SUPREME COURT OF QUEENSLAND

CITATION:	*Daly v D A Manufacturing Co P/L & Anor* [2002] QSC 308
PARTIES:	**STEPHEN DENNIS DALY** (plaintiff) **D A MANUFACTURING CO PTY LTD** ACN 010 219 717 (first defendant) **LETZBUILD PTY LTD** ACN 070 914 395 (second defendant)
FILE NO:	7502 of 1999
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 October 2002
DELIVERED AT:	Brisbane
HEARING DATES:	13, 15 August 2002
JUDGE:	Muir J
ORDER:	**Judgment for the plaintiff on the claim and counterclaim in a sum to be agreed between the parties and in default of agreement to be determined by the court.**
CATCHWORDS:	TORTS – NEGLIGENCE – where plaintiff fell from a ladder without appropriate footings on a building site – whether contributory negligence by plaintiff – measure of damages *Law Reform Act* 1995, s 13 *Johnson v Kelemic* (1979) FLC 90-675 *Husher v Husher* (1999) 197 CLR 138 *Lebon v Lake Placid Resort Pty Ltd* [2000] QSC 49 *Norman v Sutton* (1989) Aust Torts Reports 80-282 *Podrebersek v Australian Iron & Steel Pty Ltd* (1885) 59 ALR 529 *Siamis v Barlo* (1987) 48 SASR 469 *Van Gervan v Fenton* (1992) 175 CLR 327
COUNSEL:	S C Williams QC with P J Howard for the plaintiff G W Diehm for the first defendant
SOLICITORS:	Primrose Couper Cronin Rudkin for the plaintiff

Michael Stewart solicitor for the first defendant

Introduction

[1] The plaintiff, a self-employed builder, who carried out his occupation through Daly Constructions (Qld) Pty Ltd, a company owned and controlled by him, was injured on 28 August 1997 when a ladder on which he was standing slipped causing him to fall from it to the ground. The accident occurred on a building site whilst the plaintiff was in the process of installing panel ties between concrete wall slabs in a concrete tilt up construction. At that time, the floor slab had been poured and pre-cast concrete walls had been erected on poured concrete footings surrounding the slab. Between the inside edge of each panel and the slab was a depression, some 200 to 250 mm deep and 1300 mm wide.

[2] The installation of the panel ties involved the placement of steel plates across panel joints so as to lock the panels together. The plates, which had holes drilled in them to correspond with ferrules in the wall panels, were positioned over the ferrules in the panels and bolted to the panels. Experience on the building site had shown that the holes in the plates did not always match the spacing of the ferrules. In such cases, the holes in the plates need to be increased in size or a new hole or holes had to be made.

[3] Immediately prior to the accident, the plaintiff had ascended the ladder with a plate in order to ascertain whether it needed alteration. He found that it did and dropped it to the ground, advising his father, who was standing near the foot of the ladder, of the modification required. He remained on the ladder with his feet about 4 metres from the ground. The foot of the ladder was resting on the concrete slab about 1500 mm out from the wall. The height of the tie was about 5½ metres from the ground and the top of the ladder was positioned just underneath the tie, which, in turn, was about two metres from the top of the panels.

[4] The plaintiff, who does not recall making any sudden or distinct movement on the ladder, felt the ladder slipping away from the wall. He moved to protect his head and fell to the ground, injuring his right ankle.

[5] The wall at which the accident occurred was the last wall of the building to be fitted with ties. On most if not all of 40 or so prior occasions on which ties were fitted, the plaintiff had mainly used his ladders owned or hired by Daly Constructions. The feet of these ladders were also positioned on the slab. When the plaintiff came to place the subject tie, a ladder, the property of the first defendant, was already placed in a position suitable for work on the tie and he used it.

[6] He did not notice anything unusual about the ladder prior to mounting but, after the accident, his father pointed out to him that there were no rubbers or grips on the bottom of the feet of the ladder. It was also pointed out to him, and he observed, score or scuff marks left by the feet of the ladder as it moved across the slab away from the wall.

