SUPREME COURT OF QUEENSLAND

CITATION:	*Townsend v BBC Hardware Ltd* [2003] QCA 572
PARTIES:	**DOUGLAS VICTOR TOWNSEND** (plaintiff/respondent) **v** **BBC HARDWARE LIMITED** ACN 000 003 378 (defendant/appellant)
FILE NO/S:	Appeal No 2037 of 2003 SC No 320 of 2000
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	19 December 2003
DELIVERED AT:	Brisbane
HEARING DATE:	20 October 2003
JUDGES:	McMurdo P, McPherson JA and Wilson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Allow the appeal and instead of judgment for the respondent in the sum of $341,450 substitute the sum of $292,173.53 together with costs to be assessed on an indemnity basis** **2. The respondent is to pay half the appellant's costs of this appeal to be assessed**
CATCHWORDS:	CONTRACT – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – OTHER CASES – where respondent injured because saw was defective - where learned primary judge concluded appellant had duty, implied in the contract to ensure saw was fit and safe - whether primary judge erred in finding that there was any such implied obligation on the part of the appellant under the contract BAILMENT – IN GENERAL – PARTICULAR CASES - where agreement between parties constituted a contractual bailment for supply of services CONTRACT – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – OTHER CASES – where appellant counterclaims -

whether primary judge erred in not finding an implied term of the contract that the respondent or his partnership was required to report the defective saw to the appellant

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – APPORTIONMENT OF RESPONSIBILITY AND DAMAGES – GENERALLY - whether contributory negligence of 15 per cent was manifestly too low

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES - GENERAL PRINCIPLES - whether general damages award is manifestly excessive

DAMAGES – MEASURE OF DAMAGES – PERSONAL INJURIES – LOSS OF EARNINGS AND EARNING CAPACITY – whether the learned primary judge's assessment for pre-trial loss of income, interest and superannuation award was not supported by the evidence

Law Reform Act 1995 (Qld), s 10

Astley & Ors v Austrust Ltd (1999) 197 CLR 1, followed
BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) 52 ALJR 20, followed
Derbyshire Building Co Pty Ltd v Becker (1962) 107 CLR 633, followed
Elford v FAI General Insurance Co Ltd [1994] 1 Qd R 258, considered
Hochmuth v Hyne & Son Pty Ltd [1996] QDC 049; DC No 1842 of 1994, 25 March 1996, considered
Lister v Romford Ice & Cold Storage Co Ltd [1957] AC 555, distinguished
Wylie v The ANI Corporation Limited [2002] 1 Qd R 320, considered

COUNSEL: A J Moon for the appellant
C A White for the respondent

SOLICITORS: Quinlan Miller & Treston for the appellant
Roberts Nehmer McKee for the respondent

[1] **McMURDO P:** The appellant, the defendant at trial, was in the business of selling roof trusses. It orally contracted with a firm trading as D & R House Framing, run by the respondent in partnership with his wife, to fabricate roof trusses at the appellant's premises in Kirwan, Townsville. Under the contract, the appellant provided all the plant and equipment used to make the roof trusses. The learned primary judge found it was an implied term of the contract that the appellant would provide reasonably safe plant and equipment and that the appellant breached that implied term when a circular saw, with neither a guard nor an automatic returning device, moved forward and injured the respondent's left hand. His Honour ordered

the appellant to pay the respondent damages of $341,450 together with costs, and dismissed the appellant's counterclaim.

[2] The appellant now concedes that it was negligent in not providing a reasonably safe saw, but claims that the primary judge erred in finding that there was any such implied obligation on the part of the appellant under the contract; in not finding an implied term of the contract that the respondent or his partnership was required to report the defective saw to the appellant; that contributory negligence of 15 per cent apportioned to the respondent was manifestly too low; and that the damages award was manifestly excessive.

Background facts

[3] In 1974, the respondent was employed by Wilson Hart as a labourer in a business manufacturing roof trusses in Garbutt, Townsville. In about 1983, Wilson Hart told the respondent that, if he wished to continue to do their work, their relationship must change from employee to subcontractor. Wilson Hart later sold the business to McEwan's, who sold to Campbells, who in turn sold to Hardware House who then sold to the respondent. During these changes in ownership, the respondent remained a subcontracting manufacturer of roof trusses. In the early 1990s, the business moved from Garbutt to Kirwan.

