Allen v Strata Plan 54664 - [2016] NSWDC 217

District Court

New South Wales

Medium Neutral Citation:	**Allen v Strata Plan 54664 [2016] NSWDC 217**
Hearing dates:	4 and 5 April 2016; 3, 11 and 27 May 2016; written submissions to 10 June 2016
Date of orders:	16 September 2016
Decision date:	16 September 2016
Jurisdiction:	Civil
Before:	Gibson DCJ
Decision:	(1) Judgment for the plaintiff. (2) Liberty to the parties to bring in short minutes of order reflecting the mathematically agreed calculation of damages. (3) Defendant pay plaintiff's costs. (4) Liberty to apply in relation to costs. (5) Exhibits retained for 28 days.
Catchwords:	TORT – negligence – resident of strata title premises trips on mat placed on top of elevator floor carpet to protect it while another occupant moves into the building – duty of care – breach of duty – defendant's code of conduct for safe removals not complied with – obvious risk – contributory negligence – assessment of damages for non-economic loss and home care for 88-year old plaintiff
Legislation Cited:	Civil Liability Act 2002 (NSW), ss 5B, 5C, 5D, 5E, 5G, 5R and 5S Evidence Act 1995 (NSW), ss 46 and 59
Cases Cited:	Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420 Boral Bricks Pty Ltd v Cosmidis [2013] NSWCA 443 Carey v Lake Macquarie City Council (2007) Aust Torts Reports 81-874 Davis v Council of the City of Wagga Wagga [2004] NSWCA 34 Edson v Roads and Traffic Authority (2006) 65 NSWLR 453 Fallas v Mourlas (2006) 65 NSWLR 418 Ferguson v McDonalds Australia Pty Ltd [2005] NSWCA 401 Gulic v O'Neill [2011] NSWCA 361 Hill v Richards [2011] NSWCA 291 In Vitro Technologies Pty Ltd v Taylor [2011] QCA 44 Insurance Commissioner v Joyce (1948) 77 CLR 39 Jackson v McDonald's Australia Ltd [2014] NSWCA 162 Jones v Dunkel (1959) 101 CLR 298 Kappadoukas v Fransepp Pty Ltd [2006] NSWCA 366 Makita (Australia) Pty Ltd v Sprowles (2001) 52 NSWLR 705 Metaxoulis v McDonald's Australia Ltd [2015] NSWCA 95 Neate v Fox (2012) 13 DCLR (NSW) 319 Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Same [2009] NSWSC 1026 Stojan (No 9) Pty Ltd v Kenway [2009] NSWCA 364 Sutherland Shire Council v Henshaw [2004] NSWCA 386 Reece v Reece (1994) 19 MVR 103 Temora Shire Council v Stein (2004) LGERA 407 Thompson v Woolworths (Queensland) Pty Ltd (2005) 221 CLR 234 Varga v Galea [2011] NSWCA 76 Woolworths Limited v Lawlor [2004] NSWCA 209 Wyong Shire Council v Shirt (1980) 146 CLR 40 Wyong Shire Council v Vairy (2004) Aust Torts Reports 81-754
Category:	Principal judgment
Parties:	Plaintiff: Shirley Allen Defendant: Strata Plan 54664
Representation:	Counsel: Plaintiff: Mr P Jones Defendant: Mr N Chen Solicitors: Plaintiff: Graham Jones Lawyers Defendant: McCulloch & Buggy Lawyers
File Number(s):	2014/258817
Publication restriction:	None

Judgment

The plaintiff's claim for damages

1. The plaintiff by statement of claim filed on 3 September 2014 brings proceedings for damages for injuries she suffered as a result of tripping when entering the lift on premises for which the defendant was the occupier, on Sunday 17 February 2013. The plaintiff, who is currently 88 years of age, suffered significant injuries. The defendant, Strata Plan 54664, is hereafter referred to as either the defendant or the owners' corporation.

2. The circumstances of the plaintiff's accident were as follows. The plaintiff lived in a block of apartments in Mosman, Sydney, which after a series of problems and damage, laid down strict rules ("the code of conduct") about removalists and removal equipment use by persons moving into and out of the building, such as restricted hours, attention to the welfare of residents and supervision by the caretaker, who charged a fee for work done outside the set hours. The defendant provided a mat for use on the floor of the lift, kept tightly rolled up when not in use. Activities of this kind were entirely banned on Sundays.

3. In breach of all these rules, occupants moving in to the building not only continued their moving activities on Saturday (after the caretaker had left for the day) but on Sunday, which was forbidden. As a result, the defendant's mat (photographs were tendered, and it can be seen to be frayed at the edges) was left covering the carpet in the building's lift for more than a day and a half while the occupants continued their moving activities during Sunday. When the plaintiff, who lived in the building, entered the lift on Sunday in the early evening to return to her apartment, she tripped on the mat and fell.

The particulars of negligence

4. The particulars of negligence pleaded are as follows:

    1. Failing to ensure there was no raised section of the temporary rubber matting causing a trip hazard for those entering the lift.

    2. Failing to ensure that it was safe to enter the lift.

    3. Failing to have any or any proper system of inspection of the temporary rubber matting in the lift.

    4. Failing to provide a lift that was safe for use.

    5. Failing to warn the plaintiff of the raised edge of the temporary rubber matting.

    6. Failing to provide a suitable cover over the raised edge of the temporary rubber matting that was covering the floor of the lift.

7. Failing to ensure that the floor surface of the lift was level particularly at the point of entry to the lift.

8. Failing to ensure that the entrance area of the lift was safe to proceed across.

9. Failing to properly maintain an area which was used by many residents and visitors.

10. Failing to tape down the edge of the temporary rubber matting at the point of entry.

11. Failing to ensure that the temporary rubber matting did not curl up.

5. The plaintiff's fall was not observed by anyone. The plaintiff, who is currently 88 years old, has been noted in some of the medical reports tendered to suffer from memory defects.

6. The plaintiff and defendant each called witnesses about statements made by the plaintiff to other persons who came to her aid, including two residents of the building and the plaintiff's granddaughter, Ms Gemma Louise Allen. The plaintiff also relies upon contemporaneous reports of the ambulance officer and the hospital.

7. The plaintiff underwent a right reverse shoulder replacement and the effect of her injuries on a person of her age has been the subject of reports, including an occupational health report (tendered by both parties). Her injuries are set out in more detail in the section of this judgment concerning quantum.

The issues for determination

8. The issues for determination in these proceedings are:

9. The circumstances and mechanics of the plaintiff's accident;

10. The degree of weight to give to the ambulance officer's description of the circumstances of the accident;

11. Sections 5B and 5C *Civil Liability Act 2002* (NSW) issues;

12. Causation;

13. Contributory negligence; and

14. Damages.

15. The Defence "relies generally upon the provisions of the Civil Liability Act 2002 (CLA) and in particular upon Sections 5B, 5C, 5D, 5E, 5R and 5S " (Defence, paragraph 6). This very generalised statement is unhelpful, particularly as the basis upon which the claim was defended changed during the trial.

16. Inconsistently with the claim that there was nothing wrong with the rubber mat, the defendant particularises a claim of obvious risk (at paragraph 7 of the Defence):

> "The Defendant alleges that the risk of harm posed by entering the lift and traversing the rubber matting was an obvious risk for the purposes of Part 1A Division 4 of the CLA and:
>
> (a) Pursuant to Section 5G of the CLA , the Plaintiff is presumed to have been aware of the risk of harm and;
>
> (b) The Plaintiff voluntarily assumed the risk of harm and;
>
> (c) Pursuant to Section 5H of the CLA , the Defendant did not owe a duty of care to the Plaintiff to warn of the risk."

17. Although this pleading states that "entering the lift and traversing the rubber matting" was the obvious risk, that is not how the defendant conducted its defence at the hearing. The defendant never asserted the rubber mat (which belonged to the defendant, not the removalists) of itself constituted an obvious risk.

18. I shall commence with a description of the building in which the accident occurred, and the procedure which was employed to ensure that persons moving into and out of this large apartment complex were to do so in compliance with carefully planned safety rules. The opinion of the expert, Mr Burns, based on the mechanics of the fall, follows my summary of the evidence of the parties.

The building where the accident occurred

19. The apartment block in question includes the five storey building in which the plaintiff resides as well as two other buildings. Each of these buildings is serviced by a security key lift, which travels from the basement to the ground or lobby floor and then up to each of the levels on which residents have their apartments (in the case of the plaintiff, six levels in total, as hers is a five storey building). The only lift accessible by the plaintiff was lift number 3, one of the three servicing the apartment building, and located in the middle. At the time that the plaintiff suffered her accident:

    1. The lift floor was carpeted (following the accident it was replaced with vinyl: Exhibit A, page 401) (see minutes of 24 February 2011 and 20 October 2011);

    2. The lighting was non-LED (this has since been changed);

3. The car park lighting had been the subject of Body Corporate concerns as noted in a letter of 20 October 2011, when the Body Corporate considered the need to engage a lighting engineer (Exhibit D, minutes of meeting 20 October 2011; see also minutes of meeting of 6 March 2012 concerning garage emergency lighting);

4. There had been problems with "misbehaviour and damage to the complex caused by removalists" (Exhibit D, minutes of meeting Thursday 28 July 2011);

5. There were health issues arising from the age and infirmity of some residents which had placed burdens on the caretaker "beyond his scope of duties" which required the establishment of a protocol and an incident report (Exhibit D, minutes 20 October 2011).

Special rules for removalist use of lifts

20. As the few Body Corporate minutes of meetings which have been provided in Exhibit D make clear, there were "ongoing problems" (Exhibit A, page 411) with removalists and deliveries. A code of conduct was established, but it was not complied with, with the result that the following notice to residents was provided some time prior to the plaintiff's accident:

> "NOTICE TO RESIDENTS
>
> Due to ongoing problems with removalists and deliveries, residents are reminded of the property rules as listed in the Code of Conduct:-
>
> **Advance notice** is required of all removals:-
>
> - Weekdays 24 hours,
>
> - Weekends 48 hours with no exception,
>
> - **No removals or deliveries on Sunday.**
>
> According to Section 2 of Residents Code of Conduct, you are required to advise the Property Manager so that arrangements can be made to ensure that the lift and other areas can be protected against damage, and also to assist with access to the building.
>
> You can contact the Property Manager on bradyst@bigpond.net.au or phone 044 664 504 to advise if you are expecting a removalist or delivery during the following times:-
>
> - Monday-Friday 7am to 4pm
>
> - Saturday – 8am to 12pm.
>
> **Further points to note**
>
> - ALL REMOVALS MUST BE THROUGH THE BASEMENT. No deliveries to be made through the front gate at any time.

- Removal trucks are not to park in or across the drive under any circumstances.

- Residents' parking bays and basement roadways are not to be blocked.

- Gates, roller doors and fire doors must not be held open.

- Lift doors must not be held open. This may result in the lift overheating and stalling. Those responsible will be liable to pay the Otis call out charges. Removalists must not monopolise lifts to the exclusion of residents.

- A charge of $400.00 will be payable by the resident for any damage to the lifts, or any other part of the complex, caused or contributed to by removalists or contractors engaged or used by any resident moving in or moving out.

- Removals and deliveries falling outside these times will attract an overtime levy. These charges will be levied on the resident by the Managing Agents – Strata Partners.

Executive Committee

Strata Plan 54664" (Exhibit A, page 411)

21. It is not in dispute that the circumstances of the move which preceded the plaintiff's accident occurred in breach of almost every paragraph of this document:

    1. Removals were to be completed on Saturdays by midday, but that did not occur;

    2. The arrangements were for the caretaker to be paid overtime if he remained after midday on Saturday. Removals and deliveries on Sunday were forbidden, but that did not occur.

22. Mr and Mrs Alaca, who were moving into the premises, completed his move some time late on Saturday afternoon. He did not remove the mat from the lift. It remained in the lift on Saturday afternoon and evening, and for the whole of Sunday, until the plaintiff suffered her fall at around 5.00pm when entering the lift from the basement level.

23. The regular caretaker, Charles Hughes, was away. The assistant caretaker completed his duties at midday on Saturday and left the premises despite knowing that the moving of furniture had not been completed. Although Mr Twaddell, who was on the executive of the defendant, travelled up and down in the lift while the mat was there, he took no steps to remove it.

24. There is no evidence that the mat had ever been left in the lift for such a lengthy period of time. This is of significance when considering the defendant's submissions that there was no prior evidence of accidents.

The circumstances in which the accident occurred

25. I set out below the evidence given on behalf of both parties as to the accident. Surprisingly, given the plaintiff's significant injuries, there are no owners' corporation or managing agent records (contemporaneous or otherwise) recording these events.

The plaintiff's evidence as to her fall

26. The plaintiff's first knowledge that anyone was moving into the premises occurred when she used the lift on Friday 15 February 2013 to travel from the garage to her apartment. When she went to the lift in the car park, she observed a couple standing outside the lift who were stranger. She pressed the lift button and when the lift doors opened she saw that matting was on the floor of the lift for removals. She asked these two people, "You are moving in?" and one or both of them replied, "Yes in the morning", meaning Saturday morning.

