SUPREME COURT OF QUEENSLAND

CITATION:	*McKinnon v Kirdy* [2003] QSC 302
PARTIES:	**RUSSELL DAVID McKINNON** **(plaintiff)** **v** **DIANNE KIRDY** **(defendant)**
FILE NO/S:	S2571 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	16 September 2003
DELIVERED AT:	Brisbane
HEARING DATE:	21-22 August 2003
JUDGE:	Mullins J
ORDER:	**The plaintiff's claim be dismissed**
CATCHWORDS:	CONTRACTS - landlord and tenant – residential tenancies– breach of contract – where tenant injured whilst undertaking repairs to fence on the premises – where obligation on landlord at commencement of tenancy to ensure that the premises where in reasonable repair and fit for the tenant to live in - no breach of those obligations – where obligation on landlord to maintain the premises in good repair- where obligation on tenant to give notice of the need for repairs – where tenant failed to give notice – landlord not in breach of contract for not having undertaken repairs TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – REASONABLE FORSEEABILITY OF DAMAGE – PARTICULAR CASES – landlord and tenant – common law duty of landlord – whether premises maintained in safe repair *Residential Tenancies Act* 1994 *Residential Tenancies Amendment Act* 1998 *Austin v Bonney* [1999] 1 QdR 114 *Bond v Weeks* [1999] 1 QdR 134 *Cockburn v Smith* [1924] 2 KB 119 *Fine v Geier* [2003] QSC 73 *Jones v Bartlett* (2000) 205 CLR 166 *O'Brien v Robinson* [1973] AC 912

COUNSEL:	RW Morgan for the plaintiff SC Williams QC for the defendant
SOLICITORS:	Klooger Phillips Scott for the plaintiff Walsh Halligan Douglas for the defendant

[1] **MULLINS J**: On 4 January 1999 Mr Russell David McKinnon ("the plaintiff") was injured, as he climbed the fence which was 1.8m high on the rear boundary of the residential house property situated at 48 Avocado Crescent, Bli Bli ("the property") which he was renting at that time from Ms Dianne Kirdy ("the defendant"). He claims damages for personal injuries caused by the negligence and/or breach of contract of the defendant.

Residential tenancy

[2] The plaintiff who was born on 11 October 1959 required accommodation for himself and 2 of his children, Megan who was born on 7 October 1982 and Steven who was born on 18 August 1983.

[3] On or about 12 January 1998, the plaintiff entered into a written residential tenancy agreement with the defendant in respect of the property. The plaintiff negotiated the agreement with the defendant's real estate agent. The plaintiff inspected the property with the agent, before entering into the agreement. The plaintiff described the general condition of the house as poor, but that the agent indicated that some repairs were intended to be done. The plaintiff observed that there were some palings missing from the rear fence. The plaintiff informed the agent that he had a poodle. The agent indicated that that was not a problem, but stated, "…you'll just have to fix up the fence to keep the dog". When the plaintiff commenced living at the property, he put some wire mesh over some of the holes in the right hand side of the rear fence. He stated that he subsequently did "patching up".

[4] The tenancy agreement is in the REIQ form published in March 1995. It provided for a term of 6 months commencing on 14 January 1998 at a rent of $135 per week. In the item for "approved pets", one poodle is listed. In the item for special conditions, reference is made to appendix "A" and an additional condition "The dog is to stay outside at all times".

[5] The tenancy agreement incorporated the standard printed terms and conditions (Ex 8). Clauses 6.1 and 6.2 of the standard conditions provided:

> "6.1 At the start of the tenancy, the lessor must ensure:-
> (a) that the premises and inclusions are reasonably clean; and
> (b) the premises are fit for the tenant to live in; and
> (c) the premises and inclusions are in a reasonable state of repair, having regard to the age of, rent payable for, and expected life of, the premises and inclusions. (Section 103).

> 6.2 During the tenancy, the lessor must:-
> (a) maintain the premises and inclusions in a reasonable state of repair, having regard to the matters mentioned in the previous sub-clause; and
> (b) if the premises include a common area – keep the area reasonably clean. (Section 103)"

Reference is made in clauses 6.1 and 6.2 to s 103 of the *Residential Tenancies Act* 1994 ("*RTA*") which contains similar obligations which apply to the residential tenancy agreement which cannot be contracted out of or modified: s 36 *RTA*.

[6] Relevant definitions were set out in clause 6.4 of the standard conditions:

> "6.4 For this agreement:-
> (a) "Premises" include any common area available for use by the tenant; and
> (b) "Inclusions" mean everything supplied with the premises for the tenant's use (whether or not the things are supplied under an agreement)."

[7] Clause 11 of the standard conditions deal with damage and repairs:

> "11.1 If the tenant knows the premises or inclusions have been damaged, the tenant must give notice as soon as practicable of the damage.
> 11.2 If the premises or inclusions need routine repairs, the notice must be given to the lessor. (Section 125)
> 11.3 If the premises or inclusions need emergency repairs, the next clause applies."

The reference in clause 11.2 is to s 125 of the *RTA*.

[8] Clause 12 of the standard conditions deals with emergency repairs and is read with item E of the tenancy agreement which sets out that "The tenant's first point of contact for emergency repairs is the lessor's agent". Under clause 12.2 of the standard conditions as there was no nominated repairer for the repairs set out in item E, the tenant was required to give notice to the lessor, if the premises or inclusions needed emergency repairs.

