SUPREME COURT OF QUEENSLAND

CITATION:	*Rogers v Body Corporate for Waterloo Crest CTS 25235 & Anor* [2007] QSC 369
PARTIES:	**JODIE LEE ROGERS** **(plaintiff)** **v** **BODY CORPORATE FOR WATERLOO CREST COMMUNITY TITLES SCHEME 25235 (ABN 68 010 752 351)** **(first defendant)** **LIFETIME SECURITIES (AUSTRALIA) PTY LTD (ABN 010 752 351)** **(second defendant)**
FILE NO/S:	BS1794 of 2001
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	6 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	16-17, 20-21 August 2007
JUDGE:	Mullins J
ORDER:	**1. The plaintiff's proceeding against the first and second defendants is dismissed.** **2. The first defendant's third party proceeding against the second defendant is dismissed.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – GENERALLY – where plaintiff suffered a serious neck injury after falling down a flight of stairs of a unit complex that was in the common property outside the unit occupied by the plaintiff – where plaintiff claimed that she activated the timer light in the stairwell, but it turned off as she descended the stairs – where plaintiff alleged that the body corporate breached its duty of care to maintain the common property in good condition – where the body corporate engaged a building manager to keep the body corporate informed about the condition of the common property – where plaintiff alleged that the building manager also breached its duty of care – where accident occurred at a time when the natural lighting in the stairwell was dim – where light switches in the stairwell were not faulty – where light, when activated properly, would stay on sufficient time to enable a person to walk down the stairwell – where plaintiff knew how to activate the light switch properly –

where plaintiff failed to activate the light switch properly – where plaintiff failed to show that either the body corporate or the building manager breached the duty of care owed to the plaintiff

Body Corporate and Community Management Act 1997, s 36, s 152
Body Corporate and Community Management (Accommodation Module) Regulation 1997, s 108
Residential Tenancies Act 1994, s 103

Jones v Bartlett (2000) 205 CLR 166

COUNSEL: RW Trotter for the plaintiff
SJ Given for the first defendant
RA Alldridge for the second defendant

SOLICITORS: Anderssen & Company for the plaintiff
Moray & Agnew for the first defendant
Toogoods for the second defendant

[1] **MULLINS J:** The plaintiff suffered a neck injury when she fell down the stairs outside the unit in which she resided at Wynnum West on 29 December 1999 (the accident). The plaintiff claims damages for negligence and/or breach of statutory duty from the first defendant and damages for negligence from the second defendant. The first defendant is the body corporate for the unit complex and the entity which is liable to be sued as if it were owner of the common property: s 36 *Body Corporate and Community Management Act* 1997 (the Act). The second defendant was the building manager for the unit complex under an agreement with the first defendant dated 20 January 1998 (the agreement). The first defendant alleges that the accident was caused by the second defendant's breach of duty or negligence and claims a complete indemnity or contribution against the plaintiff's claim. The second defendant was the project manager and builder of the complex, but not the owner of the units in the complex. The second defendant was also the proprietor of the real estate agency of Raine & Horne Carina/Carindale from about 1996 until 30 June 1999.

Personal circumstances of the plaintiff

[2] The plaintiff was born in February 1981. Whilst at school she had casual jobs at food outlets and a retail store. She finished year 12 at the end of 1998. Her son was born in March 1999. The unit was rented as from March 1999 by the plaintiff's stepfather for the plaintiff and her fiancé to occupy. The tenancy agreement was in Form 18a under the *Residential Tenancies Act* 1994 (*RTA*) and Part 1 of the signed tenancy agreement including the signature page was exhibit 28. The plaintiff and her fiancé are shown as the permitted occupants. The lessor is shown in the tenancy agreement as Raine & Horne Carina/Carindale, even though that agency was not the owner of the unit. The plaintiff's mother at material times was employed in the sales section of Raine & Horne Carina/Carindale. The plaintiff's fiancé commenced living in the unit prior to the plaintiff. The plaintiff moved to the unit in May 1999 with her baby. Prior to the accident, she worked casually as a kitchenhand.

The accident

[3] The plaintiff said that around 4am on the date of the accident she got up because she had been awakened by her son who was due to be fed. The plaintiff heated a bottle in the microwave and fed her son. She decided to take some rubbish from the kitchen down to the bin. She was not wearing shoes. She went out through the front door of the unit with the rubbish in her left hand. She estimated that it was between 4.30am and 4.45am. She used the thumb on her right hand in a backward movement to depress the button in the centre of the pneumatic switch that was for activating the light over the stairwell. She used her left foot to hold the door of the unit open, as she activated the light. The light was on as the plaintiff went to walk down the stairs, her heel slipped and she fell down about four stairs and hit her head on the internal brick wall.

Issues

[4] As between the plaintiff and the defendants, both liability and quantum are in issue. Liability for the accident, as between the defendants, is also in issue.

[5] The specific issues raised in the trial are:

(a) what was the cause of the accident?

(b) what was the content of the duty of care or any statutory duty owed by the first defendant to the plaintiff?

(c) was the accident caused by the breach by the first defendant of any duty owed to the plaintiff?

(d) what was the content of any duty of care owed by the second defendant to the plaintiff?

(e) was the accident caused by the breach by the second defendant of any duty owed to the plaintiff?

(f) if the first defendant is liable for the plaintiff's accident, is the second defendant liable to indemnify the first defendant in respect of the plaintiff's claim against the first defendant?

Evidence relevant to the cause of the accident

[6] The plaintiff's unit (number 18) is at the top of a flight of stairs. There are seven steps from the top of the flight to the middle platform and then a further six steps to the entrance area next to the front door. The stairs change direction at the middle platform. Standing in the doorway of the unit and looking toward the stairs, there is a light switch to the right of the door to the unit. The light switch is a push-activated timer switch that enables the lights above the stairwell to be switched on and stay on for a preset amount of time whilst descending the stairs. The amount of time the light stays on when the switch is fully depressed depends on where the dial at the rear of the light switch is set. There is also a push-activated timer switch next to the front door of the complex at the foot of the stairwell which operates the same lights. The stairs were carpeted and there was a handrail. There was a skylight in the stairwell.