[4] The contract between the appellant and the respondent was wholly oral. The learned primary judge found that the parties agreed that the respondent and his partner would supply the necessary labour to cut and assemble roof trusses using the appellant's plant and materials.[1]

[5] It was common ground on this appeal that the respondent was injured because the appellant's saw was defective in that for some years it had no safety guard nor return mechanism and, for 12 months preceding the injury, it had demonstrated a propensity to move freely along its radial arm. The appellant did not have in place a system of regular safety inspection of the plant and machinery it provided to the respondent's firm.

[6] The saw had been in use in the business for many years before the respondent's injury and the respondent was never responsible for its maintenance or service; this was always done by the current owner of the machinery. An officer of the appellant said had he been told the saw was dangerous he would have had it repaired.

[7] His Honour was unpersuaded there was any contractual obligation on the respondent to draw to the appellant's attention the defective state of the equipment which had persisted over so many years and must have been patently obvious to any person qualified to inspect and maintain the equipment.[2]

Was there an implied term under the contract that the appellant would provide reasonably safe plant and equipment?

[8] The appellant contends that because the respondent's firm had the largely exclusive use of the machinery, there was no implied duty requiring the appellant to maintain the plant and equipment. It submitted at trial and on appeal that because the parties were not in a master-servant relationship, a term could only be implied in the contract if it was within the principles set out in *BP Refinery (Westernport) Pty Ltd*

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1 *Townsend v BBC Hardware Ltd* [2003] QSC 015; SC No 320 of 2000, 28-29 January 2003, [13].

2 Above, [16].

v Hastings Shire Council;[3] that there was no reason why the primary judge should imply a term that the appellant would provide safe plant and equipment rather than terms that the respondent was responsible to keep the machinery in good condition and that the appellant was only required to repair equipment which the respondent reported as defective.

[9] Although the respondent did not plead bailment, as McPherson JA pointed out in argument, that was the effect of the contractual relationship between the parties. The appellant as bailor was required to ensure the saw was safe and fit for use in roof truss manufacture: see *Derbyshire Building Co Pty Ltd v Becker*;[4] *Cottee v Franklins Self Serve Pty Ltd*;[5] *Carter on Contract*[6] and *Palmer on Bailment*.[7] On the facts here, the learned primary judge was plainly correct in concluding that the appellant had a duty, implied in the contract under which he supplied the saw to the respondent for the manufacture of roof trusses, to ensure the saw was fit and safe for the purpose for which it was intended.

[10] The appellant's first ground of appeal fails.

The appellant's counterclaim

[11] The appellant counterclaimed that it was an implied term of the contract between the parties that the respondent:

> "16. … would conduct the fabrication of roof trusses at the premises:-
>
> (a) With due care and skill;
>
> (b) In such a fashion as not to cause injury to any person, including himself;
>
> (c) In such a fashion as to take reasonable care for his own safety.
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> 17. In breach of the express and implied terms of the contract the [respondent] failed to carry out his duties with due care and skill …
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> 18. By reason of the [respondent's] said breaches the [appellant] has suffered loss and damage in such amount of the [respondent's] damages as the Court finds was caused by the [respondent's] said breaches and the [appellant] claims to set off the amount of its said loss against such amount of damages for breach of contract, if any, as may be payable to the [respondent] by the [appellant]… ."

[12] The counterclaim as pleaded does not seem to have been clearly argued at the trial and the learned primary judge made no order concerning it. A few days after judgment was delivered, the parties requested that the case be mentioned and agreed that the judge should formally dismiss the counterclaim of which his Honour was, until then, unaware. In doing so, his Honour noted that he had not dealt with the counterclaim and the contention raised that day by counsel for the respondent because he did not understand it had been relied upon at trial.

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3 (1977) 52 ALJR 20.

4 (1962) 107 CLR 633, 645, 649, 656-657, although some support is given to the appellant's contention by observations of Dixon CJ at 642.

5 [1997] 1 QdR 469, 477, 479-480.