[7] It is common ground that the ladder was owned by the first defendant, brought onto site by an employee of the first defendant and placed in position by an employee of the first defendant. The first defendant was the contractor engaged by the owner to erect the structural steel framing for the building. The evidence was that on this building site, as on others, workmen make use of any conveniently located ladder irrespective of ownership. I find that the first defendant knew, or ought reasonably to have known, that the ladder was likely to be used by other workmen on site including the plaintiff.

The plaintiff's case against the first defendant

[8] The plaintiff's pleaded case alleged negligence on the part of the first defendant in providing a ladder which did not have "rubbers" at its "bottom" which "caused the ladder to slip" and failing to warn the plaintiff that the ladder was without rubbers. There were also alleged breaches of statutory duty but they were not persisted in. The plaintiff's claim against the second defendant was settled.

The first defendant's submissions on liability

[9] Mr Diehm, who appeared on behalf of the first defendant, contended that –

(a) The fact that the ladder was not fitted with rubber feet did not lead to the conclusion that it was defective;

(b) Even without the rubber feet the coefficient of friction provided by the feet of the aluminium ladder was adequate;

(c) The ladder should have been secured by mechanical means, being held by an assistant at the bottom, or by being placed inside the depression between the slab and the wall.

[10] The evidence, which I accept, is that had the ladder been placed inside the depression, its angle would have been too steep for safety. Apart from that, there was evidence that the surface of the depression was uneven. That unevenness would constitute another risk factor were the ladder to be positioned in the depression. I am of the view also that the submission that the ladder should have been held in place by another person is rather unworldly. Such a precaution does not accord with practice on building sites unless there are signs of obvious instability. There were none in this case.

[11] It was further submitted that safe work practices required the use of scaffolding or a scissor lift. The evidence was that a scissor lift would have been very difficult, if not impossible, to use in the subject space and because of the ground configuration. Scaffolding could have been used, although its use would have been inconvenient, but there was no reason for the plaintiff to think at the time that there was any significant risk attaching to the use of ladders.

Expert evidence in relation to causes of the accident and appropriate safety precautions

[12] An engineer with extensive qualifications in the area of workplace health and safety, Mr King, gave evidence on behalf of the plaintiff. He drew attention to the content of s 2.5.3 of Australian Standard 1892.1:1996 which provides –

> " Feet shall be fitted to the bottom of each style in the bottom section of the ladder and may be fixed or hung. Feet shall comply with the following requirements:
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> (a) the feet shall be manufactured from or faced with a material which will resist deformation and slipping (see Clauses 9.2.9 and 9.3.10).
>
> (b) the feet or surfacing material shall be securely fixed at the styles but may be removable for renewal."

[13] Mr King said that feet of commercial ladders tend to be made of a variety of materials, often described as "rubber". In his experience, such feet had a degree of pliability so that they would "conform somewhat to the underlying surface" on which the ladder stood. In his opinion, a ladder with a rubber or synthetic foot would provide a much better grip than one with an uncovered aluminium foot. He conducted some tests which provided some general support for his opinion in that regard. He concluded that if the ladder had been fitted with "rubber" feet ("rubber" being used in the sense of a synthetic surface designed to provide grip), that would have provided "a significant safety margin, given that the feet would still have to move … 700mm further out before the coefficient of friction was overcome". In that case, he concluded, it would become apparent to a person on the ladder that something was moving before the ladder finally collapsed.

[14] The plaintiff, uneventfully, had used a ladder in his tie fixing operations for about two days prior to the accident. The only material difference between the use of ladders on prior occasions and the use of the subject ladder on this occasion was that the former had "rubber" feet whereas the latter did not. That rather supports the conclusion that the absence of rubber feet caused the ladder's failure.

[15] Mr Gilmore, an engineer, who was called by the first defendant to give evidence, conceded in cross-examination that an extension ladder without feet on a building site "is clearly defective" and would be contrary to Australian Standards and "good practice".

