SUPREME COURT OF QUEENSLAND

CITATION:	*Commex Communications Corporation Pty Ltd v Cammeray Investments Pty Ltd & Anor* [2005] QSC 394
PARTIES:	**COMMEX COMMUNICATIONS CORPORATION PTY LTD (ACN 010 905 718)** (plaintiff) **v** **CAMMERAY INVESTMENTS PTY LTD (ACN 010 105 816)** (first defendant) **CRANE DISTRIBUTION LIMITED (ACN 000 003 832)** (second defendant)
FILE NO/S:	BS 7160 of 2003
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	15 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	9 November 2005; 10 November 2005
JUDGE:	Holmes J
ORDER:	**1. Judgment is given for the first defendant against the plaintiff.** **2. Judgment is given for the plaintiff against the second defendant in the amount of $107,989.00.**
CATCHWORDS:	TORTS – THE LAW OF TORTS GENERALLY – JOINT OR SEVERAL TORTFEASORS – CONTRIBUTION – GENERALLY – LIABILITY IN RESPECT OF SAME DAMAGE – Where the plaintiff's employee tradesman fell through one of several brittle sections of the roof of a commercial premises while undertaking work at the request of the lessee of the premises – where an action by the employee as against the employer had previously been compromised – where the plaintiff claims contribution pursuant to the *Law Reform Act* 1995, s 6(c) against the owner and lessee of the premises – whether the brittle sheeting constituted a danger which the owner and lessee of the premises had negligently failed to remedy – whether the negligent acts were, in part, failure to discharge obligations under the *Workplace Health and Safety Act* 1995

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the plaintiff also claims damages for breach of contract against the lessee of the premises – whether the agreement between the plaintiff and the lessee of the premises included an implied contractual term that the lessee would take reasonable care to ensure the safety of the plaintiff's employee while he worked on the lessee's premises – whether this term was breached due to the same negligent failures submitted to apply in the tortfeasor contribution claim - whether breach of such a term would make the lessee liable to pay the entire compromise amount

Law Reform Act 1995 (Qld), s 6, s 6(c), s 7
Uniform Civil Procedure Rules 1999 (Qld), r 166(4), r 166(5)
Workplace Health and Safety Act 1995 (Qld), s 7(1), s 7(2)(g), s 9(1), s 11(1), s 26, s 28, s 28(2), s 30, s 30(1)(a), s 30(1)(c)
Workplace Health and Safety (Work on Roofs) Advisory Standard 1996, section 2.2, section 4.8

Astley v Austrust Ltd (1999) 197 CLR 1
Boral Resources (NSW) Pty Ltd v Watts [2005] NSWCA 191
BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266
Byrne v Australian Airlines Ltd (1995) 185 CLR 410
Climax Management v Scansash [2002] NSWCA 167
Florida Hotels Pty Ltd v Mayo (1965) 113 CLR 588
Hawkins v Clayton (1988) 164 CLR 539
Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41
James Hardie v Wyong Shire Council (2000) 48 NSWLR 679
Jones v Dunkel (1959) 101 CLR 298
Kim & Anor v Cole & Ors [2002] QCA 176
Nelson v BHP Coal Pty Ltd [2000] QCA 505
Northern Sandblasting Pty Limited v Harris (1997) 188 CLR 313
Oxley County Council v MacDonald [1999] NSWCA 126
Redken Laboratories (Aust) Pty Ltd v Docker (2000) Aust Contract R 90-113
Sherras v Van der Maat [1989] 1 Qd R 114
Wyong Shire Council v Shirt (1980) 146 CLR 40

COUNSEL: M Grant-Taylor SC, with C Harding, for the plaintiff
S Williams QC, with M Burns, for the first and second defendants

SOLICITORS: O'Mara's Lawyers for the plaintiff
Gadens Lawyers for the first and second defendants

[1] The plaintiff is in the business of installing and repairing mobile telephones and two-way radios. On 5 September 1997, it sent one of its technicians, Edgar Balarezo, to carry out some work at industrial premises at Noosaville. The second defendant leased those premises, at which it carried on its business as Tradelink Plumbing Supplies, from the first defendant. Mr Balarezo climbed a ladder onto the roof of the building to relocate some cabling. The roof was made of corrugated iron with, for lighting purposes, some alsynite sheeting. Mr Balarezo stepped onto one of the alsynite sheets, which broke, and fell into the building below, suffering various fractures and a head injury. He brought a claim against the plaintiff, his employer, which was compromised in August 2001 with a payment to him of $508,026.56 by way of damages and interest, with a further amount for costs and outlays. By this action the plaintiff claims as against the second defendant, damages for breach of contract and as against both defendants, contribution as tortfeasors, pursuant to s 6(c) of the *Law Reform Act* 1995.

