SUPREME COURT OF QUEENSLAND

CITATION:	*Adrian & Anor v Ronim Pty Ltd* [2007] QSC 073
PARTIES:	**ALAN ADRIAN** (first plaintiff) and **AERON PTY LTD ACN 079 948 431** (second plaintiff) **v** **RONIM PTY LTD** (defendant)
FILE NO:	BS6008 of 2005
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	Friday 30 March 2007
DELIVERED AT:	Brisbane
HEARING DATE:	12 February 2007; 13 February 2007; 14 February 2007; 15 February 2007
JUDGE:	Chesterman J.
ORDER:	**Judgement for the first plaintiff against the defendant in the sum of $70,594.43**
CATCHWORDS:	TORTS – LIABILITY – DUTY OF CARE – AS BETWEEN LANDLORD AND OCCUPIER – DANGEROUS PREMISES - QUESTION OF FACT - where defendant landlord was conducting building work – whether dust from building work accumulated on tiled surface - whether reasonably foreseeable that accumulation of dust on tiled surface would cause risk of slip to occupiers. TORTS – LIABILTY – BREACH OF DUTY - where defendant failed to clean dust from tiled surface - where first plaintiff slipped on tiled surface - whether dust on tiles caused the first plaintiff to slip – whether failure to clean surface constitutes a breach of the defendant's duty of care TORTS – DAMAGE – CAUSATION – PROOF OF LOSS - LOSS OF EARNINGS AND EARNING CAPACITY. - PAIN AND SUFFERING – LOSS OF AMMENITIES OR CAPACITY FOR ENJOYMENT – where first plaintiff damaged wrist in slip – where first plaintiff suffers on going pain in torso and limbs – where first plaintiff claims diminished earning capacity and enjoyment of life as a result

of the defendant's breach - whether the first plaintiff's ailments exist in fact - whether the first plaintiffs ailments are caused by the defendants breach.

COUNSEL: Mr M.H. Grant-Taylor S.C. for the plaintiff
Mr R.A.I. Myers for the defendant

SOLICITORS: Schultz Toomey O'Brien Lawyers for the plaintiff
Carter Newell for the defendant

[1] The plaintiffs claim damages as a consequence of the first plaintiff's injury on 29 July 2002. The second plaintiff's claim is for the loss of the first plaintiff's services. He was its most valuable employee.

[2] The first plaintiff is an experienced and knowledgeable legal costs assessor. The second plaintiff ('Aeron') is a company, the sole shareholder and director of which is Mrs Adrian, the first plaintiff's wife. Mr Adrian is, and was, employed by Aeron as its manager though he describes himself as its 'principal'.

[3] In July 2002 Aeron, which carried on business under a trading name, Queensland Independent Costing Service ('QICS'), occupied premises in a building known as Excalibur House situated at 52 Davenport Street in Southport. Aeron's offices were on the second floor. The building was four floors in height. Male lavatories were located on the third and first floors and female lavatories on the second and fourth floors. It was customary for male employees whose offices were, like Aeron's, on the second floor who wished to use the lavatory to take the lift to the third floor. Although there were fire stairs connecting the floors it was not always possible to open the door from the stairwell. They were often locked for security reasons. The third floor lavatories were more popular with the male employees on the second floor than those on the first floor. The tenants of that floor included barristers whose clients and witnesses, attending on them, made frequent use of the lavatories.

[4] Excalibur House had one lift. On the third floor its doors opened onto a vestibule, the floor of which was tiled with ceramic tiles. The vestibule gave access to those parts of the floor which were occupied by tenants, and to the male lavatory. That facility was located immediately adjacent to the lift well and to the left as one emerged from the lift.

[5] Excalibur House was at the relevant time owned by the defendant which admits that it occupied the common area of the building. The vestibule outside the lift on the third floor was part of the common area.

[6] At the time relevant to the action there was only one tenant on the third floor, the Leukaemia Foundation. Its premises were located on that part of the third floor to the left of the elevator as one emerged. The area to the right had been vacant for many months prior to July 2002. A tenant had at last been found for the space and the defendant was undertaking its renovation and refurbishment. The work was carried out by Mr Russell who removed the plaster from the partitioning walls, removed the framing, took down the ceiling tiles, pulled up the carpet and removed some at least of the ceramic tiles. The broken building materials which resulted from what Mr Russell called the 'strip down' were taken away at night. These were put in a wheelbarrow which went by lift to the ground floor where there was a bin.