[16] There was debate in the course of the oral evidence about the friction generated by a ladder with aluminium feet on a concrete slab as opposed to one with rubber feet and the relative safety aspects of the two. Mr Gilmore expressed the view that the aluminium feet "might bite in quite well to the concrete". He observed, however, that it was common for the feet on ladders to be rounded as opposed to sharp. He further agreed that if offered two ladders for use on a building site, one with feet and one without, he would take the former. The evidence concerning the way the ladder moved across the slab and the score marks left by it suggest that the feet of the subject ladder were not sharp and did not bite into the concrete.

Conclusions on liability and contributory negligence

[17] It is plain that the first defendant owed the plaintiff a duty of care. The risk of injury to persons of the class of which the plaintiff is a member (members of various building trades) was reasonably foreseeable. A reasonable contractor in the position of the first defendant would have taken steps to ensure that any ladder positioned so as to provide access to parts of the building site, was in a good order and condition. The provision of a ladder which complied with normal industry standards was a straightforward and obvious precaution to take against the sort of accident which in fact occurred. It was not suggested on behalf of the first defendant that it was regarded as normal, let alone acceptable, in the building industry for ladders not to be fitted with rubbers on their feet. I thus find that the first defendant was in breach of its duty of care to the plaintiff. I find also that had the ladder been supplied with "rubber" feet the accident, probably, would not have occurred.

[18] I do not find contributory negligence on the part of the plaintiff. In *Podrebersek v Australian Iron & Steel Pty Ltd*[1], it was said in the judgment of the Court –

> "The making of an apportionment as between a plaintiff and a defendant of their respective shares in the responsibility for the damage involves a comparison both of culpability, ie. of the degree of departure from the standard of care of the reasonable man (*Pennington v Norris* ...) and of the relative importance of the acts of the parties in causing the damage. ... It is the whole conduct of each negligent party in relation to the circumstances of the accident which must be subjected to comparative examination."

[19] The first defendant brought a defective ladder on site. Detection of the defect by tradesmen likely to use the ladder in the course of their activities on a busy building site was unlikely. It was to be expected that a tradesman such as the plaintiff would, without making an inspection of the ladder, use it to gain access to the position of the subject tie. The mere fact that the ladder had been placed in position for such access would suggest to persons such as the plaintiff that it was ready and suitable for use. The plaintiff, having regard to his prior experience on other building sites over a period of years and on this building site, had no reason to suspect that the ladder was potentially unstable.

The plaintiff's injuries

[20] After his accident, the plaintiff was taken to the Tweed District Hospital where he was found to have a comminuted fracture of his left calcaneus. Dr Scott Young described his injury in these terms:

> "Essentially, he had a central depression fracture of his posterior facet that was split. He also had loss of his bowler's angle and his heel height was decreased considerably with lateral splaying of his heel width."

The injury was operated on by Dr Scott Young, who performed an open reduction internal fixation and inserted a bone graft from his left iliac crest into the area of deficit.

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1 (1885) 59 ALR 529.

[21] The plaintiff was in hospital for about six days. On returning home, he was driven to the work site daily by his wife. In the first week he was limited to observing the works from his vehicle and issuing some instructions. He then took a week's holiday to Vanuatu where his wounds became infected, leading to his re-admission to hospital on 23 October 1997. He was discharged on 29 October 1997. On 26 November 1997 he was admitted again to hospital for removal of the metal plate and infected tissue. He was then discharged a week later.

[22] Dr Parsons, orthopaedic surgeon, gave evidence that the plaintiff –

(a) Has a 25% permanent impairment of his left lower limb equivalent to a 10% whole person impairment;
(b) It is possible but not likely that the plaintiff's condition will deteriorate with aging;
(c) The plaintiff is likely to be able to continue as a self-employed builder;
(d) A joint fusion could benefit the plaintiff if his pain increased to a point at which he was unable to work and his quality of life was substantially affected. The operation would stand an 80% chance of removing his pain but would not restore freedom of movement;
(e) There would be a substantial risk of complications following any such further surgery.

[23] In oral evidence, Dr Parsons expressed the view that if any such further operation proved unsuccessful, the plaintiff could be left in a worse condition than he is at present and that, on balance, he would not advise the operation.