[9] At the end of the term of 6 months, the agent conducted a routine inspection report of the property. That described the fences as "good". The plaintiff agreed in cross-examination, however, that for the entire period that he was in occupation of the property, the rear fence was in a poor condition. The tenant continued in occupation of the property under a periodic tenancy, until entering into a fresh term for a period of 3 months commencing on 24 September 1998 under the written tenancy agreement dated 25 September 1998 (Ex 7). This tenancy agreement was also in the REIQ form published in March 1995 and incorporated the standard terms and conditions found in Ex 8. This tenancy agreement also permitted one dog to be kept and incorporated the special conditions contained in appendix "A" and a condition

that the dog was to stay outside at all times. The rent was $270 per fortnight. The photocopy of the items schedule of the residential tenancy agreement that was tendered as Ex 7 had attached to it a photocopy of an entry condition report that does not appear to relate to the subject tenancy, as it is dated 24 September 1999 and nominates the tenant as being persons other than the plaintiff.

[10] A routine inspection report undertaken by the defendant's agent on 22 October 1998 described the fences as "O.K.".

[11] When that tenancy expired on 24 December 1998, the plaintiff continued to live at the property pursuant to a periodic tenancy, by virtue of clause 17 of the standard terms and conditions of the agreement.

[12] Before the tenancy expired on 24 December 1998, the *RTA* was amended by the *Residential Tenancies Amendment Act* 1998 ("the Amendment Act") with relevant effect from 1 December 1998. Prior to the amendment, s 103(2) and (3) provided:

> "**(2)** At the start of the tenancy, the lessor must ensure-
> (a) the premises and inclusions are reasonably clean; and
> (b) the premises are fit for the tenant to live in; and
> (c) the premises and inclusions are in a reasonable state of repair, having regard to the age of, rent payable for, expected life of, the premises or inclusions.
> **(3)** While the tenancy continues, the lessor must-
> (a) maintain the premises and inclusions in a reasonable state of repair, having regard to the matters mentioned in subsection (2)(c); and
> (b) if the premises include a common area – keep the area reasonably clean."

[13] After the amendment, s 103(2) and (3) provided:

> "**(2)** At the start of the tenancy, the lessor must ensure-
> (a) the premises and inclusions are clean; and
> (b) the premises are fit for the tenant to live in; and
> (c) the premises and inclusions are in good repair; and
> (d) the lessor is not in breach of a law dealing with issues about the health or safety of persons using or entering the premises.
> **(3)** While the tenancy continues, the lessor -
> (a) must maintain the premises in a way that the premises remain fit for the tenant to live in; and
> (b) must maintain the premises and inclusions in good repair; and
> (c) must ensure any law dealing with issues about the health or safety of persons using or entering the premises is complied with; and
> (d) if the premises include a common area – must keep the area reasonably clean."

[14] The relevant transitional provision is found in s 341 of the *RTA* which provides:

> **"341.(1)** This section applies to a fixed term agreement in force immediately before the commencement day.
> **(2)** This Act continues to apply to the agreement as if the amendment Act had not commenced.
> **(3)** However, if after the period fixed as the term of the tenancy ends, the agreement continued to apply because of section 46(3)-
> (a) subsection (2) stops having effect for the agreement; and;
> (b) this Act, as amended by the amendment Act, applies to the agreement."

But for the effect of s 341 of the *RTA*, section 46(3) of the *RTA* would have applied to the plaintiff's periodic tenancy which commenced upon the expiry of the fixed term tenancy on 24 December 1998 on the same terms that had applied to the fixed term tenancy before it ended. Because of s 341(3) of the *RTA*, the relevant amendments effected to s 103 of the *RTA* applied to the periodic tenancy, which commenced on 25 December 1998.

[15] In this proceeding the plaintiff has relied on the obligations imposed on the defendant as landlord pursuant to clauses 6.1 and 6.2 of the standard conditions, rather than the obligations as expressed in s 103 of the *RTA*. The defendant by her defence has admitted that the agreement between the parties contained clauses 6.1 and 6.2 in the terms pleaded by the plaintiff. To the extent that a provision of the *RTA* is inconsistent with a term of a residential tenancy agreement, the provision of the *RTA* prevails and the term is void to the extent of the inconsistency: s 37 of the *RTA*. Notwithstanding the admission of the defendant as to the application of clause 6.1 and 6.2 of the standard conditions, as a matter of law the obligations under s 103 of the *RTA* must be applied to the tenancy agreement between the parties if there is a difference in those obligations compared with those set out in the standard conditions.

[16] During 1998, the plaintiff had complained to the defendant's agent on a number of occasions about the need for repairs to the property. One complaint was that the front door had jammed, because the roots of a tree beside the house had lifted the slab and distorted the door frame. The plaintiff complained that the door on the bedroom occupied by his daughter Megan would lock, if the door closed, and Megan would have to climb out of the window to get out of the bedroom. Although the defendant's agent did send out a handyman to fix this problem, his attempts were unsuccessful and the plaintiff solved the problem by taking the laundry door lock off and putting it on the door to Megan's bedroom in place of the lock that was not working properly. The plaintiff complained about a power point in the kitchen that was cracked and which, if used, would emit sparks. Another complaint was that there were termites nesting in the main bedroom. The plaintiff also complained that when it rained, water would come in where there was a gap between the back sliding door and the door frame and the carpet would get wet and that water also leaked into the bedroom extension, when it rained.

