SUPREME COURT OF QUEENSLAND

CITATION:	*Wright v KB Nut Holdings Pty Ltd* [2013] QCA 66
PARTIES:	**ROBYN JOY WRIGHT** (appellant) **v** **KB NUT HOLDINGS PTY LTD as trustee for the KERRIE-ANN STEVENSON FAMILY TRUST (ACN 127 054 872) trading as 'BONAPARTES SERVICED APARTMENTS'** (respondent)
FILE NO/S:	Appeal No 7435 of 2012 DC No 3367 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	2 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	20 March 2013
JUDGES:	Muir JA and Margaret Wilson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal be allowed.** **2. The judgment given on 23 July 2012 be set aside and that in lieu thereof it be ordered that the respondent pay the appellant $494,759.38 together with interest thereon from 23 July 2012 at the rate of 10 per cent per annum.** **3. The parties file and exchange written submissions on costs within 7 days of the date hereof unless they have reached agreement within that time as to the appropriate costs order and have informed the Registry of it.**
CATCHWORDS:	TORTS – NEGLIGENCE – DANGEROUS PREMISES – INJURIES TO PERSONS ENTERING PREMISES – WHERE ENTRY PURSUANT TO CONTRACT – where the appellant and the respondent entered into a contract under which the respondent agreed to let the appellant and her family reside in serviced apartments for reward – where the appellant tendered DVD evidence of the filthy state of the apartment – where the internal stairs were dirty and sticky and had a build up of dust, hair and fluff where the risers

joined the treads – where the appellant suffered a needle stick injury which caused her psychiatric impairment while cleaning the stairs – where the appellant claimed damages for breach of contract, negligence and for breach of a contractual term implied pursuant to s 74(1) of the *Trade Practices Act* 1974 (Cth) – where the primary judge held that the appellant's cleaning of the stairs was foreseeable – where the primary judge found that it was probable that the standard cleaning procedure had been followed – where the primary judge found that, as the needle was not protruding, the standard cleaning procedure would not have led to any observation of the needle – where the primary judge held that the risk of harm to the appellant was not foreseeable or, in the alternative, that a reasonable person in the respondent's position would not have taken any more precautions and there was a low probability of harm – where the primary judge gave judgment in favour of the respondent – where the respondent was under a duty to ensure that the apartment was as safe for the purposes of residing in as reasonable care and skill on the part of anyone can make it – where the respondent argued that the 'but for test' imported by s 11 of the *Civil Liability Act* 2003 (Qld) had not been satisfied – where the respondent submitted that the risk of harm was not foreseeable – whether the respondent was negligent

APPEAL AND NEW TRIAL – APPEAL GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – FINDINGS ON ISSUE OF NEGLIGENCE – GENERALLY – where the primary judge's acceptance of the evidence of the appellant as to the state of the apartment was irreconcilable with the primary judge's finding that it was probable that the standard cleaning procedure had been followed – where appellant's evidence concerning the state of the apartment was corroborated by her husband's testimony and DVD evidence – where the cleaners did not have a specific recollection of cleaning the apartment – where the primary judge laboured under a misapprehension about, disregarded or failed to sufficiently take into account, the appellant's evidence about the build up of detritus on the stairs – whether the primary judge failed to use, or palpably misused the advantage of a trial judge – whether the primary judge acted on evidence which was inconsistent with facts incontrovertibly established by the evidence or which was glaringly improbable

Trade Practices Act 1974 (Cth), s 4, s 74(1)
Civil Liability Act 2003 (Qld), Schedule 2

Australian Safeway Stores Pty Ltd v Zaluzna (1987) 162 CLR 479; [1987] HCA 7, cited
Calin v Greater Union Organisation Pty Ltd (1991) 173 CLR 33; [1991] HCA 23, followed

Devries v Australian National Railways Commission (1993) 177 CLR 472; [1993] HCA 78, cited
Evans v Queanbeyan City Council [2011] NSWCA 230, considered
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102, cited
Gharibian v Propix Pty Ltd [2007] NSWCA 151, cited
Hoyts Pty Ltd v Burns (2003) 77 ALJR 1934; [2003] HCA 61, cited
March v Stramare (E & MH) Pty Ltd (1991) 171 CLR 506; [1991] HCA 12, considered
Merck Sharp & Dohme (Australia) Pty Ltd v Peterson (2011) 196 FCR 145; [2011] FCAFC 128, considered
Neindorf v Junkovic (2005) 80 ALJR 341; [2005] HCA 75, cited
Watson v George (1953) 89 CLR 409; [1953] HCA 41, followed
Woods v Multi-Sport Holdings Pty Ltd (2002) 208 CLR 460; [2002] HCA 9, cited

