Walsh v Yang - [2023] NSWDC 307

District Court

New South Wales

Medium Neutral Citation:	**Walsh v Yang & Ors [2023] NSWDC 307**
Hearing dates:	22, 23 and 24 November 2022
Date of orders:	10 August 2023
Decision date:	14 August 2023
Jurisdiction:	Civil
Before:	Andronos SC DCJ
Decision:	See paragraph 223.
Catchwords:	TORT – negligence – occupier's liability – slip and fall within residential premises – whether occupier had knowledge of slipperiness of tiled surfaces - INSURANCE – denial of insurance under policy necessitating the insured to cross-claim against insurer – construction of policy – whether exclusions apply – s 35 Insurance Contracts Act – whether insurer clearly informed insured of exclusions under policy
Legislation Cited:	*Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW), s 4 *Civil Liability Act 2002* (NSW), ss 5B, 5D, 5E, 13, 15 and 16 *Environmental Planning and Assessment Act 1979* (NSW), ss 4.2, 3.31, 6.9 and 9.37 Environmental Planning and Assessment Regulation 2000 (NSW), reg 43 *Evidence Act 1995* (NSW), s 128 *Industrial Arbitration Act 1940* (NSW) *Insurance Contracts Act 1984* (Cth), ss 28 and 35 Insurance Contracts Regulation 2017 (Cth), regs 18 and 19

Land Acquisition (Just Terms Compensation) Act 1991 (NSW), Pt 2, Div 3

State Environmental Planning Policy (Exempt and Complying Code) 2008

Cases Cited:

Australian Safeways Stores Pty Ltd v Zaluzna (1987) 162 CLR 479; [1987] HC 7

Brown v Rezitis (1970) 125 CLR 157; [1970] HCA 56

Bunnings Group Ltd v Giudice [2018] NSWCA 144

Coote v Kelly; Northram v Kelly [2016] NSWSC 1447

Dickinson v Motor Vehicle Insurance Trust (1987) 163 CLR 500; [1987] HCA 49

Government Insurance Office (NSW) v R & J Green & Lloyd Pty Ltd (1966) 114 CLR 437

Hams v CGU Insurance Limited [2002] NSWSC 273

Health Insurance Commission v Freeman (1998) 158 CLR 267

Hoy v Coffs Harbour City Council [2016] NSWCA 257

Jones v Bartlett (2000) 205 CLR 166

Lockwood & Lockwood v Insurance Australia Ltd t/as SGIC Insurance [2010] SASC 140

McCann v Switzerland Insurance Australia Ltd (2000) 203 CLR 579; [2000] HCA 65

Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104; [2015] HCA 37

Our Town FM Pty Ltd v Australian Broadcasting Tribunal (1987) 16 FCR 465

R v Khazaal [2012] HCA 26; 246 CLR 601; 86 ALJR 884; 289 ALR 586; 217 A Crim R 96

R v Orcher (1999) 48 NSWLR 273

Roads and Traffic Authority of NSW v Dederer (2007) 234 CLR 330; [2007] HC 42

Schultz v McCormack [2015] NSWCA 330

State Government Insurance Office (Qld) v Crittenden (1966) 117 CLR 412

State of NSW v Tempo Services Ltd [2004] NSWCA 4

Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5

The Nominal Defendant v Cordin [2017] NSWCA 6

	Wallaby Grip Pty Ltd v QBE Insurance (Australia) Ltd (2010) 240 CLR 444; [2010] HCA 9
Texts Cited:	*The Law of Liability Insurance*, Derrington and Ashton, 3rd ed, LexisNexis 2013
Category:	Principal judgment
Parties:	Plaintiff: Colin Walsh First Defendant/First Cross-Claimant: Hongmei Yang Second Defendant/Second Cross-Claimant: Danny Xu Third Defendant/Cross-Defendant: Insurance Australia Limited
Representation:	Counsel: Plaintiff: Mr P Khandhar SC and Mr E Anderson First and Second Defendants/First and Second Cross-Claimants: Mr S J Walsh Third Defendant/Cross-Defendant: Mr K Horsley Solicitors: Plaintiff: Brydens Lawyers First and Second Defendants/First and Second Cross-Claimants: James Tuite & Associates Lawyers Third Defendant/Cross-Defendant: Holman Webb Lawyers
File Number(s):	2021/285081
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Judgment

1. On 24 March 2019 the plaintiff slipped and fell on tiled stairs at the rear of a residential property at Jamieson Avenue, Baulkham Hills, NSW (the "Property"). At the time the tiles were wet and slippery. The Property was owned by the first and second defendants/cross claimants, Ms Yang and Mr Xu (also referred to below as the "Insured").

2. The plaintiff seeks personal injury damages from the first and second defendants, alleging they were negligent as owners of the Property in failing to take any measure to render the tiles slip resistant when they knew, or ought to have known, that the tiles were slippery when wet. The first and second defendants deny they are liable to the plaintiff.

3. The plaintiff also maintains a claim against the third defendant (the "Insurer"), the home and contents insurer of the Property, pursuant to a policy of insurance issued to the first and second defendants (the "Policy"). That claim is brought under s 4(1) of the *Civil Liability (Third Party Claims*

Against Insurers) Act 2017 (NSW) (the "Third Party Claims Act"). Ms Yang and Mr Xu also bring a cross claim against the Insurer, who has denied indemnity under the Policy.

4. There was no dispute that Ms Yang and Mr Xu, as occupiers of the Property, owed the plaintiff a common law duty to take reasonable care to avoid a foreseeable risk of injury to him. There was only limited dispute as to the circumstances in which the plaintiff slipped and fell and no dispute that the tiles were slippery when wet.

5. The principal dispute between the plaintiff and Ms Yang and Mr Xu as to liability concerned whether the risk that eventuated was foreseeable, whether the duty had been breached and whether there was any causal connection between any breach of duty and any injury suffered by the plaintiff. Further, there was a significant dispute as to the extent of any injury suffered by the plaintiff from the 24 March 2019 accident and the extent of any loss suffered as a result thereof.

6. As between Ms Yang and Mr Xu (and the plaintiff) on the one hand and the Insurer on the other, there was a significant dispute as to whether the Insurer was entitled to decline indemnity pursuant to any exclusions in the Policy. This also raised a question whether s 35 of the *Insurance Contracts Act* 1984 (Cth) (the "ICA"), when read with reg 19 of the *Insurance Contracts Regulations* 2017 (Cth) (the "Regulations"), prevents the Insurer from relying on the exclusions and whether the Insurer is nevertheless able to rely on them if it clearly informed the Insured of their effect.

Background

The plaintiff

7. The plaintiff was born in November 1962 and was 56 years old when the accident occurred. He left school in 1978 and undertook a mechanical engineering course at TAFE in Sydney whilst working as a motor mechanic at City Automobiles Sydney. He remained in that position until 1983, when he commenced employment with News Ltd as an editorial police roundsman. He remained in that role until 2006. At the same time, he worked as a casual taxi driver with ABC Taxis (from 1985 to 2006) and as chief of staff at TEN News on weekends (1995 to 2006).

8. In 2006, the plaintiff purchased a property at Grenfell, NSW, some 370 km west of Sydney, initially as an investment. He still owns that property, a three bedroom house on approximately 2,200 sqm, a reasonable proportion of which is landscaped and concreted. He lived there between about 2007 and sometime after 2015 and, after some years living in Sydney, moved back there with his now partner, Ms Christina Radovan.

9. In his role as a police roundsman for News Limited, the plaintiff was exposed to significant trauma. That work took its toll and by 2007 the plaintiff was diagnosed with post traumatic stress disorder (PTSD) and ceased work. He commenced receiving a disability support pension, which he still receives. In cross examination the plaintiff stated that the disabilities that precipitated his disability support pension were both his PTSD and injury to his lower back. The plaintiff's PTSD was one of the reasons he moved to Grenfell on the first occasion as he was experiencing difficulty in social interaction.

10. The plaintiff described his physical health in the period to 2008 as good. There was evidence, however, of the plaintiff having various health problems since about 2002. The extent to which those problems subsist and impact upon the damage he has suffered as a result of the 24 March 2019 accident were issues in the proceedings and are addressed below.

11. By 2009–2010, the plaintiff was obese, his weight reaching over 200 kg, and he suffered from Type II diabetes. The plaintiff said his obesity restricted his physical activity but that he did not experience any pain in connection with it. He lost a substantial amount of weight over the next few years and by about 2013 the plaintiff was sufficiently comfortable with social interaction to

commence volunteering with three organisations: the State Emergency Service (SES), the Rural Fire Service (RFS) and the Salvation Army.

12. During those engagements, the plaintiff was involved in several physically arduous activities for which he was trained and, in due course, provided training to other volunteers. The work included boat rescues, road rescues, deployment as a firefighter, driving a fire truck, carrying and using fire hoses and connecting hoses to pumps, climbing onto roofs and using chainsaws. It required interaction with other crewmembers and regular (weekly) training. The plaintiff coped with the physical, psychological and social requirements of his volunteer work. He enjoyed the work. By 2019 he was a senior operator with the SES and bore the rank "firefighter" with the RFS.

13. The plaintiff's duties with the Salvation Army included operating a cooking trailer, which involved deploying the trailer, cooking and dealing with people. It was in that role that the plaintiff developed an interest in a career in cooking.

14. The plaintiff also owned mowing and gardening equipment (comprising a trailer, lawnmower, whipper snipper, chainsaws, ride on mower, blowers and a vacuum). He used that equipment in a small business he advertised, and conducted on weekends, doing gardening work under the business name "Mr Clip". It appears this business commenced once he moved to Sydney. As at the date of the accident, the plaintiff earned between $60 and $100 per week for such work.

15. In addition to the work performed by the plaintiff in his "Mr Clip" gardening business, the plaintiff also conducted a part time risk assessment business under the business name "Risky Business". The precise parameters of that business activity were not explored in the evidence. In general terms, the plaintiff advised property owners about risks around the home, however, it was not made clear what was the nature of risk in respect of which the plaintiff advised, other than when the plaintiff advised Ms Yang that she ought install smoke alarms at the Property. The plaintiff accepted that he did not provide any advice as to the risk posed by the slipperiness of the tiles on the stairs, however, it was not established that the assessment of any such risk fell within any professed expertise on his part.

16. In 2015 the plaintiff met, and commenced a relationship with, Christina Radovan, who remains his partner and lives with the plaintiff at Grenfell.

17. In July 2018 the plaintiff and Ms Radovan both commenced a Certificate III course in commercial cookery at Baulkham Hills TAFE. The plaintiff did so with the intention of obtaining paid employment as a cook or chef. At the time, although the plaintiff still owned his property in Grenfell, he was frequently in Sydney attending on an aged parent. He spent a substantial amount of time with Ms Radovan at a townhouse in Baulkham Hills, which belonged to a friend of hers who was overseas at the time.

18. At around the time of commencement of the TAFE course, the plaintiff and Ms Radovan learned that Ms Radovan's friend was shortly to return to Australia and that he was going to sell the Baulkham Hills residence.

19. They therefore needed to find a place to live.

The first and second defendants and the Property

20. The first defendant, Ms Yang, moved to Australia from China in 2009 with her two daughters. During the relevant time her husband, the second defendant Mr Xu, spent a considerable part of his time in China but came to Australia once or twice per year and stayed at the Property for a few days each time. The plaintiff met and spoke with Mr Xu on occasion at the Property, which is owned by Ms Yang and Mr Xu jointly.

21. The Property comprises a free standing house with a separate structure comprising a storeroom and space occupied by the plaintiff and Ms Radovan at the rear (the "flat"). The flat and storeroom are separated from each other by a tiled staircase leading to an elevated outdoor area on the rear boundary where a clothesline and free standing clothes horse were located. The staircase was tiled at the time Ms Yang and Mr Xu bought the Property in 2009 and the same tiles had been laid in the storeroom. The first and second defendants did not change the tiles. There is no dispute as to the type of tiles on the stairs, nor is there any dispute as to the slip resistance value of the tiles.