[24] Dr Fraser, orthopaedic surgeon, whose report of 13 April 2000 was admitted without objection, gave the following opinions –

(a) The plaintiff has a permanent partial disability of 15% of efficient function of the left lower limb which equates to a permanent partial disability of 6% of the whole person;
(b) If the plaintiff's symptoms become intolerable they can be alleviated by a subtalar fusion. That would necessitate the plaintiff being absent from work for six months;
(c) Although the plaintiff is able to continue work as a builder, his disability "would make it difficult for him to participate in indoor cricket, football and water skiing".

Past economic loss

[25] Past economic loss was agreed in the sum of $7,517.

Future economic loss

[26] The plaintiff conducts his building business through Daly Constructions (Qld) Pty Ltd of which he is sole director and shareholder. Any losses which the company sustains are thus able to be treated as the plaintiff's losses.[2]

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2 *Husher v Husher* (1999) 197 CLR 138.

[27] It was submitted that future economic loss should be assessed on one of two bases. The first basis of assessment was that the plaintiff had lost some 48 hours per week of productive work and had suffered a loss of productivity for the 40 hours per week actually worked by him which equated to a loss of 13 hours per week. Taking the total loss of 53 hours per week at labourer's rates of $25 an hour produced a gross loss of $1,325 per week, and a net loss of $682 which, assuming that the plaintiff would have worked to age 60, produced a net present value of $514,000.

[28] The alternative basis of claim was expressed as follows –

> "(a) Ignoring productivity losses, the Plaintiff's weekly work is reduced from 80 hours plus to 40 hours tops.
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> . Even at the labourers' rate that is a loss of $25.00 x 40 hours) $1,000 p.w. gross;
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> . even at the top marginal tax rate his loss is $515.00 net per week;
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> . over a discounted 25 year working life, the present value of his loss is $388,310.00.
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> (b) The cost to the Plaintiff of replacing the 40 hours per week he cannot now work is $1,000.00 gross per week, $515.00 net per week, or a present value of $388,310.00.
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> (c) If the Plaintiff is not able to continue his business for any reason, his loss is the pre accident profitability of his business, less his residual earning capacity, which is negligible. On an average net profit potential of (say) $85,000.00 net profit per annum, and a residual earning capacity of $300.00 net per week, his loss after tax is $541.00 per week, or a present value of $407,000.00."

[29] The plaintiff's disability means that many of the physical actions and activities normally engaged in on a building site are either beyond his physical capabilities or, if performed, result in increased pain. The plaintiff's assessment was that because of his pain and disability he was able to accomplish only about two-thirds of what he was previously able to accomplish in the same time. He also said that he worked about 80 hours per week before the accident but that reduced, as a result of his pain, to 60 hours per week after the accident. More recently, it has reduced to 40 hours per week. In order to compensate for his reduced productivity, he has employed labour at a rate of about $1000 net per week. In particular, he has employed his father who he said "takes a lot of workload off me".

[30] The precise extent to which the plaintiff's father and others are employed to do work the plaintiff would have done if not injured was not identified. I do not suggest that any further or other evidence in this regard could or should have been given. Matters of this nature are seldom capable of any precise analysis or dissection.

[31] The plaintiff said that his pain had been worse in the last 12 months than it had been generally since the accident. The reason for the increase in pain and the steps, if any, which could be taken to reduce or contain it were not explored in the medical evidence.

[32] Dr Fraser's evidence, to which I referred earlier, was unchallenged. The evidence discloses that the plaintiff, thus far, has been able to manage his business affairs so that his income is not reduced as a result of his physical disability. It is submitted on behalf of the first defendant that the likelihood is that the plaintiff will continue as a builder, remain capable of manual work but tend more to managerial and supervisory activities. It is further submitted that the evidence does not demonstrate that any diminution in the plaintiff's physical abilities has resulted in economic loss. Further, it is contended that if the plaintiff is obliged to cease manual work, he has the intelligence, experience and abilities to assume other profitable roles and that no economic loss has been established.