The issues

[2] As a result of admissions, it was not in issue that Mr Balarezo had fallen through the alsynite sheeting, that he had suffered serious injuries, and that his claim had been compromised on a fair and reasonable basis. The issues raised on the trial were solely to do with the defendants' liability for all or part of the sums paid to Mr Balarezo. As against the first defendant the fundamental question was whether the alsynite sheeting constituted a danger which it, as owner of the premises, had negligently failed to remedy in various specified ways. It was not suggested that the first defendant had any part in, or was even aware of, Mr Balarezo's attendance at the premises.

[3] Unsurprisingly, the contribution claim was pressed with more enthusiasm against the second defendant, against which it was pleaded that it had negligently failed to remedy the danger posed by the alsynite sheets, to ensure that they were clean or in some way distinguished from the balance of the roofing, and to warn of the risk they posed; and that it had failed to discharge obligations under the *Workplace Health and Safety Act* 1995 ('the Act'), evidence of those breaches being evidence of negligence. There was some dispute as to the purpose for which Mr Balarezo was sent to the premises and whether the nature of his task changed after his arrival; those questions were relevant to the plaintiff's responsibility for sending him (rather than a more competent technician) and to what the second defendant might reasonably have expected of him.

[4] So far as the claim in contract was concerned, at issue was whether the agreement between the plaintiff and the second defendant for the work at the Tradelink premises included an implied term that the second defendant would take reasonable care to ensure Mr Balarezo's safety while he was working on the second defendant's premises; if so, whether that implied term had been breached (by the same failures alleged in the negligence claim); if so, whether the second defendant was then liable for the entirety of the plaintiff's loss in the form of the amount paid pursuant to the compromise.

The work to be undertaken by Mr Balarezo

[5] The agreement as pleaded by the plaintiff and admitted by the second defendant was that "the plaintiff ... agreed to attend at the building [the Tradelink premises] so as

to relocate a speaker and a two-way radio base from the rear of the building to the front of the building where a new dispatch area was to be set up". The plaintiff called one witness in the trial, Mr John Dahl, the plaintiff's managing director, and tendered by consent the statements of Mr Scott Wyllie, the former store manager for the second defendant.

[6] Mr Dahl explained that he had installed a base station at the Tradelink premises in about 1990. The purpose was to enable the second defendant to keep in radio contact with its delivery vehicles. The base station was connected to a roof antenna by coaxial cable. Mr Dahl could recall going onto the roof for the purpose of installing the antenna and noticing the alsynite sheeting. He was familiar with alsynite: it was a product which could, when brand new, support a man, although he preferred not to chance his weight on it; but it became increasingly brittle and dangerous with age, and its translucent quality was apt to be diminished by mould. Mr Dahl explained that before going onto any roof, he looked under it to see where there were supports and what the sheeting consisted of; in this case the alsynite sheeting was obvious from beneath. When working on a roof he walked only along the bearers, the positions of which were discernible from the placement of screws. Mr Dahl had originally installed the base station towards the front of the premises. Subsequently it was moved to the rear.

[7] In September 1997, Mr Dahl said, the second defendant had requested some work to be done which included reinstalling a speaker microphone running off the radio base station, which had been removed during some renovations. Indeed, on Mr Dahl's evidence that was the only work that the second defendant had asked to be done; but it was accepted for the plaintiff that the agreement in fact consisted of what was pleaded and admitted, i.e. the moving of the base station and speaker from the rear of the building to the front (where it had originally been installed). On Mr Dahl's account, at any rate, when he arrived at the premises after Mr Balarezo's accident, it was a surprise to him to find that Mr Balarezo had been on the roof and had attempted to shift the aerial cable. His expectation was that Mr Balarezo had only to reconnect the speaker microphone, in which task he would have been working entirely at ground level. Replacing the base station in its original position was a different exercise, which would require moving and extending the aerial cable on the roof.

[8] Mr Dahl explained it was the plaintiff's policy to send two workers to any job involving roof work. He would not in any case have allowed Mr Balarezo to do that sort of job, because he had poor balance, was in some respects careless and was not really competent beyond small jobs. But the second defendant had no means of knowing that; it was entitled, he agreed, to expect a tradesman with appropriate skills, experience and equipment for the work to be performed.