6 Butterworths Australia 2002, [30-170].

7 Law Book Company Limited, 2nd ed, 1991, 1241.

[13] The appellant now contends that the learned primary judge erred in failing to find there was an implied term in the contract that the respondent would report to the appellant any defect or problems with the machinery used by the respondent, including the saw. The difficulty for the appellant is that the pleadings did not clearly raise that claim; rather they seem to raise a claim akin to that implied in a master-servant relationship requiring an employee not to negligently perform work so as to render his employer liable in negligence or contract to suffer economic loss, as applied in *Lister v Romford Ice & Cold Storage Co Ltd.*[8]

[14] In those circumstances, I doubt whether the appellant should now be permitted to argue this ground for the first time on appeal, but in any case both the pleaded contention and the contention raised on appeal are without substance on the facts here. As to the pleaded claim, unlike *Lister*, the respondent and appellant were not employer and employee. Nevertheless, the agreement between the parties constituted a contractual bailment of machinery for the supply of services, which can ordinarily be expected to include a number of implied obligations on behalf of the bailee, namely that his services will be provided with due care and skill[9] and the labour, service or goods supplied will be reasonably fit for their purpose.[10] The respondent was obliged under his firm's contract with the appellant to produce roof trusses which were safe and reasonably fit for their purpose.[11] A bailee's liability for breach of such an implied term may extend to injury or damage to persons or property arising from a breach of that term,[12] for example, if someone bought from the appellant roof trusses negligently constructed by the respondent, which collapsed and injured the buyer or others. The legal relationship between bailor and bailee, unlike that between employer and employee, is not ordinarily one which requires the bailor to take any legal interest in ensuring that the bailee takes reasonable care for the bailee's own safety when using the bailor's machinery in a contract for the supply of services and goods to the bailor. That, of course, does not detract from the bailor's clear obligation to ensure the machinery provided is safe and fit for the purpose. Dixon CJ's discussion concerning the relevance of the bailee's negligence in *Derbyshire*[13] must be read in the light of the High Court's subsequent ruling in *Astley & Ors v Austrust Ltd*,[14] that contributory negligence does not apply to breaches of contract. There is no reason to imply into this contract a term that the respondent bailee was obliged to take reasonable care for his own safety in using the appellant bailor's unsafe saw.

[15] As to the appellant's contention raised on the appeal, it may well be that if the appellant regularly inspected the machinery to ensure it was in good and safe working order and the defects in the saw which caused the respondent's injuries suddenly arose between these inspections, then a term would be implied requiring the respondent to report any defect to the appellant. But here, as the learned primary judge noted, the defects in the saw leading to the respondent's injuries had been present for many years. Even if a term that the respondent was required to report the defective machinery to the appellant in the circumstances here were to be implied, the appellant could not defeat the respondent's claim for damages for

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8 [1957] AC 555.
9 *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145, 193-194.
10 *Palmer on Bailment*, fn 7, 913.
11 Cf *Glass Pty Ltd v Rivers Locking systems Pty Ltd* (1968) 120 CLR 516.
12 See, eg, *Smith v Eric S Bush* [1989] 2 All ER 514, 519-520.
13 Above, fn 4, 642.
14 (1999) 197 CLR 1.

breach of contract simply by proving the breach of another implied term which was a cause of the respondent's injuries and to reason that therefore the damages resulting from the appellant's counterclaim offset the respondent's damages in his claim. Had the appellant put forward such a case at trial and established that the respondent breached an implied term in not reporting the unsafe saw, it would have been necessary for the trial judge to compare the competing breaches to determine which cause was the dominant, effective real or actual cause of the respondent's injury. On the undisputed facts found by the learned trial judge, the primary cause of the respondent's injuries was the appellant's breach in failing to provide and maintain the saw in a safe condition: see *Wylie v The ANI Corporation Limited*.[15]

[16] It follows that this ground of appeal also fails.

Contributory negligence

[17] The High Court in *Astley*[16] held that an award of damages for breach of contract may not be reduced under apportionment of liability legislation for contributory negligence where a claimant has succeeded in contract. The effect of *Astley* has been statutorily modified by amendments in 2001 to the *Law Reform Act* 1995 (Qld)[17] but because the respondent commenced his action before those provisions came into force, s 10 *Law Reform Act* 1995 (Qld) does not apply here.[18] This case falls within that narrow window of time which means that the respondent's contribution to his own injuries by failing to take reasonable care does not affect his right to recover damages for the appellant's breach of contract. The respondent undoubtedly behaved irresponsibly in not demanding that the appellant repair the saw, if not for his own safety then for that of his employees, but *Astley* means it is pointless to further consider the appellant's contention that the learned primary judge erred in apportioning the respondent's liability for his injuries at only 15 per cent.