22. The structure at the rear of the house was not always configured to include a flat. At one stage it was a garage and was later used as an office. In about October 2012 Mr Xu and Ms Yang had gas and water services installed to accommodate visiting family from China because the main house was not large enough to accommodate them all.

23. In August 2015 an officer from The Hills Shire Council ("Council") inspected the Property and determined that unauthorised building works, comprised in a carport and the conversion of the garage into an unauthorised secondary dwelling, may have been carried out. By letter dated 6 August 2015, Council notified Mr Xu and Ms Yang that the works appeared to be contrary to the development standards outlined in *State Environmental Planning Policy (Exempt and Complying Code) 2008* and as a result development consent should have been obtained prior to the works being carried out.

24. Council records indicated that Council was concerned about light, ventilation and fire separation from the boundary with respect to the garage/secondary dwelling. Concerns were also raised about gaps between the brick wall and metal into the roof.

25. Council sought a response, *inter alia*, explaining why the works had been undertaken without consent. Ms Yang's response addressed the failure to obtain consent for the carport (the reason being the neighbours had consented) but did not address the conversion of the garage. She asked Council what she could do to remedy the situation. Council's further response directed Ms Yang to remove the unauthorised kitchen and cap all associated services within the wall cavity. This was clarified in an email on 8 September 2015 as requiring the removal of the kitchen cupboards and bench, disconnection of all cooking facilities, disconnection and removal of the sink and capping off of all services, such as water, gas and electricity associated with the kitchen, in the wall cavity.

26. Ms Yang arranged for the removal of the stove and sink and for the services to be capped but left part of the cabinetry and a power point in place. Council again inspected the Property and noted that the direction to remove all cupboards and bench tops had not been complied with in its entirety. Nevertheless, Council did not appear to consider the state of the garage to be a breach of the *Environmental Planning and Assessment Act* 1979 (NSW) (the "EPAA") as at that date. Rather, Council stated that reconverting or using the garage building for the purpose of a secondary dwelling is a breach of the EPAA. In other words, it appeared to be a warning against using the garage as a secondary dwelling without development consent in the future.

27. No one had occupied the flat for at least 3 years prior to the plaintiff and Ms Radovan moving in.

28. Ms Yang enrolled in the same Certificate III commercial cookery course at Baulkham Hills TAFE as the plaintiff and Ms Radovan. They became friends. Sometime between July and October 2018, the plaintiff and Ms Radovan informed Ms Yang that they were in urgent need of accommodation as their then residence in Baulkham Hills was shortly to be sold. Ms Yang offered that the plaintiff and Ms Radovan could stay in the flat.

29. The plaintiff, Ms Radovan and Ms Yang all agreed in evidence that the common intention of the parties was that the plaintiff and Ms Radovan would not stay long in the flat and would shortly be looking for somewhere to live more permanently. At the time of the accident in March 2019, the plaintiff and Ms Radovan had been staying at the flat for approximately five months. They did not

move out until January 2020 when they moved to a two bedroom unit in Hornsby. They later moved to the plaintiff's property at Grenfell, where they still live.

30. The plaintiff and Ms Radovan agreed with Ms Yang initially to pay rent of $420 per week. After the first week, Ms Yang reduced that amount to $300 per week as the plaintiff was performing domestic jobs around the Property such as mowing and edging the lawn, trimming the hedges and looking after Ms Yang's plants while she was away. The plaintiff also installed shelves, repaired a TV antenna and installed a new light at the main residence on the Property.

31. The plaintiff, Ms Radovan and Ms Yang maintained a friendly relationship, often sharing meals and going to TAFE together. Indeed, Ms Yang said that they were "like family". However, they maintained separate households.

32. At the time, the flat did not have an oven, fridge, dishwasher, connected gas or running water in the kitchen area, each of which was installed or connected by the plaintiff with Ms Yang's approval.

Approach to evidence in areas of dispute

33. Four witnesses gave oral evidence: the plaintiff, Ms Radovan, Ms Yang and the plaintiff's nephew, Simeon Walsh. Mr Simeon Walsh, the manager of a café in Melbourne, gave evidence by AVL relevant to the plaintiff's claim for economic loss. Ms Yang had an interpreter in the witness box but was able to answer most questions unassisted. There were few factual matters in dispute between the witnesses. Submissions were made challenging the credit of each of the plaintiff, Ms Radovan and Ms Yang, although counsel did not advance a submission that any of them were giving dishonest evidence. In my view, each of the witnesses gave honest evidence and did his or her best to assist the Court. I accept each of them as a witness of truth.

34. While each of the lay witnesses gave honest evidence, I am mindful of the approach to assessing oral evidence in the authorities collected by Davies J in *Coote v Kelly; Northram v Kelly* [2016] NSWSC 1447 at [165] to which his Honour referred in *The Nominal Defendant v Cordin* [2017] NSWCA 6. In that judgment, his Honour referred to a number of authorities that provide assistance in dealing with credibility issues and the fallibility of human memory. In assessing the credit of each of the witnesses, I have taken into account not just their demeanour in the witness box but the corroborative effect of any contemporaneous documents or records and the extent to which witnesses' evidence accords with the probabilities. I also proceeded on the basis that human memory is inherently fallible, fades with time and can be distorted by self-interest and by the litigation process itself.

35. To their credit, each of the plaintiff and Ms Yang made admissions against interest. At times, however, each of the plaintiff, Ms Radovan and Ms Yang became combative and defensive when their recollection was challenged. I found that each of the plaintiff and Ms Radovan exaggerated aspects of their evidence, such as with respect to the time taken to perform domestic duties.

36. Mr Xu, the second defendant, travels to Australia once or twice per year and stays a few weeks each time. He did not attend the hearing and no application was made for him to give evidence by AVL. No explanation was given for his failure to do so.

Section 128, Evidence Act certificate

37. In the course of the hearing, Ms Yang by her counsel sought a certificate under s 128, *Evidence Act* 1995 (NSW). The application related to evidence on the installation of fixtures and the connection of services in the flat and her lack of any communication with Council seeking or obtaining approval for such works or the occupation of the flat. The Insurer alleges in these proceedings that

Ms Yang and Mr Xu have committed an offence under s 4.2 of the EPAA by carrying out a specified development without consent.

38. Objection was taken to cross examination of Ms Yang by counsel for the Insurer on the basis that her answers may tend to prove she had committed such an offence. I was satisfied that there were reasonable grounds for such an objection.

39. Given the alleged illegality of such conduct was a central allegation in the Insurer's defence to the cross claim and to the plaintiff's direct claim against it, I was also satisfied that it was in the interests of justice to require Ms Yang to answer the questions proposed to be asked in cross examination on this topic.

40. Accordingly in my view, the conditions for issue of a s 128 certificate were established, and I caused a certificate to be issued on 24 November 2022 in respect of her evidence at Transcript pages 136-139.

Factual findings in areas of dispute

The domestic arrangements of the plaintiff and Ms Radovan prior to the accident

41. According to the plaintiff, prior to the 24 March 2019 accident he and Ms Radovan often did not cook at the Property as they could either eat at TAFE or bring home food they had prepared at TAFE. They generally shopped for groceries at nearby shops. Ms Radovan said that she nevertheless cooked almost every day (at least six times per week). While some preparation at home may have been required, I do not accept that cooking a full meal for two people was required almost every day during this time.

42. The plaintiff gave evidence that he and Ms Radovan each spent about three hours per day engaged in domestic chores such as cleaning, cooking and washing. The plaintiff said that he personally was involved in cooking, cleaning and doing laundry. He stated that Ms Radovan was solely responsible for vacuuming, washing floors, doing her own laundry, preparing food and shopping. It appears most likely that Ms Radovan was primarily responsible for these chores but that the plaintiff assisted from time to time.

43. Ms Radovan estimated that between them they performed about 2 to 4 hours of housework each day.

44. I find the estimates of each of the plaintiff and Ms Radovan to be unreliable and a substantial overstatement of the hours that would be required to maintain their household, being a small flat occupied by two people. To the extent this estimate informs their estimates of the amount of time required to perform domestic chores after the accident, I regard those estimates as consequently exaggerated.

The incident of November 2018

45. On 7 November 2018, the plaintiff suffered the first of two falls at the Property.

46. Shortly after the plaintiff and Ms Radovan moved to the Property, the plaintiff was in the process of moving some of Ms Yang's furniture from the flat to the storeroom. It had started to rain and was windy. The plaintiff's account is that he was moving a small fridge into the storeroom using a small trolley. The floor was wet and he slipped backwards, falling onto cabinets in the storeroom. The surface on which he was walking, just inside the storeroom, was comprised of the same tiles as those on the stairs.

47. Ms Yang's account of the incident was only slightly different. According to Ms Yang, the fridge was between 1.4 and 1.5 metres in height and, when he fell backwards, the fridge fell on top of him. She

accepted that it had started to rain at the time but denied that the tiles in the storeroom were wet because there was an awning over the storeroom door. The awning, it should be noted, was not large and on the basis of the photographic evidence, I find that if it had been raining (as was accepted) the tiles just inside the entrance of the storeroom would likely have been wet.

48. According to Ms Yang, she and Ms Radovan both then came to the storeroom. In her evidence she said "… we tell him don't do anything when it's raining. Don't do any outdoor work when raining". Ms Yang associated the rain with the plaintiff's fall. Given that the plaintiff slipped on the storeroom tiles when it was raining, I find that Ms Yang understood from that incident that the plaintiff slipped on tiles which were made more slippery and therefore dangerous because of the rain that day. This is so even though she was not aware of anyone having slipped on the stairs previously.

49. The plaintiff says he was injured and had difficulty breathing. He believes he blacked out momentarily. He experienced pain at the top of his back and shoulders. The plaintiff called an ambulance, which took him to Westmead Hospital, where scans and tests were conducted and he was admitted overnight and discharged the following day. He then resumed his weekend yard business, TAFE course and volunteer work.

50. According to the plaintiff, sometime after he returned from hospital he said to Ms Yang "Emily, the tiles are very slippery when they're wet." The plaintiff could not recall any response from Ms Yang but, it is not disputed, no steps were taken between November 2018 and March 2019 to manage the slipperiness of the tiles.

51. Ms Yang denies the conversation took place. In light of her evidence referred to at paragraph 48 above, however, I find that Ms Yang was nevertheless aware of a connection between the rain and the plaintiff's fall on 7 November 2018. In any event, I also find it accords with the probabilities that the plaintiff and Ms Yang would have had a conversation to the effect of the plaintiff's evidence and I prefer his evidence in this regard.

52. According to the plaintiff, after the accident in the storeroom in November 2018 he also mentioned to the second defendant, Mr Xu, that the tiles were slippery when wet. As this evidence is uncontradicted and I have accepted the plaintiff as a witness of truth, I accept a conversation to this effect also took place.

53. The defendants, therefore, had actual notice from November 2018 of the risk of a fall on tiles of the same kind as were laid on the stairs if the tiles were wet.

The plaintiff's fall on 24 March 2019

54. According to the plaintiff, on Sunday 24 March 2019 he was watching television in the flat while Ms Radovan had gone to the rear of the property to bring their washing off the clothesline. It had started to rain. The plaintiff was wearing flat, rubber soled training shoes. Ms Radovan called out "It's starting to rain. Can you come up and help me get the clothes off the line?". The plaintiff grabbed an empty washing basket and walked up to the top of the stairs at the rear of the Property. The stairs were wet.

55. When the plaintiff reached the top of the stairs, carrying an empty washing basket, he saw that Ms Radovan already had a basket and had started folding the clothes into it. She told him she no longer needed his help and he could go. He left the second basket with her, in case she needed it, turned around and started to descend the stairs to return to the flat.