COUNSEL: J P Kimmins for the appellant
R Douglas SC, with R W Morgan, for the respondent

SOLICITORS: Shine Lawyers for the appellant
HBM Lawyers for the respondent

[1] **MUIR JA**: **Introduction** The appellant took an apartment in Bonapartes Serviced Apartments, Spring Hill, Brisbane. The apartments were managed by the respondent and it was common ground on the pleadings that the appellant and the respondent entered into a contract under which the respondent agreed to let the appellant and her family reside in the apartment for reward. Mr Kallis looked after the maintenance of the apartments and his partner, Ms Stevenson, did "the office work". She also inspected the apartments from time to time to check on their condition.

[2] When residing in the apartment, the appellant suffered a needle stick injury which caused her psychiatric impairment. She sued the respondent claiming damages of $648,010.82 for breach of contract, negligence and for breach of a contractual term implied pursuant to s 74(1) of the *Trade Practices Act* 1974 (Cth). After a trial, the primary judge gave judgment in favour of the respondent. The appellant appealed against the judgment and against an order for costs made on 17 August 2012.

[3] Although finding for the respondent, the primary judge, as was appropriate, assessed damages. There is no dispute about that assessment.

The relevant facts

[4] The appellant and her family flew from Adelaide to Brisbane and entered the apartment at about 5.00 pm on 18 April 2009. The appellant soon found the apartment to be in an unsatisfactory state of repair and cleanliness. That day, the appellant noticed: ants behind the toilet cistern; that the shower head was held on with electrical tape and cotton buds; a broken cup under the downstairs couch; clumped up hair and dust in the bedrooms; and dust in the corner of a bedroom.

[5] The following day the appellant noticed, in respect of the master bedroom, that: the air conditioner was mouldy and that water ran out of it when it was operating; there were water marks and peeling paint on the wall; a chest of drawers was warping from being wet and there was scribble on its front; there was "a great pile of hair and fluff and other things" in the corners of the room, especially on the right hand side of the bed-head; there were dirty marks along the walls and around the door handles, which were sticky; an alcove had black scuff marks on its walls, down which some fluid had been spilt; toenail clippings, hair and a condom wrapper were under the bed; the face of the digital clock had been broken off; a lamp on the bedside table was broken from the base; the windows, which opened onto a balcony, were dirty and marked by handprints; and there was rubbish and mould around the base of the balcony.

[6] The appellant noticed that the second bedroom was in a generally similar state to the first, with accumulated hair "all over the floors". There was dust, fluff, hair and toenail clippings under the bed, the wardrobe door handles were sticky and the air conditioner was "black with mould".

[7] Inspecting the bathroom, the appellant noticed mould inside the shower and that the glass shower walls were "covered in soap scum and hand prints". There was hair and fluff around the toilet, mould around the edge of the vanity basin, the vanity mirror was dirty, the door handles were sticky and there were marks, including scuff marks, on the walls and doors.

[8] The internal wooden staircase was sticky. The appellant said that:

> "it was like someone had obviously spilt a drink down it but it had never been cleaned up … and it had like a thick sort of layer with sticky and dirt from people walking up and down. There was dust all in the corners of the ones that had the back on them because the top half of the stairs actually had like a back on it and then as you got down further towards the lower level [there were no risers]."

[9] The handrails to the stairs were dirty.

[10] The appellant explained at length the state of disrepair and lack of cleanliness of the lounge room and kitchen. It suffices, for present purposes, to state that the effect of her evidence was that the condition of these rooms and their furnishings matched that of the other rooms and their furnishings, even to the state of the air conditioning units, the presence of mould and the build up of hair and fluff.

[11] The appellant and her husband filmed the state of the unit and the DVD was in evidence before the primary judge.

[12] The appellant and her family visited Australia Zoo on 19 April. As it appeared that they would arrive back at the apartments after office hours, the appellant spoke to Mr Kallis about the state of the apartment on her mobile phone. He said that he would "get on to fixing the shower head" and would "look at the apartment". When the appellant and her family returned to the apartment around 7.00 pm, she noticed that there had been "a little bit of cleaning done". There had been some sweeping of the balcony downstairs and of the main bedroom. Some rubbish had also been taken away.

[13] On the morning of 20 April, the appellant complained to Ms Stevenson about the state of the apartment. Ms Stevenson said that "she'd had enough of the cleaners and that they were going to be put off that day". She then "held up the keys and said, 'I've got their keys. This is their final day. I'm fed up with them'". She did not, however, offer to have the apartment cleaned and the appellant volunteered to clean it herself. She said to Ms Stevenson in that regard, "Well, I'm not going to have the kids stay for the rest of the week in the place looking like it is". The appellant purchased disinfectant, rubber gloves and cleaning cloths. Ms Stevenson gave her "an indoor broom and … a little brush and shovel … and a mop and a bucket". The appellant asked for a vacuum cleaner but was told that they did not own one.