Damages

(a) General Damages

[18] The appellant contends that the general damages award of $80,000 was manifestly excessive and should be reduced by $20,000 with a consequential amendment to the interest award.

[19] The respondent was 45 at the time of the injury on 14 April 1997 and 51 at trial, with a life expectancy after trial of 32 years. The saw cut through the base of his left thumb, index, middle and ring fingers; he is right hand dominant. His thumb and the tip of his ring finger were surgically reattached. His index and middle fingers, which were amputated through the distal joints, were repaired with skin grafting. He was discharged from hospital after 11 days and returned daily for wound dressings and splint applications. In May 1997, he returned to hospital for four days for surgical tendon repair. When this wound healed he had physiotherapy and occupational therapy. The next year he had surgical treatment for joint contracture in the web space between his thumb and index finger.

[20] He completed rehabilitation to strengthen and desensitize his left hand from pain. He has been left with a weak thumb and left hand and cannot hold objects or

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15 [2002] 1 QdR 320, [27]-[29], [48]-[50].

16 Above, fn 14.

17 *Law Reform (Contributory Negligence) Amendment Act* 2001, No 65, s 5.

18 Above, s 21.

weights for more than a few minutes. He has phantom pain in the tip of his left index finger and a numbness over the stump of that finger. He suffers pain at night which sometimes requires medication. The remnants of his index finger and his middle finger ache when he grips or manipulates objects. The left ring finger is slightly bowed and has lost movement in one joint. He has a loss of range in movement in the left wrist. His left hand is deformed and cosmetically unattractive.

[21] He is no longer able to play squash or golf as he did prior to the accident. He still enjoys recreational fishing although his capacity to use his left hand is significantly diminished.

[22] The parties have referred the Court to a number of District Court decisions giving general damages awards for like injuries, including *Hochmuth v Hyne & Son Pty Ltd*,[19] *Collin v Lalley*[20] and the Trial Division decision of *Wegrzyn v Carlton & United Breweries (Queensland) Ltd*.[21] These authorities suggest that the award of $80,000 was too high and that an appropriate award in this case was in the vicinity of $65,000. Consistent with his Honour's reasoning, $35,000 should be apportioned as the pre-trial amount and interest on that amount at 2 per cent for 5.66 years would be $3,962 instead of the $5,660 awarded.

[23] Whether it is appropriate for this Court to alter the primary damages award in accordance with the principles set out in *Elford v FAI General Insurance Co Ltd*[22] will turn on whether there is substantial merit in the appellant's other contentions as to the excessiveness of the damages award.

(b) Damages for pre-trial loss of income

[24] The appellant contends his Honour's assessment of $106,532.58 as damages for pre-trial loss of income and the consequential interest and superannuation award were not supported by the evidence.

[25] The respondent's case was that, despite his inability to actively work as a roof trusser because of his injury, he continued in the partnership until November 1997. In September that year, the appellant decided to cease manufacturing trusses. The respondent conceded in evidence that, irrespective of the injury, he would have stopped his business of making roof trusses in November 1997 and looked for other employment.

[26] His Honour found the respondent was unable to do very much physical activity for about six months after the accident but by the trial he was able to work, as long as he was not required to use his left hand for more than about half an hour. He could drive, although after a short time his left hand became painful. He applied for many jobs but "perhaps because of his age, and/or because the nature of his injury was known in the industry in the Townsville district generally, he did not manage to secure an interview with anybody who might have available jobs that he could perform with his physical disability".[23] He has a very significant restriction to his left wrist and hand. He can safely lift and carry 18 kilograms if he uses both hands. He uses his left hand to support the load on his palm rather than gripping it with his

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19 [1996] QDC 049; DC No 1842 of 1994, 25 March 1996.
20 [1998] QDC 054; DC No 2745 of 1995, 2 March 1998.
21 [1997] QSC 146; SC No 443 of 1994, 28 August 1997.
22 [1994] 1 QdR 258, 265.
23 Above, fn 1, [49].

fingers. The grip strength of his left hand is considerably less than that of his right and he has a lack of endurance for sustained gripping. He no longer has the physical capacity to do the work he did before the accident and is unable to work in industrial labouring positions. His Honour recognised that the respondent had some prospect of obtaining employment, although even jobs driving motor vehicles or fork lifts for long periods were not open because of the weakness in his left hand. But for the accident, it was likely the respondent would have obtained employment supervising and making roof trusses or elsewhere in the construction industry.