[7] At about 2.15 p.m. on 29 July 2002, a Monday, the first plaintiff caught the lift intending to go to the lavatory on the third floor. As far as he could recall it was the first occasion that day he had undertaken that trip. The lift stopped, as it sometimes did, slightly above the level of the tiled floor. As Mr Adrian stepped out he slipped and fell backwards, injuring his back and left wrist. This is how he described it:

> 'I put my right foot out … to walk out of the lift. My foot went straight out from under me. I reached back with my left hand to stop my fall. When I hit the lift floor I … had sharp pain, I heard a crack in my wrist. I had incredible pain in my lower back because it hit the lip of the lift which was … raised … . I was lying there for … it could have been five minutes, could have been fifteen. The lift doors closed on me once or twice … . When I got up I noticed all this white powder on the floor of the foyer. I got myself into the bathroom. … I cleaned myself up … . I was aware of the dust, cement dust, … that was on the floor. I went down and notified Dee Ralph … who was the receptionist for [an adjoining tenant] to notify [the defendant] that there was a problem … .'

[8] Mr Adrian was asked to describe his observations of the floor immediately outside the lift on level 3. He said that he saw:

> 'Just a fine … film of dust, a very fine white film of dust, and there were piles of rubble over to the right hand side … probably about six to ten feet from the tiled (floor). … [He] had white cement dust on [his] trousers … .'

[9] Mrs Relph at the time was employed by AAA Tax & GST Advisors, an accounting business of which Mr Adrian was part owner. It occupied offices adjoining Aeron's. Mr Adrian told Mrs Relph of his fall and asked her to report the incident to the defendant. She did so. She then went to the third floor where she saw:

> '… rubble all over the floor. … like cement rubble, dust … because they had been jack-hammering the floor.'

[10] Later, in re-examination, she testified that:

> 'The concrete dust covered the entire tiled area.'

[11] Mr Becirevic was an accountant and part owner of AAA Tax & GST Advisers. He too made use of the lavatories on level 3, and had made use of them on the day of the first plaintiff's fall. He said this of the premises:

> '… the area was very messy. I think they were doing a fit-out … and there was dust everywhere. There was … I suppose just a mess … and the day after it was totally cleaned …'.

[12] Mr Milner was also an accountant employed by AAA Tax & GST Advisers in July 2002. He also used the lavatories on level 3 and was made aware of Mr Adrian's fall. He said that, at that time, there:

> '… was constantly a mess on the floors, which was evident when you walked in and out of the male toilets. You could see all the dust and mess …'.

He thought that the dust was present throughout the period of renovation.

[13] Mr Morgan is a cost assessor employed by Aeron. He was so employed on 29 July 2002. He heard of Mr Adrian's fall from the first plaintiff himself who:

> 'Shortly after … came downstairs to … our offices, and told the staff that he had suffered a fall and … hurt his back and … wrist.'

Mr Morgan:

> '… went up and had a look at where he had fallen, just out of curiosity.'

Mr Adrian had mentioned that the floor was dusty and Mr Morgan, when he arrived on level 3:

> '… could see that there were actually marks in the dust looking like someone had taken a slip there … immediately outside the elevator …'.

Mr Morgan noticed:

> '… dust … all across the … tiles with marks pretty much central in the tiles. … the dust had been disturbed. There were footprints in the dust … and there were marks in the entranceway …'.

[14] Mr Kerr is a self-employed costs assessor. In July 2002 he was employed by the second plaintiff. Mr Kerr is a solicitor and practised in a partnership of good reputation. By reason of his age and medical history he had occasion to attend the lavatory perhaps a little more frequently than others. He lived in Brisbane but drove

to work in Southport. He was accustomed to visit the third level shortly after his arrival. At about 8.30 am on the day of the first plaintiff's fall he:

> '… noticed there was a lot of grey dust, a bit like talcum powder … on the floor and there was a lot of material there and it was very slippery. … [The dust] was right in front of the lift. … [It was] a thick layer of dust and it was very slippery. … The dust was widely spread over all those tiles and quite thick.'

Mr Kerr said that he himself slipped on the dust, though he did not fall.

[15] The defendant contests the plaintiffs' evidence. Mr Russell who demolished the partitions and removed the ceiling tiles explained that he carried out the work on the night of 26-27 July 2002. He finished early on the Saturday morning, 27 July. He had arranged for the cleaner to come and clean when he finished. He:

> '… vacuumed and put all the gear to one side … and put the gear in a big pile to be taken away. … [He] didn't do it on the Monday because … the bin … was full.'

He had been performing similar work on the third floor for about two weeks. At about 7.00 am on 27 July he:

> '… vacuumed all round [his] area and cleaned [his] area up waiting for the cleaner … .'

I did not understand Mr Russell's area to include the tiled vestibule.

[16] On the Monday, 29 July 2002, Mr Russell received a telephone call from Mr Clough, the defendant's building manager who asked him to go with him to the third level of Excalibur House. Mr Clough had been informed of the first plaintiff's fall. When Mr Russell arrived he:

> '… thought the floor was clean, the rubbish wasn't on the floor … . [He] didn't see a problem.'

He did not see any dust, thick or otherwise.