[7] Although it is not in issue that the plaintiff suffered an injury to her neck when she fell down the stairs, there was much evidence that related to how the accident was caused. Apart from the plaintiff herself, the plaintiff relied on the evidence given by her parents, her sister, accident investigator Mr Wilson and Ms Wallace (who was

another tenant of the complex) of their observations of the operation of timer light switches in the stairwell that was used to access the plaintiff's unit. On this aspect the first defendant called Mr Mohr who was engaged by the second defendant as the cleaner of the complex at the relevant time. The second defendant called two employees of Raine & Horne Carina/Carindale, Ms Newton and Ms Jeffery, in respect of the operation of the timer light switches and relied on the evidence of its director Mr Collins and an electrician Mr Bennett dealing with the removal of the timer light switches.

The plaintiff

[8] The plaintiff said that the timer light switch outside her unit door was faulty the entire time that she lived at the unit. The plaintiff said that she always fully depressed the button on the timer light switches. The plaintiff demonstrated how she pushed the button in and used her thumb. The plaintiff knew that she had to push her finger on the button so that it went into the wall. She said during evidence-in-chief that on occasions she could press the light in and it would stay on for no longer than 15 seconds and on other occasions when she pressed the light in, it would "flick out" straight away. In cross-examination when the plaintiff was describing the words she used when making a complaint about the lights at the front counter of Raine & Horne Carina/Carindale, she said "The lights keeping going on – when you flick it on, it will either go for one minute or it will flick straight back out again." This suggests that the timer light switch when activated may have caused the light to be illuminated for one minute. When the light did go out straight away, the plaintiff said that she would press it in again to reactivate the light. The plaintiff said that when the light stayed on for 15 seconds, there was plenty of time to walk briskly down the stairs. Although the plaintiff said that the light switch at the bottom of the stairs operated in exactly the same way as the one outside her unit door, she also said that she never really used the bottom light switch.

[9] The plaintiff's first description of the accident was that (Transcript (T) 19):

> "…the rubbish was in my left hand, my right hand turned on the light, my foot was holding the door open as the light was still – my light in my unit was still on, because it was (*sic*) quite dawn and dark in the stairwell, went to walk down the stairs, the light was on, when I hit the first step the light went off, my heel slipped on the tread of the second step, and I fell down approximately four stairs, hit my head on the internal brick wall."

[10] The plaintiff expanded on this description in cross-examination (T77):

> "You said you turned it on with your right hand?-- Yeah.
>
> So you had to what, turn around and face the wall to turn it on?-- No, I had – I opened up my door and I had my foot open and I pressed the button in like that.
>
> You did a backhand push, right?-- Yeah.
>
> You sure it's not possible that you mightn't have depressed it properly in that position?-- No, because when you push it your finger actually goes in with it."

[11] The plaintiff said that she did not normally take out the rubbish so early in the morning, but on the day of the accident she made a spur of the moment decision to take the rubbish out after she had put her son back into his cot.

[12] The plaintiff said that it was also the first occasion on which the button of the light had popped out when she had reached the first step, rather than straight away (T46). The plaintiff also said that when the light went off, it was "shock value" and that she did not have hold of the hand rail, and went to grab it with her right hand, but did not get a full grip of it (T62).

[13] The plaintiff was cross-examined on any problems she had encountered with the stairs (T36):

> "[W]hen you did go up and down the stairs all day, you never had any trouble with the top step or the second top step, did you?-- There were a little bit far apart, but no, I don't have any problem with them.
>
> No problems with them. Even though they may have been far apart – sorry, all right. I will use your words. Even though they may have been a little far apart, they didn't ever cause you any tumbles?-- I tripped once but that was about it in my whole time I was there.
>
> You didn't even report it to Raine & Horne that you thought there was a major problem with that step, did you?-- No. My problem was the light."

The plaintiff confirmed that she did not regard the change in the height of the top step or the second top step as being of any significance at all or warranting a complaint to the agent (T38).

[14] In cross-examination, the plaintiff described the accident in these terms (T42-T43):

> "Which step do you think you slipped on?-- I got on to the first step and the light went off, so the second step I actually missed it.
>
> All right. So you had gone from the landing to the first step?-- Yes.
>
> And the light went off and it's the second step down that you recall your foot slipping; is that right?-- Yes."

The plaintiff was then asked to mark a photograph (exhibit 25) with an "X" where she said her foot slipped. She marked the "X" just below the tread of the first step below the landing. The cross-examination on where the "X" was marked was as follows (T43):

> "You've marked the X just below the tread of the first step?-- Yeah.
>
> Is that where your foot slipped from?-- Yes, when I went to walk on to the second step.
>
> So you went from the first step to the second step and your top foot slipped, did it?-- My heel.

> Your heel, your top heel, slipped from the first step?-- Well, second step it's classed to me.
>
> You see where you've put the X?-- Yeah, I've walked down the first step, gone to go to the second step and I've slipped it."

[15] Further cross-examination of the plaintiff on this evidence of where she fell was as follows (T44):

> "So where did your heel – which – did the heel on the second step slip or the heel on the first step slip?-- Where I've marked it, going on to the second step.
>
> All right. So is it over the edge of the first step?-- Yes, going on to the second step.
>
> Okay. So your foot didn't actually reach the second step?-- No, I missed it.
>
> I see. All right. So the foot that was on the first step, was that the foot you were aiming for the second step?-- My right foot was landed on the first step and my left foot missed the second step.
>
> No, your left foot – the way you've marked it there, your left foot has got caught on the first step, hasn't it, as it went to the second?-- No, I've walked down – I've walked down, my right leg landed on the first step, my second – my left heel slipped on that mark and I fell backwards.
>
> Okay. So your heel slipped on the lip of the first step, not on the tread of the second step?-- No, I missed the second step.
>
> Did your heel make contact with any part of the step?-- Yeah.
>
> Your left heel?-- Yeah, it was on – going off the first step to the second step.
>
> All right. So it's come into contact with the first step. It hasn't come into contact with the second step?-- No, I missed the second step."

[16] After the lunch break that followed the giving of that evidence, the plaintiff stated that her foot slipped on the second step and that she had marked the photograph incorrectly before lunch (T67). The plaintiff then marked the photograph (exhibit 25) with a red circle to show that she slipped on the top of the second step below the landing (which was one step lower than where she had marked the "X" on the same photograph).

[17] The plaintiff related an incident when her mother first came to visit her at the unit in about May 1999. The plaintiff's mother is claustrophobic and had a panic attack in the stairwell when the light went out as she was ascending the stairs. As a result, when the plaintiff's mother visited the unit, she would use the intercom when she was outside the complex, the plaintiff would go downstairs and open the door for her and then return to the unit, the plaintiff's brother or sister would hold in the light

as the plaintiff's mother walked up the stairs and the plaintiff would be at the top of the stairs holding the door of the unit open for her mother. A similar system was then used when the plaintiff's mother left the unit.