[27] For the year ended 30 June 1996, the respondent and his wife shared the partnership profits equally, each taking $32,756.48 and in the following financial year each received $38,039.45. Because there was no evidence that partnership profits decreased after the accident, the respondent did not claim lost income until the partnership ceased in November 1997. His Honour noted that the combined partnership profits seemed to have been generated from the respondent's activities rather than those of his wife, apart perhaps from some clerical work. His Honour regretted the absence of analysis of the partnership figures and determined that, on the evidence, it was necessary to assess the pre-trial loss of income by adopting a broad brush approach, noting that the agreed post-trial loss of earning capacity of $200 per week seemed "a very generous concession" on the part of the respondent. After 1 October 2000, the respondent assisted his wife in a gift shop which produced very little income. His Honour found that because of the respondent's experience and application in the building industry, he would, but for his injury, have earned more than the basic wage from the time of the closure of the roof trussing business in November 1997 until trial, a period of 5.25 years. His Honour had regard to the average relevant awards for the minimum basic wage ($393.90 per week before tax); a builder's labourer ($468.35 per week before tax) and a storeman and packer ($434.15 per week before tax). His Honour inferred that because of the respondent's drive, experience and initiative he would probably have earned 10 per cent more than the average of those award rates and adopted a weekly figure of $475.34 before tax ($390.23 after tax) as being the likely pre-trial weekly loss which, for 5.25 years, became $106,532.58.

[28] The appellant contends that the respondent's case was that once he commenced working fulltime with his wife in the gift shop in October 2000, he claimed only $200 per week; his Honour took a more generous approach than was claimed or argued and the appellant was denied the opportunity of testing this additional claim. This contention is supported by the respondent's further supplementary statement of loss and damage in which he claimed past economic loss of $700 per week until October 2000 and then an after tax weekly loss of income of $200 per week. The respondent did not depart from this claim in his oral submissions at trial or indeed in his submissions on appeal.

[29] Whilst understanding his Honour's concern as to whether the respondent was claiming all to which he may have been entitled, if his Honour was inclined to reject the claim of $200 nett per week in favour of the greater sum of $390.23 nett per week, he should have given the appellant the opportunity to meet that contention. In these circumstances, the respondent should not have been awarded any greater amount for the period after 1 October 2000 until trial than the $200 nett per week claimed. It follows that the award for past economic loss should have been limited to three years at $390.23 per week ($60,875.88) until 1 October 2000, and 2.25 years at $200 per week ($23,400), a total of $84,275.88 instead of the $106,532.58

awarded. The damages award for past economic loss should be reduced by $22,256.70.

[30] Loss of superannuation on this amount at seven per cent is $5,899.31 instead of the $9,083.50 awarded.

[31] It was common ground that interest can only be awarded on $46,690.76 of the past economic loss award. To this sum must be added the figure for lost superannuation of $6,081.30 ($52,772.06); interest at six per cent for 5.25 years on this amount is $16,623.20 instead of $23,760.79.

[32] Consistent with these reasons, the damages award should be reduced by $49,276.48 an amount which is significant enough when compared to the original award of $341,450 to require this Court's interference, consistent with the principles in *Elford*.

[33] I would allow the appeal and instead of judgment for the respondent in the sum of $341,450 I would substitute the sum of $292,173.53 together with costs to be assessed on an indemnity basis. The appellant was unsuccessful on the appeal against liability but successful on the appeal against quantum. The respondent should pay half the appellant's costs of this appeal to be assessed.