27. When the plaintiff used the lift on Saturday 16 February 2013, she observed a black mat on the floor of the lift. The plaintiff described this matting as follows:

> "Q. At that stage, what was the usual flooring of the lift like?
>
> A. Well, it was plush carpet and this mat used to be just put over it, this rubber mat. Like, it wasn't fitted or taped or anything else.
>
> Q. Would you have a look at this photograph please. Do you recognise the matting there?
>
> A. Yes.
>
> Q. Is that the same sort of matting that you're referring to as being placed on the lift floor?
>
> A. No. The other one wasn't cut. It was all frayed and it wasn't pinned down. It was just - prior to the accident. But I--
>
> Q. When you say "all frayed", where was it frayed? We're looking at the leading edge there.
>
> A. Yes. It's frayed on every - it was frayed on every edge, because it'd been used since day one, and that's a long time in the lift of a mat that wasn't cared for." (T 18)

28. The plaintiff was familiar with the rules in relation to the laying down of mats in the lift in relation to the activities of removalists:

> "Q. In relation to the mat and Mr Hughes, did you notice a course of behaviour that was adopted as to when the mat went down and when it was taken up?
>
> A. Yes. He was very diligent as a rule and the mat was put down and he had to lock the gates and everything after removal and it was all done as one. The mat was removed and
>
> Q. So after the moving in or moving out, was the mat generally promptly removed from the lift?
>
> A. That's right, yes." (T 21)

29. However, this was not what occurred on this occasion:

> "Q. I think on the weekend of this accident Mr Hughes, however, went away. Is that right?
>
> A. Yes, he was retiring.
>
> Q. And the mat was left down.
>
> A. Yes.
>
> Q. The move had taken place on the Saturday.
>
> A. That's right.
>
> Q. And your accident occurred on the Sunday.
>
> A. Yes.
>
> Q. On the Saturday did you hear, from inside your unit, people going in and out of the lift at various times?
>
> A. Yes, we had young children next to us and they were in and out on a beautiful day." (T 21-22)

30. On Sunday 17 February 2013 at approximately 4:00pm, the plaintiff decided to visit the local shopping centre. When she entered the lift she noted that the rubber matting was still there. Her evidence was:

> "Q. Did you think that that was somewhat unusual, given the conduct of Mr Hughes previously removing it shortly after the movement?
>
> A. That's right.
>
> Q. On that occasion that you went to do the shopping were you wearing a full flat shoe?
>
> A. Yes.
>
> Q. And had you ever tripped in those shoes previously?
>
> A. No.
>
> Q. Did you go in the lift to the basement and then get out of the lift and go to your car?
>
> A. Yes.
>
> Q. At that stage did you experience no problems?
>
> A. No.
>
> Q. Did you drive your car to the shop, go in and purchase some fruit, a couple of apples, bananas, some peaches, put them in a plastic bag and then carry them back to your car?

A. That's right." (T 22)

31. The plaintiff described what occurred when she returned to the basement of the building she lived in:

"Q. Did you get back into the car and drive to the basement of your unit?

A. Yes.

Q. Did you get out of the car?

A. Yeah.

Q. And were you carrying your handbag, being a money bag

A. Yes.

Q. with some handles on it? Is that right?

A. That's right.

Q. That was over your left forearm?

A. Yes.

Q. And were you carrying the plastic bag with the fruit in it in your right hand?

A. Yes, I'd say so.

Q. Did you come towards the lift? Down in the basement, how would you describe the lighting near the lift?

A. The lighting was very dull. It was just a round dome outside the lift.

Q. Did the lift come after you had paged it with the use of what you call a zapper?

A. Yes.

Q. Did you then attempt to enter the lift?

A. Yes." (T 22-23)

32. The plaintiff described her fall as follows:

"Q. As you attempted to enter the lift, did something happen with one of your feet?

A. Well, I entered with my right foot and tripped and fell to the ground.

Q. And what did you trip on?

A. Well, the mat, the rubber mat.

Q. When you fell to the ground, did you fall on your right shoulder?

A. Yes.

Q. Did you fall pretty heavily?

A. I did because I couldn't save myself.

Q. Then did you experience some pain?

A. Excruciating.

Q. You were lying at that stage on the floor of the lift.

A. Yes.

Q. And then were you able to get up?

A. No." (T 23)

33. The plaintiff described the circumstances in which she was discovered in that position as follows:

"Q. Eventually did the lift go up, having been paged

A. Yes.

Q. apparently by someone and were you still on the floor of the lift?

A. Yeah.

Q. And then the lift door opened and when it opened did you see the face of the chairman of the body corporate, Mr Twaddle?

A. Yes. Well, yes, we went up to his floor with me on the floor and he proceeded to try and lift me but I said, "Don't touch me. We've got to wait for someone else."

Q. Did the lift then go to the fourth floor and did you notice the same man that you'd spoken to on Friday, who was the new tenant that had moved in on the Saturday?

A. Yes, a young man.

Q. And did he and Mr Twaddle then lift you up

A. Yes.

Q. take the lift to the third floor and move you into your unit?

A. That's right.

Q. Did Mr Twaddle say something to you?

A. He said to me, "You had a blackout." I said, "I did not." I said, "I tripped on that mat."" (T 23-24)

34. The plaintiff described the calling of the ambulance and the arrival of her granddaughter as follows:

> "Q. Then was the ambulance called?
>
> A. Yes, they got me into my unit and sat down and Mr Twaddle called the ambulance.
>
> Q. Then I think he disappeared out of your unit and then returned with a double Scotch for himself. Is that right?
>
> A. That's right.
>
> Q. And your grandchildren were also called.
>
> A. Yes. Well, at first I - Judith, my youngest daughter, was out of the country and it took me a while to think who to call because I knew everybody was doing things. So after a while I remembered that there might be two grandchildren home and he called them and
>
> Q. And they came over. The ambulance came.
>
> A. Yes.
>
> Q. You told the ambulance people what had happened.
>
> A. Yes." (T 24)

35. The plaintiff agreed in cross-examination that she had walked over the mat in the lift "many, many times" (T 37) since she had lived in the building. When asked whether it felt safe underfoot, she replied:

> "Q. You felt it safe underfoot whilst you'd walked over it. Isn't that right?
>
> A. You made sure of that it was.
>
> Q. You certainly hadn't prior to your fall any difficulty in walking across, into the car across onto the mat. Isn't that right?
>
> A. I had to be careful.
>
> Q. If you were careful you were able to enter into the lift when the mat was on the floor, were you not?
>
> A. Yes. But you know you had to be.
>
> Q. You could certainly see it, couldn't you, or you knew that the mat was down because there were the curtains placed around the walls as well?
>
> A. It wasn't on this day. The curtains were not up.
>
> Q. So you observed when you went earlier out to go shopping that there was just the mat down and not the curtains. Is that right?
>
> A. That's right." (T 37)

36. It was put to the plaintiff that the mat was a thick rubber mat and that it was heavy (T 45). The plaintiff disagreed but conceded she had never lifted it herself. She was cross-examined about her recollection of the lighting (T 46) and she was cross-examined about her fall as follows:

> "Q. As you entered into the lift, you've told her Honour that's when you had your trip. Isn't that right?
>
> A. Yes.
>
> Q. You obviously and you've told her Honour you were in excruciating pain?
>
> A. Mm.
>
> Q. The next thing you remember is the lift moving to another level and Mr Twaddell entering into the lift. Is that right?
>
> A. Well, I fell to the floor as I tripped into the lift and I looked up. I couldn't reach up to go to my floor, I had to lay there till somebody activated the lift and then I managed to look up at the string of floors and we went to the - I went to the fifth floor because he was going to use it and I thought, well, at least I'm not going to lay here all night.
>
> Q. As you fell you fell towards obviously the rear of the car of the lift, didn't you?
>
> A. That's right.
>
> Q. Was your head facing to the left side or to the right side or you can't remember?
>
> A. Well, I was on the ground and I don't know about facing anywhere; I mean, I was flat out on the ground.
>
> Q. So you may have been facing away from the door for all you can recall?
>
> A. Yes, I was facing the back window, the back mirror.
>
> Q. When you were walking into the lift you were looking straight ahead, were you?
>
> A. Yes.
>
> Q. You knew the mat was there from your earlier attendance that day, didn't you?
>
> A. Well, it shouldn't have been there.
>
> Q. You knew it was there, though, didn't you, prior to you going into the lift?
>
> A. Well, I didn't expect it to be there.
>
> Q. You knew it was there didn't you when you returned from shopping that afternoon?
>
> A. No, I didn't say there's a mat in the lift because it shouldn't have been there.
>
> Q. So you weren't looking down at all prior to walking into the lift? Is that fair?

A. That's fair enough.

Q. And you were looking towards what, the mirror at the back were you?

A. Well, I was getting ready to zap my floor.

Q. But as you walked in your eyes were up not down?

A. That's right. Well, I--

Q. On what you - I'm sorry, madam, did you finish?

A. Well, you say I'm looking up: I'm looking straight ahead." (T 47-48)

37. The plaintiff agreed that she was in shock. It was put to her that she had no recollection at all about making observations about the mat itself after her fall:

"Q. In fact, you don't have any recollection at all about making any specific observation about the mat itself after your fall, other than being assisted by Mr Twaddell and the tenant. Is that right?

A. I suppose it is; I mean, we didn't say - so he said to me - do you want to know what he said?

Q. No.

HER HONOUR

Q. Yes. I'm sorry, is this part of your answer?

A. Yes. He said to me you had a blackout if anything, rather than tripped on the mat. I said, "I did not." I said, "I tripped on that mat."

CHEN

Q. The question I put was that you didn't make any observation after you were on the ground and then being assisted by Mr Twaddell and the tenant about the mat, did you? You didn't make any other observation about the edge of the mat prior to being helped out, did you?

A. No; because, I mean, what do you do when you're injured? You don't go looking around for faults and everything else." (T 48-49)

38. At T 49, Mr Chen put to the plaintiff:

"Q. All you can say, Mrs Allen, is that you tripped on the mat as you came in? Isn't that right?

A. Mm.

Q. I'm sorry, you have to say yes or no.

A. Sorry: yes."

39. When then asked whether this was all she could say about her accident happened, she replied "Well, I tripped on the mat and fell heavily to the ground" (T 50).

40. Mr Chen put to her at T 50:

> "Q. You didn't make any observation about the edge of the mat as you walked in. Isn't that right?
>
> A. Well, I couldn't could I.
>
> Q. You didn't make any observation about the edge of the mat after your fall. Isn't that so?
>
> A. Well, no; I mean yes, okay."

41. It has been necessary to set out all this evidence in detail because of the disputes between counsel as to precisely what questions were put to the plaintiff in chief and in cross-examination. Counsel for the defendant submitted that failure to ask the plaintiff for a more precise account of how the accident occurred meant that there was no evidence to support her claim as to how she fell.

42. The plaintiff described her account to the ambulance officer and the hospital in clear terms. I have set out the extracts from the relevant records below.

43. The plaintiff also gave evidence in chief, and was extensively cross-examined about, changes to the lift before and after the event. This included changes to the lighting, the carpet, the security system for getting up and down (although this was not the subject of cross-examination) and the plaintiff's evidence that a brand new mat had been bought because of the inadequacy of the previous "frayed" mat. It was also put to her that there were two mats and not one.

44. I do not propose to set out this evidence in detail. The plaintiff's credit as a witness in her ability to remember events are not significant issues in these proceedings. There is no doubt that she suffered a fall, and her recollection of the circumstances in which she suffered that fall is asserted by the defendant to be unexplored in examination in chief and thus not before the court. Her ability to recollect events generally is also challenged. In addition, and perhaps more relevantly, evidence about changes to the lift lighting, carpet, security key system and related topics are set out in the report of Mr Burns, who was not required for cross-examination. Any challenge to the facts set out in Mr Burns' report is difficult for the defendant to mount because of their failure to discover, in a frank and full fashion, the documents sought by the plaintiff under subpoena.

45. The challenges to the plaintiff's evidence are unsupported by the relevant documentary evidence. It was the plaintiff's counsel, not the defendant, who tendered the documents produced on subpoena. The defendant tendered no documents in support of their claims as to the plaintiff's asserted errors in describing the changes to the lift and to the lighting, in circumstances where this

information was peculiarly within the knowledge of the defendant. They tendered no photographs to demonstrate that there were two mats, not one.

46. The plaintiff's account of the accident is corroborated by the contents of the ambulance report and, to a lesser extent, the notation made in the hospital records. Her description of the accident to medical practitioners she consulted was also consistent. I next set out this evidence and the challenges to its reliability by the defendant.

Other evidence of the plaintiff's account of the circumstances of the accident

47. The ambulance officer who was called to her gave a very precise description of how the plaintiff said the accident occurred:

> "**Case Description** C/T 84 YOF FALLEN IN ELEVATOR – O/A MET BY GRANDSON AND ADVISE PT IS BACK IN OWN UNIT, PT ALERT, ORIENTATED, WELL PERFUSED. PT STATES SIMPLE TRIP AND FALL WHILST ENTERING LIFT (RUBBING MATTING ON FLOOR OF LIFT FOR PERSON MOVING IN STICK UP ON RIGHT HAND SIDE OF DOORWAY). PT C/P RIGHT ELBOW/HUMERUS PAIN, SOME SWELLING OVER THE DISTAL HUMERUS REGION, NIL OBVIOUS CLAVICULAR INJURY AND NIL OTHER C/P PAIN IE HEAD / NECK / CHEST / BACK, NIL VISUAL DEFECTS, LOC FOR BRIEF PERIOD – UNWITNESSED FALL, GRAZE TO RIGHT TEMPORAL REGION. RX IV ACCESS, PAIN RELIEF AS CHARTED, ANTIMETIC, SLING APPLIED, RING REMOVED FROM RIGHT RING FINGER – AND PLACED ON THE LEFT RING FINGER AND A YELLOW METAL RING REMOVED AND GIVEN TO GRANDAUGHTER [sic] (GEMMA). PT EXCTRICATED [sic] VIA CARRY CHAIR AND STRETCHER TRANSPORT. EN ROUTE PT C/O SOME FURTHER PAIN TO RIGHT ELBOW – GIVEN FURTHER DOSE OF MORPHINE POST BP CHECK. PT THEN BECAME NASUEAS [sic], HAS TRAVEL SICKNESS USUALLY, AT HOSPITAL PT NOTED TO BE HYPOTENSIVE AND POSITIONED LEGS ELEVATED / SUPINE AND IVE FLUIDS COMMENCED WITH GOOD EFFECT. PT GOOD SENSATION IN DISTAL LIMB – COLOUR / WARMTH / SENSATION INTACT BUT REDUCED MOVEMENT." (Exhibit A, page 63)

48. The plaintiff gave the same description to the hospital on her arrival, namely:

> "Slipped on a rubber mat not in lift – mat not usually there. On this floor for 15 minutes." (Exhibit A, page 10)

49. Counsel for the defendant submitted that these accounts were of no evidentiary value. He drew my attention to the observations of the New South Wales Court of Appeal in cases such as *Ferguson v McDonalds Australia Pty Ltd* [2005] NSWCA 401 at [81] , where Tobias JA stated:

> "[81] ... As Mason P, with whom Beazley JA and myself agreed, observed in Davis v Council of the City of Wagga Wagga [2004] NSWCA 34 at [35] :

> Experience teaches that busy doctors sometimes misunderstand or misrecord history of accidents, particularly in circumstances where their concern is with the treatment or impact of an indisputable, frank injury."