The plaintiff's sister

[18] The plaintiff's sister was born in March 1990 and was therefore only nine years old when the plaintiff moved into the unit. The plaintiff's sister was present on the first occasion that the plaintiff's mother went over to see the plaintiff and described her mother's panic attack and the steps the family then took to ensure that the light would not go off when the plaintiff's mother travelled in the stairwell.

[19] The plaintiff's sister's evidence about the manner of operation of the timer light switches was that the light would not stay on when the button was pressed in, but the button would pop back out after about 10 or 15 seconds. When asked how she estimated that time of 10 or 15 seconds, the plaintiff's sister said "that's the general estimate that we got". The plaintiff's sister conceded that she had discussed her evidence with her parents and the plaintiff in the couple of months before the trial and they had discussed how long it took for the light to go off.

The plaintiff's stepfather

[20] The plaintiff's stepfather would generally visit the unit about once each week. He said that because of his wife's issues with closed spaces, the family always made sure that when they visited the unit, somebody held the button down in the light switch so that it would not go out.

[21] The plaintiff's stepfather said that when he used the stairs and had pressed the button on the light switch at the top of the stairwell, it would go out within 7 or 8 seconds to 20 or 30 seconds and was variable.

The plaintiff's mother

[22] From the time the plaintiff moved into the unit, the plaintiff's mother visited the plaintiff at least once each week. The plaintiff's mother described that on her first visit to the unit she was caught on the stairs in darkness, after having activated the push button light, but it went out. Because of that incident, the plaintiff's mother never put herself in the situation again where it was possible the light might go out and therefore was not in a position to give any other observations on the usual operation of the timer switches.

Mr Wilson

[23] The plaintiff's solicitors had arranged for an investigator, Mr John Wilson, to attend at the complex on 4 May 2000. On that day Mr Wilson tested the push button light switches at both the top and bottom of the stairwell leading to unit 18 and ascertained that both appeared to function correctly. Mr Wilson ascertained that the lights remained on for approximately 15 seconds after the button was fully depressed. Mr Wilson prepared a report that was exhibit 2. The report did not record how Mr Wilson measured the time that the lights remained on when activated. All Mr Wilson could state in cross-examination was "I believe I recorded it with my stopwatch to get the times." Mr Wilson also "believed" that he did not walk up and down the stairs when the lights had been activated.

Ms Wallace

[24] Ms Wallace had gone to school with the plaintiff. Ms Wallace moved into unit 14 in the complex in late 1999, before the plaintiff's accident. Ms Wallace had used the stairwell to visit the plaintiff before the accident. Ms Wallace said that about a fortnight before the accident, she noticed that the button on the timer light switch used to "flick out" after she had pushed it in. She stated that it happened on two occasions. She also said that when the light stayed on, it would stay on for about 15 seconds which was enough time to get up the stairs. Ms Wallace was present when Mr Wilson tested the timer light switches and agreed that the time the lights stayed on when Mr Wilson tested them was the same period they had stayed on previously, when they were working. Ms Wallace stated that the lights at the bottom and the top of the stairs worked the same. Ms Wallace stated that sometimes the light switches worked and sometimes they did not.

Mr Mohr

[25] At the time of the accident Mr Mohr had a contract with the second defendant to clean the common areas (including the stairwells) of the unit complex. He would do the cleaning twice each week. There were a number of stairwells, but he adopted the same procedure in cleaning all the stairwells. As he walked into the stairwell, he turned the light on by pressing the button at the bottom of the stairs. He then carried his backpack vacuum cleaner up the stairs and would vacuum as he descended, giving the handrails a wipe for dust on the way down. He would then mop the tiled area at the bottom of the stairs and clean any glass in the doors. He found that some lights went off a little earlier in some stairwells than others, but generally he could do the first half of his cleaning on most of the stairwells before the lights went out. He thought that one stairwell, the light lasted only about two minutes and that was the one that he generally had to stop and press the button on the light again, but the others were on for around five minutes. The only time that he had problems was if he did not press the button on the light switch all the way in or if his finger had slipped off, so that the light would go out earlier than it usually did.

Ms Newton

[26] Ms Newton had lived next door to the plaintiff's mother when the plaintiff was a child. Ms Newton was therefore acquainted with the plaintiff. Ms Newton was the personal assistant to Ms Kay Jeffery who was the manager of Raine & Horne Carina/Carindale until the second defendant sold the agency. Ms Newton then became one of two property managers in the property management section of the agency. This required Ms Newton to manage properties in the agency's rental portfolio including the complex at which the plaintiff resided, although Ms Newton did not have the sole responsibility for rental properties in that complex. As Ms Newton said that the agency did three monthly inspections of each unit in the complex that was under its management, Ms Newton estimated that she had visited the complex (although not necessarily the stairwell leading to the plaintiff's unit) at least three or four times in the second half of 1999. Ms Newton used the timer light switches in all the buildings in the complex, and she did not observe any problems with the switches. Ms Newton's recollection about that part of the complex in which the plaintiff's unit was located was not accurate, however, as she thought that the stairs went straight up to the unit, rather than changing direction.

[27] Ms Newton could recall the plaintiff's mother telling her after the accident that the plaintiff had a fall down the stairs outside her unit. Ms Newton said that she did not

ask the plaintiff's mother how the accident happened, although she did ask both the plaintiff and the plaintiff's mother from time to time how the plaintiff was. The reason that Ms Newton gave in the course of her evidence for not inquiring about how the accident happened was very plausible in the circumstances.

Ms Jeffery

[28] Ms Kay Jeffery confirmed that until she ceased employment with the agency on 30 June 1999, she had visited the complex on a number of occasions with Ms Newton to carry out inspections of rental properties. She stated that the general inspections were done every six months. She did not recall any of the timer light switches in any of the stairwells in the complex not working properly.

Mr Collins

[29] Mr Ralph Collins has been a director of the second defendant since it was incorporated. He did not become aware of the allegation that the plaintiff fell down the steps because of a faulty light switch in the stairwell until the second defendant was served with process in this proceeding in 2001. Mr Collins then made arrangements with electrician, Mr Colin Bennett, to have the timer light switches tested.