[14] The appellant decided to do "a full clean" as if she were cleaning a hospital room because "it was so dirty". She scrubbed the walls and doors, swept the floors, wiped the windows down, swept the balcony, scrubbed inside the wardrobes, wiped down the skirting boards and mopped the floors. She noticed that the condom wrapper was still under the bed in the master bedroom and that a considerable amount of rubbish remained.

[15] Towards the end of her cleaning operation, the appellant started work on the stairs. By that time, the appellant, her husband and the children had walked up and down the stairs a number of times. She had noticed "a line of dust from corner to corner" at the back of the stairs where the treads met the risers. She said, "It's not like it was just a little fine thing, it was dust and fluff and hair and it was - you could see it when you walked up the stairs".

[16] The appellant explained that she started at the top of the stairs and wiped each step individually. In the course of this process, distracted by a conversation started by her husband, she "wiped into the left-hand corner at the back of the step". She said, "I sort of wiped in hard and that was when I actually got stuck with the needle". The needle penetrated the right hand glove and the end of the appellant's right index finger where it became stuck. Asked in cross-examination why, "if the needle was in the corner between the stair tread and the runner (sic)", she would not have seen it, the appellant responded:

> "Because it was actually in the back part of the corner. If you look at the photo and you look at the stairs themselves, I said that I wiped into the corner, it was sitting in the crease in the corner when I wiped into it. I had wiped into the corner and it was stuck in there. There's a small gap in there. It wasn't just sitting on the step in the corner. It was in the very back corner of the stairs."

[17] Later in cross-examination the appellant said, "My conclusion is that it was at the very back of the stair and I would not have been able to see it."

[18] This exchange then occurred:

> "So if your evidence is accepted that this was a two centimetre needle, and it was wedged in a crease at the back of the tread, you'd accept that no-one could reasonably see it?-- No, they could not reasonably see it."

[19] Mr Bowen's evidence was that he and his wife had cleaned the subject apartments six days a week over a nine month period. He said that they had done a standard clean on 12 April 2009 for $44. Such a clean was normally done after a guest's departure. He explained, "We change all the linen and clean the apartment, vacuum, clean the showers, do the dishes, empty bins, remove rubbish, yeah, that's a departure clean, yeah". The Bowens ceased work for the respondent on 20 April 2009.

[20] They had cleaned the subject apartment on numerous occasions. The DVD recording was played to Mr Bowen. Asked if the apartment would have been "a lot cleaner" than shown in the DVD if he had cleaned with his usual process, he said "Yes". Mr Bowen was taken by the appellant's counsel in cross-examination to numerous aspects of the state of dilapidation and uncleanliness of the apartment, such as the condom wrapper and toenail clippings under the bed, sticky floors and door handles, dirt and long dark hair on the floors, the taped up shower head with cotton buds, the state of the mirrors and shower screens and stains on the furniture and the walls. He had no recollection of any of those things.

[21] Mr Kallis gave evidence that the apartment was vacant between its cleaning by the Bowens and its use by the appellant and her family.

The primary judge's findings

[22] The primary judge made the following findings.

[23] The cleaning of the stairs "was foreseeable, given the $300.00 security bond for cleaning, the 'sticky' nature of the stairs … and the knowledge that the [respondent] had of the [appellant's] intent to do so (through Ms Stevenson)". Much of the evidence of the Bowens "was based upon a recollection of their standard procedure in cleaning such an apartment" and it was probable that they followed their standard procedure. Had that standard procedure been followed, it "would not have led to any observation of the needle if it were not to be found to be protruding" and it was not protruding. The appellant had "a fairly accurate memory of all that occurred" and "was generally truthful" in her evidence. The primary judge accepted "the evidence of the [appellant] and [her husband] concerning all relevant observations and events on 18, 19, 20 and 21 April 2009 regarding [the apartment]". His Honour found Mr Kallis' evidence lacking in credibility.