[17] Mr Clough's evidence is to the same effect. His evidence was that he went to level 3 of Excalibur House upon receipt of information that Mr Adrian had fallen. He:

> '… had a look at the area outside the lift. … the area was clean.'

Mr Clough had bought a cheap camera, the type which one discards when the film is developed, and took it with him on his inspection. The photographs he took became exhibit 7. It will be necessary to say something about them later.

[18] The cleaner was Ms Claudia Restrepo who has been contracted to clean Excalibur House for the last fourteen years. She recalled being asked by Mr Russell to go to Excalibur House and clean up after his demolition. It was, in any event, Ms Restrepo's practice to clean the building on Saturdays. She did so because it was easier to do 'a very good cleaning'. She arrived very early on Saturday morning and left after lunch. Her evidence of her activity on the Saturday morning was:

> 'I go to each level and clean … the tile … . At first I vacuum and then I clean the toilets … and then mop. That's what I do in each floor and I did that particular day, too. …'

She recalled using a vacuum cleaner and mop on the tiled area on each floor. When she left the building on Saturday afternoon the tiles were 'very good'. Ms Restrepo returned on the Monday evening to perform her usual nightly clean. On that occasion, 29 July 2002, there was no thick accumulation of dust on the tiles which she cleaned in the usual course.

[19] In order to make out their cause of action against the defendant the plaintiffs had to prove that:

1. the tiled floor adjacent to the lift door and lavatory on the third floor was covered in dust.

2. the dust made the surface slippery.

3. the defendant knew or ought to have known of that condition.

4. the exercise of reasonable care required the defendant to remove the dust.

[20] Despite the simplicity of the first question I have not found it easy to answer. There was no obvious reason for rejecting the evidence of any of the witnesses. Most suffered from the fact that the incident occurred almost five years ago. Except for Ms Restrepo, none was asked to commit their recollection to writing until some years had passed. There were clearly errors of recollection in some of the testimony but all, I thought, had some memory of the event and endeavoured to give an honest account of their observations. I except Mr Russell from the first observation. I thought he had a good recollection of the events which concerned him, and I thought his testimony reliable.

[21] Two sets of photographs were tendered which might have assisted in the determination of the state of the tiles when Mr Adrian fell. If what was said about the time when they were taken was correct the photographs would have been helpful, but I do not think it was. Mr Clough said that he took the photographs which became exhibit 7 when he inspected level 3 on the afternoon of the Monday, 29 July 2002. The photographs clearly show the tiles in a state of cleanliness. Certainly there is no evident, widespread, thick dust. The photographs which were exhibit 1 were taken by Mr Nham, another employee of AAA Tax & GST Advisers. He took the photographs at the request of Mr Adrian. There is circumstantial evidence that he did so at about 11.30 am on the Tuesday, 30 July. Mr Nham himself had no clear recollection of the day or time and made no note of it. Other witnesses, including the first plaintiff, had a belief, no doubt based on hearsay, that they were taken on the 30th but there is no convincing first-hand evidence of the

occasion. The parties were content to proceed on the basis that the plaintiffs' contention that the photographs were taken mid-morning on the 30th was correct but the evidence in support of the assumption lacks cogency.

[22] There is no doubt that Mr Nham's photographs show the tiles covered in a thick coating of dust. If they were taken directly after Mr Adrian fell they would offer convincing corroboration of the plaintiffs' case but I think it clear, as Mr Myers has argued, that they were taken after Mr Clough's photographs.

[23] As I mentioned those photographs appear to show the tiles in a clean state. I cannot, however, accept that they were taken at the time Mr Clough claims for them. One of the photographs shows sunlight shining through a window which, it is agreed, is in the eastern wall of the building. The sun must have been in the east when the photograph was taken. The time must have been morning, not afternoon, as Mr Clough remembered. A photograph in exhibit 7, shows a pile of broken building material on the floor to the right of the vestibule (as one leaves the lift). Mr Nham's photographs of the same area show that the material has been removed and all or part of it put in a wheelbarrow. On Mr Russell's evidence that did not occur until about the Wednesday. In any event it is clear from the sequence that Mr Nham's photographs were taken after Mr Clough's. The rubbish would have been taken from the floor and put in the wheelbarrow for removal. It was on the floor before it was in the wheelbarrow.

[24] The consequence for the fact finder is Mr Nham's photographs do not depict the state of the tiles when Mr Adrian fell. But it cannot be concluded that Mr Clough's photographs depict the tiles at that time. They were taken later than Mr Clough

thought. They cannot have been taken earlier than the Tuesday morning and Ms Restrepo cleaned the tiles on the Monday night.