56. The plaintiff had descended two stairs when his left foot slipped from under him, his right foot following. He slid downwards and sideways to the left. His left shoulder and arm first collided with the wall to his left, then he fell to his right and his right arm collided with the opposite wall. He

fell, hitting his left arm on the edge of the stairs, and his lower back hit the stairs as he continued to slide downwards. The fall caused a laceration to his left forearm which he says bled profusely.

57. Ms Radovan's account is similar. After the plaintiff came to assist her to bring in the washing and she told him he was not needed, she heard a loud thump and saw the plaintiff sprawled down the stairs. The tiles were wet and it was still raining. His left arm was bleeding.

58. Ms Yang was cooking dinner at the time. Her kitchen window looked out towards the rear of the main house. She heard yelling and saw the plaintiff standing in the back yard, about two metres from the stairs. She recalls seeing a full washing basket on the ground and Mr Radovan coming out of the flat. The plaintiff was walking back to the flat. She does not recall seeing any blood on the stairs.

59. Ms Yang's account, while differing in some detail from that of the plaintiff and Ms Radovan, was not irreconcilable with their version of events. Significantly, Ms Yang was alerted to the incident by shouting and could necessarily only have seen the immediate aftermath of the fall. Her account that she saw a full washing basket on the ground and that the plaintiff was walking back towards the flat does not contradict the plaintiff's account, which I find generally to be reliable. To the extent that Ms Yang recalls that there was no blood on the tiles and that Ms Radovan came out of the flat after the plaintiff's fall, I prefer the evidence of the plaintiff and Ms Radovan.

60. The plaintiff experienced immediate and excruciating pain across his shoulders and his back. After bringing the bleeding of his left forearm under control, he drove himself to Westmead Hospital. The pain worsened. He was admitted and scans, observations and tests were conducted. He was discharged the following day.

61. There is no dispute that the tiles were slippery, or that it was raining, at the time of the accident.

Lay evidence as to the impact of the fall on the plaintiff

The near term impact of the fall on the plaintiff

62. Following his return from hospital, the plaintiff wore a sling for his left arm until the end of his TAFE course. He says that he was in severe pain, which he rated "ten out of ten", for at least two weeks. On his evidence he took two weeks off from TAFE, which was a five day per week course. On his return to TAFE he had only limited capacity to perform the course requirements because his left arm was in a sling for the remainder of the course. Pain in his shoulders and arms prevented him from lifting pots of water and caused difficulty in chopping and preparing ingredients. He confined his activities to assembling ingredients for his classmates.

63. Although it was of only minor import, Ms Yang recalled that the plaintiff was only away from TAFE for one week and she described the sling as a "dressing". While I consider the difference to be immaterial, I nevertheless prefer the evidence of the plaintiff on this point.

64. In the weeks following the accident, the plaintiff relied on Ms Radovan to assist him with personal care, such as dressing, and carrying a greater share of the load of domestic chores than she had carried previously. Indeed, the amount of domestic work performed by Ms Radovan, relative to that performed by the plaintiff, has increased significantly since the accident.

65. The plaintiff nevertheless completed his Certificate III commercial cookery course in about June 2019. He was able to do so by performing part of the final assessment at home in a team with Ms Radovan. He subsequently completed a short espresso coffee course, qualifying with a Certificate of Attainment in about October 2019.

The longer term

66. After the 24 March 2019 accident, the plaintiff ceased his volunteer work with the SES, RFS and Salvation Army. He has also sold all of his gardening equipment and no longer operates his Mr Clip business. The plaintiff says he cannot engage in any of those activities because of limitations with his arms and shoulders suffered since the fall.

67. The plaintiff gave evidence that he has always been looking for work as a chef or a cook. He searched job search websites Indeed and SEEK and wrote to several prospective employers. While work in the restaurants of his TAFE instructors was often available to graduating students, he was unable to apply because of the physical limitations on his arms and shoulders caused by the accident. It was not put to the plaintiff that he did not genuinely seek work as a chef or cook.

68. In early 2020 the plaintiff and Ms Radovan moved out of the flat, first to a two bedroom unit in Hornsby and eventually to Grenfell. Ms Radovan continues to perform the bulk of the domestic chores, now including lawn mowing. The plaintiff estimated she spent three hours per day on domestic chores at Hornsby and continues to do so at Grenfell. The plaintiff attends to light domestic duties. For the same reasons as set out above, I regard these estimates as an exaggeration and unreliable. The plaintiff and Ms Radovan do not have any dependants and the time estimated to maintain a household of two adults does not appear to me to be realistic or to accord with common experience.

69. The plaintiff still has difficulty and experiences pain in performing tasks associated with cooking, such as lifting heavy objects such as pots full of water and chopping vegetables and ingredients. Nevertheless, he accepted in cross examination that he can prepare meals for himself as well as clear the table and stack the dishwasher afterwards. He also accepted he can dress himself but experiences pain in doing so. He can perform maintenance tasks around his current home as well as mop a floor and wipe down surfaces, although Ms Radovan mainly performs those tasks. I find that the plaintiff is capable of attending to his own personal care himself, albeit while experiencing some pain.

70. In cross examination, counsel for the first and second defendants took the plaintiff through a number of the tasks that he has undertaken since the fall. The plaintiff accepted he performed handyman and maintenance jobs for Ms Yang or her daughter, including weeding and garden spraying (using a 1½ litre bottle which he attached to a garden hose), fixing a toilet cistern and replacing a number of ceiling fans and an exhaust fan. He was able to use a small step ladder and drive to the Central Coast of NSW to perform these jobs on a property there. Although there was some debate about what was involved, the plaintiff repaired a hail damaged pergola either by replacing the sheeting or by applying tape to cover holes in it. He mixed cement and used it to replace some loose pavers. He trimmed some trees using a chainsaw.

71. Apart from the handyman tasks he undertook, the plaintiff also appeared for a friend of the plaintiff in a hearing before the Civil and Administrative Tribunal, which required him to travel to Gosford more than once, but was otherwise not physically taxing.

72. The defendants submitted that the plaintiff's account of injuries he sustained and the duration of his pain and restriction ought not be accepted. They point to the apparent inconsistency between the plaintiff's claim for attendant care and domestic assistance and the matters set out in the preceding paragraphs.

73. In my view, the evidence of the plaintiff being able to undertake these activities is not inconsistent with the degree of pain and restriction he described in his evidence. Generally I accept his evidence in this regard.

The medical evidence

The plaintiff's relevant medical history

74. The plaintiff said he was in good physical health until about 2006-2007 but had experienced the effects of trauma, resulting in his diagnosis of PTSD from about 2005 or 2006. His obesity, which appears to have reached its peak in about 2009-10, also restricted his mobility and ability to perform domestic chores. He denied suffering any pain associated with it. The plaintiff has also suffered from Type II diabetes since 2004.

75. As set out above, the plaintiff has been on a disability support pension since 2007 due to his PTSD and lower back pain. He accepted in cross examination by Mr Horsley for the Insurer that he has not been able to work at any time since 2007. A report by Dr David Wu, anaesthetist, in 2009 disclosed a severe level of functional disability due to the plaintiff's lower back pain. The plaintiff made an unsuccessful claim for total and permanent disability on a policy of insurance with AXA Insurance in 2009. A report by Dr Tim Anderson, occupational physician, in 2009 describes several physical and psychological conditions and that lower back pain caused the plaintiff to use walking sticks to ambulate at that time. This report is referred to again below.

76. The plaintiff says that he ceased suffering that lower back pain by about 2013 after his considerable weight loss. However, the evidence shows he still suffered from lower back pain in February 2016 when he presented to his general practitioner, Dr Morris Aziz, complaining, amongst other things, of chronic lower back pain, as was recorded in Dr Aziz's notes of 11 February 2016.

77. I do not accept that the plaintiff's lower back pain ceased prior to 2016. On the basis of the contemporaneous notes of Dr Aziz of a consultation with the plaintiff in February 2016, I find that the plaintiff continued to suffer chronic lower back pain at least until that time.

78. Further, from at least October 2016, the plaintiff had significant ongoing problems with his shoulders that prompted him to seek treatment from Dr Aziz on many occasions.

79. On 27 October 2016 the plaintiff suffered a fall on a public footpath across the road form Dr Aziz's surgery. The plaintiff says that he suffered abrasions (which he described as a "sort of gravel rash") to his right hand and was traumatised by the fall and suffered a lot of pain in his hand and right arm. As a result of that fall, he suffered some upper back and shoulder pain but denied that the pain persisted. Dr Aziz saw the plaintiff on 28 October 2016 and recorded that the plaintiff fell, landing on the left side of his body, grazing his left arm and leg. Dr Aziz further recorded a bilateral 10 to 15 degree extension deficit in both elbows. Both arms were subsequently x-rayed, however the x-ray results were not otherwise referred to.

80. On 26 November 2016 the plaintiff saw Dr Aziz again, who recorded "left shoulder adduction only 100 [degrees]". Dr Aziz also recorded "left adhesive capsulitis", also known as frozen shoulder, where the connective tissue enclosing the joint thickens and tightens, involving stiffness and pain in the shoulder joint. The plaintiff did not recall having any symptoms of frozen shoulder in November 2016.

81. On 6 February 2017 the plaintiff again attended Dr Aziz's surgery. In his notes Dr Aziz records "Frozen shoulder … Told possible link to fall".

82. On 8 February 2017 the plaintiff had an ultrasound which reported a subacromial/subdeltoid bursitis (inflammation of the bursa) in the left shoulder, a partial thickness tear and tendinosis of the supraspinatus tendon in the left shoulder, subscapularis tendinosis and bicipital tendinosis.

83. On 23 February 2017 the plaintiff reported sharp, stabbing pain to the left side of his neck, radiating to the scapular region of the shoulder.

84. The plaintiff consulted Dr Aziz again, in relation to bilateral shoulder and upper arm pain again on 15 and 24 April 2017. On 9 June 2017, Dr Aziz recorded that the pain was ongoing, "possibly

worse pain in R [right] shoulder/ upper? Forearm" and noted a bilateral forearm extension deficit in the elbows, greater on the right than the left.

85. The plaintiff disagreed with the accuracy of Dr Aziz's records, maintaining that he had no ongoing issues with his neck, shoulders, arms or back as at the time of the 24 March 2019 accident.

86. On 19 March 2019, the plaintiff attended Dr Aziz who recorded that the plaintiff was suffering from lower cervical spondylosis pain. While the plaintiff did not recall the consultation, he did not disagree with Dr Aziz's record.

87. To the extent that the plaintiff contends that the contemporaneous medical records are not accurate, I prefer those records, including the objective and contemporaneous recording of the plaintiff's condition by Dr Aziz. I am satisfied on the evidence that prior to the March 2019 accident, the plaintiff suffered pain and restriction in his shoulders, arms, neck and back and that that pain and restriction continued as at the date of the accident. Indeed, the plaintiff ultimately accepted that throughout 2017 he had significant ongoing problems with his shoulders that prompted him to seek treatment from his doctor on many occasions.

88. Notwithstanding those problems, however, the plaintiff had been able to continue with his various roles with the RFS, SES, Salvation Army, his studies at TAFE and his Mr Clip business.

Subsequent treating doctor reports

89. The Westmead Hospital discharge summary shows the plaintiff did not suffer a fracture or dislocation from the 24 March 2019 accident. The plaintiff suffered a deep laceration in his left forearm that did not require stitches.

90. On 26 March 2019 (that is two days after the accident), the plaintiff again attended Dr Aziz. Dr Aziz recorded that the plaintiff presented with left shoulder aggravation of pre-existing condition of rotator cuff tear and adhesive capsulitis, "soft tissue injury shoulder". He recorded the plaintiff suffered extensive soft tissue injury to his left upper arm with laceration, soft tissue injury to his left hand with bruises and swelling, very painful restricted left shoulder movements and painful restricted left elbow movements.