[9] After Mr Balarezo's fall, Mr Dahl had got up onto the roof to retrieve his ladder and had observed that the alsynite sheeting was dirty, discoloured and worn, so that it was more difficult to distinguish from the rest of the roofing material than pristine alsynite would have been. The defendants put photographs into evidence showing the exterior of the roof with panels of alsynite sheeting – each about 900 mm across, according to Mr Dahl - at intervals of several metres in the corrugated iron. The photographs show the alsynite panels as darker, readily discernible stripes in the surrounding iron, but they were, Mr Dahl said, deceptive; on the roof itself the sun's glare made the colour difference in the materials difficult to see.

[10] Mr Wyllie's statements were to the effect that he had contacted the plaintiff and asked that the base station be moved, as well as the microphone. He appreciated that that would require the technician involved to work on the roof. He had noticed that the alsynite was less obvious with sunlight on it.

The causes of Mr Balarezo's fall

[11] Mr Balarezo could not be located in time for the trial and did not give evidence. One might criticise the plaintiff's representatives for a lack of preparation, but I do not think, contrary to the submission of the defendants' counsel, that any *Jones v Dunkel*[1] inference arises. The precise mechanism of his fall is not known. Mr Dahl speculated that he might have been moving backwards at the relevant time, but there is no evidence as to how he came to be on the alsynite. Although Mr Dahl said that he was careless in some of his work, there was no suggestion he was so lacking in the instinct for self-preservation as to step onto that section of the roof knowing it was not strong enough to bear his weight. All one can reasonably infer, in my view, is that he was not alive to the risk posed by the fragility of the alsynite sheeting, either because he did not recognise it as alsynite or did not appreciate the product's frangibility.

Deemed admission of implied term?

[12] The implied term contended for by the plaintiff is pleaded as follows: "that the second defendant would take reasonable care to ensure the safety of the plaintiff's employees whilst the latter were entrants upon the second defendant's premises and engaged in performing the agreement". In its defence, the second defendant declined to admit this allegation on three pleaded bases: that it related to an issue of law rather than fact, that the allegations were not sufficiently particularised and that it could not plead until full disclosure was made.

[13] Rule 166 of the Uniform Civil Procedure Rules includes these subrules:

> "(4) A party's denial or non-admission of an allegation of fact must be accompanied by a direct explanation for the party's belief that the allegation is untrue or can not be admitted.
>
> (5) If a party's denial or non-admission of an allegation does not comply with subrule (4), the party is taken to have admitted the allegation."

Counsel for the plaintiff pointed out that no further particulars had been sought and disclosure was long since given. Whether the implied term existed was, he asserted, a question of fact. Accordingly, since no direct explanation for the belief that the allegation was untrue had been given, the second defendant was to be taken to have admitted the existence of the term as pleaded. Counsel for the second defendant, on the other hand, while accepting that the pleadings had closed without any request for further particulars and that disclosure was complete, maintained that implication of the term was a question of law, so that the pleading constituted an accurate and adequate denial.

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[1] (1959) 101 CLR 298.

[14] There is, of course, a distinction commonly drawn between terms implied as a matter of law (in accordance with mercantile usage, or as incidents of a particular class of contract) and those which involve implication as a matter of fact, from the circumstances and language of a given contract. But whether a term is to be implied at all is, as McPherson JA observed in *Nelson v BHP Coal Pty Ltd*,[2] most often a matter of mixed law and fact. Here, the plaintiff's alternative argument for implication of the term relied on a series of cases involving contracts for the provision of services where a requirement to take reasonable care was implied as incidental to contracts in that class. It is difficult to reconcile that approach with its contention in this context that the process of determining whether the proposed term should be implied involved no question of law.

[15] In any event, the second defendant's non-admission "on the basis that the allegations relate to issues of law rather than fact", does constitute a direct explanation; at least it is not one so specious as to amount to no explanation at all. I do not regard it as contravening subrule 166(4) and, accordingly, do not take the second defendant to have admitted the allegation under subrule 166(5).