[25] The finding as to the state of the tiles must be made by reference only to the oral evidence. Despite the difficulty when there is no objective reason to reject the testimony of a witness I conclude that the preponderance of evidence supports the plaintiff. Mr Clough and Ms Restrepo had, to some extent, an interest in the acceptance of their testimony. Ms Restrepo was the cleaner and Mr Clough was responsible for the condition of the building. The plaintiffs' witnesses, in particular Mrs Relph and Mr Morgan who went to the third floor very shortly after hearing of Mr Adrian's fall had no interest in securing any particular finding of fact. It is significant that they went to the third floor in response to the news of the first plaintiff's mishap and that they recalled seeing a film of dust.

[26] I therefore find that the tiles were dusty as the first plaintiff asserted. It does not matter whether the dust was there because Ms Restrepo had not cleaned it as thoroughly as she said or whether dust settled from the air or further activity after she performed her clean on Saturday morning.

[27] The next question to address is whether the dust made the tiles slippery. The plaintiffs rely only upon the fact of the fall and Mr Kerr's testimony.

[28] The latter was the subject of particular criticism by Mr Myers. Two points were made. The first is that Mr Kerr had made no reference to the slipperiness of the floor in the statement he provided to the plaintiffs for the conduct of their case in March 2005. In that statement he said that there was a thick layer of dust outside the lift but said nothing about slipping himself or observing that the floor was

slippery. The second point is that Mr Kerr did not complain to his employer or the defendant of the danger he experienced on the morning of 29 July 2002. He did not even mention the fact casually to his fellow workers.

[29] Mr Myers also points to the fact that none of the other witnesses who testified to the state of the tiles and the presence of dust noticed or asserted that the surface was slippery. Mr Morgan did not:

> '… encounter any difficulties in moving from the lift to the lavatory and back into the lift'.

Mr Milner:

> '… had never had any difficulty in emerging from the lift, walking across the tiled area, into the lavatory, turning round, coming back and going back down to [his] own work level by reason of dust on the tiles.'

It should be accepted that at least once an hour one of the men working on level 2 would have gone to the lavatory on level 3 but none, apart from Mr Kerr, experienced or complained about the slipperiness of the tiles.

[30] These are valid points but the question ultimately depends on whether I accept Mr Kerr's evidence, and I do, despite the omission from his statement of the point which has now assumed particular importance. Mr Kerr is a solicitor of good standing and reputation. I accept that his testimony is honest and that his recollection was reliable.

[31] It is a matter of surprise that the plaintiffs did not support their case by expert evidence. It is common in cases arising from a slip to receive evidence from engineers who conduct friction tests to observe the extent to which grip, or friction,

is lessened by the presence of foreign substances (usually a fluid) on the surface. The tests are easy enough to conduct and are prescribed by an Australian Standard.

[32] The plaintiffs did not resort to such evidence. The evidence they did adduce just persuades me that the presence of dust on the tiles did make them slippery. I am reinforced in my conclusion by the fact that Mr Adrian undoubtedly fell as he left the lift. It is a manoeuvre he had executed many times before and the fact that he fell on this occasion is some evidence that the state of the floor differed from the usual.

[33] The plaintiffs' counsel relied upon some evidence from Mr Milner to prove that the tiles were slippery and the defendant knew it. Mr Milner 'thought' he recalled:

> '… that there was also a yellow non-slip sign put up … soon after [Mr Adrian's fall] as well.'

It was a sort of:

> '… plastic yellow non-slip sign that they often put on slippery floors', saying something like "Caution Slippery Floor".'

I do not accept this evidence. I am satisfied Mr Milner was mistaken. This evidence was not opened by the plaintiffs' counsel and was not led in chief. It was not put to Mr Clough in cross-examination that such a sign was put in place though he would have been responsible for it.

[34] The plaintiffs also led evidence that not long after Mr Adrian fell the defendant had the tiles cleaned and affixed warning signs to the walls. The signs were no more than sheets of paper on which was printed:

> 'WARNING
> CONSTRUCTION
> BEING CARRIED

OUT ON THIS
LEVEL

STRICTLY
NO ADMITTANCE'

There were two such signs, one on each of the walls at the right-hand end of the vestibule (as one emerges from the lift). They were at the extremity of the tiled surface and at the threshold of the area under renovation.

[35] It was the plaintiffs' case that the signs were put up after the first plaintiff fell and that the act of affixing them is an implied admission that such a warning should have been in place beforehand. The plaintiffs' witnesses were nearly unanimous in their opinion that the signs were put up after 29 July 2002.

[36] I am satisfied that they are mistaken. I accept Mr Russell's evidence that they had been in place since about the time he commenced his strip down.

[37] It is apparent from the content of the notices and their position that the purpose was to deter people from entering the area under renovation. It was not to warn of a slippery floor. They would not be seen by someone emerging from the lift unless that person turned and took a step or two to the right. They would be of no utility to a person leaving the lift and turning left to enter the lavatory.

[38] The content of the notices were not apt to warn of a slippery floor. They were apt to keep someone from entering an area where demolition was under way.