[24] The Bowens' standard cleaning procedure involved Mr Bowen vacuuming the internal stairs with a backpack vacuum cleaner. He would "then dampen a *Sabco* flat mop with reasonably hot water, wring it out, obtain wooden floor cleaner which would be sprayed on the end of that mop and then mop each stair down, after which he would use a towel, or clean cloth, and buff the stair off so 'it didn't leave watermarks on it'". The Bowens undertook their standard cleaning procedure on 12 April 2009 without observing the needle. A little earlier in the reasons, the primary judge said:

> "On further cross-examination of him, Mr Bowen asserted that, in vacuuming, he would use 'small connections' so that he could 'get into creases and things like that', crouching down to do that work with the backpack on his back. As well, when using a 'towel' on the stairs after [mopping] he would do so by hand, although with respect

> to the lower part he would use his foot as he went and 'just polish it along'. As for his ability to see a needle such as this one, he did state, in cross-examination, that using his 'three-stage process' and 'being close to the stairs' he 'should have been able to see the needle protruding from the stairs', 'for sure'. I do not accept that such a response means that anyone who had done a clean in this standard way used by Mr Bowen would necessarily have seen this needle, since, in fact, it may well have been lodged in a 'crease' and remained undisturbed by the process used by Mr Bowen, thereby also remaining unobservable (for the reasons I discuss later) and non-protruding.
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> As for the further parts of cross-examination concerning what was shown on the DVD, I do not accept that it detracts in any way from the evidence that Mr Bowen otherwise gave, particularly considering the limited 'cleaning' brief that he had for the areas about which he was closely questioned."

[25] The primary judge did not identify the extent of the Bowen's "cleaning brief".

[26] The primary judge observed that: the appellant, her husband and the children had used the staircase prior to the appellant sustaining her injury; her husband and children often had bare feet; the appellant's husband conceded that he looked down at the stairs when using them; and none of them had noticed the needle.

[27] The primary judge then observed:

> "The most important concession that the plaintiff made (besides the fact that she had sufficiently clear vision of the stairs to be able to notice the stickiness on the surface of the stairs, at least on the way up, and besides her concession that, when you walked up the stairs, 'where the backs of the stairs met there was a line of dust from corner to corner – you could see it as plain as day', where there was no cogent evidence that that dust would have obscured the needle wherever it then was) was that if the needle was wedged in a crease at the back of the tread then 'no one' could 'reasonably see it', adding that if it had been sitting on the top of the tread she would have seen it and picked it up.
>
> …
>
> Accepting, as I do, that any needle which was in fact loose on the stairway on 19 April 2009 and for the seven days before, would have been seen by some one of the several persons who traversed that stairway for various reasons over that time, a reasonable and definite inference is that the needle was sitting fairly flatly in the crease between the tread and the riser – whether loosely at some short distance from the left side runner, or wedged firmly in the corner constituted by the join of the tread, riser and runner on the left most edge. Although I do accept that the needle was so positioned for that period, it is impossible to say when it first came to be within the Apartment…"

[28] The primary judge held that:

- the risk of harm to the appellant was not foreseeable in that it was a "risk of which the [respondent] did not know or … ought not reasonably to have known"; and

- if, contrary to his conclusion, the risk had been foreseeable, then, while the risk would not be insignificant, a reasonable person in the respondent's position "would not have taken any more 'precautions' than those which were taken by engaging the Bowens to clean in their standard way, inspecting their work and inspecting generally (where the object was unobservable to the reasonable observer thereby leading to a low probability of harm)".

[29] The primary judge then said:

> "… as the plaintiff asserted herself, on the only reasonable inference open being that the needle had become positioned in the crease of the particular stair in the stairway where it was not observable (to the reasonable observer), the response of a reasonable person, confronted with the lack of any knowledge of the needle and aware only of the possibility that a drug user might have occupied the Apartment some indeterminate time beforehand, would have been to do no more than what was done, particularly where it has not been established – rather than asserted – that any more competent clean or inspection would have achieved the requisite discovery."

Consideration

[30] It is difficult, with respect, to understand how the primary judge's acceptance of the evidence of the appellant and her husband as to the state of the apartment is reconcilable with the finding that the Bowens' cleaning on 12 April 2009 "did follow a standard procedure". That "standard procedure" in respect of the stairs is described in paragraph [24] hereof. Other content of the standard procedure is described in paragraph [19] hereof. Had that procedure been followed, the apartment, including the stairs, could not have been in the filthy state in which it was found by the appellant and her family. In particular, the stairs would not have had the "layer with sticky and dirt" on them and the appellant would not have been able to detect dust and build up of hairs "right across at the back of the stairs" where the treads met the risers.

[31] The primary judge was right to accept the appellant's evidence concerning the state of the apartment. It was corroborated by her husband's evidence and by the DVD. On the other hand, neither Mr Bowen nor Mrs Bowen had a specific recollection of cleaning the apartment on 12 April. Their evidence to the effect that they would have done a standard cleaning job on that day was contradicted by the DVD.