Implication of term as a matter of law

[16] I proceed on the basis that the express terms of the agreement between the plaintiff and the second defendant were those pleaded and admitted: that the plaintiff, for payment from the second defendant, would attend at the latter's building to relocate the speaker and two-way radio base. The question then arises as to whether a term to the effect that the second defendant would take reasonable care to ensure the safety of the plaintiff's employees while any such employee was on its premises and performing the agreement ought to be implied into the agreement. Counsel for the plaintiff argued, in effect, that the term was one commonly implied in such circumstances. He referred to decisions in *Florida Hotels Pty Ltd v Mayo*[3]; *Oxley County Council v MacDonald*;[4] and *Redken Laboratories (Aust) Pty Ltd v Docker*[5]. In each of those cases a contract for the provision of services by a third party to an employer was held to include an implied term to take reasonable care of the latter's employees.

[17] But in those cases it was the provider of services whose contractual duty of care was held to extend to the employees with whom it was in contact in the course of providing those services. They seem to me entirely distinguishable. It is one thing to impute to the provider of services a duty to take reasonable care as an incident of its provision of services; it is quite another to impute a similar duty to the passive recipient of services. The distinction is pointed up in this statement from *Astley v Austrust Ltd*[6], cited in *Oxley County Council v MacDonald*:

> "in contract the plaintiff gives consideration, often very substantial consideration, for the defendant's promise to take reasonable care" [7].

Here the second defendant was not being paid to do anything. If indeed contracts for the provision of services are a class of contract in which such a term ought to be

[2] [2000] QCA 505 at 4.
[3] (1965) 113 CLR 588.
[4] [1999] NSWCA 126.
[5] (2000) Aust Contract R 90-113.
[6] (1999) 197 CLR 1.
[7] [1999] NSWCA 126 at para [65].

implied by law, in this contract the term would operate as a promise by the plaintiff, not the second defendant.

Implication of term as a matter of fact

[18] Accordingly, it is necessary to determine as a matter of fact whether the parties' intentions as manifested by the contract, taken in its surrounding circumstances, support implication of the term contended for. Counsel for the defendants said that I should apply the tests set out in *BP Refinery (Westernport) Pty Ltd v Shire of Hastings*[8]:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that "it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

[19] But this was not a formal contract. Consequently, the more flexible approach proposed by Deane J in *Hawkins v Clayton*[9] and endorsed by the majority in *Byrne v Australian Airlines Ltd*[10] is appropriate:

> "in a case where it is apparent that the parties have not attempted to spell out the full terms of their contract, a court should imply a term by reference to the imputed intention of the parties if, but only if, it can be seen the implication of the particular term is necessary for the reasonable or effective operation of a contract of that nature in the circumstances of the case. That general statement of principle is subject to the qualification that a term may be implied in a contract by established mercantile usage or professional practice or by a past course of dealing between the parties."

[20] In the present case I do not think it can be said that the term's implication was required for the "reasonable or effective operation" of the agreement. The substance of the agreement was the work to be performed at the second defendant's premises, the shifting of the base station and microphone. It could be carried out perfectly well in the absence of any term requiring the second defendant to take care for the safety of the workman.

[21] If obviousness remains part of the test in such cases[11], one asks whether, had the second defendant directed its mind to the question, it would have consented to the inclusion of such a term. An occupier may, in that capacity, expect to have to take reasonable care for entrants on his premises, including tradesmen; but it does not follow that in agreeing to pay for work to be performed he expects to be contractually bound to take that care. Insofar as his premises constitute a workplace, he may assume further responsibilities for the safety of persons working there; but

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[8] (1977) 180 CLR 266 at 282-3.
[9] (1988) 164 CLR 539 at 573.
[10] (1995) 185 CLR 410 at 422.
[11] As Deane J suggests in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 121. See also the joint judgment of McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 444.

again it does not follow that he intends to assume those responsibilities as a matter of contract, particularly when those persons are employed by another.

[22] The proposed term would shift responsibility for the well-being of the plaintiff's worker to the second defendant. The extent of the latter's liability in the event of injury to the worker would depend on whether s 7 of the *Law Reform Act* 1995 was applied to the assessment of damages, in accordance with the approach of the Court of Appeal in *Kim & Anor v Cole & Ors*[12], or whether the right to recover for breach of contract was unlimited by the contribution provisions, as has been held in other jurisdictions[13]. But whether the prospective exposure to liability was for contribution or for the full extent of any damage, such a term undoubtedly would have operated against the second defendant's interest; and it is far from obvious that it would have readily agreed to it.