[39] Did the defendant know, or should it have known, of the dust and the risk it posed? The answer is affirmative. Mr Russell and Ms Restrepo were in a position to observe the state of the tiles when they left the building on the Saturday. Mr

Clough knew of the work being undertaken by Mr Russell and could have inspected the tiles on the Monday morning, before the tenants arrived for work, to satisfy himself that the premises were safe.

[40] The last question to address is whether the exercise of reasonable care by the defendant, as occupier of the common area, to make the premises safe for lawful entrants required it to remove the hazard, i.e. the dust, or give adequate warning of it.

[41] The defendant's counsel argues that the risk of injury occurring from a slip was non-existent, or so negligible as not to require any particular prophylactic action on its part. The defendant's primary position was that there was no hazard; that the tiles were clean but I have found against it on that point of fact.

[42] The defendant points to the evidence I have already mentioned: that many men traversed the tiles on the third level on 29 July 2002 without falling and, with the exception of Mr Kerr, without encountering any difficulties in walking on the tiled surface. The defendant argues that this evidence demonstrates that there was no appreciable risk of slipping on the dusty tiles and that the defendant was not negligent in disregarding such risk as there was.

[43] Mr Kerr's evidence, which I have accepted, establishes that there was a risk of slipping. Obviously a slip might lead to injury. The fact that the tiles were slippery at least to those wearing leather soled shoes should have been apparent. An inspection on the Monday morning would have shown that to be the case. The risk that someone might fall was not far-fetched or fanciful despite the fact that the incidence of falls was low. The reasonable response to the risk was neither difficult

nor expensive. It was to sweep and mop the dust which was what the defendant said it did. It should have done a better job, or done it again on the Monday morning. Given that the risk was easily removable and that it was foreseeable, in that it was not far-fetched or fanciful, it follows that the respondent in not removing the risk did not act with reasonable care towards its entrants in which class the first plaintiff was numbered.

[44] Accordingly I conclude that the defendant is liable to compensate the plaintiffs for their injuries.

[45] Consequent upon his fall the first plaintiff experienced considerable pain in his left wrist and lower back. He had put his left arm out to break his fall and the impact jarred his wrist. He went almost immediately to his general practitioner who recommended rest and analgesics. The first plaintiff complains of ongoing intractable pain in his back, neck, arms and legs which have made his life miserable and substantially diminished his earning capacity. He claims recompense for his plight. His employer, the second plaintiff, claims that it has incurred additional expense by way of payments to other employees to perform the work that the first plaintiff formerly did but is no longer able to do.

[46] Towards the end of the trial it emerged that the plaintiffs had not made proper disclosure of documents relevant to the assessment of the second plaintiff's claim. The disclosure of additional documents, on the evening of the third day of the trial, surprised the defendant and disadvantaged its forensic accountant. Rather than adjourn the proceedings I ordered that there be a separate trial of the second plaintiff's claim for damages to be conducted when the defendant had had a proper

opportunity to consider the late disclosed documents. The first plaintiff's claim, to the extent it could not be separated from the second plaintiff's claim, was also to be the subject of the separate trial.

[47] The defendant submits that the plaintiff has not suffered any diminution in his earning capacity. Should that contention be made good and the first plaintiff's damages assessed on that basis the second plaintiff's claim may not need further consideration.

[48] It is apparent that the plaintiff seeks to attribute a greater disability to his mishap of 29 July 2002 than the evidence will support. Mr Adrian displayed an eagerness to convert his sufferings into moneysworth and was not, therefore, a careful historian of his symptoms and his disability. His claim for lost earnings and his employer's (his wife's company's) claim for loss of services need not be addressed in these reasons but both were, in my opinion, contrived. The first plaintiff's claim was essentially for the loss of bonuses which the second plaintiff was accustomed to pay him before his injury but did not pay afterwards because of his lack of capacity to fulfil his employment. What happened in fact was that Mrs Adrian, after discussions with Mr Adrian, did not pay the former amounts by way of bonus to her husband but allocated the amount saved to herself, by way of dividends or director's fees. The second plaintiff's income which derived from the efforts of the first plaintiff and other employed costs assessors did not decrease despite Mr Adrian's injury.

[49] The plaintiff was referred to Dr Pentis, orthopaedic surgeon, who examined him on 27 August 2002 to support his claim for damages. Dr Pentis reported that the

plaintiff suffered 'an injury to his lower back, cervical spine and left wrist joint.' The reference to the cervical spine is, I think, mistaken. The balance of the report makes no reference to such an injury. Mr Adrian complained that he continued to suffer low back pain radiating into his upper left leg, and that his wrist joint ached and was weak. He complained that sitting or driving for lengthy periods caused back pain as did lifting, bending and twisting. An MRI of the lumbo sacral spine showed minor degenerative change at L5/S1 and of the left wrist showed a tear through the cartilage. There were no fractures.

