PARTIES:	ABORIGINAL HOSTELS LTD v DONALD EMIL HAUTH
TITLE OF COURT:	COURT OF APPEAL
JURISDICTION:	NORTHERN TERRITORY
FILE NUMBERS:	No. AP 17 of 1993
DELIVERED:	DARWIN, 29 JULY 1994
HEARING DATE:	25 JULY 1994
JUDGMENT OF:	GALLOP, KEARNEY JJ and MORLING AJ

CATCHWORDS:

APPEAL - judgment for the plaintiff in claim for damages for personal injuries - appeal against finding of negligence and refusal to find contributory negligence - no new question of principle

CASES

Nance v British Columbia Electric Railway Co Ltd [1951] AC 601, referred to

Winter v Bennett [1956] VLR 612, referred to

REPRESENTATION

Counsel
Appellant: G.E. Hiley QC
Respondent: T. Riley QC

Solicitors
Appellant: Messrs Cridlands
Respondent: Messrs Elston & Gilchrist

Judgment Category Classification: C

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IN THE COURT OF APPEAL OF THE

NORTHERN TERRITORY OF AUSTRALIA

AT DARWIN

No. AP 17 of 1993

ON APPEAL from the judgment of
His Honour Justice Angel in
proceeding No. 863 of 1988

BETWEEN:

ABORIGINAL HOSTELS LIMITED

Appellant

AND:

DONALD EMIL HAUTH

Respondent

Coram: Gallop, Kearney JJ and Morling AJ
Date: 29 July 1994
Darwin

O R D E R

The Court orders that:

(a) The appeal be dismissed.

(b) The appellant pay the respondent's costs of the appeal.

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REASONS FOR JUDGMENT

(Delivered 29 July 1994)

THE COURT: This is an appeal from a decision of Angel J. given in proceedings in which the respondent ("the plaintiff") sued the appellant ("the defendant") for damages in respect of serious injuries sustained by him when he fell from a ladder while descending from the roof of a hostel building owned by the defendant.

The facts which gave rise to the accident in which the plaintiff sustained his injuries were in dispute at the trial. However, counsel for the appellant properly conceded that the appeal must be determined upon the basis of the facts found by his Honour. The following account of those facts is taken from his Honour's reasons.

On 23 October 1987 the plaintiff, an experienced electrician employed by G & S Electrics Pty Limited, was injured when he fell from a ladder while performing work for his employer at a hostel occupied by the defendant. Prior to his fall the plaintiff had been working on a hot water service situated on the roof of the single storey hostel. He gained access to the roof by use of a ladder which he owned and which he had brought to the premises. It was an extension aluminium ladder consisting of two parts, with rounded compound grips at its base. The plaintiff's employer had been requested by the defendant to send an electrician to do some electrical work on the hot water service. When the plaintiff attended at the hostel premises he saw the manageress of the hostel, a Mrs Sevallos. He informed her why he had come to the premises. She saw him place the ladder against the building and then ascend it to the roof. There was a fascia surrounding the roof of the hostel and this made access to the roof somewhat difficult. The fascia was angled at some 55 degrees and the ladder, as extended by the plaintiff, was so placed that the lower two rungs of the upper portion of the ladder corresponded with the upper two rungs of the

lower portion. Thus extended, the ladder barely reached roof level at the top of the fascia.

The ladder's base rested on brushed concrete which, when dry, provided a good grip to the base of the ladder. When the plaintiff initially set up the ladder on the concrete, the concrete at the base was dry. The precise angle of the ladder when initially placed by the plaintiff was unknown. The plaintiff himself was unable to give a precise account of the angle at which he placed it. However, he was an experienced electrician who used ladders on an almost daily basis.

His Honour inferred that the ladder was placed at an angle of about 63 to 67 degrees and that the plaintiff used common sense in the manner in which he used the ladder on the day in question. He found, in effect, that the ladder was positioned in an appropriate way, having regard to the physical features of the roof. He also found that inclining at an angle between 63 and 67 degrees the ladder would have been unlikely to slip on dry concrete, but more probably than not it would have been likely to slip on wet concrete.

When the plaintiff first placed the ladder against the fascia, he checked its stability before he ascended it. The ladder at the time felt stable. The plaintiff then ascended the ladder without difficulty or mishap. Nothing occurred which led him to believe the ladder as he placed it was unsafe or liable to slip. He

decided it was necessary to return to his workplace in order to get some parts to complete his task and so he came down the ladder. He did so without difficulty or mishap and there was no indication that the ladder was unsafe or liable to slip.

Having returned from his employer's place of business, he again ascended the ladder without difficulty or mishap. Whilst he was on the roof working and before his final descent, Mrs Sevallos used a hose to clean the concrete in the general vicinity of the ladder. The hose was squirting with sufficient pressure to push pooling water down a drain. The concrete around the base of the ladder became wet.