[23] For these reasons I do not consider that the pleaded term is to be implied into the contract. (I might say, however, that were damages to be awarded on the basis of a breach of contract in this case I should have felt constrained to follow the decision of the Court of Appeal in *Kim & Anor v Cole & Ors*[14] in assessing damages.) It remains, then, to consider whether either defendant is liable as a tortfeasor for Mr Balarezo's damage and, if so, what contribution the plaintiff ought to recover from it.

The liability in tort of the first defendant

[24] All that is known about the first defendant's position in relation to the premises is what is pleaded and admitted by it and the plaintiff: that it owned the building and entered a lease agreement with the second defendant in January 1994. As to any duty it might owe, the first defendant rather vaguely admitted "the duties imposed on it as owner by law with respect to invitees of the building"; which of course begs the question of what those duties, if any, were.

[25] The evidence did not demonstrate when the first defendant became the owner of the property - a pleading that it was acquired in 1987 was not admitted - or whether it was at any time prior to its letting of it to the second defendant in actual physical control of it. Mr Dahl's evidence suggests, however, that the second defendant was in occupation of the property well before 1994. The terms of the lease were not in evidence, so it is not known whether the first defendant retained any right of practical control over the premises, whether it could enter or inspect. Nor does one know what the second defendant was permitted to do; whether, for example, it could effect structural repairs.

[26] As to the state of the roof, the first defendant admitted that it was in part comprised of alsynite sheeting which was translucent and which was not of sufficient strength to bear the weight of an adult male. No further evidence was adduced as to the first defendant's knowledge of the state of the roof at any given time, or anything it might or might not have done in connection with it.

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[12] [2002] QCA 176.
[13] *Oxley County Council v MacDonald* [1999] NSWCA 126; *Redken Laboratories (Aust) Pty Ltd v Docker* (2000) Aust Contract R 90-113; *Climax Management v Scansash* [2002] NSWCA 167.
[14] [2002] QCA 176.

[27] Counsel for the plaintiff referred to *Northern Sandblasting Pty Limited v Harris*[15] as supporting the proposition that as landlord, the first defendant must have owed some duty to Mr Balarezo as its tenant's invitee onto the premises. Although a failure to inspect was pleaded, the plaintiff put its case in negligence on the basis that alsynite sheeting was inherently dangerous, rather than that the first defendant ought to have known of any deterioration in the product while the premises were let. Specifically, it was alleged, the first defendant had negligently permitted the second defendant to occupy the premises while the roof was in a dangerous state, failed to warn of the danger posed by the placement of the alsynite sheets and failed to clean or otherwise mark out the alsynite sheets from the surrounding roofing. In submissions, counsel for the plaintiff argued that the danger posed by the alsynite could have been remedied by setting up a guard around it, or by installing safety mesh under the sheeting at the time the building was let to the second defendant. Had those steps been taken, Mr Balarezo would not have fallen.

[28] *Northern Sandblasting* is of very limited assistance for a number of reasons, both general and particular. It was conceded there that the landlord owed a duty of care to the plaintiff child. The tenancy was of residential, not commercial premises, and the existence and identity of the group owed the duty, the members of the tenant's household, were known to the landlord. The case offers no underlying principle as to landlords' duties of care, apart from the proposition that such duties may exist, depending on the circumstances.

[29] I do not think, in general terms, that a landlord necessarily owes a duty of care to every entrant upon commercial premises during the life of a lease of some years' duration. In the particular circumstances of this case, it seems that control of the premises for practical purposes resided in the second defendant, which had occupied them for at least half a dozen years. It was in a position to determine who entered the property and what they did when they got there, and to manage any prospective risks accordingly. From the first defendant's perspective, those entrants were an entirely indeterminate class whose composition and conduct were outside its control, entering premises in which it had no immediate management role. A reasonable person would not, in my view, regard the first defendant as owing a duty of care to all of its tenant's possible entrants over the period of the latter's occupation.

[30] If, to the contrary, there were a duty of care in the first defendant to the second defendant's entrants on the premises, its content did not extend to protection from dangers enlivened by conduct which had nothing to do with the latter's ordinary business activities; those activities being the purpose, one may reasonably assume, for which the premises were let. There was no evidence that the first defendant had any notice that its tenant would require access to the roof for any purpose such as, for example, the installation or re-location of the aerial. Indeed, there was nothing to show that the first defendant had any reason to suppose anyone would have cause to be on the roof at all. If such an occasion were to arise, plainly enough, it was the tenant in occupation of the premises which was best placed to ensure the safety of anyone going on the roof.

[31] In terms of the factors for assessment identified in *Wyong Shire Council v Shirt*[16],

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[15] (1997) 188 CLR 313.
[16] (1980) 146 CLR 40 at 47.