Mr Bennett

[30] Mr Bennett confirmed that he was instructed to remove the timer light switches from the stairwell. He described them as pneumatic switches, so that when you push the button in, the light is activated. He tested them by pushing the button in to activate the light and waiting and that after about two minutes the light went off. He removed the light switches from the bottom and the top of the stairwell leading to the plaintiff's unit, put two new timer light switches in and took the removed light switches to the premises of Clipsal in Brisbane. The light switches were marked with an "X" and an "O" to identify which came from the bottom and which came from the top of the stairwell, although at the trial Mr Bennett could not recall which mark related to which position.

[31] Mr Bennett explained that the adjustment mechanism for the timer on those lights is on the switch at the rear of the fitting which is hidden by the face plate of the switch when it is installed. Mr Bennett explained that the adjustment mechanism can be wound around to reduce or increase the time that the light remains on. Mr Bennett did not adjust the mechanism on the back of the light switches after removing them from the wall and before delivering them to Clipsal.

Expert evidence relating to the cause of the accident

[32] The first defendant called the employees of Clipsal who tested the timer light switches removed from the stairwell. The tests were conducted by electrical engineer Mr Erno Jo and reviewed by his supervisor who was another electrical engineer, Mr Les Blaszczyk. The report of the test is dated 5 February 2002 (exhibit 35). The engineers received the switches from the Quality Assurance Department of Clipsal in Queensland. The tests were conducted between 23 and 29 January 2002. The first set of testing was to check the operation of the timer, the next testing was the reliability of the switching action at the rated current and the last testing was internal inspection of the mechanism. Mr Jo stated that it was not until the final testing phase that involved the disassembly of the assembly that the

timing of the switch may have been altered. There was no alteration by Mr Jo of the setting for the timers when undertaking the first two stages of the testing.

[33] The report shows that each of the timers was tested for 10 operations to check the timing. The switch which is marked on the reverse with "XX" (exhibit 27(1)) showed an operation time on each cycle between 1 minute 48 seconds and 1 minute 53 seconds. The timer with the identification marking "OO" (exhibit 27(2)) operated at 4 minutes 16 seconds on the first operation, between 6 minutes 4 seconds and 6 minutes and 48 seconds on the next eight operations and 5 minutes 56 seconds on the last operation. For this timer switch the report notes that the discrepancy in the operation of the timer was due to the push button being pressed at a particular direction resulting in the push button releasing partially and shortening the timer duration. The report notes this was explicable by reference to gradual aging of the rubber seal in the unit and resulted in a marginal deterioration in performance only and would not result in the product being considered faulty.

[34] For the second stage of the testing each sample was wired to a 10A resistive load and operated a minimum of 20 operations. Neither timer switch showed any signs of intermittent contact.

[35] The conclusion in the report is that the two timer switches were not faulty and it was stated "Both units offer a reliable switch action without any intermittent contact evident, and both units had a reasonably consistent timing period when operated normally." The report suggests possible reasons for claimed non-operation of the timer switches could be that lamps in the light fitting were not functioning, the timer actuator may not have been fully depressed or the circuit breaker controlling the lights may have tripped or been turned off.

[36] Consulting engineer, Dr Justin Ludcke, prepared two reports (exhibits 3 and 4) at the request of the plaintiff's solicitors on the factors relating to the plaintiff's accident. Dr Ludcke is employed by The InterSafe Group Pty Ltd which prepares accident analysis reports at the request of organisations including the legal profession. Another employee had inspected the stairwell and taken measurements and photographs and these were relied on by Dr Ludcke together with the information he obtained from an interview with the plaintiff in April 2003.

[37] Dr Ludcke relied on the measurements that showed that the riser height from the top landing (outside the unit) to the first tread measured approximately 205mm, while the height from the first tread to the second tread measured 172mm. Dr Ludcke expressed the opinion that this variation in excess of 30mm is greater than the 5mm recommended by research for the design of stairways and stated "This reduction in the height of the step alone is an essential factor in the incident where Ms Rogers missed the second step and subsequently fell." Dr Ludcke also identified visual factors arising from the shape of the nosing of the stairs and lack of visual delineation of the edge of the stair tread as risk factors for a person using the stairs.

[38] Dr Ludcke was subsequently provided with the timer light switches that had been removed from the stairwell and tested by Clipsal. He recorded on a DVD (exhibit 32) tests he performed in activating each of the light switches by depressing the button using his thumb on different parts of the button. This enabled Dr Ludcke to conclude that the amount of time that the push button remains depressed after being activated is related to the manner in which the button was pressed or how much of

the button was the subject of pressure as the button was pressed. None of the testing recorded on the DVD simulated the manner in which the plaintiff activated the light switch immediately before the accident. That was because Dr Ludcke gripped the whole switch in his hand as he tapped or pressed the button with his thumb. He also did not use the "backhand push" described by the plaintiff.

[39] Dr Ludcke confirmed in the course of his evidence that it was his view that the steps were more significant in causing the accident than the light. Both Dr Ludcke's written report on this aspect (exhibit 3) and his oral evidence were directed at giving an opinion on the likely cause of the accident, or an analysis of risks inherent in using the stairwell, without giving sufficient weight to the plaintiff's description of and explanation for the accident. Dr Ludcke ignored the plaintiff's express statement that she did not have any problem with the top step and the second top step being "a little bit far apart", but that her problem was with the light and the shock that she got when the light turned off as she was on the stairs.

[40] On the issue of whether the amount of time for which the dial on the timer light switch was set could be adjusted, it was relevant that the timer light switch was installed and connected to the electricity. Dr Ludcke stated that adjustment did not have to be done by an electrician, but should probably be done by an electrician. Dr Ludcke explained that in order to make such an adjustment the screws that held the light switch to the wall would have to be removed, the switch pulled out of the wall without making contact with the electrical wires and that the dial could then be adjusted.

Notification to agent of problem with light switch

[41] The plaintiff described how she made complaints to the agent about various problems with the unit. She said that she would complain to the girls at the front counter at the agency premises. The plaintiff said the girls would write the complaint down on a Post-it slip and say "we'll pass that on for you" or "we'll get that problem attended to". The plaintiff had made a complaint in April 1999 about the hot water not shutting off, in June 1999 about a tap handle that came off a wall, and in July 1999 about grout coming out from the tiles and ants getting in and said that each of these complaints was attended to after a few weeks. At the end of November 1999 the plaintiff complained about a problem with the switch for the garage door and on 11 December 1999 complained about the hot water system, but these problems had not been attended to before she vacated the unit. (There was a written record held by the agency for all of these complaints made by the plaintiff, but there was no record of any complaint made by the plaintiff about faulty timer light switches.)