91. Two subsequent reports from Dr Aziz were also admitted into evidence. A handwritten report dated 30 July 2020 recorded that the plaintiff was capable of performing office work at home and that he had a good prognosis, the only ongoing pain being the pre-existing left shoulder injury and that the plaintiff would need analgesics on demand.

92. In his report dated 8 February 2022, Dr Aziz recorded that the plaintiff was "generally not fit to presume (sic - resume) work but I believe his work capacity potential has been reduced further with his above injury".

Medico-legal reports

93. The plaintiff relies on medico-legal reports of Dr Yuk Kai Lee and Dr Sean Low.

94. On 7 December 2021 the plaintiff attended the rooms of Dr Lee, an orthopaedic surgeon. Dr Lee recorded the plaintiff's injuries as being to his shoulders, neck and back. He recorded a rotator cuff tear bilaterally and aggravation of facet joint arthritis in the cervical spine. In Dr Lee's view, the plaintiff would not be fit to be a chef whose job includes lifting of heavy pots and pans and in a stressful environment. He recorded that the plaintiff could not help with housework and that his partner, who is on WorkCover, does all the work. Dr Lee considered that six hours of domestic help per week is appropriate.

95. In Dr Lee's view, the plaintiff's shoulders may be treatable surgically and he suggests the plaintiff see a shoulder surgeon. The particular surgery, acromioplasty, rotator cuff repair and biceps tenodesis of the left shoulder, would cost about $9,000. Post-operative physiotherapy would cost a further $3,000.

96. Dr Lee expects the plaintiff to continue to have pain and stiffness in his spine and shoulders, which may become worse in the future. He expects the plaintiff to develop arthritis in the traditional sense.

97. Dr Lee's report is criticised by the defendants on the basis that he was not provided with or did not refer to any scans that predated the accident and appeared to be unaware of, or did not consider, the plaintiff's relevant history (the fall on 27 October 2016, ultrasound report of 8 February 2017, reports of Dr Aziz of 30 July 2020, consultation of 19 March 2019).

98. On 7 December 2021, the plaintiff also saw Dr Low, an occupational physician. In Dr Low's view, the plaintiff remained unfit to return to work in any capacity. Dr Low considered that the plaintiff remains significantly disadvantaged in the open labour market, that he requires ongoing physical restrictions against performing any manual tasks and that overall he remains unfit to return to work in any capacity. He would be unable to tolerate the inherent duties in working as a kitchen hand or chef and would be unable to perform repetitive upper limb tasks involved in cooking and manoeuvring kitchen items, would be unable to tolerate prolonged periods on his feet or to tolerate full-time hours. Unless he had assistance from family members, he would require two hours of domestic assistance each week to assist with heavy household tasks such as vacuuming, mopping and cleaning bathroom services.

99. According to Dr Low, the plaintiff's prognosis is guarded and he requires referral to an orthopaedic surgeon for review of his shoulder conditions, possible cortisone injections, hydro dilatation or surgery. With respect to his cervical spine, he requires referral to a treating neurosurgeon, consideration of surgical options and otherwise requires ongoing prescription of analgesia for breakthrough pain. Dr Low assesses the plaintiff requires access to multidisciplinary care with treatment modalities including exercise physiology and hydrotherapy. He should see his treating general practitioner at 3 to 4 monthly intervals to coordinate his care.

100. Dr Low's report is criticised by the defendants on the same basis as Dr Lee's in that he did not appear to be aware of the 8 February 2017 ultrasound report and did not address the handwritten report of Dr Aziz.

101. Senior counsel for the plaintiff noted that neither Dr Lee nor Dr Low were required for cross examination and submitted that the "causal potency" of any failure by them to consider the earlier medical evidence was a matter for the defendants to establish and had not been made out.

102. The defendants rely on the medico-legal reports of Professor Ian Cameron, a rehabilitation physician, of 18 July 2022 as well as the earlier reports of Dr McGrath of 13 March 2009 and Dr Anderson of 11 September 2009, already referred to at paragraph 75 above.

103. Professor Cameron noted moderate and symmetrically restricted movement at the cervical spine (70% of normal), inconsistent movement of both shoulders (abduction of 70 degrees, adduction 20 degrees, flexion 70 degrees, extension 20 degrees, external rotation 60 degrees and internal rotation 70 degrees), full range of movement at the elbows and limited movement at the wrists and symmetrically reduced movement in the lumbar spine to 50% of normal. Professor Cameron also reviewed the plaintiff's history, including with respect to his attendance at Westmead Hospital following the November 2018 fall and the discharge summary in respect of the plaintiff's March 2019 fall. He reviewed Dr Aziz's notes, his handwritten report of 30 July 2020 and the CT scan of the plaintiff's cervical spine on 13 October 2021.

104. In Professor Cameron's view, the radiological reports were consistent with degenerative changes in both shoulders and neck. Professor Cameron accepted that the plaintiff sustained injuries to his left forearm, left shoulder and cervical spine as a result of the 24 March 2019 accident. He further accepted that the plaintiff possibly suffered injury to his upper back and right shoulder. He considered the plaintiff suffers from many pain related complaints, and he concluded that the plaintiff suffers from chronic pain syndrome, which is not a reason to have limited engagement in daily activities.

105. Ultimately, Professor Cameron considered that the plaintiff does have significant restrictions in his work capacity but these are the result of pre-existing conditions unrelated to the accident. In Professor Cameron's view, the normal healing time for his injuries would be approximately one month and surgery was not indicated. He does not accept the claimed requirement for 14 hours domestic assistance per week in the period immediately following the accident or in the future but considers that domestic assistance was required for 2 hours per week for 4 weeks after the accident.

106. In assessing the medical evidence, I have had regard to the plaintiff's history of neck, shoulder and back pain and the plaintiff's medical history prior to the accident. I have also had regard to the plaintiff's evidence of his ongoing pain and restriction, which evidence I accept. In weighing up the competing opinions of Drs Lee and Low on the one hand and Professor Cameron on the other, I accept the defendants' submission that the failure of Drs Lee and Low to consider the relevant history of the plaintiff to some extent undermines their conclusions as to the cause of the plaintiff's pain and restriction. Accordingly, I consider the better view is that the plaintiff's 24 March 2019 accident aggravated or accelerated symptoms in his neck, shoulders upper arms and upper back.

107. Nevertheless, I consider that the evidence of Drs Lee and Low as to the extent of the plaintiff's ongoing pain and restriction is to be preferred to that of Professor Cameron. I do not accept that a reasonable period of recovery would have been approximately one month. The evidence of Drs Lee and Low in this regard is broadly consistent with the plaintiff's evidence as to his level of pain and restriction and inability to continue with volunteer activities that he had enjoyed and found fulfilling. While I have found the plaintiff to have exaggerated aspects of his claim, I nevertheless accept his evidence that he has continued to suffer pain and restriction, which is consistent with his having given up his volunteer work and gardening business.

Treatment

108. The plaintiff continues to suffer physical pain in his shoulders and upper back, neck and arms. He is not undergoing any active treatment to manage his pain, although he takes Celebrex and Diazepam for pain relief.

109. Drs Lee and Low recommend the plaintiff see a surgeon in respect of possible surgical intervention, although I do not read their evidence as affirmatively recommending surgery. Professor Cameron does not agree that it could assist. I am not satisfied that Drs Lee and Low have articulated a sufficient basis for me to conclude that surgical intervention is warranted.

Principles for determination of liability

110. The circumstances of the plaintiff's claim against the first and second defendants are governed by the *Civil Liability Act 2002 (NSW)* (the "CLA"). The relevant provisions are:

> **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.

....

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).

....

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.

111. There was no dispute that the first and second defendants owed a duty to exercise reasonable care to prevent foreseeable injury to the plaintiff as an entrant using reasonable care on his part for his own safety: *Australian Safeways Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479; [1987] HC 7; *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330; [2007] HC 42. The duty extends to taking precautions a reasonable person in the circumstances would take by way of response to the risk that a person may slip on tiles: *Schultz v McCormack* [2015] NSWCA 330 at [73].

112. An occupier is not under a duty to engage an expert in the field of slip resistance testing where such risks of defects could, in the nature of things, be seen as a possibility: *Jones v Bartlett* (2000) 205 CLR 166 at [184] per Gummow and Hayne JJ. However, once alerted to a risk, the occupier's duty is to exercise reasonable care to take such steps as a reasonable person would take in response to the risk so identified: *Bunnings Group Ltd v Giudice* [2018] NSWCA 144 per Leeming JA at [34].

113. In the present circumstances, I find that no later than the plaintiff's fall on the tiles in the storeroom in early November 2018 and his subsequent conversations with each of Ms Yang and Mr Xu, the first and second defendants were alerted to the risk that an entrant to the Property, such as the plaintiff, could suffer injury by slipping and falling on the tiles when they were wet. This was

the risk that eventuated on 24 March 2019 when the plaintiff suffered the accident the subject of these proceedings.

Breach and causation

114. The plaintiff bears the onus of proving any fact relevant to the issue of causation: s 5E, CLA.

115. The plaintiff relies on an expert report of Denis Carduro of Carduro Worksafe Pty Limited dated 8 June 2022 (the "Caduro report"). The Caduro report was admitted without objection and there is no other expert material before the Court on any question relevant to liability. I accept Mr Carduro's analysis and conclusions.

116. On the basis of the Caduro report, I am satisfied that the surface of the stairs failed the minimum standards of the relevant Australian Standards requirements in that they were inadequately slip resistant when wet and inappropriate for use on external surfaces, which surfaces would almost certainly be wet from time to time. Mr Caduro identified reasonable preventive measures that could (and in his opinion should) have been implemented. In a non-exhaustive list, he identified the installation of slip resistant visually contrasting nosing, grip tape and a hand rail, each of which could be achieved simply and inexpensively. Obvious notices could also have been prominently and permanently displayed, advising that the stairs were slippery when wet. I consider each of these steps to be a reasonable response to a foreseeable risk, of which the first and second defendants had actual notice from November 2018.

117. By way of summary with specific reference to the elements identified in s 5B of the CLA, I find that the risk of personal injury being suffered by an entrant to the Property by slipping on wet tiles was foreseeable and was a risk of which the first and second defendants had actual knowledge from no later than November 2018. That risk was not insignificant and there was a high probability of harm if someone were to slip on the tiled stairs when wet. The burden of taking the precautions identified by Mr Carduro was slight. The injury suffered by the plaintiff was serious and, as senior counsel for the plaintiff submits, had the plaintiff hit his head, the injury might have been fatal.

118. Accordingly, in the circumstances I find a reasonable person in the position of the first and second defendants would have taken the precautions against the risk of harm. As the first and second defendants did not take such precautions, I am satisfied that they breached their duty of care to the plaintiff.

119. As to whether the breach of duty as I have found it caused the plaintiff's injury, I am also satisfied that the requirements of s 5D of the CLA have been made out. In particular, I note that s 5D(1)(a) is a statutory statement of the common law "but for" test of factual causation: *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5. I find that factual causation is made out on the facts as I have found them. Further, with reference to s 5D(1)(b) of the CLA, I consider that it is appropriate for the scope of the first and second defendants' liability in the circumstances to extend to liability incurred in the current circumstances. Causation within the terms of s 5D of the CLA is therefore made out.

Findings as to liability

120. On the facts as I have found them, I find that the first and second defendants are liable to the plaintiff for negligently failing to take reasonable steps to protect him from the risk of injury resulting from slipping and falling on the tiled surface of the stairs at the rear of the property when wet. That risk eventuated on 24 March 2019 as a result of which the plaintiff suffered injury to his shoulders, left arm, neck and upper back.