> "the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action ...",

there is nothing in the evidence which would show that the first defendant ought to have been aware that there was any real prospect of someone stepping on the alsynite sheeting. Even if some risk could be said to have existed, I do not think it was of such proportions that a reasonable person in the first defendant's situation would have taken the steps proposed by the plaintiff's counsel to guard against it; particularly in circumstances where the second defendant was in a position to manage any such risk. In short, I am not satisfied that the first defendant owed any duty of care to Mr Balarezo; if it did, that duty was not breached by a failure to reinforce, fence off or otherwise bring to his attention the existence of alsynite sheeting in the roof.

The second defendant's liability in tort

[32] The plaintiff pleaded a failure to inspect, which of itself could not be causative of anything, and, more significantly, a failure to warn the plaintiff and Mr Balarezo of the danger posed by the sheeting and a failure to clean, mark or delineate the sheets so as to distinguish them from the surrounding roof material. It also relied on what it said were breaches of ss 28 and 30 of the *Workplace Health and Safety Act* 1995 as evidence of negligence.

[33] Section 28(2) of the *Workplace Health and Safety Act*, as it stood as at September 1997, imposed on an employer

> "…an obligation to ensure ... the workplace health and safety of others is not affected by the way the employer conducts the employer's undertaking".

Section 30(1) (as it still does) imposed on "a person in control of a workplace"

> "… obligations-
> (a) to ensure the risk of ... injury from a workplace is minimised for persons coming onto the workplace to work;
> …….
> (c) to ensure there is appropriate, safe access to and from the workplace for persons other than the person's workers. "

[34] Section 26 of the Act prescribed how any obligation was to be discharged where there existed an applicable advisory standard: the way the standard provided to identify and manage exposure to the risk was to be followed, or another means of doing so adopted. There was an applicable standard dealing with roofs containing brittle material: the *Workplace Health and Safety (Work on Roofs) Advisory Standard* 1996 ('the Standard'). Section 4.8 is in the following terms:

> "This Standard recommends employers and persons in control of buildings ensure that if the roofing membrane is made of a brittle or fragile material which may not support the weight of a person, people are not permitted to access it.
>
> If a roof or a part of a roof contains brittle or fragile material, employers and persons in control of buildings must ensure this area is barricaded off and identified with warning signs. Preferably,

> barricades and signs should be placed so that a person is aware of this condition before going up on the roof.
>
> If access is required to or across a section of brittle or fragile roof, the means of access should be made safe. This may be achieved by the use of roof ladders, planking, walkways or similar means."

(The membrane is the upper layer of the roof, including metal roofing and translucent roof sheeting.)

[35] Given the circumstances of Mr Balarezo's entry to its premises, the second defendant could not sensibly have argued that it owed him no duty of care, and it did not. It admitted the existence of the alsynite sheeting and its incapacity to bear weight, while maintaining that the presence of the material and any risk posed by it were so obvious that no warning was required. That was particularly so given that the second defendant was entitled to take Mr Balarezo as a competent technician in the employ of the plaintiff, which was, from earlier work, aware of the roof's features. Its second point was that there was no evidence Mr Balarezo had not been warned of the danger.

[36] As to the breach of statute argument, counsel for the second defendant argued that as tenant, the second defendant was not "a person in control" of any workplace constituted by the building's roof, because the first defendant as owner retained control of the fabric of the building. In any event, the roof was not the second defendant's workplace; it did not control it in that capacity. And if persons in the second defendant's position were held obliged to comply with the Standard, the results would be ludicrous; the Standard recommended, for example, making a work area on a roof an enclosed environment by use of guard rails, fall protection barriers, and access by means such as mobile work platforms. Clearly, it was said, the Standard could not be directed to owners or occupiers of buildings, as opposed to persons who worked on roofs and their employers.

[37] I may begin by saying that I do not think that s 28 of the *Workplace Health and Safety Act* has any application here. The second defendant's business was plumbing supplies; that was its "undertaking", and there was nothing about its conduct of it that affected Mr Balarezo's safety. Nor do I think that s 30(1)(c) is relevant. Mr Balarezo was not harmed by any lack of safe access to the workplace; it was when he got to the area where the work was to be done that he was injured.