[50] Dr Pentis thought that the first plaintiff had suffered soft tissue damage to his lower back and wrist. He thought that:

> 'Common sense and gentle exercises, analgesics, a course of physiotherapy … is warranted.'

As to the wrist Dr Pentis thought that if the first plaintiff continued to 'have problems' he should have an arthroscopy.

[51] Dr Purssey examined the plaintiff at the request of his solicitor on 5 September 2003. He reported that in October 2002 the plaintiff was referred to Dr Stabler for ongoing discomfort in his left wrist. An investigation of the symptoms revealed that the first plaintiff had contracted bilateral carpal tunnel syndrome as a result of his work as a cost assessor. This condition was completely unrelated to Mr Adrian's fall but was a source of disability and discomfort. In December 2002 Dr Stabler operated on the first plaintiff's left wrist to debride the torn cartilage and to decompress the tendon to give relief from the carpal tunnel syndrome. The operation was successful and in January 2003 the first plaintiff underwent an operation to decompress the tendon in his right wrist.

[52] Dr Purssey's examination revealed a full range of movement in Mr Adrian's left wrist with normal sensation, no muscle wasting and a good grip. There was some limitation of movement in his lower back but he walked normally, had normal reflexes and could squat normally. The doctor thought that he had suffered a soft tissue injury to his left wrist and lumbo-sacral spine. The symptoms had not improved after fourteen months and Dr Purssey considered that they would persist.

[53] The doctor thought that the first plaintiff could continue in his employment but would have had:

> '… difficulty with any heavy manual employment or anything requiring repetitive bending and straightening.'

He did not think that the first plaintiff would require any assistance with any domestic or household chore:

> '… apart from some help with looking after the garden.'

[54] Mr Adrian was also examined by Dr Scott-Young, orthopaedic surgeon who furnished a number of reports. There is no point in discussing them separately because there is no disagreement as to the nature of the injuries the first plaintiff sustained in the fall. What is in issue is the extent to which the first plaintiff continues to suffer pain and disability as a result of those injuries and the extent to which he is incapacitated from the daily routine of life and work.

[55] Dr Scott-Young reported, on 17 December 2003, that he had treated the first plaintiff between 11 December 2002 and 26 June 2003. His report continued:

> 'Mr Adrian presented at my practice on 11 December 2002 with chronic persistent low back pain. He did have some left leg pain that ran into the buttock, down the posterior thigh, into the calf and … the sole of the foot. … Most of his lower back pain was … on the left side. … He had limited success in sitting, standing was a little difficult. Recumbency did give him some relief, but his sleep could

> be affected. … Mr Adrian stood with symmetrical development of his quads and calves. His range of motion was reasonable in all directions. His straight leg raise showed mild hamstring tightness and reproduced back pain. … He had tenderness over the lower lumbar sacral spine. His tone was normal, his power was normal, and his reflexes and sensation appeared to be intact. I reviewed the MRI scan … . It showed loss of signal from the L5-S1 disc. There was also an annular tear to the left of the midline … adjacent to the left S1 nerve root, which correlates with his symptoms.
>
> I advised Mr Adrian … that he probably had some minor degenerative disease present at the time of his fall and, as a result of the force has sustained in the fall and … has sustained … an axial compression injury that has resulted in the annular tear. …
>
> I advised Mr Adrian that the bulk of the treatment was conservative and revolved around avoidance activities, regular stretching, exercising, anti-inflammatories, analgesics and physiotherapy … . I recommended that Mr Adrian return to the workplace [as] soon as possible … . On 26 April 2003 … he reported that he was not much improved … . I advised … that his symptoms were no longer related to the annular tear but were related to his underlying degenerative condition.'

[56] The first plaintiff was examined by Dr Parkington, orthopaedic surgeon, at the request of WorkCover Queensland on 6 August 2003. Dr Parkington reported:

> 'Mr Adrian was hurt … when he fell backwards. He appears to have jarred his back and hurt his left wrist.
>
> There is evidence of pre-existing degenerative disease in the lumbar spine and it is possible that he may have aggravated this. That aggravation has now ceased. There was no disc prolapse and no nerve root entrapment in the lumbar spine. … His lumbar spine … has now fully recovered and any symptoms he may have are due to pre-existing age-related degenerative disease at the lumbo-sacral level.
>
> Although Mr Adrian is suffering from degenerative disease in the cervical spine, which is quite widespread, there is no evidence at all that this was injured or aggravated in any way in this accident. He had no complaints in relation to his cervical spine until after he had undergone surgery to the right hand … six or seven months after his accident. … I accept that Mr Adrian may have suffered a fibro cartilaginous injury to the left wrist. He has undergone entirely appropriate treatment for that. He has regained full movement in the left wrist with only some minor discomfort on certain movements.'

[57] Dr Parkington concluded that the first plaintiff was fit for work as a legal costs assessor but that there were 'significant psycho-social factors' affecting the first plaintiff's recovery.