[17] Apart from the handyman being sent to fix the bedroom lock, none of these complaints of the plaintiff resulted in action on the part of the defendant. The plaintiff did not complain about the state of the rear fence. As a result of the lack of action from the defendant or her agent in respect of these complaints made during 1998, the plaintiff stated that he had given up on the real estate agent doing anything and he thought it was pointless to complain.

The accident

[18] The plaintiff tendered a bundle of photographs (Ex 9) which mainly showed the rear fence of the property and the terrain on the other side of the rear fence. The photographs on pages A to G were taken in July 2002. The rear fence marks the boundary between the property and the road reserve which has been cut for the construction of the road. The photographs show that the fence was constructed of wooden palings affixed to lower and upper railings which themselves were affixed to posts. The posts and railings were on the property side of the fence. The photographs show that the footpath was overgrown and that the cutting was higher than 8 feet as, in some photographs, an 8 foot ladder has been placed against the cutting down which the plaintiff fell.

[19] As at the date of the accident the plaintiff was of the opinion that the strongest part of the rear fence was in the middle, as there were trees hanging over and shrubbery around the fence at either end and the fence was "a bit rotted" at either end.

[20] On 4 January 1999 the plaintiff was mowing the yard and doing the garden, when he saw a couple of palings lying in the grass on the footpath side of the fence. The plaintiff decided to nail the palings back on to stop the dog from getting out and to tidy up the look of the property. This was the first occasion on which he tried to repair the fencing by nailing back palings. By this stage, the dog which the plaintiff was keeping at the property was a German Shepherd. He fetched a hammer and nails.

[21] The part of the fence where the plaintiff chose to climb over is shown in the photographs on page H of Ex 9. The photographs on page H were taken in or about February or March 1999. The top photograph on page H has the letter "X" where the plaintiff climbed the fence. The bottom photograph on page H is a close up of that part of the fence. The top photograph on page H shows that there were 2 palings missing about 4 palings down to the left of the post where the plaintiff chose to climb over and that there was also one paling to the right of the post missing. The plaintiff who is 6 feet 1 inch in height and weighed about 83kgs stepped up on a rock that was about a foot high, in order to get onto the fence. He described the accident as follows:

> "First of all, I stepped up on the rock and put my left hand on the post. Then I put my right leg up. Because my legs are long, I just – didn't have to jump up or anything. I just put my right leg up, pulled my weight up to the top, and when I jumped down I still had hold of the post in my left hand, but I turned around to balance meself *(sic)*

> on a paling, I reached out to balance meself *(sic)* and I grabbed a paling. That's the paling that came off. It put me off balance, and I skimmed the top of the embankment and went down the bottom."

When asked where his right hand was, the plaintiff stated:

> "Beside me. Like, it was just one sort of steady movement. One leg up, brought the other leg up, swung around. I just balanced at that point for a second and swung around, grabbed the----- ."

In cross-examination the plaintiff identified the paling which came off as he put his right hand on it as the second, third or the fourth paling to the left of the post. The plaintiff stated that before he undertook the manoeuvre of jumping up onto the fence, he wriggled a couple of the palings and went by appearance that it was a safe place to jump up. He stated that there were many more palings missing at either end of the fence.

[22] The plaintiff described that, as he fell, he was clawing at the embankment to stop himself from falling further, but he went down feet first with his legs straight and hit the bottom of the embankment and rolled out onto the road. The plaintiff stated that he rolled back into the gutter and lay there, waving his arm, and eventually a passerby stopped and called for an ambulance.

[23] The photograph on page K of Ex 9 which was taken in or about February or March 1999 shows the paling which came off, as the plaintiff grabbed it, lying at the foot of the embankment.

[24] The photograph on the bottom of page E of Ex 9 shows the bushes covering the road reserve on either side of the point where the plaintiff jumped the fence. The plaintiff described that both ends of the road reserve were blocked off and that it was not possible that he could have returned to the property by walking along the road reserve, rather than scaling the fence.

[25] A couple of days after the accident, the plaintiff's eldest son, Mr Shaun McKinnon, decided to repair the fence himself, so that the dog did not have to be kept locked up in the shed on the property. Shaun stated that he carefully climbed the fence and nailed about 10 palings back onto it. He also re-hammered the palings that were still on. In order to return to the property, he walked about 200 metres along the road reserve side of the rear fence and fences of other properties adjoining the same road reserve. Shaun stated that he crawled for at least 20 metres, because there were trees and branches hanging over the road reserve. As the plaintiff is a bigger person than Shaun, he did not think his father would have been able to get through the vegetation easily. Shaun stated that he ended up getting grazes and cuts all over himself.

[26] The plaintiff conceded in cross-examination that, as far as his arrangement with the agent that the fence was his responsibility was concerned, it was a matter for the plaintiff as to how he fixed the fence.

Treatment

[27] The plaintiff was admitted to Nambour General Hospital. An x-ray revealed a fracture to T12. A CT scan showed a wedge compression fracture of T12. The plaintiff was transferred on 11 January 1999 to the Princess Alexandra Hospital to undergo fixation.