Damages

121. The plaintiff seeks damages for non-economic loss, past and future out of pocket expenses, past and future economic loss and past and future domestic assistance.

Non-economic loss

122. Damages for non-economic loss are assessed in accordance with s 16 of the CLA, which provides a mechanism for assessing the severity of such loss with reference to the most extreme case.

123. Each of the parties contended for a different finding as to the severity of the plaintiff's loss: the plaintiff ultimately contended that his loss was 32% of a most extreme case; the first and second defendants said the proportion was 23% and the Insurer said it was no greater than 10%.

124. The defendants point out that the plaintiff has suffered from Type II diabetes since 2004 and PTSD since 2006. He has suffered from lower back pain from 2003 and underwent numerous investigations to 2009. Damage at the L5/S1 vertebrae, structural changes at the thoraco-lumbar junction and somatic pain referred into the right leg were identified by Dr McGrath in March 2009. Extensive degenerative changes were identified at L4/5 with a posterior protrusion deviated towards the right and a small posterior protrusion at L5/S1 towards the left were identified by Dr Anderson in September 2009. At that time Dr Anderson considered the plaintiff was not fit to return to work and his prognosis was poor.

125. It should be noted, however, that the plaintiff through his own efforts made enormous progress in the period to 2013 such that he could participate in community and social activities that would have seemed highly unlikely in 2009.

126. Nevertheless, the plaintiff's pre-accident medical history as set out above shows continuing pain in his shoulders, neck and upper back. Pains continued and the plaintiff sought medical treatment in respect of them as late as 5 days prior to the accident. I have already indicated above that to the extent that the plaintiff denies this history, I prefer the objective and contemporaneous reports of various treating practitioners, particularly Dr Aziz.

127. I have accepted that the plaintiff suffered injury to his neck, shoulders, upper back and left forearm in the 24 March 2019 accident. The laceration to his left arm, which has healed, is an uncontroversial injury suffered in the accident. The extent of the soft tissue injury caused by the 24 March 2019 accident, however, is in issue. The first and second defendants accept it is probable that the accident aggravated pre-existing conditions and that as a result the plaintiff has suffered an increased level of pain and restriction in his physical capacity, particularly in his neck, upper back and shoulders. The defendants add that these issues would have resolved within 4 weeks.

128. I accept that since the accident the plaintiff has been unable to participate in tasks formerly available to him in the SES, RFS and Salvation Army and that this has deprived him of the activity that he enjoyed and found fulfilling. I accept that for a time he needed assistance in day to day tasks, although I do not find that this has been a permanent change. I note that the plaintiff has conceded that he can dress himself, cook for himself and attend to many, if not all, day to day household and maintenance tasks around the home.

129. In these circumstances, I have concluded that the plaintiff suffered a soft tissue injury to his neck and shoulders, which has aggravated his pre-existing condition. This is also consistent with the plaintiff's subsequent medical history, such as radiological reports from 2021 which show minor degenerative changes in the cervical spine and acromioclavicular joint arthrosis, tears of the supraspinatus and degenerative changes of the biceps labral junction. Similarly a CT scan of the plaintiff's shoulder on 23 April 2019 was reported to show a small glemohumeral joint effusion and moderate arthritic changes to the acromiclavicular joint.

130. Taking all of the above matters into account, I assess the plaintiff's non-economic loss at 25% of a most extreme case. In accordance with the regime under s 16 of the CLA, this results in a non-economic loss award of $46,000.

Out of pocket expenses

131. Past out of pocket expenses are agreed at $3,928.50.

132. In respect of future out of pocket expenses I do not accept that the plaintiff requires surgery. Nevertheless, I accept that the plaintiff will require analgesics to manage his pain and may need to consult his general practitioner from time to time. In this respect I propose to allow a buffer of $3,000.00.

Past and future economic loss

133. The plaintiff's claim for economic loss is essentially that by reason of the breach by the first and second defendant's duty of care to him, he has been injured by the impairment of his earning capacity. That injury is primarily alleged to have been the ability he otherwise would have had to take up employment as a sous chef, either with his nephew Simeon Walsh in Melbourne or otherwise. The plaintiff also seeks to recover as past economic loss his lost capacity to earn income from his Mr Clip gardening business.

134. As at March 2019, the plaintiff had not worked in any capacity other than his volunteer work, odd jobs and his Mr Clip business for about 12 or 13 years. He had continually been on a disability support pension for that whole period.

135. The plaintiff's evidence is that he proposed to enter the world of commercial cooking in his mid to late 50s. He made a number of unsuccessful applications to a variety of establishments. He had had conversations with his nephew, Simeon Walsh, who manages a café in Melbourne at which he has responsibility for hiring staff. The plaintiff gave evidence that he was prepared to move to Melbourne to take up that opportunity.

136. Mr Simeon Walsh gave evidence by AVL that he had been prepared to hire the plaintiff as a sous chef on completion of the plaintiff's Certificate III commercial cooking course but could not do so once the plaintiff suffered his injuries from the 24 March 2019 accident. In cross examination, however, he provided the following evidence as to the physical demands of working in a commercial kitchen and its effect on hiring decisions:

> Q. … I want you to assume a hypothetical set of facts, please. Someone comes to you and tells you between 2003 and 2010 "I had back pain and a back condition that caused me significant disability". If someone had come to you with that background at any time between 2019 and 2022, would you give that person a job?
>
> A. If I was to understand that someone was injured, I could not employ them.
>
> Q. Can I give you another assumption? Someone comes to you and says, "I've had post-traumatic stress disorder and I haven't been in full-time employment since 2006", would you employ that person?
>
> A. I guess - sorry, again, I could not employ someone that was injured. And if I could give you an example, when I was first employed, I was asked if I had any injuries and if my had strong wrists. That was my first question when I was an apprentice was, do I have strong wrists and a strong back because there is a lot of heavy lifting and a lot of workloads. So, I, as a head chef, moving forward to the time you're referring to, and in present time, cannot employ someone who is injured, it's a risk of themselves and others.

Q. Can I ask you then a question based on a different assumption? Can I ask you to assume that someone comes to you and says, “I have a previous injury, I injured my left shoulder in 2016 and I had problems with that shoulder for a number of months after that injury”. Would you give that person a job as a sous chef?

A. I'm sorry to be short with you, but are these assumptions leading somewhere?

Q. If I could just ask you to answer the question and I will ask you one further question thereafter.

HIS HONOUR

Q. Can I just intervene, Mr Walsh, it's the judge here.

A. Yes.

Q. You don't have to have the end result in mind in answering these questions. These are just questions which are being put to you. And you just answer each question on its merits. If there is a reason--

A. Okay, I understand that he’s--

Q. If there is a reason for you not to answer that question, the plaintiff's barrister will object and then I'll rule on the objection, but in the meantime--

A. Okay, I understand, but these are all assumptions, am I correct, this all assuming that someone is--

Q. Yes. These are all put to you, Mr Walsh, on the basis that they’re assumptions. And so you just make the assumption that's embedded in the question and then just answer it on those terms.

A. I'll answer again then, I would not hire someone who has an injury that could harm themselves or others in the workplace dealing with possibly hot water in pots, lifting heavy trays, dealing with sharp knives and could possibly injure myself, themselves or others, so, no, I would not hire someone with his assumed injuries.

137. In light of the findings I have made as to the plaintiff’s pre-accident morbidity, the unvarnished evidence of Mr Simeon Walsh demonstrates that, even absent the injury suffered by the plaintiff on 24 March 2019, the plaintiff was unlikely to have succeeded in obtaining and retaining employment.

138. His age is undoubtedly another adverse factor. Simeon Walsh also gave the following evidence:

A. This being all hypothetical, then hypothetically, it depends on what the injury was. If they say I "stubbed my toe", hypothetically, "two years ago", then no, that would not impact my decision and I would possibly hire that person. If they said "I had a car accident but I was fully recovered and that was years ago", then no, that would not impact my decision and I would possibly hire that person. If they said "I broke my arm and I still have pain in my arm and it may impact my work", then it may, hypothetically, deter me from hiring that person over, say, a healthy 18 year old, if that makes it clearer.

139. Accordingly, I find that the plaintiff is unlikely to have obtained employment in a commercial kitchen in the period since the accident. Further I find the plaintiff’s most likely future circumstance is that he would not obtain work in a commercial kitchen, be it in a restaurant, café or otherwise.

140. The plaintiff frankly conceded in cross examination by Mr Horsley that he was capable of working in an administrative position. He is qualified as a Justice of the Peace, is competent in Microsoft Office and had studied emergency management with the SES.

141. Section 13 of the CLA provides:

> **13 Future economic loss — claimant's prospects and adjustments**
>
> (1) A court cannot make an award of damages for future economic loss unless the claimant first satisfies the court that the assumptions about future earning capacity or other events on which the award is to be based accord with the claimant's most likely future circumstances but for the injury.
>
> (2) When a court determines the amount of any such award of damages for future economic loss it is required to adjust the amount of damages for future economic loss that would have been sustained on those assumptions by reference to the percentage possibility that the events might have occurred but for the injury.
>
> (3) If the court makes an award for future economic loss, it is required to state the assumptions on which the award was based and the relevant percentage by which damages were adjusted.

142. On this basis I find that the accident has not caused the plaintiff economic loss by reason of depriving him of the capacity to earn an income as a sous chef or cook in any commercial kitchen.

143. That is not to say that the plaintiff has not suffered any economic loss. Prior to the accident the plaintiff earned between $60.00 and $100.00 per week from his gardening business. The plaintiff has provided calculations on the basis of lost earnings of $100 per week, which the defendants have not addressed. Accordingly, I will treat that as the measure of the plaintiff's past economic loss.

144. I calculate that 223 weeks have now passed since the date of the accident. I have calculated past economic loss as commensurate with lost earnings. Past economic loss is therefore $22,300.00.

145. I consider that but for the breaches of duty the plaintiff's most likely future circumstance is that he would have continued to conduct the gardening business and that his earning capacity has been diminished in this regard. There was no evidence before me as to what, if any, income was derived from the plaintiff's risk assessment activities. I consider the plaintiff would have been likely to continue in the gardening business until retirement and that some damages by way of a buffer or otherwise ought be awarded in respect of the loss of capacity in that regard. I do not see any basis award any sum in respect of superannuation.

146. There is no basis to infer that the plaintiff would have continued to work past the usual retirement age of 67 years. The plaintiff is presently 60 years of age. According to my calculation, with reference to the statutory multiple of 309.4 (being the present lump sum equivalent in value to the sum of $1.00 per week discounted by 5%) and a further 15% discount for vicissitudes, the plaintiff's future economic loss is in the sum of $26,299. Alternatively, I will award a buffer in that sum.

147. I ask the parties to confirm these calculations when bringing in short minutes giving effect to these reasons.

Domestic assistance: past and future

148. Pursuant to s 15(3) of the CLA, damages for gratuitous attendant care services are only payable if the services are provided (or to be provided) for at least 6 hours per week, and for a period of at least 6 consecutive months.

149. On the facts as I have found them, the plaintiff does not reach this threshold. Accordingly, I do not award any damages in respect of this claimed head of damage.

> Further, the plaintiff claims damages in respect of future commercial domestic assistance calculated at 2 hours per week for life. By reason of application of the statutory multiple, this amounts to a claim for $69,183. On the basis of my findings as to the plaintiff's ability to perform domestic tasks and care for himself, I do not find that this claim is made out.

Conclusion as to damages

150. The damages to which the plaintiff is entitled are, therefore:

Non-economic loss 25% of a most extreme case	$46,000.00
Past out of pocket expenses	$3,928.50
Future out of pocket expenses, buffer	$3,000.00
Past economic loss	$22,300.00
Future economic loss or buffer	$26,229.00
Total	$101,457.50

Claims against the third defendant

The insurance issues

151. The insurance issues may be summarised as follows:

1. The first and second defendants (already defined in these reasons as the "Insured") claim indemnity under the Policy, entered on 19 February 2019.