50. Mr Chen warned that cases where such evidence was accepted (such as *Ferguson v McDonalds Australia Pty Ltd* and *Davis* v Council of the City of Wagga Wagga [2004] NSWCA 34) resulted in appeals being allowed. It certainly is the case that caution must be exercised when considering the notes of busy emergency workers. In *Gulic v O'Neill* [2011] NSWCA 361 the Court:

> "[24] ... In undertaking this task, however, I bear in mind that it is necessary to exercise a degree of caution in relation to placing reliance upon histories taken by medical practitioners. The need for caution in this area has been stated by this court on a number of occasions: Davis v Council of the City of Wagga Wagga [2004] NSWCA 34 at [35] ; Mason v Demasi [2009] NSWCA 227 at [2] ; Container Terminals Australia v Huseyin [2008] NSWCA 320 at [8] ; Kappadoukas v Fransepp Pty Ltd [2006] NSWCA 366 at [56] ; Mastronardi v State of New South Wales [2009] NSWCA 270 at [87] ; Hill v Richards [2011] NSWCA 291 at [23] ."

51. However, common sense must be exercised. In *Hill v Richards* [2011] NSWCA 291, two doctors recorded that a person at the scene of the accident had helped the plaintiff up, and the submission was made that the plaintiff's denial of this, and failure to call the witness, meant this evidence should not be accepted. The Court stated at [22]-[23]:

> "[22] Fourthly, the histories recorded by two doctors called in the respondent's case included that he was helped up after the fall. Mr Alan Nichols, who examined the respondent in May 2007 for the purposes of a medico-legal report, recorded that "[h]e required help to get up", and Dr Frank Breslin, who examined the respondent in July 2008 for a medico-legal report, recorded that "[h]e needed help to get up". The respondent said in evidence that he gave no such history. The appellants submitted that what the doctors recorded could only have come from the respondent, and that if he was helped up someone else in the shed must have seen the fall but was not called to give evidence. They submitted that the respondent had given evidence of bouncing back up in order to explain (inferentially, falsely) why there was no eye-witness evidence.
>
> [23] This last had not been directly put to the respondent; he was asked whether he appreciated that if someone helped him to stand up "that would be important", and he answered, "No". The discrepant history is a material consideration not only for credibility, but also for a possible inference against the respondent's case from the absence of evidence from someone who may have helped him up. However, the correctness of recorded histories in medical reports much later on may be open to question (see Davis v Wagga Wagga City Council [2004] NSWCA 34 ; (2004) 4 DDCR 358 at [35] ; Kappadoukas v Fransepp Pty Ltd [2006] NSWCA 366 at [56] ; Mastronardi v New South Wales [2009] NSWCA 270 at [87]); others in the shed were equally available for the appellants to call to give evidence; and the submission of false evidence by the respondent to explain an absence of eye-witness evidence may attribute too much forensic understanding to the respondent."

52. I acknowledge that particular care is needed with ambulance notes. In Kappadoukas v Fransepp Pty Ltd [2006] NSWCA 366, ambulance notes, then copied by a triage nurse, contained material inconsistent with the plaintiff's account of the accident. The Court of Appeal noted at [55]-[57] both that the ambulance staff were likely to have been preoccupied with treating the plaintiff than inquiring into how the accident happened, and that their error was the likely source of the later notes.

53. When determining whether the notes in question have been hastily prepared or are otherwise likely to be inaccurately or unreliable, care should be taken to analyse just what is written rather than extrapolating generally from decisions in other cases. The ambulance notes in these cases are a longer than usual and carefully written document, where the ambulance officer has gone to some trouble to set out the cause of the accident and was in a position to observe the mat in question, as opposed to just recording what the plaintiff said. I regard this document and (to a much lesser extent) the hospital notes, as being corroborative evidence of importance for this reason notwithstanding the circumstances of their hasty preparation.

54. The plaintiff also called evidence from her daughter and granddaughter.

The evidence of Mrs Judy Goldsmith

55. Mrs Goldsmith, the plaintiff's daughter, was only called in relation to the claim for home care. Most regrettably, she was not asked about the correspondence she had with the managing agent about her mother's accident, in which the state of the mat was discussed. This is one of a series of unfortunate gaps in the evidence.

56. Mrs Goldsmith was overseas when the accident happened. When she returned, the plaintiff was still in hospital. After the plaintiff was discharged from hospital, Mrs Goldsmith spent time with her mother performing household tasks and doing shopping.

57. Prior to the accident, the plaintiff had been receiving some limited care and occasionally used a walking stick. After her accident, an organisation called "Daughterly Care" came in the morning so Mrs Goldsmith came during the lunchtime period which coincided with physiotherapy appointments. She would prepare her mother's lunch and perform washing and cleaning and other general tasks. Because the plaintiff was not having great success eating with her left arm, there were often food stains on her clothes. She described the plaintiff as remaining in a sling for "quite some time" (T 68). Objection was taken to her giving evidence outside the particulars provided of past total care.

58. It is apparent from her evidence that she did carry out work well in excess of the amount particularised. Mr Chen (who had challenged the claim for past care in its entirety, although the defendant would later concede this amount) submitted that I had already allowed the case "up to the pleaded amount" but should not permit more, and this course was agreed upon by Mr Jones, resulting in agreement as to past out of pocket expenses.

59. The amount of care began to reduce from October 2013, but this was in part due to Mrs Goldsmith had her daughter's inquest coming up. Her daughter had died in circumstances which appeared to have affected the family profoundly. Mrs Goldsmith stated that she was "a bit blurry" as to what happened as she was in quite an emotional state. She did, however, give a graphic description of the degree of impact that this accident had had on the plaintiff as follows:

> "Q. Are you able to tell the Court please the changes that you've noticed in your mother after the accident compared with before the accident?
>
> A. They were profound. Three months before her accident we had a threeday road trip to Canberra for her great grand-daughter's christening and she coped with the drive to Canberra; you know, we stopped in Goulburn to go to the art gallery and have lunch, we went to the portrait gallery in Canberra, so she was very much mobile and out and about and very engaged with life and interested in things, very buoyant. She was also very self-sufficient. Two weeks prior to the accident she'd been on a bus trip to Taree, which is quite remarkable. So very, I would say, self-sufficient, buoyant, interested in life. After the accident very overwhelmed by pain, very vulnerable and a loss of confidence and very much clutching at you whenever she went out as well as using her stick and much more needy; asking for things, wanting help.
>
> Q. These days does she complain of any pain?
>
> A. Yes, she still complains of pain.
>
> Q. Where?
>
> A. In her shoulder and arm.
>
> Q. Which side?
>
> A. In her right shoulder and arm.
>
> Q. What do you notice about her ability then to do things for herself these days, particularly activities involving her right shoulder and arm?
>
> A. Okay. Her movement is still restricted. So she can't reach for anything above you know waist height with any success. So that causes pain. Long days. So she's had to give up her Killara bridge because it was a long day and it caused - you know the sitting upright causes her pain. So certain things are going by the wayside and certainly we don't go to Canberra anymore because of that extended sitting upright causes her pain. I think it's the seatbelt.
>
> Q. Pain where?
>
> A. Pain in her shoulder and arm.
>
> Q. What's her outlook on life generally like now compared with before the accident?
>
> A. Less humour. Less - she's certainly less engaged in life and just her world has shrunk because of this, what she does and what she participates in. Like her art has gone by the wayside. Not interested in walking around an art gallery with me anymore." (T 70-71)

60. In cross-examination it was put to Mrs Goldsmith that the plaintiff had used a walking stick all the time before the accident when she went out, to which she responded:

> "A. Not all the time. She picked her moments. She used her walking stick if she was say, for example, going on an extended walk, if she was going to Chatswood Chase or if she was going on one of her bus tours, where obviously she'd come across rocky terrain. If she was just across the road to Bridgepoint she didn't take her stick at that time." (T 71)

61. I pause to note that on the day of the accident, the plaintiff had visited the Bridgepoint Shopping Centre, and this means she did not have her walking stick with her, and I assume that this meant she did not have her walking stick with her when she entered the lift. I did not, however, hear any evidence about this.

Evidence of Ms Gemma Louise Allen

62. At the hearing the plaintiff did not call her granddaughter and grandson, whom she told the court had come to assist her after the accident. The explanation given by Mr Jones was that the plaintiff's granddaughter was overseas and the plaintiff's grandson suffered from an illness. Upon my indicating that I would draw an *Jones v Dunkel* inference (*Jones v Dunkel* (1959) 101 CLR 298) in relation to the evidence of the granddaughter, an application was made to reopen the case and to call her. I granted leave for this to occur and Ms Gemma Louise Allen gave evidence on 11 May 2016 and was cross-examined on 27 May 2016.

63. Ms Allen gave evidence that she was at home on the afternoon of 17 February 2013 when her grandmother telephoned her as follows:

> "Q. Do you think you could recall her exact words a little more clearly? So she said something, "Hello, dear. It's grandma here. I've had a bit of" – can you try and do that?
>
> A. Sure. "Hi Gemma, it's your grandmother, Shirley. There has been an accident. I have tripped over. Could you please quickly come over because I'd like you to be in the ambulance with me to go to the hospital."" (T 187-188)

64. Ms Allen and her brother drove to the plaintiff's home, which took approximately ten minutes. When she went into the building her state of mind was that she was very worried about her grandmother, as she "didn't give me much information about what had happened, so I wasn't sure what to expect" (T 188). When she entered the lift, she made no observations about its contents, and simply went to her grandmother's apartment.

65. When Ms Allen and her brother went in, she saw her grandmother sitting in the lounge room clutching her right arm. She was introduced to a man who was there, who, it transpired, is Mr Twaddell, the neighbour who had helped to bring the plaintiff back into her home after falling in the lift.

66. Ms Allen asked her grandmother, “Grandma, are you okay?” (T 189), to which Ms Allen said the plaintiff replied:

> “A. She said, “I – I tripped over in the lift. I had gone to the shops and, as I got into the lift, I tripped over on the – and there was a mat that shouldn't have been there in the lift.”
>
> Q. Did she say anything—
>
> HER HONOUR
>
> Q. Sorry, did you say, “I tripped over on the mat,” or did you say, “I tripped over. There was a mat?” Can you just say that again?
>
> A. Sure, “I tripped over on a mat in the lift. The mat should not have been there.”
>
> JONES
>
> Q. Did she say anything else about the mat, at that stage?
>
> A. Just that it shouldn’t have been there and that it was raised on the right-hand side.”

67. An objection was taken that this conversation had not been put to Mr Steven Twaddell (T 190). I permitted the evidence to be given under objection on the basis that Mr Twaddell could be recalled to give evidence. Ms Allen repeated at T 191:

> “Q. “I went into the lift after I went shopping," and, in the first person.
>
> A. And I tripped over the mat that was raised on the righthand side. The mat should not have been there.”

68. The plaintiff told her granddaughter that she had called an ambulance and it was on its way. Ms Allen described what occurred next as follows:

> “Q. What happened next?
>
> A. We waited for the ambulance to arrive and we obviously discussed what happened.
>
> Q. At some stage did the ambulance arrive?
>
> A. Yes.
>
> Q. Do you remember how many people
>
> A. Yes.
>
> Q. were associated with the ambulance?
>
> A. There was a male and a female.
>
> Q. Can you remember what they looked like?

A. The woman had short blonde hair in a ponytail, and the male was - had brown hair. They were both of young appearance.

Q. Did the ambulance people speak with your grandmother?

A. Yes.

Q. Were you present when that conversation took place?

A. Yes.

Q. Do you recall what the ambulance people said to your grandmother?

A. Yes.

Q. What did they say?

A. Firstly the woman asked, "Shirley, how are you feeling?" She examined her arm. She said, "It looks like this - I suspect this might be a fracture. What happened?"

Q. What did your grandmother say?

A. She said, "Oh, I tripped on a mat in my lift that shouldn't have been there. It was raised."" (T 191-192)

69. Ms Allen completed her answer by saying that the plaintiff had said "It was raised on the righthand side" (T 192). When asked to describe what happened next, Ms Allen said:

> "A. So after they examined her we then left her apartment to go to the ambulance via the lift, and as we went into the lift the female ambulance officer said, "Oh, I can see where you have tripped."" (T 192)

70. Following a ruling on an objection, Ms Allen restated this evidence as:

> "WITNESS: "Oh, I can see where you have tripped, Shirley. Be careful as you get in the lift again." (T 192)

71. Ms Allen was asked to described what she noticed as the female ambulance officer said this, and she replied:

> "Q. What did you notice?
>
> A. I had noticed that it was raised on the righthand side as if it had been pushed to the right, raised about 5 centimetres." (T 192)

72. Ms Allen was asked if anyone else was present at that time besides herself, the plaintiff and the ambulance officers and replied:

"A. I can't remember if we were in the lift together but the people there were my brother and that man I mentioned.

Q. Did that man come to the lift or not?

A. No.

Q. Did your brother get in the lift with you as well, or not?

A. No.

Q. Did you go down into the lift with your grandmother and then exit?

A. Yes.

Q. Where did you go to after you got out of the lift?

A. We went to the ambulance and went into the ambulance car.

Q. Did you go into the ambulance with your grandmother?

A. Yes. Just me." (T 193)

73. By reason of the evidence of Ms Allen taking Mr Chen by surprise, I was obliged to grant a second adjournment for cross-examination to take place. This was to enable Ms Allen to be cross-examined and for Mr Twaddell to give evidence in reply. Ms Allen was not cross-examined until 27 May 2016.

74. It is not to the credit of the solicitors for the plaintiff that it transpired that Ms Allen had only been overseas for one year, for the purpose of working in America (T 208). She was contacted while she was overseas by her mother, and asked to write a statement (T 209) which was not provided until after the commencement of this hearing (T 210). In cross-examination, a challenge was made to her recollection of events:

"Q. Is it fair to say, Ms Allen, that prior to providing the statement, or preparing that statement a few weeks ago, you really hadn't had cause to think much about the circumstances of how your grandmother came to fall in February of 2013?