[28] On 15 January 1999 the plaintiff underwent an open reduction internal fixation of the T12 fracture and T11/L1 fusion. The plaintiff was discharged on 20 January 1999 and went to stay with his mother, Mrs Roberta Good, at Collingwood Park. The plaintiff stayed with his mother for 5 days during which she provided care ranging from 8 hours per day to 5 hours per day. Mrs Good then drove the plaintiff back to the property.

[29] The day after the accident, Shaun moved to stay at the property in order to look after his 2 siblings. Upon the plaintiff's return home, Shaun also provided care to the plaintiff by helping him dress occasionally. Over a period of 5 months Shaun also ran the household and looked after the property, although in that period the plaintiff progressively improved. Shaun estimated the care he gave to the plaintiff and household responsibilities took him 3 ½ hours per day for 5 months.

[30] When the plaintiff was reviewed at Nambour Hospital on 8 February 1999, he reported some decrease in his left foot sole sensation and an aching left thigh. When reviewed on 22 March and 19 April 1999, the foot sensation was returning and the plaintiff's stabilisation of T12 was adequate. The plaintiff was allowed to increase mobility. When reviewed on 21 June 1999, his fusion appeared solid and he had only occasional twinges on the left side.

[31] On 18 October 1999 the plaintiff reported increasing lumbar pain radiating to both ankles, when reviewed at the Nambour Hospital. He had a bone scan and magnetic resonance imaging. The bone scan showed no active bony pathology in the lumbar sacral spine, but ongoing bony activity related to T12 which was consistent with the injury on 4 January 1999. The MRI showed no significant disc pathology in the thoracolumbar junction. It was observed that at L3-4, there was early degenerative changes of the discs. There was a similar finding at L4-5. At L5-S1 there was degenerative change with a mild generalised annulus bulge which was producing mild anterior effacement of the thecal sac and was adjacent to the descending S1 nerve roots.

[32] When the plaintiff was reviewed in October and November 1999 at the Nambour Hospital, he reported a dull ache in his thoracic region, persistent lower back pain with radiation to his legs. He was referred for hydrotherapy.

[33] The plaintiff was reviewed at the Royal Brisbane Hospital Pain Clinic in March 2001. He has used analgesia on an intermittent basis for control of his pain. He has also taken anti-inflammatory medication and received acupuncture treatment.

Work history

[34] When the plaintiff was 20 years old he was working for a plumber's firm at a bauxite factory in Western Australia cleaning out a manhole, when he injured his lower back whilst pulling the head of the pump out of the drain. He had cortisone injections and was off work for a couple of months. He had physiotherapy treatment and went back to work on light duties. Soon after, the plaintiff and his wife decided to return to Queensland and the plaintiff received a lump sum settlement payment in respect of that work injury from the employer. A myelogram performed in 1982 showed some bulging within the L4/5 and L5/S1 discs at that time.

[35] The plaintiff undertook manual work on his return to Queensland such as labouring, mechanical work and plumbing work. At one stage he worked in a freezer stacking boxes on pallets continually for hours.

[36] The plaintiff and his wife separated about 14 years ago. The plaintiff has had Steven reside with him from about a year after he and his wife separated and Megan came to live with the plaintiff about 6 years ago. The plaintiff was in receipt of a supporting parent's benefit from the time he commenced looking after Steven.

[37] The plaintiff stated that after he took on the role of being a sole parent, he would obtain casual work, whenever he could, such as cleaning trucks and working in a foundry. In the year ended 30 June 1996, the plaintiff earned $710 gross for 3 weeks' work from Mallet Enterprises Pty Ltd. In the year ended 30 June 1997 the plaintiff earned $1,965 gross for about 2 weeks' work for TC Truck Services Pty Ltd.

[38] During 1998 the plaintiff undertook courses to assist him in obtaining employment as a security officer. He completed a security officer/crowd controller's training course in May 1998 and instruction to become a private investigator and a *Weapons Act* security guard licensing course in September 1998.

[39] In late 1998 the plaintiff worked on a casual basis for a number of security firms which had franchises for Naskam Security. The plaintiff has a group certificate from Catt Security Pty Ltd which shows he earned $51 gross in the month of November 1998. For the year ended 30 June 1999 the plaintiff has a group certificate from Glacer Security Services which shows in that financial year he grossed $5,605 which was for work undertaken primarily before the accident. Between 23 September and 18 December 1998 the plaintiff earned $2,566 gross from Naskam Security Services Pty Ltd. The plaintiff earned $97 from Peter Cunningham for security work in December 1998. Before the accident the plaintiff was interested in obtaining a Naskam Security franchise for himself.

[40] After the accident the plaintiff attempted to do some security work. He worked at Corbould Park races on one occasion on Sunday for 4 hours, checked a car park for 2 hours and did patrols for 4 hours on each of 2 nights. Because of his backache,

the plaintiff found it difficult doing this work and did not continue with it. He has not sought other employment.

[41] As from 24 August 1999 the plaintiff has been in receipt of a disability support pension.

[42] The defendant caused the plaintiff to be videotaped whilst at his girlfriend's house on 21 February 2003. The video showed the plaintiff for about 20 minutes mainly in the garage area moving items and sweeping. The video showed the plaintiff bending to pick things up from the floor. The plaintiff was not shown moving at any speed, but the plaintiff did not appear to have any difficulty in carrying out the movements that were caught on the video.