[58] Dr Scott-Young noted in his report of 17 December 2003:

> 'In relation to Mr Adrian's consistency of presentation, I am of the opinion that there are significant psycho-social factors at play here. … The symptoms in relation to his cervical spine are primarily constitutional and … he is trying to attribute these symptoms to the fall. I am of the opinion that he has convinced himself that this is the case. I have no doubt that some of the symptoms he reports are present, but they are significantly out of proportion to the clinical signs. There are considerable inconsistencies in his proposed disability versus his functional capability.'

The same point was made by Dr Parkington in evidence (T280.50-281.2):

> 'His range of movement of the cervical spine was better during the conversation than when he's being formally observed … when I put him on the scales to weigh him he looked down … to the scales, flexing his neck some 45 degrees yet there was only about 20 degrees of flexion when he was being formally examined. So there was conflicting physical signs. … I put it down to voluntary restriction of movement.'

[59] The last report which it is necessary to mention is that of Dr Pentis of 18 January 2007. Mr Adrian complained to him of constant low back pain which radiated into his buttock and down to his left knee and foot. He complained also of neck pain which caused difficulty with activities involving lifting, bending and twisting. He repeated his complaints of discomfort while driving for any distance and some difficulty in sleeping. He complained as well of difficulties in his left wrist which is painful all the time and weak. He said that he could cope with his work but had been unable to return to any of his sporting activities. Dr Pentis expressed the opinion that the first plaintiff had suffered a soft tissue injury to his spine, 'an

aggravation of degenerative problems in the cervical and lumbar regions' which were causing 'some symptoms' which were best treated conservatively.

[60] The plaintiff has complaints of ongoing disability in his right wrist but these can be ignored. They are unrelated to his fall.

[61] The plaintiff also complains of pain in his upper spine and neck but likewise these complaints may be ignored. It is clear that the plaintiff did not have any such complaints for several months after his fall. The medical evidence is that unless he complained of neck pain very shortly after his fall the symptoms cannot be attributed to it.

[62] The plaintiff complained that his lower back 'aches all the time'. It is still and sore in the morning. The pain radiates down his left leg and wakes him at night. The pain is aggravated by driving, sitting for lengthy periods and walking long distances. His pastimes had included golfing, fishing and horse riding but he had been unable to return to any of these activities. He had a young child and is unable to lift her or play with her.

[63] I am satisfied that the plaintiff has exaggerated the extent to which he is inconvenienced by the injuries sustained in the fall. It was not a serious accident and I accept the medical evidence that the first plaintiff suffered soft tissue injury to his lower back which stirred up some previous degenerative chain which had been largely asymptomatic. The extent to which the plaintiff continues of ongoing pain and disability is exaggerated. I attribute the exaggeration to a conscious desire to maximise his return from the litigation and as well Mr Adrian's own personality which makes him overly concerned about his health and well-being and sensitive to

every ailment. He admitted that he had 'health issues' before his fall. It is apparent from the medications he had been prescribed that he was tense and nervous and preoccupied with his bodily conditions. There is, I think, no doubt that the first plaintiff worked extremely hard. He put in long hours, felt tense and had trouble sleeping. He was prescribed medication to assist him to relax and to sleep. These circumstances combined to cause the first plaintiff to attribute more symptomology to the injuries sustained in the fall than the evidence justifies and led him to seek greater recompense than the case warrants.

[64] I am not satisfied that the first plaintiff has suffered any diminution to his earning capacity. On his own evidence he returned to work after an absence of about two weeks and has performed as before though with discomfort and pain. On occasions he needed assistance to lift boxes of files, and to turn pages. He feels a need to stand and move around after he has been sitting for a prolonged period. None of this affects his capacity to work very long hours as a costs assessor. It is noteworthy that he mentioned to the doctors that he copes with work.

[65] The first plaintiff is to be compensated for some continuing lower back pain which does cause him discomfort and has probably led to his giving up his pastimes. I am not satisfied that he engaged in them as often as he claimed: the hours he worked and the demands of a young family would have left him with little time for his own amusement. It is probably right that he now needs some assistance with the garden but I do not accept that he needs assistance with ordinary household chores or that he has ever needed such assistance except initially after his fall and following his surgery to the left wrist.

[66] I allow the first plaintiff $35,000 for pain, suffering and loss of amenity. Interest at two per cent on $20,000 of that sum between 29 July 2002 and 15 March 2007 is $1,853. I allow $1,000 for the provision of gratuitous services for the period prior to the trial. I allow the sum of $10,000 for the provision of those services in the future. I allow $5,000 for future pharmaceutical and medical expenses. There are some agreed special damages: $1,485 for hospital expenses; $6,045.51 for medical expenses and $101.92 for travelling expenses. I allow $3,000 for other special damages and out of pocket expenses. The figure was not proved with any precision. There is a real difficulty in attributing such expenses as the first plaintiff could prove he paid to the injuries for which the defendant is liable. I have rounded off that figure to include any component for interest. The so-called *Fox v Wood* component is agreed in the sum of $7,109.