A. When I was contacted overseas last year I took time to recollect - to think about my recollection, so I had thought about it. It wasn't as if I had just started to think about it recently, if that's what you mean.

Q. All right, and prior to 2015 when you'd had this contact via your mother, you hadn't prepared a statement at all, had you?

A. No.

Q. You hadn't made a note of any kind of what occurred on the day of the accident, had you?

A. Nothing really, no.

Q. And you hadn't taken a photograph of what you saw at the - where your grandmother lived. Is that fair?

A. No.

Q. Are you agreeing with me that you didn't take a photograph, did you?

A. I did not take a photograph.

Q. So is this the position: that as at 2015 you started to think about the incident a little more when your mother made contact on Facebook. Is that so?

A. I was still aware that she was planning to take action way before my mother had contacted me. That was just the first time she contacted me about myself giving a statement."

75. Ms Allen explained her understanding of the issues before and after speaking to counsel for the plaintiff as follows:

"Q. You didn't understand specifically what evidence you needed to give in relation to your grandmother's claim, did you, before you saw Mr Jones?

A. No.

Q. After you saw Mr Jones, you understood, did you not, that one of the issues that you needed to give evidence about was what your grandmother said following the fall when you attended upon her?

A. I was told to provide my recollection of all the events that happened, but not anything specific, just every step.

Q. You understood, did you not, after you had seen Mr Jones, that one of the issues that you needed to give evidence on was what occurred when you attended upon your grandmother following her fall. Isn't that right?

A. Yes.

Q. One of the issues, as well, that you understood that you'd be needed to give evidence about was what discussions, if any, were had with the ambulance officers. Isn't that right?

A. Yes.

Q. I take it you knew that an ambulance report had been prepared. Is that right?

A. Yes.

Q. You know the contents of it, don't you?

A. Before I gave my recollection to them, they had not told me about the ambulance report. I wasn't aware until afterwards, after I provided my statement to them.

Q. So you've certainly seen the ambulance report, haven't you?

A. No." (T 212)

76. In answer to the challenge to her recollection of events and any possible reconstruction resulting from contamination from other sources, Ms Allen replied at T 213:

"Q. I take it that you'd accept that over time your recollection about particular events can diminish?

A. Yes, but this is an event that I remembered because it was significant, and I had known shortly after that she was taking legal action. It wasn't until a while after when I was contacted from my mum that I knew that I would be a witness.

Q. No one doubts you've got a good recollection of the fact that your grandmother had a nasty fall, but do you accept as a proposition that recollection about conversations over time can deteriorate?

A. Yes, but my recollection of the conversation and the subjects are clear.

Q. But you've got no doubt about it in your own mind now?

A. No.

Q. You're certain, are you, that your grandmother said particular words, and you've got a distinct and clear recollection, do you, of the very precise words that she said?

A. Yes.

Q. You wouldn't, for example, accept as a proposition that you could be mistaken in any way?

A. No.

Q. You wouldn't accept that perhaps if your grandmother had a version that was different to yours, that your recollection may be wrong?

A. No.

Q. Not at all?

A. Well, you're saying if I don't remember exact words - it's impossible to remember exact words, but I remember what was said, and I have no doubt of what was said.

Q. But you go further, don't you, and you've got a, on your version, an exact recollection of the precise words used?

A. I provided the conversation, whether they were the exact words or still of that nature.

Q. You see, do you accept that, for example, your grandmother may have said that she tripped on the mat?

A. She did say she tripped on the mat.

Q. Do you accept in fact that all she said was that she tripped on the mat and said nothing further about the mat being raised at all?

A. She did say that."

77. In cross-examination, Ms Allen adhered to her description of the mat given in her evidence in chief (T 214):

"Q. What you do say, though, is that the mat appeared to be pushed, and I think you related it to the door, or the opening of the door of the lift. Is that right?

A. Yes, it seemed to be gathered on the right hand side as you walk into the lift."

78. Ms Allen agreed (T 215) that the fact that the mat was pushed up to the right was obvious to her and that as soon as she looked at it, "you couldn't miss it" (T 215), where Ms Allen agreed with Mr Chen that this was the case.

79. She also adhered to her evidence about what was said by the ambulance officers:

"Q. You also gave some evidence about what the ambulance officers have said. Do you remember giving evidence about that?

A. Yes.

Q. Can I suggest to you that you are mistaken and that they never said such a thing?

A. In regards to as we entered the lift?

Q. Yes.

A. No, that conversation did happen." (T 215)

Challenges to Ms Gemma Allen's evidence

80. Counsel for the defendant challenged Ms Allen's evidence on the following bases:

1. Leave to reopen the case should not be granted;
2. The evidence of the plaintiff's words to Ms Allen should not be permitted as the plaintiff has not given this evidence;
3. Ms Allen's evidence about what the ambulance officers said was hearsay and should be excluded; and
4. Objection was made to Ms Allen's description of the mat as being pushed up above five centimetres in that, while Mr Twaddell was available to give evidence, Mr Alcala was not (T 202), as he had returned to Spain.

(a) Leave to reopen

81. The first objection, later withdrawn, was described as having been "ameliorated" (T 198) by the fact that Mr Twaddell was able to give evidence and, in those circumstances, the defendant accepted that my exercise of discretion under s 46 *Evidence Act 1995* (NSW) would fall away. This brings me to the defendant's objections to the evidence Ms Allen gave about her conversation with her grandmother about the cause of the accident and the evidence in relation to the statements made by the ambulance officer.

(b) Exclusion of evidence of the conversation between the plaintiff and Ms Allen

82. As to Ms Allen's conversation with the plaintiff, it is clear from the extracts of the plaintiff's evidence set out above that the plaintiff had only a very general recollection of these events. As is set out in more detail in the section of this judgment on quantum, the plaintiff's intellectual abilities generally have started to fade. Not only is her recollection of these events very general for this reason, but it is clear from the circumstances of the accident that she suffered a very significant injury. I am satisfied that she gave evidence to the best of her ability and that she would have had no recollection of these events.

(c) Exclusion of Ms Allen's evidence of her conversation with the ambulance officer

83. Mr Chen submitted that the starting point was s 59(1) *Evidence Act 1995* (NSW) which provides:

> "(1) Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation."

84. Mr Chen submitted that while medical reports are an exception to the hearsay rule, the only circumstances in which Ms Allen's evidence would be admissible would be "if the ambulance officer wrote down a narrative that contained certain statements consistent with the oral evidence of Ms Allen" (T 200-201). While he was unable to object to the report going in as evidence, he was entitled to object to the evidence of Ms Allen as to her conversation with the ambulance officer at the time. The plaintiff chose not to call the ambulance officer and the ambulance officer was not made available to be cross-examined at all (T 201).

85. Mr Jones submitted, and I accept, that the plaintiff's case had always been that the mat was sticking up on the right hand side and that he had opened his case by referring to the ambulance reports saying "rubber matting on floor of lift for person moving sticking on the right hand side of the doorway". Mr Jones had put it to both Mr Twaddell and Mr Alcala and, as the evidence of these witnesses shows, they had not made any specific observations of the mat on the day (T 113, 117 and 128). In those circumstances, I will allow this evidence.

(d) Unavailability of Mr Alcala

86. Finally, the objection based on the absence of Mr Alcala is without merit. Mr Alcala made no observations of the mat on the day in question. Nor is it necessary for the purpose of s 46 *Evidence Act 1995* (NSW) to recall all of the witnesses. I do not accept that the plaintiff was under an obligation to put the terms of the ambulance report to Mr Alcala.

Conclusions concerning Ms Allen's evidence

87. It has been necessary to set out Ms Allen's evidence in detail to demonstrate the clarity and accuracy of her observations. She made concessions where appropriate but adhered to her evidence in chief throughout cross-examination. I accept her as a witness of credit. While it is unfortunate that her evidence was not obtained earlier, the fact that she was able to give evidence in person was of assistance because I was able to observe her demeanour in the witness box. I am satisfied that her evidence on all issues was accurate and that she has a clear recollection of these events; indeed, Mr Chen did not submit otherwise.

88. Mr Twaddell was recalled to give evidence after Ms Allen. I shall first set out Mr Twaddell's evidence on 5 April 2016 and then compare this to the concessions he made when he was recalled on 27 May 2016.

The evidence of Mr Steven Twaddell

89. Mr Twaddell was very knowledgeable about the rules of the owners' corporation concerning removalists activities and the number, size and description of the mat used. That evidence is dealt with in more detail below in relation to the section of this judgment on the expert evidence.

90. Mr Twaddell entered the lift on Sunday intending to go play tennis, which had been his habit for the previous 30 years or more. He described how he came across the plaintiff in the lift as follows:

> "Q. How did you see her when you first came across her?
>
> A. I called the lift to my level 5 to go across the street to Bridgepoint. When the lift arrived, I looked in the lift, and there was Mrs Allen lying on the floor of the lift. I got into the lift. I said, "Shirley, what happened?" and she said, "I caught my foot," or, "I stumped my foot getting in." At that point, the lift went down to level 4. We stopped. A new resident of the complex had called the lift on level 4. He got in. Fortunately, he was able to help me get Mrs Allen up onto her feet; she hadn't been able to get up. When I saw her in the lift in the first place, she'd been shopping and groceries were on the floor around her in the lift. And we got down to her level. I took her key. We got her into her apartment. We called the ambulance service. We called her family. I stayed with Mrs Allen until her granddaughter arrived and the ambulance people arrived.
>
> Q. After that, did you go? You returned to your unit?

A. Yes, I did.

Q. Prior to Mrs Allen's fall, had you had any difficulties in using the mat?

A. No.

Q. Had you had any concerns about the use of those mats?

A. No.

Q. On the day that you - or the moment you came to see Mrs Allen, did you make any observation about the mat when you first came across her?

A. Honestly, my concern was Mrs Allen lying on the floor of the lift.

Q. Prior to that time that you saw Mrs Allen, had you ever seen the leading edge of the mat in any of the positions it was in any of the lifts every curling up or poking out?

A. You'd asked me that before and I can't recall that I have." (T 122-123)

91. In cross-examination, Mr Twaddell said he was sure that he had observed the leading edge of the mat in question, although he could not recall specifically doing it on any occasion (T 127). He was cross-examined about any inspection of the mat he did on the day in question:

"Q. You never specifically inspected the leading edge of that mat on that day, did you?

A. I did not. I inspected Mrs Allen lying on the floor of lift number 3.

Q. And she had told you, hadn't she, that she had tripped on the leading edge of that mat coming into the lift, hadn't she?

A. I don't believe that's true.

Q. She told you, didn't she, that she had tripped over the mat?

A. I believe she said that she fell - that she stubbed her foot. Her foot did not slide on the mat and she fell over.

Q. Well, you as the chairman then of the body corporate would have been concerned about safety aspects of the unit complex, would you not?

A. Correct.

Q. And wouldn't you have been interested, having had a report from a resident of the complex, about the safety of this mate on this occasion?

HER HONOUR: You have to answer that.

WITNESS: Post-facto, of course." (T 128)

92. Mr Twaddell was asked if he made any notes of these events for the minutes of the owners' corporation:

"Q. You see, you never even caused this matter to be recorded in the minutes of the body corporate, did you?

A. I did not.

Q. Didn't you think it would've been an important matter of concern about the safety of these units such that it should've been brought up and recorded in the minutes of the body corporate?

A. It was reported to the property manager immediately after it happened. It was reported to the strata manager the following day.

Q. You'd never even caused a note of it to be recorded in the minutes of the body corporate, did you?

A. I said that's correct." (T 128-129)

93. Mr Twaddell was aware that furniture had been moved in and out of an apartment in the building and that there had been failure to comply with the code of conduct on this occasion, although he seemed reluctant to admit it:

"Q. Of course, you knew that on the day before this lady had the trip and fall, heavy furniture had been moved in and out of that lift upon that mat. You knew that, didn't you?

A. I knew that the mat was down, I knew that the curtains were up. I'm not sure what was being moved in or out.

Q. There was a code of conduct, wasn't there, in relation to movements in the lift. That's right, isn't it?

A. Correct.

Q. The code of conduct required that the caretaker/manager be notified that these movements were going to be made. Is that right?

A. Correct." (T 130)

94. He was aware that the removalist had not finished by noon on Saturday and that the moving job had been completed some time on Saturday afternoon (T 130-131) and that no attempt had been made to remove the mat after the moving job had been completed (T 131). He was also aware that the caretaker had gone away for the weekend. His evidence on this issue is discussed in more detail in relation to evidence on the breach of duty of care as set out below.

95. When Mr Twaddell was called on the second occasion, he was asked about two topics. The first of these was about the conversations he had after he assisted the plaintiff to exit the lift and to go into her apartment. He recalled the arrival of Ms Allen, her brother and the ambulance officers and he replied:

"Q. Mr Twaddell, it has been suggested that during the course of the time when you were present, that Mrs Allen the plaintiff said words to the effect that she tripped on a mat in her lift that should not have been there, it was raised. Do you have a recollection about any conversation occurring to that effect?

A. I recall Ms Allen saying she tripped. I don't recall the word "raised" with reference to the mat, and I honestly don't recall her saying that the mat shouldn't have been there.

Q. It has been suggested in evidence that that kind of conversation occurred initially in your presence, but also when the ambulance officers arrived. What do you have to say about

A. It may have. I don't recall that it - I'm sure it would've been logical from the - for them to have asked what happened, and I would expect that Ms Allen would've said the same thing that she said before, but honestly don't recall that specifically."

96. He repeated his previous observation that he did not see the mat being lifted (T 218). In cross-examination, Mr Twaddell's evidence at T 128 line 14 was put to him. This was as follows:

"Q. You never specifically inspected the leading edge of that mat on that day, did you?"

A. I did not. I inspected Mrs Allen lying on the floor of lift number 3." (T 128 and 218)

97. Mr Twaddell conceded at T 219:

"Q. You said to the Court this morning that - well, you presumed and it would make sense that the ambulance people would have asked Mrs Allen what had happened. Do I take it that you have no specific recollection of that occurring? Is that right?