[33] I accept that the medical evidence establishes that the plaintiff probably will be able to continue working as a builder. It is clear, however, that the plaintiff's capacity for manual labour has been reduced. Precisely what impact that will have on his income is difficult to assess. It is possible that it will cause the plaintiff to adopt a more supervisory and less physically active role in his business. Were that to happen, and there is evidence that it is already taking place, it does not follow necessarily that he plaintiff's income would be reduced. Increases in the size of a builder's business would normally require the builder to spend more time on supervision and administration. Possibilities such as this, however, were not explored in the evidence and I can only speculate as to how the plaintiff's business may develop in future. On the evidence presented, I do not consider it probable that the plaintiff's business would have increased beyond its present scale. I find that he will be obliged to employ a labourer to make up for his lost productivity. I do not accept, however, that what has been lost equates to the work able to be performed by one full time labourer.

[34] In my view, the plaintiff, in order to make up for his physical deficiencies, will be put to the cost of hiring additional labour but not an additional labourer for the whole of the year. I consider that a person of the skills and initiative of the plaintiff will develop strategies and techniques which compensate, to a degree, for his disability. On balance, I have concluded that his loss equates to two-thirds the cost of hiring a labourer over a period of 25 years.

Pain, suffering and loss of amenities of life

[35] The plaintiff suffers a considerable degree of pain which increases with physical activity. His occupation ensures that increased levels of pain will be experienced on a regular basis. He has lost the ability to play the active sports enjoyed by him before his injury. Further it is plain that his pain interferes to a degree with his marriage and social life. It has taken a distinct toll on him emotionally and has adversely affected his relationship with his wife. It is submitted on his behalf that an appropriate award under this heading is $80,000.

[36] Mr Diehm submits that an award of $40,000 is appropriate. That in my view is too low having regard to the extent and likely duration of the plaintiff's pain and the impact of that pain on the plaintiff's enjoyment of life. I consider that an appropriate award under this heading is $50,000.

Griffiths v Kerkemeyer

[37] Attempting to ascertain the plaintiff's case in this regard has not been easy. The evidence of gratuitous care is essentially that set out in Ex 14, which was adopted by Mrs Daly. In dealing with the period between 18 April 1999 and the date of trial the plaintiff claimed $14,580 for an item which provided –

> "To administer medication, to collect medication, footspas, foot massage, cooking, cleaning, food preparation, shopping, yard and gardens, maintenance minor home maintenance, emotional support."

[38] Mr Diehm submitted that the claim was for matters which the plaintiff could have attended to himself and they were dealt with by Mrs Daly purely as a matter of choice. In my view, there is a great deal of force in Mr Diehm's submission. Some of the items the subject of the claim cover matters which Mrs Daly would have attended to even if her husband had not been injured. I refer in particular to cooking, cleaning, food preparation and shopping.

[39] *Van Gervan v Fenton*[3] is authority for the proposition that it is no impediment to a claim for such services that they would probably have been provided gratuitously even if the accident had not occurred. It is essential, however, that the plaintiff establish a need for the services the subject of the claim.[4] The services mentioned earlier are all within the plaintiff's physical capacity if no regard is had to the plaintiff's fitness for general domestic activity after a day's work. When the plaintiff's physical and emotional condition at the end of a working day are taken into account, as they must be, the plaintiff's claims have substance.

[40] I think it plain enough that Mrs Daly has performed services which fall within the ambit of an allowable claim for approximately a half hour a day over a substantial part of the period claimed. In this regard, I conclude that footspas and foot massages, although within the plaintiff's physical capabilities, are not matters to which he would have been practically capable of attending himself, having regard to his pain and state of exhaustion after a day at work. I accept also that there has been, and will continue to be, some reduction in ability to bear his share of normal domestic activities. Making a jury assessment, I regard half an hour a day on this account as reasonable. There was no serious challenge to the other items claimed and I allow them subject to the claim for the period between 4 September 1997 and 30 May 1998 being reduced to 3 hours per day and the claim for the period 1 June 1998 to 17 April 1999 being reduced to 1 hour per day. The reductions are necessary to conform with my assessment of the likely time spent by Mrs Daly in claimable activities.

[41] As for the future care claim, in written submissions, what was said about it was – "The plaintiff claims future care on a global basis in the amount of $40,000." The oral submission was –

> "… $43,596 is the present value produced by allowing the plaintiff 3.5 hours per week of domestic assistance at $12 per hour over a 30 year period until he is approximately 65. Now, if we assume that he

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3 (1992) 175 CLR 327.