[32] The primary judge held that the cross-examination of Mr Bowen based on the DVD evidence did not detract from Mr Bowen's other evidence, "particularly considering the limited 'cleaning' brief that he had for the areas about which he was closely questioned". He found also that it was probable that the Bowens followed their standard cleaning procedure on 12 April. It is apparent from these findings that the primary judge mistook the evidence about the Bowens' cleaning role when

undertaking a "standard procedure". It included vacuuming and mopping the floors of all rooms in the apartment, vacuuming furniture, and vacuuming, mopping and wiping the stairs in the manner specified in paragraph [24] hereof. It also involved Mr Bowen cleaning the bathroom and Mrs Bowen cleaning the kitchen. Having observed the DVD, Mr Bowen said that the shower head was never in the condition observed in the video when he was cleaning the apartment and that if he had cleaned the unit in accordance with his usual process "it would be a lot cleaner than that".

[33] The primary judge, by accepting the evidence of the appellant, implicitly accepted the existence of general stickiness and dirtiness on the stairs and the build up of dust, hair and fluff on the treads. He failed to have regard to the evidence, however, when considering where the needle was positioned when it pierced the appellant's finger; whether, and for what reasons, it had not been seen by the appellant, her husband or the Bowens; and whether it was probable that it would have been removed or detected by a cleaner exercising due skill and diligence. The primary judge considered, at length, the opportunities that the appellant, the appellant's husband, Mr Bowen and Mr Kallis had to see the needle if it was visible. He referred to Mr Bowen's evidence of his stair cleaning practice and his evidence that in employing that practice he "should have been able to see the needle protruding from the stairs", "for sure". His Honour observed in that regard:

> "I do not accept that such a response means that anyone who had done a clean in this standard way used by Mr Bowen would necessarily have seen this needle, since, in fact, it may well have been lodged in a 'crease' and remained undisturbed by the process used by Mr Bowen, thereby also remaining unobservable (for the reasons I discuss later) and non-protruding."

[34] His Honour observed that Mr Bowen's ability to see the needle was a matter of speculation on his part. Counsel for the appellant submitted that his Honour's approach to Mr Bowen's speculation was inconsistent with his attitude to that of the appellant.

[35] In all of his discussions concerning the possible location of the needle, the primary judge mentioned the dust and hair on the stairs only once: when speaking of the appellant's "concession that, when you walked up the stairs, 'where the backs of the stairs met there was a line of dust from corner to corner – you could see it as plain as day'". His Honour remarked that "there was no cogent evidence that that dust would have obscured the needle wherever it then was". He then referred to the appellant's other "concession" that "if the needle was wedged in a crease at the back of the tread then 'no one' could 'reasonably see it', adding that if it had been sitting on the top of the tread she would have seen it and picked it up".

[36] The primary judge's quotation of the appellant's evidence did less than justice to her evidence that there "was a build up of dust … not … just a little fine thing, it was dust and fluff and hair … you could see it when you walked up the stairs", or to her observation that there was a "thick sort of layer with sticky and dirt". In my view, an obvious explanation for the failure of the appellant and her husband to see the needle was that it may have been covered, or partly obscured, by the detritus on the stairs. Dust, hair or fluff, or a combination of such materials, could easily break up the outline of the needle making it difficult to see, particularly if it also had a build up of dust on it. It could, of course, have been under a layer of such materials. The general grime and stickiness on the surface of the treads would have also obscured the visibility of small objects such as the needle.

[37] The appellant's evidence that the needle was "stuck [in the corner]" can be no more than speculation. She was not looking into the corner when she wiped into that area and she felt the needle penetrate her index finger. The needle could have been on the stair tread and, when pushed by the appellant's glove, it could have been forced into the appellant's finger when it met the resistance of the riser or the side of the stringer.

[38] It was unlikely that the needle was "wedged firmly" as it penetrated the end of the appellant's finger and became lodged in it until she pulled it out. The other possibility mentioned by the primary judge, that the needle was sitting fairly flatly in the crease between the tread and the riser, was based on speculation by the appellant in an attempt to explain how she had missed seeing it. However, the fact that the needle was moved from wherever it was so that it penetrated the end of a gloved finger and remained there until removed does not suggest that it was seated or lodged in any narrow groove so that it would not have been visible even if not obscured by the build up of dirt, dust, hair and fluff.

[39] There is no sufficient reason to conclude that the needle, if it had been dislodged by the appellant's cleaning, would not have been likely to have been dislodged or detected by a cleaner using normal skill, diligence and equipment.

[40] It was not suggested that the mode of cleaning which Mr Bowen said he utilised was anything other than conventional. It involved the use on the stairs of a vacuum cleaner (with a brush and "small connections … [to] get into creases and things like that"), a mop and a towel or rag to polish.