2. The Insurer says that liability is excluded under the Policy due to any or all of six enumerated exclusions, which defeat the Insured's claim for indemnity and any direct claim made by the plaintiff under the Third Party Claims Act. The Insured (and the plaintiff) contend that, as a matter of construction, the exclusions do not apply. The relevant exclusions are described in these reasons as:

    1. the business occupation exclusion;

    2. the business use exclusion;

    3. the unlawful activity exclusion;

    4. the ordinary resident exclusion;

    5. the building regulation exclusion; and

    6. the local authority regulation exclusion.

3. Alternatively, to the extent that they do apply, the Insured say that pursuant to s 35(1) of the ICA, the Insurer may not refuse to pay the claim as the Policy is a prescribed

contract and the event giving rise to the claim is a prescribed event within the meaning of s 35(1) of the ICA.

4. If that be right, the Insurer in turn relies on s 35(2) of the ICA to defeat the Insured's reliance on s 35(1) on the basis that, before the Policy was taken out, the Insurer clearly informed the Insured in writing of the relevant provision of the proposed Policy, or the Insured knew, or a reasonable person in the circumstances could be expected to have known, the Policy would not provide insurance cover in respect of the happening of the relevant event.

The policy of insurance

152. The Policy schedule provided that the Policy was for building and contents insurance. The Insured's relationship to the Property was described as "live in it as your home. Do not expect the property to be unoccupied for more than 60 days in a row in the policy year".

153. The process of applying for cover involved answering a number of questions on the Insurer's website. Ms Yang undertook that task for both Insured. In answer to the question of how the home would be used, she answered "To live in as your main home". In answer to the question "Is any part of the home used for business purposes", Ms Yang answered "No." The position of persons residing at the Property who were not ordinarily part of the policy holders' household was not expressly addressed other than a question was directed to whether 5 or more unrelated people lived in the home.

154. The insuring clause provided cover for loss or damage caused by 13 specified insured events not relevant to the current proceedings. A further insuring clause provided cover for legal liability as follows:

> Legal Liability cover insures you against the costs of paying compensation for death or bodily injury to other people or for loss or damage to their property.
>
> ...
>
> If your schedule shows that you have Building and Contents cover, we cover your legal liability as a result of an incident which happens anywhere in Australia.

155. There is no dispute that *prima facie* the insuring clause responds to the Insured's claim in the present circumstances.

156. The relevant exclusions are set out below. In the Legal Liability Cover section, the Policy is described as providing additional cover for legal liability. It further states:

> **What is not covered**
>
> We will not cover liability for personal injury or property damage *arising from, or in connection with directly or indirectly* from:
>
> ....
>
> • Any of the General Exclusions on page 54-57
>
> • any trade, business, occupation or employment carried on by you, your family or anyone living at your home, for reward, [referred to in these reasons as the "business occupation exclusion"];
>
> • the use of your home or the site for any business purpose or farming activity, unless we agree to the cover, and this is specified on your schedule, [referred to in these reasons as

the "business use exclusion"];

...

• Any illegal or unlawful activity by you or your family or anyone acting with the consent of you or your family, (the "unlawful activity exclusion")

• claims by you, your family, any resident ordinarily residing with you or with whom you ordinarily reside, (the "ordinary resident exclusion")

...

157. In the General Exclusions section at pages 54 to 57, the Policy states:

General Exclusions

We do not cover

We will not pay for any loss, damage or liability *arising directly or indirectly from or in any way connected with* any of the following:

....

non-compliance with government regulations relating to buildings, [the "building regulation exclusion"]

breach of any statutory obligations, government or local authority regulations or bylaws, or the cost of complying with any notices received prior to you making a claim under this policy, [the "local authority regulation exclusion"]

158. "Buildings" is defined to mean:

- Buildings used for domestic, residential purposes, and
- Which are fully enclosed, with walls, fully glazed widows, doors and a roof, and
- Which can be locked up

And also includes:

- Outbuildings and permanent structural improvements that comply with local government or other statutory requirements;

But does not mean:

- Hotels, motels, boarding houses, commercial buildings, exhibition or display homes

...

- Any part of a building or site used for conducting a business, trade or profession other than as described in your schedule.

159. There are 29 separate exclusions in the Legal Liability Cover section of the Policy. There are a further 45 separate exclusions in the General Exclusions section, many of which refer to multiple risks and all of which are incorporated into the Legal Liability section exclusions by way of cross reference. Space does not permit the recitation of each of them in these reasons, although it may be noted that each of the exclusions on its face goes to matters which alter the assessment of risk of claims, either by elevating the risk that liability may eventuate or that a claim might otherwise be made. For example, the Legal Liability Cover section excludes liability in respect of the use of

certain aircraft, certain watercraft, interference with buildings, asbestos products and transmission of disease. The General Exclusions include bushfire, grass fire, flood, storm, rainwater or named cyclone within 48 hours from the start date of the policy, landslide, landslip subsidence or erosion.

Relevant principles of construction of the Policy: the exclusion clauses

160. The relevant principles of contractual construction are not in doubt. As with any commercial contract, a policy of insurance must be construed in a businesslike manner, paying attention to the language used by the parties, the commercial circumstances which the document addresses and the objects which it is intended to secure: *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579; [2000] HCA 65 at [22]. Construction is determined objectively according to what a reasonable businessperson would have understood the terms to mean: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* (2015) 256 CLR 104; [2015] HCA 37 at [47].

161. The Insurer bears the onus of proving any qualification or limitation on cover: *Wallaby Grip Pty Ltd v QBE Insurance (Australia) Ltd* (2010) 240 CLR 444; [2010] HCA 9 at [36]. Unless evidence demonstrates that both parties are aware of extrinsic facts or there is some evidence as to a practice to which both parties subscribe, I cannot take any extrinsic material into account on the question of construction of the Policy. This includes other policies of insurance issued by the Insurer but not the subject of agreement between the parties or of which there is no evidence that the Insured had notice.

Relationship between liability and exclusions

162. As a matter of ordinary construction, the Policy excludes liability where there is a sufficiently close relationship between the basis for the Insured's liability to the plaintiff and the exclusion in the Policy. A question nevertheless arises as to how close the relationship must be in order to enliven the relevant exclusions in this case.

163. The Policy uses two composite formulations to connote the requisite relationship between the liability and the exclusion:

    1. *"arising from, or in connection with directly or indirectly"* for the purpose of each of the exclusions (the first formulation)

    2. *"arising directly or indirectly from or in any way connected with"* for the purpose of the building regulation and local authority exclusions (the second formulation).

164. The Insurer says both limbs of each formulation are engaged; the Insured says they are not.

165. The relational terms, "arising out of" and "in connection with" are each ambulatory terms, the construction of which does not involve the resolution of ambiguity but, rather, an analysis that takes into account their context and purpose: *R v Khazaal* [2012] HCA 26; 246 CLR 601; 86 ALJR 884; 289 ALR 586; 217 A Crim R 96 at [31].

166. Of the various terms used, the words "arising from" are the narrowest. They connote a causal relationship, albeit a less proximate relationship than would be connoted by the words "caused by": *Government Insurance Office (NSW) v R & J Green & Lloyd Pty Ltd* (1966) 114 CLR 437 at 443. In the well-known example of *Dickinson v Motor Vehicle Insurance Trust* (1987) 163 CLR 500; [1987] HCA 49, a father drove to a town centre with two very young children, leaving them alone in the car while he temporarily went shopping as a stop on a longer journey. During his absence one of the children was injured when the other found and started playing with a box of matches. The issue was whether the injury arose out of the use of the vehicle. The High Court found that it had, because the vehicle had been used to carry the children as passengers in the course of a journey which was only temporarily interrupted. It was in use in that way when the fire occurred and the injuries which were sustained had arisen out of that use. At 505 the Court stated:

> The test posited by the words "arising out of" is wider than that posited by the words "caused by" and the former, although it involves some causal or consequential relationship between the use of the vehicle and the injuries, does not require the direct or proximate relationship which would be necessary to conclude that the injuries were caused by the use of the vehicle ...

167. Similarly, the addition in the second formulation of the words "directly or indirectly" makes clear that an indirect causal or consequential relationship will be sufficient to bring the two concepts into the requisite relationship for the exclusion to apply. Thus, the degree of proximity may be greater, but a causal connection is nevertheless still required.

168. The words "in connection with directly or indirectly" or "in any way connected with" pose a different construction question. The words "in connection with", and their cognates, are also words of wide connection: *Government Insurance Office (NSW) v R J Green & Lloyd Pty Ltd* (1966) 114 CLR 437. A broad connection, not necessarily causal, is generally sufficient: *State Government Insurance Office (Qld) v Crittenden* (1966) 117 CLR 412. In *Our Town FM Pty Ltd v Australian Broadcasting Tribunal* (1987) 16 FCR 465 at 479, Wilcox J noted that one of the very generally accepted meanings of "connection" is "relation between things one of which is bound up or involved in another" or "having to do with".

169. Nevertheless, as a matter of construction, the degree of connection required is determined by the context: *R v Orcher* (1999) 48 NSWLR 273 at [28] – [32] per Spigelman CJ. Considering the issue in the context of statutory rather than contractual construction, the relevant principles of which are not materially different, the learned Chief Justice referred to *Health Insurance Commission v Freeman* (1998) 158 CLR 267 where the Full Federal Court said:

> The words "in connection with" have been accepted as capable of describing a spectrum of relationships between things, one of which is bound up with or involved in another: see *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280 at 288. However, as was pointed out by Sackville J in *Taciak v Commissioner of Australian Federal Police* (1995) 59 FCR 285 at 295, the question that remains in a particular case is what kind of relationship will suffice to establish the connection contemplated by the statute. That requires a "value judgment about the range of the statute": see *Pozzolanic* at 289.

170. Mr Walsh, for the Insured, relied on a statement of Barwick CJ in *Brown v Rezitis* (1970) 125 CLR 157; [1970] HCA 56 at 165 to the effect that the expression "in connection with" requires a "real" or "close" connection. He illustrated this submission by reference to the analysis in *Brown* itself, as well as *State of NSW v Tempo Services Ltd* [2004] NSWCA 4 and *Hoy v Coffs Harbour City Council* [2016] NSWCA 257. In my view, the true principle is as described by Spigelman CJ in *Orcher*, however, the illustrations identified by Mr Walsh demonstrate the types of value judgments required to apply the principle.

171. In *Brown*, the power conferred by the *Industrial Arbitration Act* 1940 (NSW) to make orders "in connection with" unfair contracts did not extend to expenses incurred by a cartage contractor in reliance on representations by shareholders of a company as to the amount that would be available under the contract. In *Hoy*, legal costs incurred in invoking the hardship provisions of Pt 2, Div 3 of the *Land Acquisition (Just Terms Compensation) Act* 1991 (NSW) were not incurred "in connection with" the compulsory acquisition that followed as those costs were incurred prior to the decision to acquire the land. Conversely, in *Tempo*, the State's liability to a cleaner who tripped while attending school premises to be cleaned was held to be a liability "in connection with" the performance of the cleaning services for the purpose of a contractual indemnity clause in the services contract.

172. In *Tempo*, Hodgson JA (with whom Giles JA agreed, Meagher JA concurring) stated at [19] and [20]:

> "Provision of services" in cl.20(c) means provision of services by Tempo; and those services include doing whatever is necessary to have cleaners in place at appropriate times, as well as monitoring and supervising the provision of services in various ways. It is plain in my opinion that services were being provided by Tempo, both at the school and elsewhere at the time the plaintiff had her accident.
>
> 20 Furthermore, in my opinion the personal injury to the plaintiff in this case was "in connection with" Tempo's performance of services. The matters referred to by Mr. Walker, namely that the injury occurred at a work place, during working hours, when the plaintiff was there for the purpose of performing services, had signed on, and was going about the performance of services, gives the injury sufficient connection with the provision of services.