4 *Van Gervan v Fenton (supra)* at 331-333.

> would ordinarily have reached a degree of decrepitude by the time he is 65, he would have needed similar assistance in any event, that calculation demonstrates … or verifies the $40,000. It is premised … on the evidence of Mrs Daly that about half an hour a day is spent by her reasonably meeting these additional needs of the plaintiff."

[42] I accept that this claim, which equates to half an hour a day, is supported by the evidence.

Special damages

[43] The plaintiff claimed $17,409.74.

[44] Mr Diehm challenged the $5,300 component of this claim which was attributable to the cost of vitamins and natural anti-inflammatory medication on the basis that there was no evidence that they were necessary or of assistance. They were not prescribed by a medical practitioner but were recommended by the physiotherapist responsible for the plaintiff's treatment. In my view, these expenses are recoverable as being the reasonable cost of substances reasonably necessary for the alleviation of the plaintiff's symptoms.

Claim by the plaintiff's wife for loss of consortium

[45] The plaintiff's wife, Mrs Jacquie Daly, in separate proceedings claimed for loss of consortium.

[46] In *Johnson v Kelemic*[5] Reynolds JA, with whose reasons Samuels JA agreed, said –[6]

> "*Toohey v Hollier* 92 CLR 618 is authority for the proposition that a husband can recover damages for such material or temporal loss capable of estimation in money which he suffered and which he will continue to suffer by reason of his wife's reduced capacity to perform her domestic duties, manage the household affairs and give him her support, assistance and companionship. [See per Samuels, JA in *Jones v Kealley (supra).*]"

[47] In Queensland wives may make claims for loss of consortium.[7]

[48] The evidence in support of the claim may be summarised as follows. She and the plaintiff married in 1996 but lived together for some years prior to that date. They have no children. Prior to the accident, they customarily took part in sporting pursuits together on weekends and other periods when the plaintiff was not working. The plaintiff is now unable to engage in any such activities or to assist with normal domestic activities to the same extent as he did prior to the accident. Their sex life, "active and fulfilling" before the accident, has "gone down". Prior to the accident they intended having a family but have now deferred making a final

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5 (1979) FLC 90-675.
6 At 78,491.
7 *Law Reform Act* 1995, s13.

decision in that regard for financial reasons. The consequences of the accident placed stresses on their marriage and they came close to separation in 2000.

[49] It is submitted that the strains on Mr and Mrs Daly's relationship have been severe and are continuing and that "a substantial allowance for loss of consortium is called for". Reference was made to a District Court decision in which $15,000 had been allowed in that regard.

[50] Mr Diehm referred to *Lebon v Lake Placid Resort Pty Ltd*[8] in which $4,000 was awarded in respect of a period of about 7 years between the date of the accident and the date on which the claimant husband separated from his former wife. The former wife was rendered tetraplegic by an accident. Her condition brought the couple's previously active social life to an end, a previously active sexual relationship ceased altogether, and they became estranged.

[51] The trial judge, Williams J, observed in his reasons – "In recent times, relatively moderate awards have been made for loss of consortium".

[52] Observations to like effect were made in *Siamis v Barlo*.[9]

[53] This claim does not have the temporal limitation which affected the quantum of the award in *Lebon* but then again, the loss is arguably not as great. In the circumstances, I have concluded that an appropriate award is $8,000. In making the award I have been conscious of the need to avoid compensating the plaintiff's wife for a sum already recovered by the plaintiff.[10]

[54] For the above reasons there will be judgment for the plaintiff on the claim and counterclaim against the first defendant. Before making a final order, I invite the parties, having regard to these reasons, to agree upon a quantum schedule. On the face of it, the plaintiff should have his costs assessed on the standard basis but if either party wishes to contend for a different order, he or it is at liberty to make appropriate submissions.

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8 [2000] QSC 49.

9 (1987) 48 SASR 469.

10 *Norman v Sutton* (1989) Aust Torts Reports 80-282 (NSW CA).