[41] It is apparent from the foregoing analysis that the primary judge's findings in respect of the cleaning, if any, done on 12 April by the Bowens are unsustainable. It is apparent also that the primary judge laboured under a misapprehension about, disregarded or failed to take into account sufficiently, the appellant's evidence about the build up of detritus on the stairs. The primary judge thus "'has failed to use or has palpably misused his advantage'[1] [and] has acted on evidence which was 'inconsistent with facts incontrovertibly established by the evidence' or which was 'glaringly improbable'[2]".[3] Accordingly, this Court must make its own findings on the facts, at least in respect of those matters affected by the primary judge's errors and omissions. Fortunately, this Court, having due regard to the primary judge's other findings and the objective evidence, can regard the appellant and her husband as credible witnesses and adopt the primary judge's reservations about Mr Kallis' evidence.

[42] The Further Amended Statement of Claim (the Statement of Claim) relevantly alleged:

> "3. It was an implied term of the contract referred to in paragraph 2 hereof that the premises would be clean, tidy and in a safe condition when let to the [appellant].
>
> 3A. Further it was an implied term of the said contract, and/or it was the duty of the [respondent], its servants or agents, to

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1 *S.S. Hontestroom v. S.S. Sagaporack*, [1927] AC 37, at p. 47.

2 *Brunskill* (1985), 59 ALJR, at p. 844; 62 ALR, at p. 57.

3 *Devries v Australian National Railways Commission* (1993) 177 CLR 472 at 479 per Brennan, Gaudron and McHugh JJ.

ensure that the said apartment was as safe for the purpose of residing in as reasonable care and skill could make it.

4. Further, it was the duty of the [respondent], its servants or agents, to take reasonable care to ensure that [the apartment] of the premises was in a clean, tidy state and in a safe condition when let to the [appellant] and her family.

4A Further:

(a) the said Apartment was supplied by the [respondent] to the [appellant] in trade or commerce;

(b) the [appellant] was a consumer;

(c) there was a term implied into the said contract:

(i) pursuant to s.74(1) of the *Trade Practices Act 1974*, that the [respondent] would use due care and skill in the supply of the said Apartment to the [appellant] and any materials supplied would be reasonably fit for the purpose for which they were implied…"

[43] Bonapartes Serviced Apartments were defined as "the premises" and "said Apartment" was a reference to the subject apartment.

[44] The Second Further Amended Defence (the Defence) relevantly alleged:

"3AB. As to paragraph 3A of the Further Amended Statement of Claim the [respondent] denies the allegation therein because:

(i) the [respondent] does not know and the [appellant] has not pleaded what the alleged factual or other basis is for the implication of such a term;

(ii) the term as pleaded involves incorrect conclusions of law;

(iii) says that the correct expression of the contractual term implied by law was that the [respondent] warranted that the premises would be as safe as reasonable care and skill could make them; and

(iv) says that the correct expression of the duty of care owed at law was that the [respondent] would take reasonable care to make the premises safe for entrants such as the [appellant].

3BB. As to paragraph 4 of the Further Amended Statement of Claim:

(i) the [respondent] denies it was under a duty by its servants or agents to take reasonable care to ensure that

> [the apartment] of the premises was in a clean, tidy state and in a safe condition when let to the [appellant] and her family; and
>
> (ii) the [respondent] says that it was under a duty to take reasonable care to make the premises safe for entrants such as the [appellant].
>
> 3.A In relation to the facts alleged in paragraph 4A of the Amended Statement of Claim, the [respondent]:
>
> …
>
> **(c) admits that the contract between the [appellant] and the [respondent] contained an implied term that the apartment would be reasonably fit for its purpose, being short term accommodation and further, that services provided by the [respondent] to the [appellant] being the supply of short term accommodation would be provided with due care and skill;**
>
> …
>
> (d) Further or in the alternative, the [respondent] says that it did exercise due care and skill in the supply of the services, being short term rental accommodation to the [appellant] in that it engaged cleaners to ensure that the apartment was in a clean, tidy and safe condition and reasonably fit for its purpose." (Emphasis added)

[45] It may be seen that, although paragraph 3A of the Statement of Claim is concerned with the "apartment", paragraph 3AB(iii) of the Defence, which responds to paragraph 3A, refers to the contractual term implied in respect of "the premises". It is plain, however, that the reference in paragraph 3AB was intended to be to the "apartment" and not the "premises". That was the way in which the case was conducted at first instance and on appeal.