173. The addition of the words "directly or indirectly" to the first formulation and the words "in any way" in the second formulation must, as a matter of construction, have some work to do. In my view, they each widen the potential ambit of the relevant connection such that the requisite degree of proximity is greater than it otherwise would be. They cannot, however, extend the ambit beyond that which the language of the Policy in its documentary context can bear. Ultimately, this becomes an evaluative question.

174. It is on this basis that I approach the construction of the relevant exclusions.

The "business occupation exclusion" and the "business use exclusion"

175. The Insurer contends that the Insured's conduct in letting the flat to the plaintiff and Ms Radovan in consideration of the payment of rent constituted a business, sufficient to enliven the business occupation exclusion and/or the business use exclusion. Notwithstanding that the accident did not occur within the flat, the Insurer contends that the Insured's liability arose indirectly from the conduct by the Insured of the business comprised in letting the flat to the plaintiff and Ms Radovan from October 2018 and was therefore caught by the exclusion clause.

176. Counsel for the Insured submitted that the exclusions do not apply because, properly construed, they are both directed to the carrying on of a trade, business, occupation or employment rather than the use of the Property as a residence itself comprising the relevant business.

177. "Business" is not defined in the Policy. There was, however, broad agreement between the parties that a business involves repeat activity and a one-off rental cannot constitute a business activity. As the learned authors of Derrington and Ashton, *The Law of Liability Insurance*, 3rd ed, LexisNexis 2013 noted "there must be continuity and customary engagement … It usually requires a habitual factor in the relevant occupation, profession or trade rather than an isolated, irregular or illegal occasion …".

178. Counsel for the Insurer contended, however, that the characteristics of continuity and repetition were made out by 24 March 2019, in circumstances where the plaintiff and Ms Radovan had occupied the flat and paid rent over a period of about 5 months.

179. On balance, I consider that a business was not established over that period. Prior to the occupation of the flat by the plaintiff and Ms Radovan, the flat had been unoccupied. There was no evidence that the Insured contemplated letting the flat to anyone else on their departure. The Insured let the flat to the plaintiff and Ms Radovan in order to assist them and they remained friends, occasionally sharing meals and the plaintiff performing odd jobs and gardening for Ms Yang, indeed the restoration of the services in the flat was one such job. Their friendship was a key factor in the foundation of the arrangement. The fact that the arrangement had continued for 5 months as at the date of the accident did not change its character in that period.

180. In my view the period of the continuation of the arrangement was not a sufficient circumstance to establish the requisite element of repetition as at the date of the accident in this case. Accordingly, I am not satisfied that the occupation or use of the flat by the plaintiff and Ms Radovan was pursuant to any business conducted by the Insured within the meaning of the Policy as at the date of the accident.

181. That is not to say, however, that letting a property or part of it cannot constitute a business use within the meaning of the business use exclusion. Nevertheless, I do not consider that the occupation of the flat in the present circumstances as at the date of the accident can itself comprise a relevant business use within the meaning of the Policy.

The ordinary resident exclusion

182. Mr Horsley, while not abandoning the point, placed little weight on the ordinary resident exclusion. As with the business occupation and use exclusions, Mr Horsley's key point was that by the time of the accident, a degree of continuity and repetition had been established with respect to the plaintiff's residency of the flat sufficient to characterise him as ordinarily resident there.

183. Mr Walsh took the Court to Derrington and Ashworth, which identifies the vice that the exclusion addresses. That is, it is directed to preventing collusive claims by members of an insured's family and household and who live under the same roof as the insured, including parties who are or have an interest in the policy. In my view this informs the construction of the relevant exclusion, which I take to refer to those who are part of the insured's household and remain so on other than a transitory basis.

184. On the facts as I have found them, I consider that the plaintiff did not reside with the Insured in any relevant sense. While they maintained friendly relations – indeed, Ms Yang at one point described the plaintiff and Ms Radovan and "like family" – they nevertheless lived their lives independently of each other and were more like neighbours than family members or flatmates. The fact that the plaintiff and Ms Radovan did not reside in the main house but in the flat, while not dispositive, adds a further basis to this finding. In my view, they were not part of the same household and as a result do not fall within the operation of the ordinary resident exclusion.

185. I therefore find that the ordinary resident exclusion is also not made out.

The unlawful activity, building regulation and local authority regulation exclusions

186. Mr Horsley's principal submission on the operation of the exclusion clauses was directed to the building regulation and local authority regulation exclusions. As they overlapped with the unlawful activity exclusion, it is convenient to address that exclusion here as well.

187. As set out above, Ms Yang and Mr Xu received correspondence from Council in 2015 directing them to remove certain services from the flat. Some, but not all, of those services were removed. There the matter rested until about October 2018 when the plaintiff, with the consent of Ms Yang, reconnected certain services and reinstalled certain kitchen appliances, thereby making the flat habitable. The circumstances are addressed above.

188. The *Environmental Planning and Assessment Act* 1979 (NSW) (the "EPAA") relevantly provided:

> **3.31 Making of environmental planning instruments for local areas (LEPs)**
>
> (cf previous ss 53, 53A)
>
> (1) A local plan-making authority may make environmental planning instruments for the purpose of environmental planning—

(a) in each local government area, and

(b) in such other areas of the State (including the coastal waters of the State) as the local plan-making authority determines.

(2) Any such instrument may be called a local environmental plan (or LEP).

(3) For the purposes of this Division, the following are **local plan-making authorities**—

...

(c) a council for its local government area if the gateway determination under this Division authorises the council to make the local environmental plan concerned.

189. Council made an environmental planning instrument for the purpose of the EPAA, being The Hills Shire Plan 2012 (the "Hills Plan"). In Council's correspondence and in Mr Horsley's submissions, it was stated that the Hills Plan required development consent for the conversion of the garage into a secondary dwelling.

190. Section 4.2 of the EPAA provided:

4.2 Development that needs consent

(cf previous s 76A)

(1) **General** If an environmental planning instrument provides that specified development may not be carried out except with development consent, a person must not carry the development out on land to which the provision applies unless—

(a) such a consent has been obtained and is in force, and

(b) the development is carried out in accordance with the consent and the instrument.

Maximum penalty—Tier 1 monetary penalty.

(2) For the purposes of subsection (1), development consent may be obtained—

(a) by the making of a determination by a consent authority to grant development consent, or

(b) in the case of complying development, by the issue of a complying development certificate.

(3), (4) (Repealed)

(5) **Complying development** An environmental planning instrument may provide that development, or a class of development, that can be addressed by specified predetermined development standards is complying development.

(6)–(9) (Repealed)

...

6.9 Requirement for occupation certificate

(cf previous ss 109H(1), 109M, 109N)

(1) An occupation certificate is required for—

(a) the commencement of the occupation or use of the whole or any part of a new building, or

(b) the commencement of a change of building use for the whole or any part of an existing building.

(2) However, an occupation certificate is not required—

(a) for the commencement of the occupation or use of a new building—

(i) for any purpose if the erection of the building is or forms part of exempt development or development that does not otherwise require development consent, or

(ii) that is the subject of a compliance certificate in circumstances in which that certificate is an authorised alternative to an occupation certificate (such as a swimming pool or altered part of an existing building), or

(iii) by such persons or in such circumstances as may be prescribed by the regulations, or

(iv) that has been erected by or on behalf of the Crown or by or on behalf of a person prescribed by the regulations, or

(b) for the commencement of a change of building use for the whole or any part of an existing building—

(i) if the change of building use is or forms part of exempt development or development that does not otherwise require development consent, or

(ii) by such persons or in such circumstances as may be prescribed by the regulations, or

(iii) if the existing building has been erected by or on behalf of the Crown or by or on behalf of a person prescribed by the regulations

...

9.37 Failure to comply with order—offence

(cf previous s 125)

(1) A person to whom a development control order is given or is taken to have been given must comply with the terms of the order.

(2) It is a sufficient defence to a prosecution for an offence against this section if the defendant satisfies the court that the defendant was unaware of the fact that the matter in respect of which the offence arose was the subject of an order.

Maximum penalty—Tier 1 monetary penalty.

191. Regulation 43 of the *Environmental Planning and Assessment Regulation* 2000 (NSW) (since repealed) provided:

43 Development consent required for alteration or extension of buildings and works

(cf clause 41 of EP&A Regulation 1994)

(1) Development consent is required for any alteration or extension of a building or work used for an existing use.

(2) The alteration or extension—

(a) must be for the existing use of the building or work and for no other use, and

(b) must be erected or carried out only on the land on which the building or work was erected or carried out immediately before the relevant date.

192. Mr Horsley for the Insurer submitted that the evidence clearly establishes that the installation of a kitchen in what was originally the garage, its use as a dwelling and the agreement to let it to the plaintiff for the purpose of habitation were in contravention of relevant planning laws. He further submitted that each of these matters was clearly known to the first and second defendants at the time they agreed to let the converted garage to the plaintiff and Ms Radovan as they had been expressly notified by Council that reinstallation of services and reconversion or use of the garage as a secondary dwelling would be in breach of the EPAA.

193. On this basis Mr Horsley submits that the Insured's liability to the plaintiff is sufficiently connected to the various breaches of the planning laws because the liability is connected with the plaintiff's occupation of the flat as his residence: his residence at the property was only made possible by reason of the installation of services and appliances in breach of those laws. As Mr Horsley puts it, "all liability in any way connected with the failure to obtain approval for the reinstallation of the kitchen, the failure to obtain approval for the change of use to a secondary residence and the use of the premises as a secondary residence is excluded".

194. Importantly, Mr Horsley submits, the planning laws stipulate safety requirements and conscious violation should not be overlooked. On the basis that Council's correspondence with the Insured in 2015 constitutes notice of their breach of the planning laws and regulations, Mr Horsley further submitted that "there is no reason that a conscious violation of the law should be overlooked and there is good reason why it should not be", pointing to the safety concerns which underpin at least some planning laws.

195. The evidence demonstrates, and the Insured admit, that the reconversion and occupancy of the flat without development consent was a breach of regulations. Whether the Insured's liability to the plaintiff is "in connection with directly or indirectly" or is "in any way connected with" the breach is, therefore, the issue.

196. The evidence does not establish that development consent, had it been sought, would not have been granted. There is little evidence as to why, had consent been sought, it would not have been consented to if that be the case. At its highest, the evidence in Council's files refers to "concerns" as to light, ventilation, fire safety and gaps between the brick wall and roof. This is well short of a finding by any curial or other process that those concerns constituted a breach of any regulation, other than the bare fact that the reconversion and occupation were without consent.

197. On the Insured's case, this is relevant to construction because there is no demonstrated connection between the fact of reconversion and occupation without consent and any elevation of risk or likelihood of a claim being made. If the relevant illegality, non-compliance with regulation applying to buildings or breach of statutory obligation, local government authority regulation or by-law is failure to obtain consent, it is the failure to obtain consent that must be connected with the relevant exclusion.

198. Put another way, counsel for the Insured submitted that the connection with the event creating liability must be with the illegality, not the mere fact of occupation.

199. The difficulty with this reasoning is that it posits the relevant counterfactual as occupation with consent when the more apposite counterfactual is that there was no occupation at all.

200. Ultimately, in my view, the language of the exclusion appears sufficiently broad to embrace the current circumstance. As the plaintiff was residing in the secondary dwelling and was injured in the course of performing a domestic task associated with one's place of residence, I consider on balance that the liability is "in any way connected with" or "in connection with directly or indirectly" with the reconversion without consent. I therefore find that the building regulation exclusion and local authority exclusion apply.