Medical reports

[43] At the request of his solicitors the plaintiff was examined by orthopaedic surgeon, Dr Peter Winstanley, on 25 September 2001. According to the report of Dr Winstanley (Ex3) the plaintiff reported difficulty in performing gardening or household activities and difficulty with bending and rotational type activities. Dr Winstanley observed that there was tenderness to palpation within the mid portion of the scar within the midline of his thoracolumbar area measuring 19cms in length and that the fixation device was easily palpable. Dr Winstanley observed that there was some limitation with motion within the plaintiff's lumbar spine in all planes. Dr Winstanley considered that the plaintiff has normal neurological function within his lower limbs and a free straight leg raise to 70 degrees on both sides. At the time of the examination Dr Winstanley was of the opinion that the plaintiff's condition had stabilised and that he was left with a permanent partial disability relating to his lumbar spine injury of 15% loss of bodily function.

[44] The defendant's solicitors arranged for the plaintiff to be examined on 19 September 2002 by orthopaedic surgeon, Dr Peter Boys. According to Dr Boys' report (Ex 4), at that stage the plaintiff described constant pain around the 12th thoracic vertebra and pain across the lumbosacral junction into the buttocks with variable discomfort extending to the legs and as far as the feet on occasions. The plaintiff also described intermittent paraesthesia of the calves and feet if he were to sit too long and considered that he had a comfortable sitting tolerance of 20 minutes.

[45] Upon examination Dr Boys noted mild tenderness in the region of T12, but that the lumbosacral spine was non-tender. The plaintiff was able to flex his thoracolumbar spine to touch his knees and the rhythm of spine extension from that position was normal. Active extension range was about two-thirds of normal range. Lateral flexion and rotatory movements were mildly restricted. Straight leg raising was 80 degrees bilaterally.

[46] Dr Boys was of the opinion that the plaintiff has complaints of pain relating to the effects of the fracture of the 12th thoracic vertebra and its subsequent fixation and

the effects of lumbar degenerative disc disease. Dr Boys considered that the plaintiff's injuries were stable and permanent and that the plaintiff has a 15% impairment of bodily function referable to the lumbar spine. Dr Boys apportioned 12.5% impairment of bodily function to the effects of the accident and 2.5% impairment of bodily function to the effects of constitutional age-related degenerative change pre-existing the accident. Dr Boys was of the opinion that the plaintiff's thoracolumbar spine condition would not preclude light sedentary work which would allow him to stand or sit as comfort required.

[47] The plaintiff consulted psychologist, Mr Peter Stoker, on 15 May 2000 for the purpose of the preparation of a report on his psychological state and how it relates to the accident. In his report dated 1 June 2000 (Ex 5), Mr Stoker expressed the opinion that the plaintiff had suffered a psychological reaction to the accident and had developed a chronic and severe level of depressive symptomatology. The plaintiff had described to Mr Stoker that he was depressed and frustrated due to his inability to work, suffered flashbacks, had nightmares, suffered insomnia, was worried about his future, suffered poorer motivation, had diminished concentration and short term memory function, experienced mood fluctuation, was more introverted and had poorer confidence. Mr Stoker considered that the plaintiff's prognosis was fair to good and his psychological disability should reduce with therapy. By the trial, the plaintiff was no longer suffering from flashbacks or nightmares, but would still suffer periodically from depression and was taking anti-depressants.

Claim in contract

[48] During the course of the trial leave was give to the plaintiff to file an amended statement of claim. There was not time before the end of the trial for the amended defence to be filed. Mr Williams of Queen's Counsel indicated what the proposed amendments would be and I gave leave to make amendments to the defence as foreshadowed. An amended defence largely conforming to the foreshadowed amendments and the case presented for the defendant at the trial was delivered to my Associate after the trial concluded. That is the amended defence to which reference is made in these reasons.

[49] The plaintiff alleges discovering a hole in the fence which needed repair on 4 January 1999 which the plaintiff alleges was "somewhat urgent" as he kept a German Shepherd dog on the premises.

[50] The plaintiff seeks to rely on the failure of the defendant and/or her agent to respond to his various complaints during 1998 about other aspects of the premises for which repairs were required and alleges in paragraph 11C of the amended statement of claim:

> "(i) The Plaintiff had no reasonable expectation that the Defendant would comply with her obligations to repair the fence if asked; or alternatively;

(ii) Had no reasonable expectation the Defendant would comply with her obligations to rectify the fence, if asked, within a reasonable time;

(iii) The Defendant was aware, or ought to have been aware, by her agents, that the Plaintiff had been obliged to effect repairs to the house due to the Defendant not doing so, and had indeed done so;

(iv) It was not practicable for the Plaintiff to arrange for the Defendant to repair the fence;

(v) It was reasonably foreseeable to the Defendant that if the Plaintiff attempted to repair the fence in its unsound or defective state that he would be injured."

[51] The plaintiff pleads that he commenced preparations to repair the hole in the fence and attempted to climb over the fence. In paragraph 13A of the amended statement of claim, the plaintiff pleads that he had no other reasonable means to obtain access to the other side of the fence where he needed to be to re-nail the palings to the fence.

