr Low referred to papers on the subject of workplace harassment including one entitled 'Stress at Work':

> In 1994, the publication 'Stress at Work' was conjointly published by the Division of Workplace Health and Safety and the Workers' Compensation Board of Queensland. According to the publication, workplace conflict can be a significant source of stress at work and, while much of this conflict may be of minor nuisance value only, some conflict may escalate to serious levels and create significant stress for the people involved. The recommendations in this publication would have been based on practice during the time that Mr Dickson was employed by the Council.
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> Good personnel practice would make employees cognisant of an organisation's expectation that employees were not to be harassed in any form and give an employee confidence that, if he or she reported harassment, it would be dealt with in an effective and appropriate manner. Having consulted to organisations in Australia since around 1980, I would have expected that, if the Council had good personnel policy, at the time Mr Dickson was employed, supervisors would have been aware, through education and direction by the Council, of the need to curtail any (apparent) harassment of employees and deal

> appropriately with any complaints made by workers who alleged that they were being harassed.

His Honour observed that Dr Low's evidence was 'fairly long on assertion and rather short on detail' and did not sustain 'the conclusion that the Noosa Council ought to have had in place policies against bullying and harassment of the kind to which [Mr Dickson] was subjected in November 1993 or prior to that date'. I see no reason to doubt the correctness of that finding, and in any event the evidence of the Council employees shows that they were aware that complaints could be made to superiors and would be dealt with. Furthermore, Mr Buchanan's evidence, such as it was, shows that even in the absence of a complaint steps would be taken to prevent excesses. It must be borne in mind, however, that while it may be accepted that the Council had a duty to ensure that the behaviour of its employees conformed to basic standards of decency towards one another, it would be unreasonable to expect such an employer to institute a regime requiring a workplace of the kind in question here to eliminate all coarse behaviour.

[20] I am not persuaded that there is any merit in the second argument for the Dicksons.

[21] The third and final argument advanced for the Dicksons was that his Honour's finding that Mr Dickson was not a person of normal fortitude was against the evidence. It was submitted that that issue would be relevant only if this court takes the view that, even where there already exists a duty of care of the more traditional type such as that owed by an employer to an employee, nevertheless in cases of the negligent infliction of 'psychological injury', a duty of care is owed only to persons of normal fortitude. We were referred to *Queensland Corrective Services Commission v. Gallagher* [1998] Q.C.A. 426 at para. 22 per de Jersey C.J. The passage in question in that paragraph is: 'There was no finding that the respondent bore the burden of abnormal susceptibility, and in any event, whether a duty is owed "must generally" depend on a normal standard of susceptibility (*Bourhill v. Young* [1943] A.C. 92, 110).'

[22] I doubt that the passage supports the bald proposition that in cases of negligent infliction of mental injury a duty of care is owed only to persons of normal fortitude. The use of the word 'generally' would appear to admit of particular cases in which extraordinary susceptibility, if known to a defendant, may be the foundation of a successful claim. Quoting Lord Wright's speech in *Bourhill v. Young* more fully from the page referred to, reveals that to be so:

> What is now being considered is the question of liability, and this, I think, in a question whether there is duty owing to members of the public who come within the ambit of the act, must generally depend on a normal standard of susceptibility. This, it may be said, is somewhat vague. That is true, but definition involves limitation which it is desirable to avoid further than is necessary in a principle of law like negligence which is widely ranging and is still in the stage of development. It is here, as elsewhere, a question of what the hypothetical reasonable man, viewing the position, I suppose ex post facto, would say it was proper to foresee. What danger of particular infirmity that would include must depend on all the circumstances, but generally, I think, a reasonably normal condition, if medical evidence is capable of defining it, would be the standard. The test of

> the plaintiff's extraordinary susceptibility, *if unknown to the defendant*, would in effect make him an insurer. The lawyer likes to draw fixed and definite lines and is apt to ask where the thing is to stop. I should reply it should stop where in the particular case the good sense of the jury or of the judge decides. (my emphasis)

[23] In my view there is, however, no need to pursue that issue because as I interpret his Honour's findings they were that the evidence tended to show that the Council had not failed to discharge the duty it owed to Mr Dickson whether or not he was a person of normal fortitude. His Honour's findings turned on the extent to which the Council could have been aware of Mr Dickson's distress, which Mr Dickson's behaviour before 11 November 1993 very effectively concealed until it was too late. But in any event there was evidence, which clearly enough his Honour accepted, to support his Honour's conclusion that Mr Dickson was not a person of normal fortitude. That evidence may be found in the report dated 5 November 2000 by Dr Jill Reddan, consultant psychiatrist, to Mr Creevey's solicitors. Two passages are relevant. In the first, Dr Reddan, after referring to Mr Dickson as 'a man with significant personality vulnerabilities', continued:

> Mr Dickson's presentation and longitudinal history would indicate that he has a low self-esteem, is timid, shy, has great difficulty asserting himself and dealing appropriately with hostile or angry feelings. He is prone to misinterpreting the actions of others and thus feels readily criticised. His personality difficulties would best be characterised as a Personality Disorder with avoidant, obsessional and dependent traits. Obsessional personalities tend to be preoccupied with orderliness and control. Avoidant personalities display a pattern of social inhibition, hypersensitivity to negative evaluation and feelings of inadequacy, and dependent personalities tend to be submissive and have a great need to be taken care of by others, often because they believe they are unable to function adequately without the help of others. (pp. 12-13)

Then, at p. 14 Dr Reddan said:

> Undoubtedly his manifest disapproval of the behaviour of his fellow workers led to them teasing him even more and he was unwilling to appropriately confront the behaviour of his co-workers. Most individuals with a "normal" personality would assert themselves without undue aggression, but with firmness. A person of "normal fortitude" would have been distressed by prolonged teasing or harassment, but once the teasing had ceased would have experienced a gradual resolution of the emotional upset. Mr Dickson's avoidant and obsessional personality determined that he would experience the situation more personally and more intensely, conceptualising it as a confirmation of his fear of others, reinforcing his beliefs about himself and leading to even more rigid beliefs and behaviours.

Although Dr Reddan agreed under cross-examination that timidity, shyness etc., were common - or not uncommon - personality traits, she maintained her view that Mr Dickson was 'particularly vulnerable'.

[24] The appeal should be dismissed with costs.

[25] **MULLINS J:** I agree with the reasons of and orders proposed by Helman J.