[38] But s 30(1)(a) does, in my view, have some relevance. It is not obvious at first glance that the roof of the Tradelink premises was a "workplace" or that the second defendant was "in control" of it as a workplace. But "workplace" is defined very broadly in s 9(1) of the Act as "any place where work is, is to be, or is likely to be, performed by a worker, self-employed person or employer". Mr Balarezo was a "worker"; s 11(1) defines the term as including a person who "does work ... for or at the direction of an employer." The roof of the premises was where he was to, and did, perform his work on 5 September 1997.

[39] As to the second defendant's control over the roof as a workplace, while it is not known what the lease had to say about its capacity to conduct structural work, it is quite clear that it had access to the roof of the building, and control over who went on it. On previous occasions, as well as the one involving Mr Balarezo, it had

contracted the plaintiff to send its employees up there to carry out various tasks. For all practical purposes, the second defendant was the "person in control" of the roof.

[40] Counsel's examples of the extraordinary lengths to which the Standard would require an occupier to go seem to me to overstate what it prescribes. It recognises, for example that an enclosed environment may not be practical for "short-term access activities"; in that instance it recommends use of a personal fall protection system i.e. equipment in the form of an anchor point, lanyard and harness or belt by which a person is secured to the building while working on it. It is the employer who is to ensure the use of an appropriate system, and one would expect the employer to provide the equipment, but it does not seem remarkable that the Standard should oblige the building's occupier to insist on its use. That is consistent with the more general statement in section 2.2 of the Standard as to what is expected of a person in control of a workplace:

> **"Person in Control's Responsibility:**
>
> …..
>
> The person in control of the workplace will need to be satisfied any work, including maintenance work, on the roof can be performed while minimising the risk of falling."

[41] For an occupier of commercial premises, having to meet statutory obligations arising from a transitory workplace on its premises may well seem onerous. But it is consistent with the aims of the Act, the objects of which include ensuring "freedom from ... injury to persons caused ... by workplaces, workplace activities ..."[17] That object is to be achieved by, among other means, "imposing workplace health and safety obligations on certain persons who may affect the health and safety of others by their acts or omissions."[18] In sum, having examined the Act and the Standard, I consider that the latter does apply to occupiers in the second defendant's position.

[42] Turning to the relevance of section 4.8 of the Standard in the circumstances of this case, clearly enough Mr Balarezo had to have access to the roof. Any barricade, as an obstacle to that access, had to be moved; its only use would have been the same as that of a warning sign: to signify that the roof contained dangerous sections. Roof ladders, planking or walkways were not necessary to make access across the alsynite safe. The panels were only about 900 mm in width; and as long as he knew they were there, they could safely be crossed. The relevant feature of section 4.8 is the requirement to identify the area of weakness in the roof with warning signs. Of course, the second defendant's failure in that regard could have been obviated by telling Mr Balarezo in person that the roof was hazardous.

[43] But, the second defendant argued, there was no evidence of such a failure to warn, and the pleadings denied it. In its amended defence, it addressed the allegation of a failure to warn of the danger posed by the placement of the alsynite sheets in these terms:

> "The second defendant denies that the placement of the alsynite sheets posed any danger to anyone but says that in any event, the existence and nature of the alsynite sheets were so obvious as not to require any warning to Balarezo;"

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[17] s 7(1).
[18] s 7(2)(g).

Despite counsel's submission to the contrary, that does not seem to me to constitute a denial that a warning was not given, nor even a non-admission. The obvious inference from what is pleaded is that the defendant is asserting that no warning was given because it was not called for. In any event, on the evidence in the case, I would infer that Mr Balarezo was not warned of the risk posed by the alsynite sheeting. He may have been a careless workman in some respects, but nothing suggests he was so entirely reckless that he was likely to step on something he would fall through, if he had been warned it was there. I find some support in drawing that inference from the fact that the defendants called no witness to suggest that any warning of any kind was given; one would have expected such evidence, had it been available.

[44] When first installed, the alsynite was translucent; it would probably have been obvious at first glance from both the exterior and interior of the building that it was a lighter material intended to admit sunlight; a glance then might have given a casual observer pause. But it had darkened considerably over time. Scrutinised from the inside of the building – assuming one perceived the need for scrutiny – it could be seen to be a less substantial material than the surrounding roof. On the roof, I accept, with the sun on it, it would have been a good deal harder to make out. The plaintiff's workmen had previously been on the roof in earlier years, it is true, but Mr Balarezo had not, and I do not think the second defendant could reasonably assume that he had been told of its composition.