[52] It is pleaded in paragraph 16 of the amended statement of claim that the plaintiff's injuries as a result of the accident were caused by the defendant's breach of clauses 6.1(b), (c) and/or 6.2(a) of the standard conditions in that the paling came away from the fence whilst the plaintiff was climbing the fence because:

(a) the paling timber and/or the bearer it was attached to had deteriorated such that minimal force was needed to cause the paling to separate from the fence; and/or

(b) the paling was inadequately fixed to the supporting structure of the fence;

(c) the defendant was aware of the poor condition of the fence.

[53] The plaintiff therefore identifies the hole in the rear fence, as the defect requiring repair, but then seeks to base the alleged breach of contract on the failure of the defendant to maintain in good repair the paling which came away from the fence, as the plaintiff was climbing the fence.

[54] In the amended defence, the defendant denies the allegations in paragraphs 11C and 13A of the amended statement of claim for the following reasons:

"(a) the defendant complied with all obligations referable to the tenancy;

(b) it was not reasonably foreseeable that the plaintiff would be injured when he attempted to repair the fence in a safe, proper and appropriate manner;

(c) the plaintiff had available to him reasonable means to access the other side of the fence other than the means he utilised."

[55] The defendant also alleges, in the alternative, that the accident was caused by the negligence of the plaintiff in breaching clauses 10.1, 11.1 and 11.2 of the standard conditions of the residential tenancy agreement on the basis that the plaintiff failed

to give the defendant or her agent notice of his attempt to repair the fence and by attempting to effect repairs to the fence without the defendant's agreement or authority, the plaintiff voluntarily assumed the risks associated with effecting such repairs.

[56] As the accident occurred when the plaintiff was holding over after the expiry of the tenancy which commenced on 24 September 1998, the relevant date for determining whether the defendant had fulfilled her obligations at the commencement of the tenancy was 24 September 1998 which was before the commencement of the Amendment Act.

[57] The question is therefore whether as at 24 September 1998 the defendant had complied with each of the obligations contained in clauses 6.1(b) and (c) of the standard conditions which corresponded exactly with s 103(2)(b) and (c) of the *RTA*, as they then stood.

[58] Although the condition report in October 1998 described the fences as "OK", the plaintiff's description of the rear fence being in a poor condition accords with what is shown in the photographs on pages H and I of Ex 9 (which were taken in February or March 1999). The test of reasonableness is applied to the obligation on the defendant to provide premises that were fit for the plaintiff and his family to live in, having regard to the age, character and locality of the premises and to the effect of a default on the state or condition of the premises as a whole: *Bond v Weeks* [1999] 1 QdR 134, 138*; Fine v Geier* [2003] QSC 73 at paragraph [56]. The effect of the approval of the defendant for the plaintiff to keep a dog at the premises was that the plaintiff was not in breach of the residential tenancy agreement by having the dog at the property. Approval to the plaintiff to keep a dog did not alter the ambit of the obligation owed by the defendant to the plaintiff to provide premises that were fit for the plaintiff and his family to live in. The defendant did not assume any contractual obligation in respect of the suitability of the premises for the plaintiff's dog. The poor state of the rear fence did not affect the fitness of the premises as a residence for the plaintiff and his family, particularly having regard to the quantum of the rent being paid by the plaintiff for the property which was described by Mr Morgan of Counsel for the plaintiff as a "modest rent". That is also reflected by the fact that the plaintiff sought the further fixed term which commenced on 24 September 1998 after having lived at the property since 14 January 1998. The defendant was not in breach of the obligation contained in clause 6.1(b) of the standard conditions (or s 103(2)(b) of the *RTA* as it then stood) at the commencement of the relevant tenancy.

[59] The same conclusion must also be reached in relation to the defendant's obligation to ensure that the premises were in a reasonable state of repair, having regard to the age of, rent payable for, and expected life of the premises, whether the obligation is considered under clause 6.1(c) of the standard conditions or s 103(2)(c) of the *RTA* as it then stood.

[60] Although the next question arising from the pleadings is whether the defendant was in breach of her obligation under clause 6.2(a) of the standard conditions on

4 January 1999, as that clause imposes a less stringent obligation than s 103(3)(b) of the *RTA* after the Amendment Act took effect, the question should be determined by reference to the obligation imposed by s 103(3)(b) of the *RTA*, as it stood after the Amendment Act.

[61] Under the *Residential Tenancies Act* 1975 the obligation that was implied in the tenancy agreement on the part of the landlord to maintain the dwelling-house in good tenantable repair and in condition fit for human habitation was subject to the standard of reasonableness, even though the word "reasonable" was not included in the provision: *Bond v Weeks* [1999] 1 QdR 134, 138:

> "On the other hand, in requiring "good tenantable repair" in paras (ii) and (iii) of s. 7(a) and "a condition fit for human habitation" in the first of these, the section is, in each case, imposing a standard of reasonableness having regard to the age, character and locality of the house and to the effect of the failure on the state or condition of the house as a whole." *(footnotes omitted)*

[62] Before the Amendment Act, the obligation imposed on the landlord during the tenancy to maintain the premises in a reasonable state of repair incorporated language similar to that which had been used by the court in *Bond v Weeks*. That wording however was omitted by the Amendment Act. It is therefore not appropriate to qualify the obligation in s 103(3)(b) of the *RTA* that the landlord must maintain the premises in good repair by reference to the standard of reasonableness.