[42] In relation to the allegation that the timer light switches were faulty, the plaintiff's evidence was unclear about when she made complaints to the agency about the lights. The plaintiff said there were three months prior to the accident (which would have been from September 1999) when she was attending at the agency at least once a week and every week she went in she made a complaint about the lights. That is difficult to reconcile with the incident involving the plaintiff's mother that occurred in May 1999, the plaintiff's assertion that the light switches were faulty the entire time she was at the unit and the plaintiff's knowledge that other complaints she made at the agency were attended to within a few weeks.

[43] Although the plaintiff's mother said that the plaintiff did not ask her to complain to the agency about the lights in the stairwell, the plaintiff's mother said that she reported the problem with the timer light switches on at least four or five occasions spread over around four months. She recalls that the first time that the plaintiff asked her to pay the rent, the plaintiff's mother asked the young girl at the counter of the property management section of Raine & Horne Carina/Carindale if a tradesman could be sent out to fix the lights in the stairwell, because the lights were faulty and "kept coming out". The plaintiff's mother states that the girl took a note down on a Post-it note and said that she would pass it on to Pam (referring to Ms Pam Newton) whom the plaintiff described as being "in charge of property management". The plaintiff's mother said that on the other occasions she would say something to the effect "no-one has still come out to the lights at Jodie's unit where she's renting." Before the accident the plaintiff's mother did not speak directly to Ms Newton about any problem with the lights in the stairwell outside the plaintiff's unit.

[44] Ms Newton explained in her evidence that tenants who attended at the agency who had a complaint about their rental property would give the details to the receptionist at the counter who would complete a maintenance request form that would then be passed by the receptionist to one of the property managers. Ms Newton said that the agency attended to the maintenance if it was an appropriate matter for the agency to fix, but would refer it to the body corporate, if it were a matter for the body corporate. During 1999 Ms Newton did not become aware of any problem with the internal lighting of the stairwell leading to the unit occupied by the plaintiff. Ms Newton was not aware of any complaints made between May and December 1999 about the lights in that stairwell.

[45] Ms Bronwyn O'Regan who was employed in 1999 at Raine & Horne Carina/Carindale as a secretary in the property management section could recall the plaintiff coming in to pay the rent, but did not recall her making any complaints about the lights. Ms O'Regan also did not recall any complaints being made by the plaintiff's mother in relation to the light switches in the stairs leading to the plaintiff's unit.

[46] Ms O'Regan explained that any complaints from tenants regarding maintenance or other issues would be set out on a maintenance form that was forwarded to the property management department for action.

[47] I infer from the evidence of the plaintiff and the members of her family that the early incident involving the plaintiff's mother's claustrophobia assumed much greater significance for the plaintiff and her family after the plaintiff's accident. It is apparent from the content of the evidence of the plaintiff and her mother that prior to the trial they have talked about the plaintiff's mother's problem with the lights in the stairwell, the steps the family took to accommodate the plaintiff's mother's claustrophobia and that the plaintiff's mother had raised her problem with the lights with the girls who worked at the front counter of the agency. I accept that the plaintiff's mother was likely to have said something in passing about her problem with the stairwell lights to the girls who worked on the front counter of the agency. That the plaintiff's evidence is vague as to the timing and content of any complaint made by her, and that the agency does not have a record of any complaint made by or on behalf of the plaintiff about faulty timer light switches or faulty lights in the stairwell, confirms the conclusion that I have reached that there was no notification

made by or on behalf of the plaintiff of any problem with the light switches that was intended to be a complaint requiring action by the agency. That is also consistent with the view that I formed of both the plaintiff and her mother that if either had made a complaint to the agency about a faulty light switch or faulty light in the stairwell intending the agency to take action to remedy it and the complaint was not acted upon within a reasonable time, the plaintiff or her mother would have followed up the complaint in a forceful way that could not have been ignored or overlooked by the agency.

Findings in respect of the accident

[48] The time the accident occurred is in contention. The time is relevant, as it assists in determining what amount of natural light was in the stairwell at the time of the accident. The defendants rely on the Astronomical Phenomenon Certificate (exhibit 36) obtained from the Department of Natural Resources & Mines that describes the state of natural light at Brisbane on 28 December 1999. Civil twilight occurred at 4.26am and sunrise occurred at 4.53am. Civil twilight marks the time when ordinary outdoor operations are difficult without artificial light. At sunrise the upper edge of the sun is on the clear or true horizon. Although in the plaintiff's original statement of claim, she claimed that the accident occurred at approximately 5.30am (when it was likely to be light) and did not amend the claim to allege the time of the accident was at approximately 4.30am (when it was likely to be dark) until after the second defendant had alleged that the skylight above the stairs would have provided adequate lighting at the time of the alleged accident, I accept the plaintiff's evidence that it was "very dim" outside at the time she went to descend the stairs. Usually the plaintiff did not use the timer light switches to illuminate the stairs for herself when there was sufficient light to enable her to use the stairs. As the plaintiff was carrying rubbish at the time of the accident, it is unlikely that she would have manoeuvred in the awkward way she described to activate the timer light switch, if that were not necessary to do so.

[49] The defendants made much in their cross-examination of the plaintiff that the Mater Hospital's records show that on presentation at 9.10am on the day of the accident, it was recorded by hospital staff that at 6am the plaintiff had fallen down five stairs. The fact that the hospital has that note in its records does not mean that that was the information given by the plaintiff. By way of example, the plaintiff's fiancé may have reported that the plaintiff had fallen down around 6am or a few or three hours previously. Even if 6am had been specifically mentioned by the plaintiff (which the plaintiff denies), the plaintiff was in extreme pain and was unlikely to have been concerned with recalling precisely the time of the accident. In any case, it is not the time, but the state of the light when the accident occurred that was relevant.

[50] The timer light switches were removed by Mr Bennett sometime after July 2001 and before they were tested in January 2002. There is nothing in the evidence that supports a suggestion that some person may have removed the light switches and adjusted the setting of the timer between the date of the accident and the removal of each timer light switch by Mr Bennett. In view of the fact that the light switches were delivered by Mr Bennett to Clipsal for testing, I infer that the timing mechanism on each switch was not adjusted before being sent by Clipsal from its Queensland office to its testing laboratory in South Australia. I am satisfied on the basis of the report from Clipsal that the timer light switches in the stairwell were not

faulty. That is consistent with Mr Wilson's opinion on testing the light switches in May 2000 *in situ* that they were functioning correctly.