[45] While the danger of the alsynite might have been apparent to a careful or well-informed observer, the risk to Mr Balarezo, if he failed to make that observation or had not already been cautioned about it, was so obvious and of such consequence, and the effort involved in pointing it out to him so minimal, that one can only conclude it was a breach of the second defendant's duty of care to fail to give the warning. The conclusion as to the need to warn is one I would have arrived at in the absence of the Standard.

Contribution

[46] I am satisfied that the second defendant did breach a duty of care owed to Mr Balarezo in a way which contributed to his injury. The question then is the extent to which the second defendant was responsible for the damage he suffered. In the scheme of things I do not think its role was major. Accepting that the arrangement for the work to be done was that pleaded, the plaintiff sent Mr Balarezo to the second defendant's premises for the purpose of relocating the radio base. (Despite a valiant attempt to convince me to the contrary, I do not accept counsel's submission that the pleading leaves open the prospect that it was only when he arrived at the second defendant's premises that the nature of the work was identified). The plaintiff had Mr Dahl's knowledge that Mr Balarezo was not a competent roof worker, that his balance was poor and that he was on occasion careless. It also had the knowledge that the roof would not at all points bear a worker's weight, because of the brittle alsynite sheets. Its own policy was that two people should be used in undertaking roof work unless it was an emergency, and there is no suggestion this was such a case. It quite clearly should not have permitted Mr Balarezo to undertake the job at all, much less on his own.

[47] The second defendant was also entitled to expect Mr Balarezo would take more care for his own safety than he did; as a competent and qualified technician (which,

for all the second defendant knew, he was) he could be expected to survey the roof from underneath to form an impression of its constitution and while on the roof, to endeavour to stay on the bearers as marked out by the screw lines. And indeed, a prudent worker would have done those things. Nonetheless, knowing that Mr Balarezo would have to get up on the roof to perform the work and knowing that there were areas of the roof which would not support his weight, which were not marked out in any way, the second defendant failed to give any warning. That negligence and its direct relationship to Mr Balarezo's fall and injury, balanced against the negligence of the employer, with its far greater responsibility and awareness of the risks to Mr Balarezo, and Mr Balarezo's own lack of prudence[19], is fairly reflected in an order for contribution amounting to 15 per cent.

[48] The plaintiff claimed contribution in respect of an amount of $544,214.44 made up as follows: the settlement sum of $508,026.56; Mr Balarezo's legal costs and outlays paid by the plaintiff in the amount of $6,206.72; and the plaintiff's own legal costs and outlays incurred in responding to Mr Balarezo's claim, in an amount of $29,981.16. I do not consider that the plaintiff's costs constitute any part of Mr Balarezo's "damage" within the meaning of ss 6 and 7 of the *Law Reform Act* 1995, but there is authority for the proposition that the costs paid to Mr Balarezo may be the subject of contribution. [20] I will therefore apply the percentage I have arrived at for contribution to the settlement sum and the payment for costs and outlays, giving an amount of $77,134.99. Mr Williams did not argue against the plaintiff's submission for interest at 10 per cent for four years, giving a further $30,854.00.

Judgment & costs

[49] I give judgment for the first defendant against the plaintiff. I give judgment for the plaintiff against the second defendant in the amount of $107,989.00.

[50] It was argued for the defendants that they should, whatever the outcomes, have their costs of one day of the trial, because most of the first day had been lost in an application for an adjournment and subsequent attempts by the plaintiff to find its witnesses; the trial could otherwise have finished in a single day. That is so and an examination of the transcript shows that on the first day one hour and 42 minutes were spent on the adjournment application and one hour and three minutes on evidence, while on the second day two hours and 12 minutes were spent in submissions. All of that could, it is self-evident, have been accomplished in a single day. The argument is now only relevant in respect of the second defendant's costs which I will allow for a single day.

[51] I will hear the parties as to the rate at which costs should be allowed and any other aspects of the costs orders.

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19 As counsel for the second defendant pointed out, it is reasonable to infer that contributory negligence was not taken into account in the compromise of the claim as between the plaintiff and Mr Balarezo because he would have had a claim for breach of his contract of employment pre-dating the amendments to the *Law Reform Act* 1995 and thus was not liable to a reduction of his damages on that account.

20 *Sherras v Van der Maat* [1989] 1 Qd R 114 at 118; *James Hardie v Wyong Shire Council* (2000) 48 NSWLR 679 at 684; *Boral Resources (NSW) Pty Ltd v Watts* [2005] NSWCA 191 at para [75].