[63] It is relevant in considering whether the defendant's obligation to maintain the premises in good repair was breached that the hole which the plaintiff was attempting to repair at the time of the accident was discovered by the plaintiff only on the day of the accident.

[64] In the absence of an express covenant or statutory provision requiring a landlord to repair, a landlord was generally under no obligation to do so: *Cockburn v Smith* [1924] 2 KB 119, 128. Under the *Residential Tenancies Act* 1975 enforcement of the implied contractual obligation on the landlord to maintain the premises in good tenantable repair and fit for human habitation depended on the tenant having given prior notice in sufficient time to allow the landlord to remedy the defects: *O'Brien v Robinson* [1973] AC 912, 929-930; *Austin v Bonney* [1999] 1 QdR 114, 118, 124, 130-131.

[65] The *Residential Tenancies Act* 1975 was replaced by the *RTA* which continues the regime of imposing contractual obligations on the part of the landlord in relation to fitness and repair of the premises, but formalises as contractual obligations the requirement for the tenant to give notice of damage to the premises.

[66] The definition of "emergency repairs" found in s 123A of the *RTA* is also set out in clause 12.6 of the standard conditions. A hole in the fence caused by palings having fallen off is not a defect for which emergency repairs are prescribed by s 123A of the *RTA*. It was a spur of the moment decision of the plaintiff to undertake repairs of the nature which he elected to do on the day of the accident. The plaintiff had not

previously attempted repairs of that nature, limiting himself to "patching up" the fence by such means as placing wire mesh over a hole. The plaintiff's own evidence as to what the agent had told him he would have to do was merely "to fix up the fence to keep the dog". The plaintiff's evidence falls short of proving what he pleads the agent told him that "he would have to fix any missing palings on the fence himself in order to secure the boundary for the dog".

[67] In order to hold the defendant liable for the defects in the rear fence, the plaintiff was required to give notice to the defendant of the need for routine repairs under clause 11.2 of the standard conditions which incorporates the obligation under s 125 of the *RTA*.

[68] In view of the fact that the defect which prompted the plaintiff to act in the manner which he did on the day of the accident was discovered by himself only on that day, in the absence of notice to the defendant of that defect, the defendant was not in breach of her obligation to repair that defect, even if that defect can be described as requiring repair in order to maintain the premises in good repair. Although the test of reasonableness is no longer applied, all that the fence was required for was to provide a barrier between the property and the road reserve or mark that boundary. The poor condition of the rear fence had little impact on the overall repair of the dwelling house.

[69] If the defect were the loose paling which gave way as the plaintiff climbed the fence, the plaintiff also failed to comply with the notice obligation in respect of that defect.

[70] The plaintiff explains his conduct in undertaking the repairs himself by reference to the lack of action on the defendant's part in response to other complains which he had made during 1998. None of those complaints was about the rear fence. It is not pleaded that the contract between the plaintiff and the defendant was affected in its operation by the lack of action of the defendant during 1998 to the other complaints of the plaintiff. If the plaintiff wished to hold the defendant liable for breach of the obligation to undertake repairs in order to maintain the premises in good repair, the plaintiff was required by the residential tenancy agreement to give notice of the need for those repairs.

[71] The plaintiff has failed to prove the breach of contract alleged against the defendant. It is therefore unnecessary to consider the question of causation between the alleged breach of contract and the plaintiff's injuries.

Claim in tort

[72] The duty of care which the plaintiff alleges in paragraph 17 of the amended statement of claim was owed by the defendant to him was that of inspecting, maintaining and repairing the fence prior to or during the currency of the plaintiff's tenancy. The plaintiff alleges that his injuries were caused by the defendant's failure adequately to inspect, maintain and repair the fence.

[73] A landlord of residential premises has a duty to take reasonable care to avoid foreseeable risk of injury to the tenant and members of the tenant's household: *Jones v Bartlett* (2000) 205 CLR 166, 184-185 (per Gleeson CJ), 240-241 (per Kirby J). In that case Gauldron J expressed the duty in terms of a duty to put and keep the premises in safe repair (at 193) and Gummow and Hayne JJ expressed the duty in terms that the premises be reasonably fit for the purposes for which they are let, namely habitation as a domestic residence (at 215).

[74] In *Jones v Bartlett* the adult son of the tenants who resided with his parents injured himself by carelessly putting his knee through a glass door in the house. The glass door which was 4mm thick complied with the building standards at the time the house was constructed, but it did not comply with the standards that would have been applicable had the house been constructed immediately before the tenancy was entered into. At that stage what would have been required was glass 10mm thick which was toughened or laminated. On the facts, it was held by the majority that the landlord had not breached the duty of care owed to the tenants' son. In considering what was the landlord's duty in respect of dangerous defects Gummow and Hayne JJ stated at 217-218:

> "Moreover, the danger must appear in the course of the use of the premises for the purpose for which they were let. The reasonableness of the conduct engaged in by the person injured will be important. The danger may arise only to those performing acts unauthorised or uncontemplated as part of the purpose for which the tenancy was let. If so, there ordinarily will not be a dangerous defect. The actions contemplated and authorised by the purposes of the lease will depend on all the circumstances of the case. Often they will be expressed by the instrument of lease itself. Thus, ordinarily it will not be an incident of use of residential premises to climb trees situated thereon; nor ordinarily will it be a reasonable use of premises if the tenants do something, such as perform repairs, which they are forbidden to do by the terms of the lease which grants occupancy." *(footnote omitted)*

[75] The rear fence performed the function of providing a barrier or marking the boundary between the property and the road reserve. At a height of 1.8m it was above the height that would ordinarily be climbed. Normal use of the property would not extend to an adult weighing 83kgs climbing the fence of 1.8m in height. The fence itself did not present as a dangerous defect, even allowing for its poor condition, when its normal use was simply to provide a barrier or mark a boundary. It was not reasonable to expect the defendant to anticipate that the plaintiff would behave in the manner that he did, when he made the spur of the moment decision on 4 January 1999 to repair the palings on the rear fence, by attempting to climb over the fence.