[67] I therefore give judgment for the first plaintiff against the defendant in the sum of $70,594.43.

[68] Two points require attention. The first concerns the attempted tender of a document which was marked for identification.

[69] In the course of his very brief cross-examination of Ms Hardgraves, Mr Myers asked the witness what she had been told by Mr Adrian about his fall. He said:

> 'You made a statement back in 2005 in which you said that the floor was covered in building dust and debris? - That's just what he said. I didn't go up and see it.'

Mr Myers then asked a question or two about the first plaintiff's ability to perform his work. He said:

> 'As you say in your statement, to do his work, the job requires two good hands? - Yes.'

At the end of the cross-examination senior counsel for the plaintiff called upon Mr Myers 'to tender the statement of 15 March 2005 …' because 'he cross-examined about the contents of the statement'.

[70] Mr Myers' questions seemed an inadequate basis for requiring him to tender the statement. When asked to formulate the rule governing counsel's right to compel his opponent to tender a document Mr Grant-Taylor told me he:

> 'Would have to go back to … Cross to get the precise formulation.'

It was agreed that the point should be argued when counsel had had an opportunity to consult the texts and authorities. The statement was produced to the court and marked for identification. Its tender was to be decided after argument.

[71] The point was never adverted to again. Mr Grant-Taylor did not press his tender and the statement has not become an exhibit. I do not think it should have been received.

[72] The statement was not shown to the witness. Mr Myers did not call for it. Ms Hardgraves' testimony was not challenged by reference to anything she had said in the statement. In these circumstances I do not think the statement was admissible. The requirements of the rules which allow counsel to insist that his opponent tender a document were not satisfied. See eg *Senat v Senat* (1965) P 172 at 177.

[73] Section 19 of the *Evidence Act* 1977 might have supported the tender. The section provides:

> '(1) A witness may be cross-examined as to a previous statement made by the witness in writing … relative to the subject matter of the proceeding without such writing being shown to the witness.

> (2) A court may … during the hearing … direct that the writing containing a statement referred to in subsection (1) be produced to the court and the court may make such use … of the writing as the court thinks fit.'

[74] It is probably not right to categorise the exchange between Mr Myers and Ms Hargreaves as cross-examination as to a previous statement made by the witness, so that the section had no application. If it did apply, no doubt the court's discretion conferred by subsection (2) could be exercised at the urging of a party to the proceeding, but senior counsel for the plaintiff did not rely upon the subsection or urge the court to direct the statement be produced. Given the nature of the questioning, which incidentally elicited a prior consistent statement, I do not see what purpose would have been served by its production.

[75] The second matter concerns the evidence in chief, or lack of it, of the plaintiff's forensic accountant. Mr Thompson was called and asked to identify himself and his two reports and to prove that his curriculum vitae appeared in one of them. He was then asked if he maintained the opinions expressed in the reports. When he said he did the evidence in chief was concluded. I protested that that course was unsatisfactory. The opening address on the aspect of the claim for loss of services had been very brief. Mr Thompson was not asked to explain the methodology by which he had calculated the second plaintiff's loss, or to essay a précis of the reports' reasoning. I pointed out that I had scant understanding of the basis on which the second plaintiff's claim for quantum was advanced. I was assured that the rules forbad counsel eliciting any oral evidence in chief, even limited to that which might assist the court to understand the plaintiffs' case, or to make the reports intelligible.

[76] The rules in question were said to be *UCPR* 427(3) and (4). They provide:

> '(1) An expert may give evidence … by a report.
>
> (2) …
>
> (3) The report is to be tendered as evidence in chief of the expert.
>
> (4) Oral evidence in chief may be given by the expert only –
>
> (a) In response to the report of another expert; or
> (b) If directed to issues that first emerged in the course of the trial; or
> (c) If the court gives leave.'

[77] The course adopted by counsel for the plaintiffs was not dictated by the rule. A superficial reading may suggest that it bears the meaning advanced, but that cannot be what the draftsman of the rule had in mind. The rule is clearly intended to prevent an expert advancing a new opinion, or perhaps even a new basis for an opinion, from that which appears in the report which will have been disclosed to the other parties in the action. The function of the rule is clearly to bring the parties to battle, on the issues with respect to which the experts speak, on grounds and materials advertised beforehand. It is to prevent surprise at the trial. It is emphatically not its function to prevent counsel from leading an expert through an explanation of his opinion, and how it was arrived at.

[78] If it was thought that the rule had that effect the obvious answer was to apply for leave pursuant to *UCPR* 47(4)(c) to adduce oral evidence in chief to assist the judge to understand the testimony contained in the report. It is not to be thought that such leave would be refused often.