A. That is correct."

98. Mr Twaddell recalled Ms Allen arriving before the ambulance arrived and said that he saw the plaintiff having a conversation with her:

"Q. Do you recall what was said?

A. Interestingly enough, I recall one specific item which is not at all relevant to what we're discussing, but it's the only specific thing, in reflection, that I do remember.

Q. All right. Can I suggest to you that a conversation occurred in relation to the circumstances of the fall, between the granddaughter and the grandmother before the ambulance arrived?

A. It's certainly logical to think that happened.

Q. When you say it's logical, do I take it that, sitting there now, you can't recall whether or not that took place?

A. I can't remember any precise words on that subject.

Q. Is it the situation that, sitting there right now - and I'm not being critical of you but, sitting there right now, not only do you not recall any precise words but you don't recall even the general words that were made during that conversation? Is that right?

A. I recall some discussion about the length of time that I had known the Allen family. I recall some specific references to individuals that were known to the Allen family that I also knew, which was a surprise to Mrs Allen's granddaughter."

99. Mr Twaddell repeated this evidence in cross-examination:

"Q. Just to pick up, finally, what her Honour referred to, you said you recalled one specific matter, or you gave some evidence about there was one specific matter that you had a recollection about.

A. It was with reference to an individual that used to be a close friend of Mrs Allen's daughter Judy.

Q. I see.

A. And the granddaughter was surprised that I even knew of that person and of that relationship. As I said, it wasn't relevant to really what we talked--

Q. I see. Why did you refer in your earlier evidence to you've got a specific recollection about one specific matter. What was the importance that you attached to that?

A. **Only that that's the one thing that I seem to remember out of that entire conversation with Mrs Allen and her granddaughter at that time.**"

[Emphasis added]

100. This was a frank and honest concession by Mr Twaddell as to his lack of recollection of what was in fact said. In those circumstances, I prefer Ms Allen's evidence as to the plaintiff's description to her of her accident. That evidence is corroborative of the plaintiff falling in the manner described by the ambulance officer. I also note, as to the evidence of the ambulance officer, that Mr Twaddell similarly had no recollection of the ambulance officers asking the plaintiff what had happened.

Conclusions concerning Mr Twaddell's evidence

101. A sustained attack was made on the credibility of Mr Twaddell by reason, *inter alia*, of the defendant having failed to produce documents under subpoena. The documents produced under subpoena were tendered (Exhibit D) and I have read their contents. It is clear that the problems caused by removalist activities generally were significant issue for the defendant and this makes the circumstances of leaving this mat in the lift all the more difficult to understand. Mr Twaddell had personal knowledge of breach of the code of conduct because he was using the lifts in which the removalists' mat remained for more than 24 hours. His defensive demeanour in the witness box on the first occasion that he gave evidence should be viewed in the light of his personal failure

to arrange for this mat to be removed in circumstances where, by reason of the code of conduct, he was aware that the mat remaining in the lift after the removalists have gone constituted a danger to the lift users.

102. Looking at the voluminous complaints on other issues in the minutes of meeting, it does defy credibility that in an owners' corporation where all manners of issues were minuted that the plaintiff's serious accident is not referred to even once. I accept Mr Jones' submissions that the credibility of Mr Twaddell as a witness needs to be viewed in context of this failure to record what was clearly not only a serious breach of the code of conduct but an accident causing significant injury to a long-term resident of the building, in circumstances where it would have been obvious from the first that there could be legal proceedings against the defendant.

103. In *Insurance Commissioner v Joyce* (1948) 77 CLR 39, Rich J noted:

> "...when circumstances are proved indicating a conclusion and the only party who can give direct evidence of the matter prefers the well of the court to the witness box a court is entitled to be bold."

104. While those remarks relate to a failure to call a witness, the same may be said concerning the failure to produce the documents sought on subpoena, not only about the circumstances of the plaintiff's fall, but the substantial modification to the lift, including removing the carpet on the floor, changing the lights and changing the lift key security system.

Evidence of Mr David John

105. Mr David John, the current caretaker, gave evidence (T 80 ff). He told the court that he had not been the caretaker at the time of the accident and that the previous caretaker, Charles Hughes, who was responsible for the putting down of mats had died. He did not assume the position of caretaker until July 2013 but for about four years prior to taking over the caretaker's role in July 2013 he provided cleaning services.

106. Mr John described his duties as caretaker as being to make sure all plant and machinery was serviced, supervised the garbage, general maintenance and cleaning. Prior to appointed caretaker, when he was at the premises for cleaning purposes, he would leave on Saturday at midday. He was therefore not at the premises at the time of the accident as on Saturday afternoons and Sundays his cleaning contracting firm was not required to be present. He was asked about the code of conduct for removalists as follows:

> "Q. When did you become aware of the requirements contained in the code of conduct?
>
> A. Not so much aware of them being in the code of conduct as being required to put the covers and mats in the list as required of us by Charles Hughes, the manager.
>
> Q. You helped put the mats into the lifts?

A. Yes.

Q. Did that also involve you sometime removing them as well?

A. Yes.

Q. Did anything else go up along the walls of the lifts?

A. Yes, covers.

Q. What were they? Covers.

A. Yes.

Q. What's that material?

A. It's a sort of quilted fabric.

Q. And from when did you first start providing help to Charles Hughes to either put the mat or the covers in, or removing them?

A. During the time that we had the cleaning contract. So that would be approximately four years.

Q. You understand Mrs Allen had a fall on 17 February 2013?

A. Yes.

Q. Up to that time, on how many occasions would you have put the mats out or removed the mats from the lifts?

A. Do you want the number, or do you want an approximate--

Q. Approximate.

A. Probably once a week." (T 84-85)

107. He described the mat as the most "sort of heavy rubber" (T 85) and said there were two of them. He said they have never been changed. When they were not in use they were stored in an area called the "tractor bay" and that he had what he called "a, sort of, contraption" on wheels, like a trolley to take the mat to the lifts to be laid on the floors, as they were "very heavy". However, this was not a sophisticated piece of equipment, it was what he called "a, sort of, wheelie bin that's been cut off and we just put the mat in there and we just pull it along" (T 87).

108. Mr John was the person who put the mat out on the day in question:

"Q. What was your job on that weekend and how did you come to do it?

A. I was on duty from 8 o'clock until 12 o'clock on the Saturday and I was instructed by Charles Hughes to put the mat and the covers into the lift because we had removalists coming to the property. So the first thing in the morning, I would have put the mat and the covers into the lift.

Q. How were they to come out of the lift? Was that your job?

A. Well, if someone was on job - it would have been me, if I was still on duty, but I finished at 12 o'clock and the removalist was still carrying on their work.

Q. The mats themselves, can you describe a little bit more about their shape? Do you know approximately how long they are, or how wide they are?

A. Approximately two metres long, I'd say, by just over one metre wide.

Q. What about the corners of them? Is there anything about the corners of them?

A. They're cut to the shape - cut to the shape of the floor.

Q. Can I show you MFI1? Do you recognise the two - or what is shown in the two photographs in MFI1?

A. Yes.

Q. What is shown in those photographs?

A. The rubber mat that goes inside the lift when removalists come, and the outer mat that sits outside the lift entrance.

Q. So could you describe, in terms of the top photo, please, what's shown in the top photo?A. The rubber mat that sits on the floor that we put into the lift on the floor when we have removalists on site.

Q. The bottom photo is the one that sits outside the lift; is that right?

A. The mat that's underneath that mat is the one that sits outside." (T 87-88)

109. Mr John said that the mats "fit fairly snugly because they are cut to shape" (T 88).

110. Mr John also described the lighting (T 89) and said that changes made after the accident were to change the globe from a halogen globe to a LED globe in four of the fittings for energy saving reasons. Mr John described the level of lighting in the garage as "adequate" (T 90) and said that he was unaware of any complaints about the level of lighting. He also described a meeting with the plaintiff concerning her claim that the mat had been changed, in terms different to the conversation as stated by the plaintiff. However, as I consider this line of questioning largely irrelevant, I do not propose to do more than note it.

111. Mr John acknowledged that since the plaintiff's accident, he has taped down the leading edge (erroneously recorded in the transcript as "take down") (T 93). When asked why he did not do this before, he replied "We didn't deem it to be a risk" (T 93).

112. In cross-examination, Mr John conceded that these mats spent most of their life tightly rolled-up, leaning against something and that as a result it was a possibility that the rubber developed some sort of memory, although he declined to comment further on the basis if this was a matter of "physics" (T 95). This was one of a number of occasions when Mr John appeared reluctant to answer questions directly. He agreed that when the mat was to be placed in the lift, after being rolled up and stored for days or perhaps weeks on end, the edge closest to the entry was the edge involving the smallest diameter when it was coiled and would thus have a tendency sit up (T 96). As these mats had not been replaced since 1997, this was a long period of time for a mat to remain tightly rolled up. As the transcript shows, Mr John was reluctant to agree, either saying "Can I elaborate", or speaking in terms of possibilities.

113. It was Mr John who was responsible for taping the mat down. Mr Jones put to him at T 97:

> "Q. Would you agree with me - and I'm not trying here to be sycophantic or flattering to you but clearly once you'd got that system in place, that - I'll call it the leading edge of the mat, isn't going to be able to poke up, is it, because it's held down, it's adhered down?
>
> A. That's right.
>
> Q. That would effectively cancel out any memory which may be in the rubber mat.
>
> A. Yes.
>
> Q. It's a pretty simple solution that you proposed and indeed put in action, isn't it?
>
> A. Mm.
>
> Q. It doesn't take a lot of time, it doesn't take a lot of expense, and it removes that hazard, doesn't it?
>
> A. Yes."

114. Mr John was also asked about how snugly the mat fitted into the lift. He was shown figure 6 of page 4 of Mr Burns' report and acknowledged that it was not flush-up against the wall (T 98). He agreed that there was potential for some lateral movement by the mat in question to "slide about" (T 98). Similarly, looking at the photograph which is Exhibit B, Mr John made similar admissions. He went on to say that the weight of the mat would be "an anchoring factor" (T 99) as well as the posts of the lift, but he acknowledged that he subsequently taped the leading edge because of the potential risk for tripping (T 97). He also agreed that one of the reasons for removal of the mat after the removalists had finished was that there may be risks associated with matting left in the lift and that if furniture caught on the mat, this could cause movement of an unsecured mat. It was put to Mr John (T 102) that if the mat was moved laterally, at the leading edge (as shown in Exhibit B), there was a possibility that it may crease up against that vertical post. Mr John was reluctant to

admit to this, but conceded there would be a period between it being pushed up against the side and settling there. He was read the relevant extract from the ambulance report at T 102 and it was put to him that this could have happened as a result of some laterally movement of the mat, to which he replied "Yes".

115. Mr Jones then put to Mr John:

> "Q. So not only had you had a mat, and once again I'm not being critical of you because when you come along you identify the hazard and you say take it down, but as at 17 February 2013 you have a potential for that rubber matting having some sort of memory and there being some curl at the front and you also have the potential for some lateral movement and some pushing up against the vertical post. Do you agree with that?
>
> A. Yes.
>
> Q. All it required was for somebody sensible such as yourself to say, "Hang on. We should adhere this down and put a bit of tape and that will solve the problem." That's all it required, isn't it?
>
> A. Yes.
>
> Q. In relation to whether or not you knew about any prior problems, of course before July 2013 you wouldn't have any reason to have been specifically informed that so and so had tripped or fallen on this mat. That's right, isn't it?
>
> A. No. Because I had close communication with Charles Hughes and he would have told me if something like that had happened.
>
> Q. You think he would have told you?
>
> A. Absolutely.
>
> Q. One of the places where you might be able to find out whether or not there'd been any such incidents would be to look in, for instance, the notes of the body corporate?
>
> A. Yes.
>
> Q. You would expect, would you not, if this lift were being managed properly and correctly, if there'd been a problem with the lift, particularly safety, you would expect there to be some note of that in the body corporate notes, wouldn't you?
>
> A. Yes." (T 102-103)

116. Mr John was well aware of the code of conduct, not least because it involved payments to the building manager who had to stay behind to supervise such activities (T 99). One of the reasons for this is because it is necessary to ensure that the matting is removed once the job is complete (T 100). It was put to him at T 100:

> "Q. Is one of the reasons why you want it removed when the job is complete is because there may be some risks encountered by those using the lifts while the matting is there?

A. Well, there's no reason for it to still be in once the removalists have finished their job."

117. Again, this was one of a number of occasions when Mr John was reluctant to make admissions. At T 100, he was asked:

> "Q. Is one of the reasons that there may be some risks associated with use of the lift with that matting still in the lift?
>
> A. Yes."

118. Although Mr John said that the words "No removals or deliveries on Sunday" was in bold, this was not to avoid specific risks but so that people could have "peace and quiet" on Sunday (T 101), but acknowledged that there would be high traffic in the lifts on Sundays and that this would "possibly" be a reason for the rule against removals or deliveries on a Sunday.

119. Mr John was also asked if he could give any explanation about how minutes of body corporate meetings had no references to the plaintiff's accident. He had not looked at these records but said that "You'd expect some mention to be made" (T 103). Mr John added:

> "A. If I had an incident like this happen now I would have reported it to the committee. That may not mean it will be logged in the committee minutes. It may just be a sort of internal thing rather than going and being logged onto you know the committee notes or minutes." (T 104)

120. He was asked about Mr Twaddell, who had found the plaintiff in the lift in circumstances where she told him she had tripped on the rubber:

> "Q. And assume that thereafter, even though the chairman of the body corporate knew about it, it wasn't recorded at all in the body corporate notes. That'd have to give you some real concern, wouldn't it, about--
>
> A. I would expect it to be recorded.
>
> Q. And it would give you some real--
>
> A. In some way. Recorded in some way.
>
> Q. And it would give you some real concerns, wouldn't it, as to how much safety was a priority for that management?
>
> A. That's drawing a long bow.
>
> Q. Is it? I mean it wasn't until you recommended that the simple procedure of taping the leading edge be utilised that it was done.
>
> A. Mm. I think you're asking me to comment on something prior to when I took over as manager and I think I can't really make a proper call on that.