[76] If the duty of care is expressed in terms of taking reasonable care to avoid foreseeable risk of injury, the manner in which the plaintiff injured himself by climbing the fence was not a foreseeable risk of injury. If the duty of care is expressed in terms of keeping the premises in safe repair, repair of the fence was not

required by the defendant in order for the residential premises to be in a state that was fit for the purposes of habitation as a domestic residence.

[77] In view of the fact that the rear fence formed a subsidiary role in connection with the provision by the defendant of the residential premises for the plaintiff and his family to live in as tenants, it overstates the defendant's duty of care to define it in specific terms in relation to the rear fence. The duty of care would be better expressed in this case in terms of an obligation of the defendant to keep the property in safe or good repair. In any case, it was not the defendant's failure adequately to inspect, maintain and repair the rear fence that caused the plaintiff's injuries, but the plaintiff's decision to undertake a manoeuvre in relation to climbing the fence which was not reasonably foreseeable by the defendant.

[78] The plaintiff therefore has failed to prove that his injuries were caused by a breach by the defendant of the duty of care.

Quantum

[79] Although the plaintiff has been unsuccessful in establishing the liability of the defendant for his injuries, I will assess the quantum of damages appropriate to the plaintiff's injuries.

[80] The parties were agreed that an appropriate award for damages for pain and suffering and the loss of amenities of life is $45,000. Of that award, the sum of $15,000 should be allowed as past damages. Interest on the past award of $15,000 at 2% for 4.7 years is the sum of $1,410.

[81] The plaintiff had only just returned to paid employment in a consistent way in the few months prior to the accident, although he was still not earning enough from that paid employment to cease being on social security benefits. Past economic loss and loss of future earning capacity should be assessed on the basis that after the plaintiff recovered from his injuries, he has a residual capacity for work (as supported by the video and the opinion of Dr Boys). The lack of a lengthy work history prior to the accident would also need to be reflected by a significant discounting in the assessment.

[82] The plaintiff has sought past economic loss on the basis of a loss of $200 net per week since the accident and damages for loss of future earning capacity on the basis of 12 years at a net income of $400 per week which on the 5% tables, using the multiplier 472, would result in damages of $188,800. These calculations are far too generous in the light of the evidence of the plaintiff's lack of work history before the accident and the plaintiff's residual working capacity since the accident.

[83] The defendant submits that these exigencies would be reflected in a calculation of loss of earning capacity (both past and future) at $100 net per week for the past and for 15 future years. That underestimates the plaintiff's losses. In the circumstances, a better approximation of these losses is reflected by calculating past economic loss

at $150 net per week for 4.7 years ($36,660) and loss of future earning capacity at $150 net per week for 15 years ($83,250). In addition the plaintiff should recover loss of past superannuation benefits at 8% and loss of future superannuation benefits at 9%. The plaintiff does not make a claim for interest on past economic loss, because he has received Centrelink payments since the accident.

[84] The special damages that are agreed are those that are set out in the schedule which is Ex 14. The refunds to hospitals total the sum of $19,114. The Health Insurance Commission seeks to recover Medicare benefits in the sum of $2,677.40. The balance for the other special damages listed on Ex 14 is $1,241.69 for which interest should be allowed at 5% for 4.7 years, making the sum of $290.

[85] The plaintiff claims past care of 25 hours supplied by Mrs Good and 490 hours for the care provided by Mr Shaun McKinnon which was supported by the plaintiff's evidence and that of Mrs Good and Mr Shaun McKinnon. This total amount of 515 hours should be allowed at $15 per hour, making the sum of $7,725. Interest on past care calculated at 5% for 4.7 years is $1,815.

[86] The plaintiff sought a global sum of $2,000 for future special damages, but no evidence was offered to support such a claim.

[87] The damages which have been assessed can be summarised as follows:

Damages for pain and suffering and the loss of amenities of life	$45,000.00
Interest (on $15,000 at 2% for 4.7 years)	1,410.00
Past economic loss ($150 net per week for 4.7 years)	36,660.00
Loss of past superannuation benefits (at 8%)	2,930.00
Loss of future earning capacity ($150 net per week for 15 years)	83,250.00
Loss of future superannuation benefits (at 9%)	7,495.00
Refunds to hospitals	19,114.00
HIC benefits	2,677.40
Other special damages (as per Ex 14)	1,241.69
Interest on other special damages (at 5% for 4.7 years)	290.00
Past care (515 hours @ $15 per hour)	7,725.00
Interest on past care (at 5% for 4.7 years)	1,815.00
Total	**$209,608.09**

Order

[88] It follows that the order which should be made is that the plaintiff's claim be dismissed.