201. For the sake of completeness, I should add that I do not consider the "unlawful activity" exclusion to apply because it connotes activity which goes beyond mere occupation. As a matter of context, where occupation and activity are conceptually different and treated as such in the exclusions. Aside from allowing the plaintiff to occupy the flat without consent to the conversion of the flat first having been consented to, there was no suggestion of any unlawful activity associated with the liability.

Section 35(1) of the Insurance Contracts Act

202. To the extent that exclusions apply, the Insured rely on s 35 of the ICA to preclude the Insurer from relying on the exclusions in terms.

203. Section 35 relevantly provides:

> **35 Notification of certain provisions**
>
> (1) Where:
>
> (a) a claim is made under a prescribed contract; and
>
> (b) the event the happening of which gave rise to the claim is a prescribed event in relation to the contract;
>
> the insurer may not refuse to pay an amount equal to the minimum amount in relation to the claim by reason only that the effect of the contract, but for this subsection, would be that the event the happening of which gave rise to the claim was an event in respect of which:
>
> (c) the amount of the insurance cover provided by the contract was less than the minimum amount; or
>
> (d) insurance cover was not provided by the contract.
>
> (2) Subsection (1) does not have effect where the insurer proves that, before the contract was entered into, the insurer clearly informed the insured in writing (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise) or the insured knew, or a reasonable person in the circumstances could be expected to have known:
>
> (a) where the effect of the contract, but for subsection (1), would be that the liability of the insurer in respect of a claim arising upon the happening of the event would be less than the minimum amount—what the extent of the insurer's liability under the contract in respect of such a claim would be; or

(b) where the effect of the contract, but for subsection (1), would be that the insurer would be under no liability in respect of such a claim—that the contract would not provide insurance cover in respect of the happening of that event.

(3) Regulations made for the purposes of this section take effect at the expiration of 60 days after the day on which they are registered on the Federal Register of Legislation under the *Legislation Act 2003*.

(4) Where regulations made for the purposes of this section are amended after the day on which a particular contract of insurance is entered into, the amendments shall be disregarded in relation to the application of subsection (1) to that contract.

204. Regulations 18 and 19 of the *Insurance Contract Regulations* 2017 (the "ICR") relevantly provide:

18 Prescribed contracts

The following class of contracts of insurance is declared to be a class of contracts in relation to which Division 1 of Part V of the Act applies, namely, contracts that provide insurance cover (whether or not the cover is limited or restricted in any way) in respect of destruction of, or damage to, a home building, where the insured or one of the insureds is a natural person.

19 Prescribed events

(1) The following, except in so far as they are excluded by subsection (2), are declared to be prescribed events in relation to a contract referred to in section 18:

....

(d) the insured or a residing family member of the insured incurring a liability as owner or occupier of the home building to pay compensation or damages to some other person.

(2) The following are excluded:

....

(d) destruction or damage, or the incurring of a liability as mentioned in paragraph (1)(d), as a result of:

...

(iv) the use of the home building for the purposes of a business, trade or profession; or

(k) the incurring of a liability as mentioned in paragraph (1)(d):

(i) to the insured or a residing family member of the insured;

...

205. There is no dispute that the Policy is a prescribed contract and the plaintiff's claim against the first and second defendants is a prescribed event within the meaning of s 35(1). As I have found that the business and ordinarily residence exclusions do not apply, reg 19(2)(d)(iv) and (k) do not arise.

206. Nevertheless, the operation of the building regulation exclusion and local authority regulation exclusion enliven s 35(1). There is no dispute that, if the exclusions apply, the declinature by the Insurer of the claim by the Insured falls within s 35(1). The issue is whether sub-s. 35(2) applies in the circumstances.

The operation of s 35(2)

207. For s 35(2) to operate, the Insurer must establish it "clearly informed" the Insured in writing, or a reasonable person in the position of the Insured would have known that the Policy would not cover the Insured's liability to the plaintiff.

208. As a matter of construction, the inclusion in s 35(2) of the word "clearly" must have some work to do. In my view, its construction is informed by three relevant factors. First, s 35 is a form of consumer protection legislation in that it is concerned with ensuring that consumers are adequately informed of the limits of cover in a policy to enable them to make properly informed decisions as to whether to enter into a particular policy on particular terms. Secondly, as a matter of language in its context it contemplates that not all provision of information will be sufficiently clear to achieve this purpose. Where the terms of an exclusion are difficult to understand, either as a matter of language or otherwise, it is incumbent on an insurer seeking the benefit of s 35(2) to make the operation of the exclusion sufficiently clear to inform the insured of the effect of the exclusion. Finally, as I read s 35(2), the provision of the actual policy wording may be sufficient, but will not necessarily be so. Ultimately this becomes a question of fact in the whole of the relevant circumstances.

209. The parties agree that, through the online portal which Ms Yang used to complete the proposal and take out the Policy, the wording of the exclusions was disclosed to her. It was not contended that Ms Yang had actual knowledge of the exclusions on any other basis or that she ought to have known liability to the plaintiff would not be covered by the Policy.

210. The question remains whether provision of the policy wording "clearly informed" Ms Yang that the relevant event would not be covered. The Insurer says that the provision of the actual Policy wording is contemplated by s 35(2) and is enough. The Insured says that the wording requires such careful and detailed analysis in order properly to be understood that, even if as a matter of construction the exclusions apply, the Insurer has not "clearly informed" the Insured of the effect of the exclusion simply by providing the Policy wording at the time the Policy is proposed.

211. In *Lockwood & Lockwood v Insurance Australia Ltd t/as SGIC Insurance* [2010] SASC 140, Kourakis J (as the learned Chief Justice then was) considered an exclusion in a motor vehicle policy (to which s 35 of the ICA also applies) which excluded liability "if at the time of the incident ...your vehicle was being driven ... by a person who was not licensed or permitted to drive it".

212. The relevant circumstance was that the car was stolen and driven by an unlicensed driver while stolen. His Honour found that, as a matter of construction, the unlicensed driver exclusion did not apply in the circumstances of that case. He further went on to find that if the exclusion did apply, section 35(1) of the ICA prevented reliance on the exclusion by the Insurer as the provision of the wording was not sufficient to "clearly" inform the policy holder of the exclusion:

> SGIC Insurance relies entirely on the provision of the policy booklet as the only information given to the Lockwoods about the scope of their cover. Section 35(2) of the Act recognises that in some circumstances the provision of the policy may be enough, but it does not deem the provision of the terms of the policy to be a sufficient disclosure in all cases. The unlicensed exclusion clause would be read by a reasonable person in the position of the Lockwoods as more naturally referring to accidental damage occurring when the insured vehicle was driven by a person they had permitted to drive. It does not expressly refer back to the theft cover. There is no reference to the unlicensed exclusion

> in the column of the cover part of the policy where provision is expressly made for the limitations on the theft cover it provides. Indeed, as I have already observed, the unlicensed exclusion clause does not appear in the general exclusion part or the cancellation part of the policy.
>
> A reasonable person would have been surprised to learn that the policy did not cover the circumstances in which the Lockwood's vehicle was damaged. A reasonable person would expect a motor vehicle insurance policy to meet the circumstances of this case. The scope of the policy set out in the Regulations reflects that view and for that reason imposes a duty on an insurer who excludes that cover to clearly inform the insured of the exclusion. The terms of the policy, far from being calculated to alert an insured to the unlicensed exclusion clause, hid it in a "multiplicity [and] generality of words"

213. In *Hams v CGU Insurance Limited* [2002] NSWSC 273, Einstein J considered a policy of building and contents insurance which excluded liability in respect of flood, which was defined to include inundation following the escape of water from the normal confines of that body of water. His Honour considered the question of whether provision of the relevant policy in and of itself was sufficient to satisfy the test in s 35(2). His Honour held, with my interpolation in square brackets, with respect to the formulation:

> 243 Hence I accept as correct the proposition that the words in parentheses [*after the words "clearly informed" (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise*)] mean that providing a document containing the provisions is one of a number of mechanisms by which an insurer *may* clearly inform the insured. In each case the content of the document and all of the circumstances of its provision would need to be considered in order to determine if the insurer had effectively informed the insured of the limitation.

214. His Honour continued:

> 244 I certainly do not accept that as a general rule it would be incumbent upon an insurer to provide along with a document containing the provisions, either a text on insurance law or an annotated Policy identifying and explaining either the general principles of insurance law or the principles dealing with the proper approach to the construction of Policy provisions. The fact is that the principles which underpin the law of insurance are often complex in the extreme and it could not be the case, as it seems to me, that a condition precedent to an insurer establishing that it had clearly informed the insured in writing of the relevant limitation, required the insurer to annotate the Policy by reference to principles of insurance law.

215. Ultimately on the facts of that case, his Honour found the insurer had clearly informed the insured of the relevant limitation.

216. I note that Einstein J lays out a general, but not absolute principle. It is in the nature of s 35(2) that its operation depends on the circumstances and the wording of the policy itself in order to establish whether particular steps to inform an insured did so at all, let alone did so clearly. Just as there is no general rule that it is incumbent on an insurer to annotate a policy, in my view there is no absolute rule as a matter of construction of the section that provision of the policy will always be sufficient.

217. I have found that the building regulation and local authority regulation exclusions both apply. Each of them applies, not by reason of an obvious or direct causal link but by reason of broad connecting factors in the chapeau, being the formulations "in any way connected with" and "in connection with directly or indirectly". There was no explanation in the Policy or in any material made available to the Insured of how these terms operate. These terms have been the subject of a

number of authorities and good faith legal debate over many years. As discussed above, their meaning is informed by a value judgment as to their proper range.

218. In the context of the building regulation and local authority regulation exclusions and their relationship with the Insured's liability to the plaintiff, these are not straightforward questions. The fact that counsel for the Insured advanced compelling but ultimately unsuccessful arguments as to their construction illustrates the point.

219. On balance I find that the Insurer is not able to rely on s 35(2) of the ICA in the present circumstances. The steps taken to inform the Insured of the building regulation and local authority regulation exclusions, by providing them with a copy of the Policy, were not sufficient to satisfy s 35(2). This is because they were not sufficiently clear in the circumstances to exclude liability where the relevant connection between the relevant breaches of regulation and liability was only that the plaintiff resided in a dwelling for which consent had not been obtained.

Conclusion as to indemnity

220. In my view, therefore, the Insurer has not made out its claim that the exclusions in the Policy apply such that it is entitled to decline cover.

Conclusion and orders

221. My reasons in this matter were initially delivered on 30 June 2023, and on that occasion, I asked the parties to bring in short minutes giving effect to them and to raise with me any matters which may still require determination.

222. At the time, I also indicated that my preliminary view as to costs, which would ordinarily follow the event, was that the plaintiff should have his costs and Ms Yang and Mr Xu should have their costs of the cross-claim. I afforded the parties an opportunity to agree on costs or otherwise apply for any special costs order.

223. Since then, the parties brought to my attention the fact that my reasons did not separately address the plaintiff's claim for commercial care, which is now addressed at paragraph 149 above. The parties have otherwise agreed on orders, including as to costs, which give effect to my reasons, which orders I made on 10 August 2023 and set out below.

Orders

In the proceedings brought by the Plaintiff against the First, Second and Third Defendants:

1. Judgment for the Plaintiff against the Defendants in the sum of $102,508.20.

2. Order the Defendants to pay the Plaintiff's costs on an ordinary basis.

In the First Cross-Claim:

3. Judgment for the Cross-Claimants against the Cross-Defendant in the amount of:

    1. the First and Second Defendants' liability to pay damages to the Plaintiff;

    2. the First and Second Defendants' liability to pay the Plaintiff's costs of the proceedings, including interest on costs; and

    3. the First and Second Defendants' costs of defending the proceedings brought by the Plaintiff on a solicitor and own client basis.

4. Order the Third Defendant to pay the First and Second Defendants' costs of the First Cross-Claim on an ordinary basis.

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Decision last updated: 14 August 2023