[51] As to the length of time that the light would operate when the timer light switch outside the plaintiff's unit's door was activated properly, I am also satisfied on the basis of the report from Clipsal that when the timer light switch at the top of the stairwell was activated properly it caused the light to operate for at least about 1 minute 48 seconds (assuming in the plaintiff's favour that of the two switches tested by Clipsel the light switch that was set for the lesser time was the one from outside the door of unit 18) which was sufficient time to enable a person to walk down the stairwell before the lights went out. This is supported by the lack of complaints to the agency and the first and second defendants about the operation of the lights in 1999 and the evidence of Mr Mohr and Mr Bennett. Although this finding is at odds with the evidence of Mr Wilson, Ms Wallace, the plaintiff and the other members of her family to the extent that it suggested that the lights remained on for about 15 seconds when the timer light switch was properly activated, that evidence has a number of deficiencies. It was not clear how either Mr Wilson or Ms Wallace measured the length of time they say the lights were in operation after being activated. There are discrepancies within the plaintiff's evidence as to the length of time the lights would usually operate upon activation (whether 15 seconds or one minute). There is the problem of the discussions involving the plaintiff's sister with other members of her family prior to her giving evidence about the length of time that the lights remained on. The plaintiff's family members did not operate the timer light switches in the usual manner of operation when the plaintiff's mother was present.

[52] The next factual issue is whether the plaintiff properly activated the light switch. The timer light switches are of a type that are not outside common experience. In fact, the plaintiff did not suggest otherwise in her own evidence and clearly knew how to activate the light switch. Although the plaintiff asserts that she did properly activate the light switch immediately before her accident, the manner in which she described how she activated the light switch makes it unlikely that she activated the timer light switch properly. She was standing to the side of the light switch and not facing it and used "a backhand push" with the thumb of her right hand which must have made it difficult for the plaintiff to be certain that she was pushing the button so that it was fully depressed. I therefore find that the plaintiff did not properly activate the light switch immediately before the accident and that was the reason that the lights went out as the plaintiff was descending the stairs.

[53] The next factual issue is where on the stairwell the plaintiff slipped. The defendants made much of the change during the course of the plaintiff's evidence of the point on the stairwell as depicted in the photograph that was exhibit 25 as to where her foot slipped. The plaintiff's description of the accident was pleaded in paragraph 5 of the statement of claim (which remained unchanged despite a number of other amendments to the statement of claim) as follows:

> "Upon descending, but before reaching the bottom of the stairwell, the light went out and thereby caused the Plaintiff to miss the second step and fall down about 6 steps, sustaining head and neck injuries."

Even though the first mark that the plaintiff put on the photograph that is exhibit 25 was just below the tread of the first step below the landing, her evidence at the same time was in respect of her heel slipping on the tread of the second step. I accept that

the plaintiff did make a mistake in putting the first mark on the photograph (exhibit 25) and that the accident occurred when her foot slipped on the second step. I do not treat the mistake that was made by the plaintiff during the course of her evidence in endeavouring to reduce her oral testimony to a mark on a photograph as reflecting adversely on her credit generally.

[54] I accept the plaintiff's evidence that she slipped on the stairwell when she got a "shock" when the lights went out and that it was not the physical state of the stairs that caused her to fall. The visual factors that Dr Ludcke identified in his report as risk factors (the shape of the nosing of the stairs and the lack of visual delineation of the edge of the stair tread) have no relevance, whatsoever, to the manner in which the plaintiff described her fall as occurring. It was not a case of her missing her footing because of these lack of visual factors (or the variation in riser height between the first and second steps), but the shock she got when the lights turned off unexpectedly.

Duties of the first defendant

[55] The plaintiff alleges that the first defendant owed the plaintiff a duty to ensure that an adequate, proper and safe system of lighting lit the stairwell. The manner in which the plaintiff alleges that the first defendant breached that duty were:

(a) the time switch for the lighting was defective;
(b) failing to warn the plaintiff as to the insufficient time lapse between turning the light on and its automatic turn off;
(c) failing to provide alternate means of lighting; and
(d) failing to warn the plaintiff that it was necessary to depress the light switch fully.

[56] Because the plaintiff had the right to occupy unit 18 under the tenancy agreement, the plaintiff was entitled to expect the landlord under that tenancy agreement to fulfil its obligation under s 103 of the *RTA* to maintain the premises that were rented (including any common area available for use by the tenant with the premises) in good repair. As the first defendant has the statutory obligation to administer, manage and control the common property reasonably and for the benefit of lot owners (s 152 of the Act), the means by which the landlord carries out its obligations in respect of the common area must be to procure the performance by the first defendant of its statutory obligations in respect of the common area.

[57] The relationship between the plaintiff as the occupier of rental premises who has a right to use the stairwell and the first defendant as the legal entity that has the control and management of the stairwell must give rise to a duty of care in tort owed by the first defendant to the plaintiff to take reasonable care to avoid foreseeable risk of injury to the plaintiff: (*Jones v Bartlett* (2000) 205 CLR 166, 184-185 [57], 241 [253]). The issue is whether there has been any breach by the first defendant of that duty of care. In view of my findings of fact that the timer light switch outside the plaintiff's unit's door was not faulty and, when activated properly, operated the lights in the stairwell for sufficient time to enable a person to descend the stairs and therefore provided an adequate means of lighting, the plaintiff has failed to show that the first defendant breached the duty owed to the plaintiff in any of the first three respects relied on.

[58] The next issue that has to be determined is whether the first defendant breached its duty of care owed to the plaintiff by failing to warn the plaintiff that it was necessary to depress the light switch fully. The problem that the plaintiff faces is that there was no suggestion in the evidence that the timer light switch was a device that was outside common experience and the plaintiff herself knew that in order to operate the light switch properly the button had to be fully depressed. A warning sign stating what was common knowledge was not required to alert the plaintiff what she already knew. The first defendant's obligation to take reasonable care to avoid foreseeable risk of injury to occupiers of units in the complex did not require a warning sign in the stairwell informing occupiers that it was necessary to depress the light switch fully in order to activate the light properly.

[59] The plaintiff has separately particularised breach of the duty of care against the first defendant based on the state of the stairs, relying on Dr Ludcke's report. In view of my findings about the cause of the accident, these particulars of negligence are not relevant.