Q. I want to ask you some questions then about the lighting and would it be true to say that it's not really until you became the property manager in July 13 that you had really focused attention on the minutiae of this rather large unit complex?

A. I'm very safety conscious.

Q. I accept that, but would you agree with that proposition? It's not until you became property manager that you became fully aware of the little details that may have been important around the property.

A. I've tried to improve things where I can." (T 104-105)

121. Mr John's demeanour in the witness box was that of a man who was uncomfortable with the evidence he was giving. I am satisfied that he was aware of the problems caused by using tightly rolled-up mats and their tendency to stick up at the edge.

122. I do not consider Mr John to be a witness of credit. This means I do not accept his evidence on any issue which is not corroborated. This includes his claim that there are two mats, and not one mat. The mat seen by Mr Burns, and identified by the plaintiff as being the same mat she saw regularly used for removals, is the mat that I am satisfied was used. It would have been a simple matter for the defendant to have tendered photographs of these two mats, as well as a relevant step to take, since Mr Burns also comments upon the frayed edge of the mat. I am satisfied that the mat seen in Mr Burns' photographs was the mat used on the occasion when the plaintiff fell, and that the measurements for that mat can therefore be relied upon.

The evidence of Mr Juan Alcala

123. Mr and Mrs Alcala moved into the premises the day before the accident. It was as a result of the mat remaining left out for their removal, which continued on Saturday afternoon and most of Sunday, that the events in question are alleged to have occurred.

124. Mr Alcala told the court that he obtained access to the apartment on Friday and that he and his family "moved in the 16th and the 17th" (T 110). This would mean that the plaintiff's description of meeting Mr and Mrs Alcala on the Friday is likely to be accurate, although it was not recalled by Mr Alcala.

125. Mr Alcala described how he parked his car at the basement and assisted the removalists moving. He was aware of the procedure of mat and curtain protection for the walls of the lift and that this was "something that the strata requires to give notice" (T 112). There were about ten trips made up and down in the lift on the Saturday by Mr Alcala, while his wife remained upstairs with their child and putting items away. There were two removalists involved in moving the heavier items and they made, he thought, around 20 trips (T 113).

126. Mr Alcala continued moving smaller items on Sunday, again using the lift. He thought he went up and down in the lift moving these items about ten times, including return trips. He thought that the curtains had been removed but was aware that the mat was still there. He did not recall seeing the leading edge of the mat standing up (T 113). In fact he said he did not recall seeing "anything there with the mat" (T 113). Significantly, this suggests that these trips could have been taking place up to the time when the plaintiff returned from shopping on Sunday.

127. Mr Alcala's recollection of first seeing the plaintiff was finding her lying in the lift on Sunday. He said that another neighbour from level 5, Mr Twaddell, came into the lift and, as he had a master key, they were able to get access to level 3 to help the plaintiff to get onto the sofa in her apartment. Mr Alcala said this was the first time he had seen the plaintiff or Mr Twaddell and that as he did not have any prior relationship with either of them, he just returned to his apartment while Mr Twaddell waited with her. He recalled using the lift later that day, but his answer on this question was ambiguous (T 114). Whether he continued to move items afterwards, and the circumstances of the mat was removed, were never revealed.

128. Mr Alcala's recollection of the events in question was vague. When it was put to him that he had indeed met the plaintiff before, and had a conversation with her on Friday, he said he was "not completely sure, to tell you the truth" (T 115).

129. Although Mr Alcala played down the amount of furniture that was moved, he agreed that the move had included large items such as a double bed which, since the lift was one metre by two metres, meant that the professional removalists had to "jockey things around to get them into that lift" (T 116). He agreed there would have been a fair bit of twisting and movement to get some of the larger items into and out of the lift and this all occurred on the rubber mat (T 117). He did not make any observations as to whether or not lights were functioning, but I note he described the light as being "normal".

130. Mr Alcala was not an impressive witness. His recollection was poor and he appeared self-conscious and embarrassed. He knew that the code of conduct meant he should not have been moving items on Sunday. As a partial witness, his evidence is of limited value only.

The report of Mr Burns

131. Mr Burns' report (Exhibit A, page 399 and following) was prepared following an inspection of the premises on 18 December 2014. On that occasion, an occupant was moving out of the building, and Mr Burns had the opportunity to inspect the lift being used for the purpose of removal of furniture. He made the following observations:

    1. As to the floor of the elevator:

    "The floor of the elevator is surfaced in vinyl (figure 3). My instruction is the lift floor was carpeted at the time of injury. Carpet is thicker than vinyl so the edge of the rubber

protection mat would have been raise [sic] higher than on the day of my view. A rubber mat had been placed on the floor of the elevator and was cut to the same shape as the elevator (figure 4). I am instructed that the mat placed at the time of injury was the same as the mat seen on inspection in that it had the same pattern (figure 5); however, it did not fit the elevator as the mat seen on inspection fitted. The smooth vinyl surface does not have sufficient slip prevention qualities to prevent the mat from moving when force is applied by the movement of the feet of pedestrians. It is therefore not a stable surface on which to walk."

2. As to the walls of the elevator:

"The walls of the elevator are panelled and covered with dark coloured drapes, presumably, to prevent damage from occurring."

3. As to the doorway of the elevator:

"The doorway of the elevator is 900mm wide and 2100mm high to the underside of the lintel. The elevator is 2200mm long 1400mm wide. The panelling that forms the walls of the lift steps back all the way to the back wall and the floor of the lift is vinyl."

4. As to the mat on the floor of the elevator:

"The mat on the floor of the lift at the time of my inspection was 1380mm wide and placed nominally 50mm in from the two edges (figure 8). There are 45° chamfers at the back corners and length of the chamfer is 340mm. The mat is 6.5mm thick and the leading edge stands 5mm above the entry to the elevator (figure 9). The mat reached the side at the front of the elevator between the 'door frame sides'."

5. As to the lighting:

"On entering the lift from the basement, two lights are located in the roof outside the lift (figure 10), however, these lights are of little use when entering the elevator as they are behind persons entering and therefore a shadow is thrown on the entrance to the elevator. Inside the lift are six down lights (figure 11). The lights are placed so they provide indirect illumination to the lift from reflection off the lift walls. The effectiveness of illumination is compromised by the hanging of the protection padding that is installed when people in [sic] to use the lift for furniture moving."

132. There are photographs of the mat and Mr Burns notes in his report at pp 3 - 4:

"a. The mat was frayed at the front – this makes the leading edge of the mat uneven (figures 4 and 7);

b. The placement of the mat was not even, some flooring was exposed and some was not – when pedestrians move their feet, the surface is not even with random discrepancies in the height of the surface;

c. Fibres from the mat were exposed – this again creates an uneven surface;

d. The mat was not taped down – I am instructed that this was the same position at the time of injury and note that 17 February 2013 was a Sunday when it could be expected that there would be a greater volume of pedestrian traffic as residents remain at home longer and enter and leave their homes for shopping, socialising, etc. With a high volume of pedestrian traffic, it is probable that the mat will be moved with the movement of feet and as it moves on contact with the foot, it can cause pedestrians to lose balance."

133. It was Mr John's evidence that after he became caretaker, the mat was taped down during removals. Mr John was not cross-examined about how, in those circumstances, the mat was not taped down when Mr Burns attended the premises on 18 December 2014.

134. Mr Burns' conclusions were that at the time of the accident, the following were contributing factors:

    1. The mat placed on the floor of the elevator on top of the carpet formed an unstable surface for the reasons set out above;

    2. The leading edge of the mat was raised above the floor of the elevator even with vinyl underneath, and would have been higher where carpet (which is thicker than vinyl) was underneath, which formed a tripping hazard;

    3. The placing of the lights, as illustrated in Mr Burns' photographs, meant there was insufficient light to detect the presence of the hazard.

135. Mr Burns considered that a risk assessment of the consequences, if undertaken, would have identified and could have remedied, by simple and easy steps, ways to avoid the incident occurring. These would include cutting the rubber mat to neatly sit over the floor of the lift and using gaffer tape or similar to secure the leading edge across the door opening, which the defendant admits is now the current practice.

136. The rubber mat appears to have been considered necessary because there was carpeting to protect (see paragraph 5 of Mr Burns' report). Mr Burns questioned why it remained necessary to place a rubber mat on the elevator floor during furniture moving activities if there now was a vinyl surface, adding that the slip factor with vinyl is in fact worse.

137. Mr Burns' report confirms that the real problem was movement of the mat, which required taping down because it was placed over carpet which formed an unstable surface. That means that, whether the plaintiff tripped over the edge or not, essentially the whole of the mat formed an unstable surface, not merely the tripping edge.

138. Mr Burns' report confirms that the mat did not fit snugly into the lift, in that it was 80mm from the edge of the lift door (Exhibit A, p 402) and that heavy items being moved into the lift could have caught and moved the rubber matting, particularly if it was left in place over such a long period.

139. This is a useful report, consisting of terms of measurements, observations of removalists actually using floor and wall lift coverings to carry out removal activities in one of the complex's lifts (there being three buildings, each with dedicated lifts) and practical solutions. It is significant that the practical solution proposed, namely taping down the mat, is what was put in place by Mr John. Challenges were put to the weight I should place on this document, with Mr Chen reminding me that the expert report in *Makita (Australia) Pty Ltd v Sprowles* (2001) 52 NSWLR 705 was rejected, notwithstanding its tender without objection at the trial, for the many flaws in its contents, many of which are evident in this report. The degree of friction between the mat and the underlying carpet is an appropriate matter for expert evidence, and such evidence should generally be either challenged or responded to if the court is asked to reject it (*In Vitro Technologies Pty Ltd v Taylor* [2011] QCA 44 at [19]).

140. This brings me to consideration of the issues set out in paragraph 8 of this judgment.

Duty of care

141. What was the duty the defendant owed to the plaintiff? This must be defined with precision in order to determine whether that duty has been breached.

142. The New South Wales Court of Appeal has repeatedly stated that this duty must be identified with precision: *Jackson v McDonald's Australia Ltd* [2014] NSWCA 162. It is only by defining this duty with the care outlined as necessary by the New South Wales Court of Appeal that any breach will become evident.

143. The duty of care the defendant owed the plaintiff was to contain the known potential risk of damage and injury caused by removalists using the building's lift. The performance of this duty included ensuring compliance with its code of conduct, checking the adequacy of the equipment it provided for the removals to take place (namely the mat) and ensuring the right of safe ingress and egress by apartment occupiers and their invitees (these being premises with security systems) while removals were occurring in the lifts. The defendant also owed the plaintiff a duty to maintain and look after owners' corporation equipment used for such activities. In this regard, the criticisms by Mr Burns of the mat in question and the circumstances of its use, and the apparent acknowledgement of this by Mr John in introducing the very practice recommended by Mr Burns, are relevant.

144. The defining of this duty demonstrates that the defendant's submission that nothing could be shown to have alerted the defendant to being aware of this "insignificant" risk (written submissions, paragraph 25) is misconceived. Lifts, like stairways, have inherent risks in their use. The defendant knew removal of furniture had caused problems in the past, and that those problems included lift use. It was to combat these risks of damage to goods and injury to other residents that the code of conduct was introduced. The conduct of Mr Alcala, in breaching that code of conduct, in circumstances where the defendant (in the form of Mr Twaddell and the caretaker who had gone home for the day) knew of that breach, mean that liability for breaching

the duty owed to the plaintiff by this quite flagrant breach of the code of conduct is clearly also relevant when considering breach of the duty owed.

145. Counsel for the defendant (paragraph 13, written submissions), rather than defining duty of care, elides this issue with breach of duty, and puts to the court that the plaintiff's case is that the defendant was negligent in the following ways:

    1. in having a mat placed inside the lift that had a tripping hazard;

    2. in failing to tape down the mat;

    3. in failing to have adequate lighting; and

    4. in failing to replace the inside of the lift and replace it with more durable materials [sic].

146. However, the commencement of any consideration of liability must turn on a consideration of ss 5B and 5C *Civil Liability Act 2002* (NSW) , not upon a summary of what the opponent's case is asserted to be

147. Section 5B provides:

> "**5B General principles**
>
> (1) A person is not negligent in failing to take precautions against a risk of harm unless:
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
>
> (b) the risk was not insignificant, and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
>
> (a) the probability that the harm would occur if care were not taken,
>
> (b) the likely seriousness of the harm,
>
> (c) the burden of taking precautions to avoid the risk of harm,
>
> (d) the social utility of the activity that creates the risk of harm.
>
> **5C Other principles**
>
> In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk."

148. These were the issues which the defendant needed to address, particularly in light of the code of conduct which was the product of past problems with removalists generally.

149. The list of beaches set out by the defendant misconceives the nature of the plaintiff's case which was that:

1. Had the usual procedure for removals being followed, then the mat would not have been in place for over 24 hours after the deadline for its removal, and the procedure would not have been unsupervised by the caretaker;

2. Secondly, that if the taping subsequently adopted had been utilised, the trip would not have occurred; and

3. Thirdly, that better illumination would have meant that the plaintiff had a better chance to observe the rise in the mat on the right hand side (T 5).

150. Counsel for the defendant's submissions as to ss 5B and 5C (written submissions, paragraphs 24 – 26) are that there had been a long and incident-free use of the mat across the three buildings. However, it is not the case that the removal process and the use of the mat were incident-free. They were strictly regulated, and presumably the code of conduct was generally complied with, which is a relevant factor in relation to prior incidents (or lack thereof), whereas it was not complied with on this occasion. The statement in the defendant's written submissions at paragraph 26 that "there is no suggestion that the defendant knew of any risk" runs completely contrary to the code of conduct, the terms of which were not only in strict form but which were the subject of amendment, as well as discussion, in the owners' corporation meetings both before and after the plaintiff's accident.

151. Mr Chen next submits that there was no industry practice which suggested there was any other means by which the defendant should be taken to have known of any risk, and that the position is no different from any rug or carpet runner or doormat left in place for walking over, in that no one suggested it is negligent not to tape down a doormat or a carpet runner (written submissions, paragraphs 26 – 29). Again, this completely misconceives the issue before the court. This was not a carpet runner or rug which was in place for such practices; it was not even a doormat. It was a special rubber mat kept tightly rolled-up for much of its life, which was used to protect the surfaces of the lift carpet while removalists carried heavy items which could damage that carpet

and then returned, rolled-up, to its storage place. It was placed over existing carpet for this limited purpose, rather than being a carpet to walk on, with all the risks attendant upon that special use.