[46] Senior counsel for the respondent submitted that, notwithstanding the existence of the duties of care identified in the pleadings, the appellant could not establish that any breach of duty caused her injury and loss. In this regard, reliance was placed on the failure by the appellant, her family and the Bowens to detect the needle coupled with the appellant's evidence that the needle was wedged in a gap in the step's back corner and the primary judge's inference "that the needle was sitting fairly flatly in the crease between the tread and the riser". It was submitted that this was a finding with which this Court could not interfere, being an inference properly drawn from competing inferences by reference to the facts properly found by the primary judge. Reliance on this aspect of the primary judge's findings is misplaced for the reasons already given.

[47] The implied contractual duty of care was, as pleaded by the appellant, "to ensure that [the apartment was] as safe for the purpose of residing in as reasonable care and

skill on the part of anyone can make [it]". That accorded with the duty of care owed to contractual entrants stated in *Watson v George*.[4]

[48] The respondent contended that the *Civil Liability Act* 2003 (Qld) (the CLA) applied to the contractual and tortious claims and to the claim that relied on the first limb of s 74(1) of the *Trade Practices Act*. I have reservations about the proposition that the common law duty that the subject premises be rendered "as safe for the purpose of residing in as reasonable care and skill on the part of anyone can make them"[5] can be said to be coextensive with a duty of care in tort "… to take reasonable care or to exercise reasonable skill (or both duties)".[6] However, in *Calin v Greater Union Organisation Pty Ltd*,[7] Mason CJ, Deane, Toohey and McHugh JJ concluded, in effect, that although in *Australian Safeway Stores Pty Ltd v Zaluzna*[8] the High Court had declined to hold that the liability of an occupier to a person permitted by the occupier to enter a premises for reward should be determined by the application of the general principles of negligence rather than under the "principle established in *Watson v George*", in the circumstances there under consideration, the *Watson v George* standard equated to the duty imposed under the general principles of the law of negligence to take reasonable care to avoid a foreseeable risk of injury to the entrant. High Court decisions subsequent to *Calin* have confirmed that the duty of care owed to contractual entrants to premises is that stated in *Watson v George*.[9]

[49] Section 74(1) of the *Trade Practices Act* provides:

> "(1) In every contract for the supply by a corporation in the course of a business of services to a consumer there is an implied warranty that the services will be rendered with due care and skill and that any materials supplied in connexion with those services will be reasonably fit for the purpose for which they are supplied."

[50] Senior counsel for the respondent accepted that the first limb of s 74(1) encompassed the provision of a safe and habitable apartment and the obligation to exercise due care and skill in its cleaning. He argued, however, that as s 74(1) implied a contractual term, the CLA applied to the duty imposed by it. That contention accorded with the primary judge's finding in respect of the first limb of s 74(1).

[51] The primary judge held that the second limb was not applicable. Counsel for the appellant argued that the primary judge erred in this respect and that the apartment's stairs were "materials supplied in connexion with" the services supplied by the respondent to the appellant. He drew attention to the wide definition of services in s 4 of the *Trade Practices Act*, which includes:

> "… rights (including rights in relation to, and interests in, real or personal property), benefits, privileges or facilities that are, or are to be, provided, granted or conferred in trade or commerce …"

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4 (1953) 89 CLR 409 at 415–416 per Williams ACJ; at 423–424 per Fullagher J; *Calin v Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 at 38.

5 Appellant's submissions at 8.

6 *Civil Liability Act* 2003 (Qld), Schedule 2.

7 (1991) 173 CLR 33 at 38.

8 (1987) 162 CLR 479.

9 *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460; *Hoyts Pty Ltd v Burns* (2003) 77 ALJR 1934; *Neindorf v Junkovic* (2005) 80 ALJR 341.

[52] The application of the second limb of s 74(1) would have been of benefit to the appellant as the respondent's liability would not have depended on whether it had exercised reasonable care.[10] The need to establish causation would have remained but the conditions imposed by the CLA would not have applied.

[53] The *Trade Practices Act* does not contain a definition of "materials". My impression is that s 74(1) appears to regard "materials supplied" as being distinct from the "services" supplied or "rendered" and it is far from obvious to me that part of the structure of an apartment under a contract to supply a service falls within the meaning of "materials". There is, however, some support for the appellant's argument in *Gharibian v Propix Pty Ltd*[11] (a toboggan run in a recreational park) and *Fugro Spatial Solutions Pty Ltd v Cifuentes*[12] (an aircraft used pursuant to a contract for the carriage of goods). I do not, however, find it necessary to decide any of these issues. For reasons which will soon become apparent, I am content to proceed on the basis that the CLA applies.