[60] In reliance on a statutory duty alleged to be based on the first defendant's obligation pursuant to s 152(1)(b) of the Act and s 108 of the *Body Corporate and Community Management (Accommodation Module*) *Regulation* 1997, the plaintiff alleges that the first defendant breached its statutory duty to maintain the common property in good condition. That allegation is disposed of by my findings in relation to the action in negligence against the first defendant.

Duties of the second defendant

[61] The first defendant engaged the second defendant to perform the duties and functions specified in the agreement for the remuneration that was provided for in the agreement. The second defendant's duties were set out in clause 4 of the agreement and included:

> "(b) to liaise with the Body Corporate in respect of the administration of the Common Property in the possession, custody or control of the Building Manager; …
>
> (d) to at all times ascertain and be aware of the general condition of the Building and all machinery and appurtenances thereto so that at all times the Building Manager is able to keep informed the Body Corporate as to the condition of that property;
>
> (e) to ensure that all lighting in the common property operates efficiently and that time switches are reset when necessary; …
>
> (h) to report promptly on all things requiring repair and all matters creating a hazard or danger and to take remedial action where practicable, to safeguard the whole Building against unlawful entry or accident."

[62] Because of the obligations assumed by the second defendant under the agreement, the plaintiff alleges that the second defendant owed the plaintiff a duty of care to ensure that the property was safe to use by means of adequate lighting and stairs which were safe and to maintain such lighting and stairway in a condition which was safe for the plaintiff's use. The second defendant accepted that it owed at least

a duty to the plaintiff to carry out its duties under the agreement with reasonable care.

[63] Under the agreement aspects of the first defendant's control and possession of the common property, including maintenance of the common property in good condition, were delegated to the second defendant. The second defendant's duty of care to the plaintiff could not exceed that of the first defendant, insofar as the allegations against the second defendant based on negligence were identical to those alleged against the first defendant. In view of the findings that I have made that the timer light switches were not defective, that the lights when activated properly operated for sufficient time to allow a person to descend the stairwell and that a warning sign about depressing the light switch fully was not required, there is no basis for the plaintiff to succeed in her claim against the second defendant.

[64] In relation to the plaintiff's claim against the second defendant based on the state of the stairs, for the same reason that the plaintiff cannot succeed against the first defendant, her claim based on negligence against the second defendant must fail.

Treatment

[65] The plaintiff's fiancé took her to the Mater Hospital at about 9am. A cervical spine x-ray revealed a fracture to the vertebral body of C5 (a crush fracture of C5), with some anterior displacement of the anterior inferior fragment, and approximately 5mm of posterior displacement of C5 on C6. The plaintiff was transferred to the Princess Alexandra Hospital for management of the injury. She was placed in skull tongs with 10 pounds of traction and nursed on an Egerton bed. She was treated in a cervical halothoracic brace that was placed on 30 December 1999. The plaintiff was discharged on 1 January 2000.

[66] The halo brace was removed on 11 February 2000 and was replaced with a soft collar. When the plaintiff was reviewed on 18 February 2000 an x-ray showed some instability at the C4/5. The plaintiff was then admitted on 21 March 2000 to undergo anterior corpectomy and *in situ* bone graft insertion. This was performed on 22 March 2000, she was nursed in a Philadelphia collar and discharged on 24 March 2000 and after a few weeks changed to a foam collar. Her neurology was normal when she was reviewed on 7 April and 25 May 2000. She spent about two months wearing a collar after the surgery.

[67] After the operation and the plaintiff had ceased wearing a collar, she suffered and continues to from severe recurrent headaches and neck stiffness for which she takes Panadeine Forte. The plaintiff has treatment each month from a remedial massage therapist.

History after the accident

[68] While the plaintiff was wearing halo brace, her mother spent three hours at the unit each morning and another three hours in the evening as the plaintiff required assistance with personal care, domestic tasks and looking after her son. When the halo brace was removed, the plaintiff, her son, her fiancé and his two children moved to another apartment. After the removal of the halo brace, the plaintiff did not require as much assistance from her mother who then spent about 1½ hours each evening with her. This continued after the operation for the remainder of that year.

[69] The plaintiff made a complaint to the police in December 2000 about her fiancé's violence towards her and their relationship ended. The plaintiff and her son went to live with her grandmother, Mrs Rogers, in January 2001.

[70] Mrs Rogers has provided the plaintiff with assistance in undertaking the heavier household chores, since the plaintiff and her son came to live with her. That assistance is claimed on the basis of eight hours per week, in reliance on the report of occupational therapist Ms Suzanne Jesser (exhibit 13). It is logical that the restriction in the movements of her neck which affect the plaintiff's ability to undertake paid work also affect her ability to undertake domestic chores. The plaintiff did concede, however, that if she has the time to do the chores she can attend to most of them, but ironing and vacuuming and carrying heavy bags of groceries continue to cause difficulty.

[71] In 2003 the plaintiff attempted to work for an uncle's catering business. She worked as a kitchenhand for two hours per day on three days each week and earned $150 per week. She lasted only three months.

[72] The plaintiff then worked in her stepfather's takeaway food business. She was only able to work two or three times in a month for 90 minutes or so at a time.

[73] At the time the plaintiff left school, she had contemplated undertaking a business management course and then working in real estate with her mother. Another career choice for her was beauty therapy. Because of her pregnancy, she was unable to embark immediately on either career. As a result of the accident, the plaintiff decided that working in real estate was not feasible, because of the requirement to get in and out of a motor vehicle many times throughout the day. In 2005 the plaintiff did a beauty therapy course that required her attendance between 10am and 4pm on five days per week. She commenced working for Zen Hair, Skin & Body (Zen) in January 2006 and was still working for that employer at the time of the trial. Evidence was given by the owner of that business, Mr Rik Pene. Mr Pene considers that the plaintiff's skills as a beauty therapist are exceptional. He would like her to work more hours than she does and is prepared to accommodate to some extent the restrictions that the plaintiff suffers from as a result of her injuries. Although the plaintiff appears to be permanently employed by Zen, she is paid at an hourly rate.