[34] **McPHERSON JA:** Mr Moon of counsel for the appellant submitted that the defendant could not be made legally responsible for the plaintiff's injuries unless a term could be implied to that effect in the agreement between the parties; and that no such term was capable of being implied consistently with the principles and decision of the Privy Council in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266. However, in *Gemmell Power Farming Co Ltd v Nies* (1935) 35 SR (NSW) 469, 475, Jordan CJ said that:

> "**…** when one person for value supplies a chattel to another to be used for an agreed or stated purpose, or for a purpose indicated by the nature of the chattel, he impliedly promises, in the absence of some provision to the contrary, that it is reasonably fit for such use."

[35] The principle laid down there by Sir Frederick Jordan was adopted and applied by the High Court in *Derbyshire Building Co Pty Ltd v Becker* (1962) 107 CLR 633, 645, 649, 659, in circumstances not unlike those in this case, in which a power saw was lent to the plaintiff to enable him to carry out fencing work as an independent contractor for the defendant. See also *Cottee v Franklins Self Service Pty Ltd* [1997] 1 QdR 469, which concerned the provision of a shopping trolley at the defendant's self-service store at which the plaintiff had bought goods.

[36] In *Becker's* case, Dixon CJ accepted (107 CLR 633, 642) that, because the agreement was that the plaintiff would use the defendant's power saw for his fencing, the bailment of the saw was not gratuitous. The same is true here. The defendant provided the workshop, and supplied timber and equipment in the form of electrically driven saws, and the plaintiff as independent contractor supplied the labour which cut and made up the timber into roof trusses for which the defendant paid at piecework rates. The parties therefore had a common interest in the transaction. It can make no difference whether or not in strictness a bailment of the saw or saws was constituted. The principle adopted from Sir Frederick Jordan in *Becker's* case is more widely expressed than that, although in most cases a bailment of a chattel will no doubt be involved.

[37] In the present case, the saw was attached to a work bench presumably for the purpose of stability and convenience in using it. There is no suggestion that the effect was to attach the saw, or the bench, to the floor as a permanent fixture, and it is improbable that there was any intention to do so. Indeed, the saw in question was one that had been shifted from other premises when the defendant or a previous owner had moved his business. In any event, the New Zealand Court of Appeal in *Southland Harbour Board v Vella* [1974] 1 NZLR 526 applied the same principle to a form of mechanical meat-loader, described as a very substantial and heavy machine, which was firmly secured to the floor see ([1974] 1 NZLR 526, 528). The Court of Appeal in that case referred to *Derbyshire Building Co Pty Ltd v Becker* (1962) 107 CLR 633 and to *Francis v Cockerell* (1870) LR 5 QB 701 as justifying implication of a term of reasonable fitness for purpose of the chattel or the premises provided.

[38] The result here is that Mr Moon's principal point on appeal fails. The defendant was liable for the plaintiff's injuries in contract as well as tort. That being so, his claim for damages in contract was not at the relevant time subject to reduction under the legislation on account of contributory negligence on his part. That has been decided in several instances involving the hire, loan or use of chattels which turned out to be defective, including *A S James Pty Ltd v C B Duncan* [1970] VR 705 and in *Southland Harbour Board v Vella* [1974] 1 NZLR 526 itself. The latter decision followed *Harper v Ashton's Circus Pty Ltd* [1972] 2 NSWLR 395 in treating the issue of contributory negligence as depending on whether the damage suffered was caused by the defendant's breach of contract or by the plaintiff's own negligent act or omission, which is in substance the rule adopted in *Astley v Austrust Ltd* (1999) 197 CLR 1, which the learned trial judge applied to the plaintiff's contractual claim for damages in the present case.

[39] Having found the defendant to have been in breach of an implied term of its contract with the plaintiff, his Honour nevertheless went on to apportion those damages if recoverable in tort. Had he been at liberty to do so, he would have been prepared to reduce the plaintiff's damages on account of his own contributory negligence by 15%. Such, however, was not the case, and there is no doubt that it was the defendant's breach of contract that was the cause of the injury and loss here. On the other hand, I consider that the award of damages is in some respects excessive, and I agree with what the President has said on that subject in her reasons. The appeal should be allowed by varying the amount for which judgment was given by reducing it from $341,450.00 to $292,173.53. The respondent should, as the President proposes, pay half of the appellant's costs of the appeal.

[40] **WILSON J:** I agree with the reasons for judgment of the President, with the qualifications contained in the reasons for judgment of McPherson JA. I agree with the orders proposed by the President.