152. Mr Chen next submits that the heaviness of the mat meant they were unlikely to move (written submissions, paragraph 29). I do not accept the evidence of Mr John that the mat was heavy; I do not accept any of his evidence unless it is corroborated by Mr Burns. The description of the mat by Mr Burns does not refer to its being heavy; in fact he notes (and it is agreed, given Mr Chen's submissions on this issue) that they are only 5mm thick. I note Mr John's evidence about the use of a wheelie bin to take them to and from their storage space, but no specific reason was given; it could be other reasons, such as mat size. Having regard to my adverse view of Mr John's reliability as a witness, Mr Burns' expert report concerning the mat's ability to slide over the carpet is the evidence upon which I propose to rely, not Mr John's uncorroborated statement that the mat was heavy.

153. An additional problem I have, in relation to the submission that I should accept the evidence that there had been a long and incident-free use of the mat, is that the plaintiff's accident is not even recorded or referred to in any of the documents produced under subpoena, including the minutes of meeting of the defendant. This is despite the correspondence of 27 March 2013 between the plaintiff's daughter, Mrs Judy Goldsmith, and Mr Paul Bailey of Strata Partners, as follows.

154. On 27 March 2013, at 3:23pm, Mrs Goldsmith wrote to Mr Paul Bailey as follows:

> "Hello Paul,
>
> Further to our conversation, could you please provide the Form from the Insurance Company that I need in order to provide the Incident Report. I want to ensure that I cover off all the required items of information.
>
> To summarise:
>
> On Sunday 17th February 2013 at approximately 2.30pm Shirley Allen, [D.O.B. redacted], resident of [redacted], took the lift in order to go shopping at Bridgepoint Shopping Centre which is directly across the road. At approximately 5pm Shirley returned and upon entering the lift she tripped on the edge of rubber matting that was covering the floor of the lift.
>
> In the fall she banged her head on the handrail and fractured her right shoulder.
>
> She lay on the floor until Steve Twaddel [sic] used the lift. Steve & the new resident on Level 4 came to her assistance & called the ambulance.
>
> The matting had been laid the previous day (Saturday 16th) to protect the carpet during a furniture move in that day to Level 4. Shirley did not leave the house on Saturday.
>
> The rubber matting was subsequently removed on Monday morning.
>
> Shirley was transported by ambulance to RNSH Emergency. She was then transferred to an orthopaedic ward. The orthopaedic specialist (Dr Alan [sic] Young) recommended a shoulder replacement. This was necessary to avoid a life of chronic pain and to maximise the prospect of regaining her previous level of quality of life and independent living.

Thank you

Judy Goldsmith (daughter)"

155. Several minutes later, Mr Paul Bailey replied:

> "Judy we will send you a copy of the form once it is completed however the insurer will want to know what the monetary value of the claim is, is it all of the medical costs or the gap between the actual cost and health fund subsidy?
>
> Was the rubber mat lying flat on the floor or was it gathered up in some way so as to create a trip hazard? If you can answer this I will understand and Steve Twaddell may be able to assist me.
>
> Regards
>
> Paul Bailey"

156. Mrs Goldsmith's reply, if it exists, and any other correspondence about the circumstances of the accident are not included, including any reply from Mr Twaddell. Unfortunately, Mrs Goldsmith was not asked about this exchange of emails by either counsel when she gave evidence, so I cannot speculate, but the mere fact that Mr Bailey had made such a statement suggests a degree of knowledge of prior propensity of the mat to gather up.

157. Mr Jones, for the plaintiff, asks me to infer, from the absence of reference to the plaintiff's injury in these documents, that it is possible that other persons have suffered injuries, or been concerned about injury, in that this is the only real explanation for the code of conduct having such strict rules about moving. While I am not prepared to infer that others were actually injured, I am prepared to accept that the defendant knew that removalist equipment was hazardous and compliance with their strict rules was necessary. That is a significant factor in relation to s 5B(1)(a) and (2).

158. The minutes of meeting makes it clear that the issue of "misbehaviour and damage to the complex" caused by removalists was an issue of some longstanding known to the defendant, as the minutes of 28 July 2011 (Chairman's Report) notes.

159. The question of contribution of the lighting to these issues is dealt with in Mr Burns' report. At the time that Mr Burns gave his report, he did not have the benefit of minutes of meeting of the owners' corporation, such as the minutes of 25 May 2009, which noted the problems with car park lights and the need to engage a lighting engineer. While the issue of lighting is of limited relevance to these proceedings, I accept Mr Burns' observations of the impact of the lighting in terms of being able to see the mat edge clearly.

160. Another factor relevant to s 5B is, as Mr Jones pointed out, the number of aged persons living in the building. Special care had to be taken on their behalf. The documents under subpoena make it

clear that the caretakers raised concerns about other problems concerning aged persons having accidents in their homes. Mobility and vision problems for elderly residents were problems of which the defendant was aware.

161. As to s 5C, the cost of taping down the mat is trifling and the time spent on it very short. Mr Burns queried whether, now that the carpet has been removed, protective matting is necessary at all.

Conclusions concerning breach of duty of care

162. I am satisfied that the plaintiff's accident occurred as is described in the careful report of the ambulance officer and the evidence of Ms Allen. This means she tripped getting into the lift over the slightly raised edge of the mat. I am also satisfied that by reason of the mat having slipped to one side, most likely as a result of Mr Alcala's continued use of it on Sunday after the removalists had left, the whole of the mat was an unsafe surface upon which to stand in any event.

Causation

163. Section 5D *Civil Liability Act 2002* (NSW) provides:

> "**5D General principles**
>
> (1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm ("factual causation"), and
>
> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability").
>
> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.
>
> (3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
>
> (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
>
> (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

164. Section 5E provides:

"**5E Onus of proof**

In proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation"

165. Factual causation is determined by posing the question "but for the negligent act or omission, would the harm have occurred?" (*Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [45]) The negligent act or omission is not related to issues of inadequate lighting or failure to tape, but to the breaches of duty of care.

166. Had the mat not remained in place for such a long period of time, had the building supervisor (who was experienced in the potentially hazardous business of removal work) been in attendance as required, and had the mat been removed as soon as the moving was over (assuming the moving had in fact been completed by Sunday evening when the plaintiff fell, which I consider, on the balance of probabilities, to be unlikely), this accident would not have occurred. Causation under s 5E is thus established.

Obvious risk

167. The defendant submits that, if the trip hazard did exist, it was an obvious risk.

168. Section 5G provides:

"**5G Injured persons presumed to be aware of obvious risks**

(1) In proceedings relating to liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk."

169. The approach to take concerning the interrelationship of obvious risk as defined in the *Civil Liability Act 2002* (NSW) with concepts of breach of duty is explained by McCallum J in *Perrett v Sydney Harbour Foreshore Authority; Wine & Vine Personnel Pty Ltd v Same* [2009] NSWSC 1026, referring to *Carey v Lake Macquarie City Council* (2007) Aust Torts Reports 81-874. As Bryson JA

noted in *Sutherland Shire Council v Henshaw* [2004] NSWCA 386 at [88], the concept of an obvious risk is elusive, depending upon physical conditions and what the person about to have the accident is doing at the time. A helpful starting point is an examination of the principles set out in *Thompson v Woolworths (Queensland) Pty Ltd* (2005) 221 CLR 234 at [36]-[37] :

> "[36] The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety. This is not a case about warnings. Even so, it may be noted that a conclusion, in a given case, that a warning is either necessary or sufficient, itself involves an assumption that those to whom the warning is addressed will take notice of it and will exercise care. The whole idea of warnings is that those who receive them will act carefully. There would be no purpose in issuing warnings unless it were reasonable to expect that people will modify their behaviour in response to warnings.
>
> [37] The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration."

170. As noted by Basten JA in *Fallas v Mourlas* (2006) 65 NSWLR 418 at [152], when determining whether the risk was obvious, the defendant must establish the level of particularity with which the risk in question should be identified. Looking at the test set out in *Wyong Shire Council v Shirt* (1980) 146 CLR 40, the question of whether the risk was obvious as opposed to far-fetched or fanciful is a significant issue in this case. The risk was not so obvious as to be noticed by either Mr Twaddell or Mr Alcala, despite their repeated use of the lift over the weekend, or by Ms Allen when she entered the lift; I am satisfied, on the evidence, that the risk was identified because of the sharp professional eyes of the ambulance officer and that it was as a result of her pointing this out to the plaintiff and Ms Allen, as well as noting it in her report, that the fact that the mat was caught up on the right hand side is recorded.

171. The importance of the fact that the mat was bunched up on one side was that it had been sliding across the carpet in the lift for the reasons set out by Mr Burns. The plaintiff tripped because this mat was slipping. Her evidence is that she stepped into the lift in the usual way and then tripped. While it is unclear whether she actually stood on part of the mat which was already bunched up or whether the mat slipped to bunch up at the time of her accident, the slippage of the mat to create the trip hazard was the cause of the accident, and that could not have been known by the plaintiff to be an obvious risk, whether she was aware of the purposes of the Code of Conduct about removals or not (and I note that no questions were put to her about her understanding of the reasons behind the Code of Conduct's requirements for removalists).

172. The next issue is whether the risk is the same or "very different for different classes of pedestrians" (*Temora Shire Council v Stein* (2004) LGERA 407). What is relevant here is not that the plaintiff was a woman in her eighties, but that she was making a journey she had made thousands of times, namely travelling in a lift accessible by security key only, this being the only way she could reach her home. In following such a familiar route, walking forwards into the lift would have been an almost automatic reaction. This was, for her, a "well-worn path" (*Edson v Roads and Traffic Authority* (2006) 65 NSWLR 453 at [24]). It would not have occurred to the reasonable person, in the position of the plaintiff, exercising ordinary perception, intelligence and judgment (*Wyong Shire Council v Vairy* (2004) Aust Torts Reports 81-754 at [161]) that it was necessary to inspect a mat on the carpet of the lift and to consider how to stand on it without tripping. The second issue identified by Bryson JA is what the person about to have the accident is doing at the time. Unlike the plaintiff in *Stojan (No 9) Pty Ltd v Kenway* [2009] NSWCA 364 (who proceeded to continue up a stairway which was lighted at the bottom but where the lighting was blocked further up), the plaintiff had no alternative route to take. The only way she could reach her apartment was to use the lift. Although obvious risk was not raised in those proceedings and the discussion related to the issue of contributory negligence, the factual problem was the same – the plaintiff was in the course of a journey where logic dictated that she had to move forward, and where the "natural human inclination to minimise effort" (at [150]) propelled her to continue on her journey.

173. Taking all of the above into account, I do not consider that the presence of the mat, or the fact that it was bunched up to one side, constituted an obvious risk.

Contributory negligence

174. The defendant submits that the plaintiff and others were able to enter and exit the lift without incident "on the day – and on earlier occasions". This is asserted to be evidence that the lift could be accessed without falling or tripping and as strong objective support of the "observability" of any gathering up of the mat (written submissions, paragraph 35).

175. The plaintiff remained home all day on Saturday, according to Mrs Goldsmith's letter, and encountered the mat on Sunday afternoon when she decided to go shopping. She was familiar with the mat, and with the rules for its use, but she did not know any more than that. It was not put to her that she knew the mat had been there for most of the weekend, and that she should have paid closer than usual attention for that reason. She had no way of knowing how much the lift had been used, or how likely the mat was to have shifted, or that the building caretaker was not supervising these events. She knew the code of conduct banned moving on Sundays, but that was all. In those circumstances, the plaintiff was not alerted to any danger in stepping onto the mat.

176. The next submission by the defendant is that the plaintiff had never made a complaint about the mat's use and that, if she had known about it, "she should have done something about it" (written submissions, paragraph 36). As with all the other submissions put by the defendant, this overlooks the fact that the mat was not being used consistently with the rules in the code of conduct. There

was already a risk of movement of the mat for the reasons explained by Mr Burns, but that risk was increased substantially if a new occupant (as opposed to a careful caretaker) was continuing to use the mat over an extended period. The plaintiff knew nothing of those matters.

177. This is not a case where the plaintiff was alerted to the danger and charged forward, as was the case in *Stojan (No 9) Pty Ltd v Kenway* . However, she was faced by the same difficulties, if not worse, in that the plaintiff had no other realistic means of leaving her apartment except by using the lift. The propulsion to go forward that motivates persons carrying out familiar journeys such as entering and exiting from their homes need to be taken into account. As for Mr Chen's submission that the plaintiff should have done something, it is hard to see what she could have done on a Sunday afternoon in the absence of the caretaker.

178. I am satisfied that no allowance should be made for contributory negligence.

179. The plaintiff having been successful on liability, I now consider the issue of damages.

Damages

180. The plaintiff claims non-economic loss, past and future out-of-pocket expenses and past and future home care. I will deal with each of these in turn.

Non-economic loss

181. The plaintiff claims non-economic loss of 28%, making a total of $83,000. There is no significant issue about the nature and extent of the plaintiff's injuries in that the plaintiff suffered a fractured right shoulder that required a reverse shoulder replacement. The injury was described by her treating orthopaedic surgeon, Dr Allan Young, in his report of 20 February 2014 as "significant" (Exhibit A, tab 6, report 20 February 2014). He goes on to say that after such a significant injury the plaintiff "is actually doing reasonably well". However, he goes on to say:

> "... She has recovered functional motion about her shoulder although with limitations in all directions. Her forward elevation is to just above the horizontal height, external rotation to 20° and internal rotation to the level of the sacrum.
>
> Progress x-rays has been performed and demonstrates good position of the prosthesis with healed tuberosities. There are no complicating features.
>
> I have explained to Shirley that whilst her shoulder may improve a small amount over the next six to twelve [sic], I do not think any further gains will be dramatic. Shirley is aware that as a consequence of the injury and the need for reverse shoulder replacement, she will have permanent restrictions in the motion about her shoulder in addition to the strength of the shoulder."