Having completed his work on the roof the plaintiff commenced to descend the ladder. He did so without looking down and without noticing that the concrete below was wet. The top of the ladder was barely above the level of the top of the fascia. The plaintiff placed his left leg on the second top rung, steadying himself with his hands on the top of the stiles of the ladder whilst keeping his right foot on the roof. When he lifted his right leg towards the ladder rungs, the ladder itself bore his full weight and it slipped from under him, causing him to crash to the concrete.

His Honour found that "the ladder came to grief in these circumstances because the concrete at its base was wet." He further found that, in the circumstances of the awkward access to the defendant's roof created by the fascia, the plaintiff acted

reasonably. He also found that the plaintiff did not act "unreasonably or in a foolhardy way" in not noticing the wet concrete below him when he climbed onto the ladder for his final descent. He was of the opinion that as the plaintiff had set up a safe system prior to ascending to the roof he was entitled to rely upon it, as he did.

His Honour also found that Mrs Sevallos knew, or ought to have known, that it was unsafe to hose in the general area of the base of the ladder at the time that she did and that the collapse of the ladder resulted from a lack of due care on her part. It was common ground that the defendant was vicariously responsible for her lack of care. Accordingly his Honour found a verdict for the plaintiff.

Upon the hearing of the appeal Mr Hiley QC, senior counsel for the appellant, presented two substantial arguments. First, he submitted that the evidence given at the trial did not support his Honour's finding that Mrs Sevallos knew or ought to have known that it was unsafe to hose the concrete at the base of the ladder and that accordingly his Honour was in error in finding that the collapse of the ladder resulted from a lack of due care on her part. Secondly, he submitted that his Honour was in error in failing to make a finding that the plaintiff was guilty of contributory negligence and in failing to reduce the damages accordingly.

Were it not for some passages in the evidence to which we shall presently refer, we might have had some difficulty in concluding on the evidence that Mrs Sevallos ought to have known that hosing the concrete at the base of the ladder might cause it to slip. However, we think his Honour was justified in finding that Mrs Sevallos knew of the danger of hosing the concrete at the foot of the ladder. In one portion of her evidence, she was asked why she had said in an earlier statement that she did not think hosing the concrete would affect the ladder. She replied, in effect, that she thought hosing the concrete "wouldn't hurt him", i.e. the plaintiff, if she hosed away from the ladder.

It is plain that the trial was conducted on the basis of her denial that she hosed the concrete at the base of the ladder and her assertion that she kept the water away from the base of the ladder because otherwise it might cause the plaintiff harm. Indeed it was put expressly to his Honour by counsel for the defendant in his final address, that Mrs Sevallos was aware that hosing at the base of the ladder might have "interfered or prejudiced" the plaintiff and that was the reason she was careful to keep the water away from the base of the ladder.

We think it was well open to his Honour to conclude from the above evidence that Mrs Sevallos knew that hosing the concrete at the base of the ladder would create a situation of danger and that therefore she acted negligently. The challenge to his Honour's finding of negligence therefore must fail.

We turn now to consider Mr Hiley's argument that a finding of contributory negligence should have been made. We think this argument has some force and indeed at one stage of the argument we thought it should succeed. There is much to be said for the view that the plaintiff, being experienced in the use of ladders, ought to have checked to see that the base of the ladder was secure before he descended from the roof. Although the evidence on the point is not entirely clear, we think it is a reasonable inference from the evidence that if the plaintiff had looked towards the concrete upon which the ladder was resting he would have seen that it was wet. He would then have appreciated that the ladder might slip if he placed his weight upon it.

However, it is to be remembered that the task of getting from the roof and across the fascia onto the ladder was not easy. The plaintiff was entitled to concentrate his efforts on getting onto the ladder and focussing his attention on the immediate task in hand of stepping from the roof onto the ladder. He had ascended and descended the ladder without difficulty on two or three occasions within a relatively short period before the accident occurred. In these circumstances we think it would be hyper-critical of the plaintiff to find that he did not exercise due care for his own safety by failing to look to see that the concrete upon which the ladder rested was in a safe condition. It follows that we share the learned trial Judge's opinion that the plaintiff was not guilty of contributory negligence.

Mr Hiley also submitted that his Honour applied a wrong test in deciding whether the plaintiff had been guilty of contributory negligence. He referred to his Honour's statement that the plaintiff had not acted in a "foolhardy" way and submitted that it was not incumbent on the defendant to show that the plaintiff had acted in a foolhardy way to prove contributory negligence. For this proposition he relied on **Nance v British Columbia Electric Railway Co Ltd** [1951] AC 601 and **Winter v Bennett** [1956] VLR 612. We accept that foolhardiness is not the test of contributory negligence, but we do not think that, read in their entirety, his Honour's reasons disclose that he applied that test. Indeed, he found that the plaintiff had not acted unreasonably, and that finding was destructive of the allegation of contributory negligence.

The appeal is dismissed. The appellant must pay the respondent's costs of the appeal.