[54] The respondent argued that the "but for test" imported by s 11 of the CLA had not been satisfied by the appellant. Reliance was placed on the following passage from the reasons of the Court in *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson*:[13]

> "The 'but for' test serves, in this field of discourse, as a negative criterion. That is to say, unless the defendant's actionable conduct is shown to be a necessary condition of the plaintiff's injury, the plaintiff's claim will not succeed. Thus, in *Amaca v Ellis* at [11]-[12], it was accepted that a plaintiff must show on the balance of probabilities that the actionable conduct of the defendant was a necessary condition of the occurrence of the harm in respect of which the plaintiff claims damages. It is true, as counsel for Mr Peterson pointed out, that this rule was not the subject of argument in *Amaca v Ellis*; but it is also true that this rule represents the law in Australia binding on all courts below the High Court."

[55] A little later in its reasons, the Court expressed agreement with the following observation of Allsop P in *Evans v Queanbeyan City Council*:[14]

> "… Subject to the views of the High Court in respect of any development of the common law or to the operation of any legislation, it can be concluded that at common law, as a general proposition, the increasing of risk of harm by a tortious act is, alone, insufficient for a conclusion of causation by material contribution to that harm or for a conclusion of responsibility in law for that harm."

[56] In my view, the "but for test" as well as the practical or commonsense concept of causation discussed by Deane J in *March v Stramare (E & MH) Pty Ltd*:[15]

> "… whether an identified negligent act or omission of the defendant was so connected with the plaintiff's loss or injury that, as a matter

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10 *Gharibian v Propix Pty Ltd* [2007] NSWCA 151; *Fugro Spatial Solutions Pty Ltd v Cifuentes* [2011] WASCA 102.
11 [2007] NSWCA 151.
12 [2011] WASCA 102.
13 (2011) 196 FCR 145 at 169.
14 [2011] NSWCA 230 at [22].
15 (1991) 171 CLR 506 at 522.

> of ordinary common sense and experience, it should be regarded as a cause of it"

were met in the circumstances discussed above.

[57] The respondent's conduct did not merely increase the risk of harm but, the failure to render the apartment "as safe as the exercise of reasonable care and skill on the part of anyone [might] make [it]", left it in a filthy condition. As a direct result of that condition, it is probable that the needle was obscured from the appellant's vision when cleaning the step on which it was positioned. The stairs not only had a build up of dust, hair and fluff along the line at which the risers joined the treads, they were dirty and sticky. Thus, not only was the needle likely to have been obscured from vision but, the area in which the needle was located was in obvious need of thorough cleaning. Such a cleaning would have required a careful application of appropriate cleaning materials including the use of suitable vacuum cleaner fittings. As remarked earlier, there is no good reason to conclude that, although the needle was located and moved by the appellant's cleaning, it would not have been discovered and/or removed by a contract cleaner whose task it was to leave the apartment in a clean, tidy and habitable condition. Nor is there good reason to conclude that such a contract cleaner would not have followed a procedure similar to the one just described.

[58] Senior counsel for the respondent also submitted, in a general way, that the foreseeability of any relevant risk was not established. In my view, there was a foreseeable risk of injury to the appellant of which the respondent knew or ought to have known. The risk was of an injury which may have been grave in consequence of the appellant being cut by, impaled on or falling as a result of unremoved objects or general detritus. The build up of filth in the apartment increased the risk that things such as shards of glass, safety pins, pins and needles would lie unobserved until stood on or touched by an occupier. And it was to be anticipated that the occupier would be likely to walk about the apartment in bare feet and that some cleaning of the stairs, because of their state, could be by hand. The general state of the apartment also gave rise to broader health issues. It was foreseeable that a person injured physically might, in consequence, suffer psychiatric impairment.

[59] A reasonable person, in the position of the respondent, would have taken the precaution of properly cleaning the premises. Such cleaning was no more than that which a provider of services in the position of the respondent would deem necessary to provide in order to attract customers and which a user of services in the position of the appellant would consider acceptable.

Conclusion

[60] For the above reasons, I would order that:

1. The appeal be allowed.

2. The judgment given on 23 July 2012 be set aside and that in lieu thereof it be ordered that the respondent pay the appellant $494,759.38 together with interest thereon from 23 July 2012 at the rate of 10 per cent per annum.

[61] The Court was informed that offers made by the parties may be relevant to the question of costs. Accordingly, I would direct that the parties file and exchange

written submissions on costs within 7 days of the date hereof unless they have reached agreement within that time as to the appropriate costs order and have informed the Registry of it.

[62] **MARGARET WILSON J**: I agree with the orders proposed by Muir JA and with his Honour's reasons for judgment.

[63] **DOUGLAS J**: I agree.