182. Dr Deveridge in his report of 20 November 2014 (Exhibit A, tab 9, p 1) confirms this. He notes that she has recovered reasonable functional motion, but with limitations in all directions. He notes the plaintiff is limited in her daily living activities, that she has required hired help and that she is unable to perform a number of household tasks whereas previously she was largely independent in such matters. He goes on to say:

> "She cannot lift or carry significant weights, and has become much more dependent on her non-dominant left arm for these tasks. She finds it awkward to use her left arm for even simple tasks. She cannot reach above shoulder height, nor can she lift anything from that level. The shoulder is likely to ache during the night but she cannot lie on her right side for long."

183. He considers her position to be "chronic and stabilised" and that the prognosis generally is "guarded".

184. The reports of Dr John Stephen are along similar lines. He notes that prior to the fall the plaintiff was completely independent in all activities save for a cleaner who came to her flat once a month for about two hours (Exhibit 2, report of 16 December 2014). He notes the restrictions on her housework that she drives with a 15km limit imposed on her driver's licence and "has quite a bit of difficulty parking". Her leisure activities have ceased. He describes her as having done "quite well" but that she has a shoulder which fatigues easily and in which "there is significant restriction, both of elevation and of internal rotation" (Exhibit 2, report 16 December 2014).

185. The defendant relies upon the plaintiff's life expectancy of six years as a significant matter that "tells against anything other than a modest claim for non-economic loss", citing *Reece v Reece* (1994) 19 MVR 103 and putting that non-economic loss at less than 20%.

186. In *Reece v Reece* , the plaintiff was a 64 year old woman who loss much of the efficient use of her right wrist, including the thumb and two fingers, as well as having difficulties using her dominant hand. Like the plaintiff in these proceedings, she had led an active personal life prior to the accident and was substantially impaired as a result of the ongoing effects of her injuries. The trial judge awarded damages for non-economic loss assessed at one-third of the most serious case. On appeal, Handley JA held that this represented a "wholly disproportionate assessment of the degree of the plaintiff's loss" and said that such an assessment might properly be made in the case of a much younger woman who before her injury had a similar range of interest and hobbies but who face a much longer period during which she would experience the pain, disabilities and progression of her condition.

187. *Reece v Reece* was considered by the New South Wales Court of Appeal in *Woolworths Limited v Lawlor* [2004] NSWCA 209, where the plaintiff was assessed at 30 % of the most extreme case. The plaintiff in those proceedings was 56 years old, and the amount awarded was considered to be reasonable in that she still had about a third of her life to live (at [15]).

188. Although life expectancy tables remain largely the same, attitudes towards aging members of the community have changed since *Reece v Reece* . I note for example in *Neate v Fox* (2012) 13 DCLR (NSW) 319, Levy SC DCJ rejected similar submissions in the case of a 70 year old man, noting the devastating effect of injuries upon a plaintiff who, in what Levy SC DCJ called, is "in twilight years" (at [218]) rather than being well and active, had to endure physical restrictions, pain, discomfort, inconvenience and loss of amenities. The plaintiff in those proceedings had a further life expectancy of 16 years.

189. In *Varqa v Galea* [2011] NSWCA 76 at [72]-[74] , McColl JA emphasised that age was only one of "numerous matters the court takes into account in its assessment of non-economic loss":

> "[72] *Reece v Reece* states the uncontroversial proposition that the plaintiff's age at the time of the assessment of damages is a factor relevant to the assessment of non-economic loss, a proposition Handley JA made abundantly clear when considering *Reece v Reece* in *Marshall v Clarke* (Court of Appeal, unreported 5 July 1994); see also *Christalli v Cassar* [1994] NSWCA 48 (at 3) where Kirby P (with whom Powell and Cole JJA agreed).
>
> [73] Age, however, is only one of the numerous matters the court takes into account in its assessment of non-economic loss, which is defined in s 3 of the 2002 Act as follows:
>
> "non-economic loss" means any one or more of the following:
>
> (a) pain and suffering,
>
> (b) loss of amenities of life,
>
> (c) loss of expectation of life,
>
> (d) disfigurement.
>
> [74] The assessment of non-economic loss depends on the circumstances of each plaintiff, albeit as s 16 of the 2002 Act now requires, as assessed by reference to a "most extreme case". In this respect, in my view however, Windeyer J's remarks in *Thatcher v Charles* [1961] HCA 5; (1961) 104 CLR 57 (at 71–72) remain cogent:
>
> Compensable loss depends not only on the severity of the physical injury but on the consequences for the individual. No two injuries are really the same; and the consequences of apparently similar injuries vary infinitely for different individuals. Thus amounts given in different cases may be harmonious on principle, although appearing disproportionate when the physical injuries alone are regarded. Measuring in money such things as pain and suffering or the impairment of capacity to lead life to the full really involves dealing in incommensurables. It is an attempt to weigh imponderables.
>
> As Handley JA observed in *Dell v Dalton* (1991) 23 NSWLR 528 (at 532), although Windeyer J was in dissent, this passage "reflected the previous law"."

190. The plaintiff's evidence paints a compelling picture of a woman whose life was devastated by an injury which is agreed to be significant. If she was 30 or 40 years younger, those damages would

result in a significant award, almost certainly over one-third of the most extreme case. In the present case, allowance must be made for the plaintiff's age, but it is only one of many factors to take into account. Accordingly, I propose to award the plaintiff 25% non-economic loss ($38,500).

Past and future out-of-pocket expenses

191. Past out-of-pocket expenses are mathematically agreed in the sum of $56,208.12, although the BUPA claim may need to be updated. For this reason, I have granted liberty to the parties to bring in short minutes of order in the event that there are further overlooked past out-of-pocket expenses.

192. Future out-of-pocket expenses were claimed in the plaintiff's schedule of damages as follows:

    1. In the schedule of damages provided, the plaintiff makes a claim for a general practitioner visit once a month at $76 per consultation (AMA rate) - $4,710.83;

    2. The plaintiff also made a claim for physiotherapy in the sum of $1,500; and

    3. Medication at $10 per week - $2,686.

193. Dr Deveridge's opinion was that the plaintiff will require non-prescription analgesia at the cost of about $20 per month indefinitely. No further surgical procedures are anticipated (Exhibit A, report 20 November 2014, p 3).

194. Dr Robertson recommended physiotherapy and exercise classes to build strength, prevent falls and increase function, although Dr Robertson went on to note that it was uncertain whether the plaintiff will use them.

195. In subsequent submissions Mr Jones has acknowledged that there is very little support for physiotherapy (notwithstanding Dr Robertson) or for regular visits to the doctor.

196. This is a very modest claim for future treatment. The maximum set out in the plaintiff's schedule of damages is $7,553.83. The defendant alternatively proposes a buffer of $1,000.

197. I agree with Mr Chen that a buffer is a suitable recourse, but I consider the sum of $1,000 manifestly inadequate. The plaintiff is taking non-prescribed medication on a regular basis and will need to see her general practitioner from time to time. She may well benefit from some form of exercise classes or other treatment of the kind proposed by Dr Robertson. While she may not need to consult her general practitioner very often, she has severe restrictions in relation to her dominant right arm that may need to be taken into account if she suffers other non-injury related illnesses.

198. Taking all of the above into account, I propose to award future out-of-pocket expenses in the sum of $5,000.

Past and future home care

199. As to the issue of past care, there is no doubt the plaintiff required substantial nursing. The claim for six hours per week for eight months is reasonable and fair and is agreed by the parties to be $5,742.05.

200. The plaintiff makes a claim for future care in the sum of $50,271 for 4 hours per week paid commercial assistance at $48 per hour. The defendant contests her entitlement to any extra care, on the basis that the plaintiff needs this care already because she is 88 years old, although conceding two hours a week because of Dr Stephens' report. Any claim for assistance of a non-commercial kind is challenged as not being particularised.

201. As to future commercial assistance, the plaintiff lives by herself in her own home. There can be no doubt, from the orthopaedic reports, that she is unable to perform a wide range of household tasks. The plaintiff has been receiving commercial domestic assistance since approximately May 2015 and proposed to continue to do so in the future.

202. The claim for future paid care is for four hours of commercial care at the rate of $48 per hour. The defendant's submission is that this should be provided only in the sum of two hours of service per week and that the nature and extent of the care needs to take into account that the plaintiff receives some gratuitous care "possibly provided by a government department" (written submissions, paragraph 53), although the implications of this are not gone into.

203. Part of the problem is that both parties rely upon the opinion of specialist surgeons rather than on reports from occupational therapists. The plaintiff relies upon a report of Dr Deveridge in terms of the quantum of the claim and the defendant relies upon Dr John Stephen.

204. In *Boral Bricks Pty Ltd v Cosmidis* [2013] NSWCA 443 at [93] , Basten JA observed:

> "[93] In support of the threshold of six hours per week, counsel for the plaintiff drew the court's attention to the report of Dr Matthew Giblin, an orthopaedic surgeon, dated 18 July 2011 who stated (at p 4), "domestic assistance is recommended four hours a fortnight for gardening and four hours a week for home care". This submission did not fit well with the plaintiff's other submissions in relation to the inadmissibility of Dr Johnston's evidence. On what basis the orthopaedic surgeon assessed the number of hours per week required to undertake domestic duties and gardening was not revealed. It is not the kind of "expertise" which is normally attributed to orthopaedic surgeons. The evidence was clearly inadmissible, although not objected to, and should be given no weight at all. Why the court was taken to it is obscure."

205. Dr John Stephen sets out the plaintiff's current situation as follows:

> "**Current Situation**
>
> This is one in which Mrs Allen is able to live independently at home. She dresses and undresses without help but this is much more of an effort than before. She uses a front-opening bra and most of her other clothes are front opening. She does not wear stockings any longer, simply shoes. The bathroom is all set up (and was set up by Daughterly Care) so that she is independent in terms of showering and toileting.
>
> Mrs Allen drives over short distances. There is a 15km limit imposed on her. She has quite a bit of difficulty parking.
>
> She says her cooking is simple. She cannot get dishes out of the oven any more, most of the crockery and other implements are at waist height. She cannot reach up to high cupboards.
>
> She still has the same cleaner once a month. She is arranging for extra help in the new year, three hours a fortnight in terms of other household activities such as dusting, ironing, shopping and so on. At present, she said she simply cannot manage all these activities satisfactorily.
>
> Concerning leisure, she used to paint and go to an art group. She does not do this anymore, nor does she go to the Pymble Players where she used to drive her friends. She still plays bridge at the North Sydney Leagues Club and at Killara Golf Club once a week, where she is driver by her friends.
>
> In summary, there is a need for domestic assistance, which I would estimate as being the previous two hours once a month provided by her cleaner prior to the fall and an extra three hours a fortnight, as a conservative estimate, together with some incidental help from her daughter.
>
> This probably amounts to a couple of hours per week, meaning that she needs extra help in the range of five – six hours per fortnight.
>
> As well as this, her leisure activities have been curtailed as described above."

206. Additionally, there is a physiotherapist report of a treating nature in the form of a review of the plaintiff's needs by the Northern Sydney Local Health District (Exhibit E). This sets out her need for assistance with housework such as vacuuming and cleaning (such as in the bathroom), as well as noting that she has a private cleaner and uses the organisation Daughterly Care. This report describes her as "vague at times"; while the plaintiff gave her evidence in court in a sprightly fashion she did become fatigued fairly rapidly, and I view this comment in that light. The plaintiff scores well for most daily tasks but it is noted she uses a stick to walk. However, her ability to perform housework and laundry indicate she needs assistance. Her level of need is mild but she is noted as increasingly needing support to remain at home.

207. This is an argument about whether a woman with a significant injury should receive two or four hours per week commercial assistance for the rest of her life. Viewed in realistic terms, the impact of the plaintiff's accident upon her ability to perform many of her household activities has been

significant. I consider the plaintiff's claim for future paid commercial assistance to be both realistic and fair. There is no doubt that the plaintiff is currently receiving this kind of assistance, and it should continue; she will need more assistance in the future, not less, and given her extremely good physical health prior to the accident, she would probably have been able to look forward to being able to lead a fit and healthy life and carry out all her housework and social activities and generally live as a normal independent person for the rest of her life expectancy. The accident has robbed her of that opportunity and, in the circumstances, the sum for future paid commercial assistance sought by the plaintiff should be awarded.

208. However, a deduction from this sum should be made to take into account the observations of the New South Wales Court of Appeal in *Metaxo ulis v McDonald's Australia Ltd* [2015] NSWCA 95. Mr Jones conceded this had not been done.

209. This case differs from most others where this principle is applied in that the plaintiff is now 88 years old. In practical terms, because of her age, the actual level of assistance the plaintiff needs for other medical problems is very low indeed. Rather than deduct a percentage to the extent which occurred in *Metaxo ulis v McDonald's Australia Ltd* , I propose merely to make a small deduction to take into account the principles enunciated by the Court of Appeal. In those circumstances, if I award a lump sum of $45,000 for future care, this will take into account that the plaintiff's home care needs of the future may overlap with the paid care she is going to need for other future medical issued.

Concluding remarks

210. I have entered judgment for the plaintiff with liberty to the parties to bring in short minutes of order reflecting the mathematically agreed calculation of damages following confirmation of the BUPA past out-of-pockets and any other necessary adjustments.

211. I will also grant liberty to apply in relation to costs. The circumstances in which the plaintiff made an application to reopen her case in closing submissions resulted in two adjourned hearing dates and further written submissions. The fact that a witness is overseas is no excuse for not preparing a statement and seeking appropriate orders under the *Evidence Act 1995* (NSW) and/or making an application for that witness to be cross-examined by telephone and/or AVL. However, the parties should not assume that I have a concluded mind on this issue. There are many other issues in the conduct of these proceedings which may need to be considered in relation to costs.

Orders

1. Judgment for the plaintiff.

2. Liberty to the parties to bring in short minutes of order reflecting the mathematically agreed calculation of damages.

3. Defendant pay plaintiff's costs.

4. Liberty to apply in relation to costs.

5. Exhibits retained for 28 days.

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Decision last updated: 16 September 2016