Medical evidence

[74] The plaintiff was reviewed on 12 December 2000 for the purpose of a medico-legal report (exhibit 9) by orthopaedic surgeon, Dr TA Parsons, at the request of the plaintiff's solicitors. Dr Parsons observed that there was a quite marked restriction of movements of the cervical spine – forward flexion was measured at 20º, extension at 35º, and right and left lateral flexion at 15º to 20º and right rotation was to 20º and left rotation to 25º. Dr Parsons reviewed the plaintiff again on 17 December 2001. Dr Parsons stated in his report (exhibit 10) that the surgical stabilisation produced a stable, but rigid, segment in the cervical spine, eliminating all movement between C4, C5 and C6. Dr Parsons expressed the opinion that the resultant loss of movement in the cervical spine following the fracture and surgical stabilisation comprises a 25% permanent impairment or loss of function of the whole person. He also observed that there is a possibility that in the medium to long term future there will be some further increase in discomfort from the motion

segment immediately above the rigid segment and possibly that immediately below. He also anticipated that progressive degenerative changes at these levels, hastened by the need to stabilise the injured segments, will possibly produce more neck stiffness and discomfort as aging takes place than would have been expected without the injury. Dr Parsons attributed the headaches that the plaintiff was still suffering from at the time of this review to the neck injury.

[75] Dr Parsons expressed an opinion in his letter dated 22 February 2002 (exhibit 12) on the effect of the plaintiff's injuries on her future working life and social activities and need for domestic assistance. Dr Parsons noted that the loss of movement in the plaintiff's neck requires her to turn her body more when looking around and will produce discomfort if she is looking around, upwards or downwards at extremes for prolonged periods. He described the neck and upper limbs symptoms from which the plaintiff suffers as probably based on muscle fatigue and physical stress. He considers that the plaintiff should be able to lead a normal life by modifying her activities so that they may be undertaken in a way that accommodates her loss of movement in her neck.

[76] Another orthopaedic surgeon, Dr Scott Campbell, examined the plaintiff on 18 December 2001 at the request of her solicitors. In his report dated 28 December 2001 (exhibit 11), Dr Campbell noted that on examination of the cervical spine flexion and extension were reduced by 20% and lateral movements were reduced by 30%. Dr Campbell was of the opinion that the plaintiff was suffering from a 15% whole person impairment attributable to the underlying pathology and susceptible to further damage caused by the injury that was likely to be permanent. When Dr Campbell provided a further report on 18 July 2002 (exhibit 14), he assessed the plaintiff as suffering from an 18% whole person impairment.

[77] When Dr Campbell provided an updated report on the plaintiff on 8 December 2004 (exhibit 15), the plaintiff's condition was much the same as when he had last reviewed her. He recorded that the plaintiff was still complaining of neck pain and stiffness, headaches and a sensation of stiffness and weakness of the upper limbs especially when used above shoulder height. On examination Dr Campbell noted that there was a decreased range of movement of the cervical spine by 30% in all directions with pain at the extremity of movements. Dr Campbell confirmed his assessment that the plaintiff was suffering an 18% whole person impairment that was permanent.

[78] The first defendant's solicitors had the plaintiff examined by neuro surgeon, Dr Michael Weidmann, in October 2002. Dr Weidmann recorded in his report dated 17 October 2002 (exhibit 29) that on examination there was limitation of neck movements in all directions and diffuse tenderness across the back of the plaintiff's cervical spine. He noted no objective neurological abnormalities. Dr Weidmann expressed the opinion that the plaintiff did not require any domestic assistance or help with her day to day activities, but that she would have some restriction of her employment options. Dr Weidmann noted that the plaintiff would have difficulty with any work of heavy physical nature that requires bending or lifting. Dr Weidmann assessed the plaintiff as having an 18% partial permanent impairment of the whole person as a result of her injury.

[79] Dr Weidmann reviewed the plaintiff again on 1 November 2004. In his report of the same date (exhibit 30) he noted that there was some tenderness to palpation over

the back of the plaintiff's cervical spine, there was mild limitation of neck movements in all directions, but there were no objective neurological abnormalities in the plaintiff's upper or lower limbs. Dr Weidmann remained of the view that the plaintiff would have some restriction of her employment options but that she should be medically fit for any lighter work not requiring bending or lifting and that allowed her to move about. Dr Weidmann accepted that the plaintiff might have difficulty performing appropriate light employment on a full time basis. Dr Weidmann assessed the plaintiff with an 18% impairment of the whole person as a result of the injury to her cervical spine. Dr Weidmann's opinion that the plaintiff does not require any domestic assistance at home as a result of her injuries is inconsistent with the restrictions he notes on her employment options and his assessment of a significant disability arising from the restrictions in the movement of her cervical spine.

Quantum

[80] The nature of the injuries sustained by the plaintiff in the accident was not in dispute.

Pain, suffering and loss of amenities

[81] On any view of the evidence, the plaintiff has been left with a significant disability. Each of Drs Campbell and Weidmann reviewed the plaintiff for a second time that was three years later than Dr Parsons' last examination of the plaintiff. I therefore proceed on the basis of their assessment that the plaintiff sustained an 18% whole person impairment that was permanent. The plaintiff seeks an award of damages for pain, suffering and loss of amenities of $70,000. The first defendant's submission that an award of $60,000 should be made does not suggest that the plaintiff's claim is outside the appropriate range. Damages for pain, suffering and loss of amenities are assessed at $70,000, of which $30,000 is apportioned to the past.

Special damages and future expenses

[82] The parties have agreed upon special damages at $14,000 and future expenses at $10,000.

Past economic loss

[83] The plaintiff seeks past economic loss of about $140,000 calculated by reference to notional earnings from 1 April 2000 of $400 per week until the plaintiff commenced working for Zen when lost earnings are calculated on the basis that the plaintiff has failed to realise her actual earnings as a beauty therapist because of the restrictions due to her residual disability. The first defendant submits that a global figure of $30,000 for past economic loss would be appropriate.

[84] Although prior to her accident the plaintiff had contemplated working in real estate as a result of the example of her mother, she abandoned any idea of working in that field as a result of the restrictions in her neck movements. In particular the plaintiff finds it difficult to drive a motor vehicle and considers that an essential part of working in real estate. Although some evidence was directed towards this issue of whether the plaintiff was able to work in real estate or not, it became irrelevant when the plaintiff made it clear that her claim for lost earnings and loss of earning capacity is not made on the basis that she would have had a career in real estate.

[85] At the time of the accident the plaintiff was working casually as a kitchenhand for approximately 10 to 15 hours per week. Although she stated in her evidence that she intended working fulltime in the year 2000 (but for the accident), that was not borne out by the steps that she had taken prior to the accident regarding employment. Allowance has to be made for the intention that the plaintiff expressed of undertaking further study for at least six months, but more likely for a period of 12 months, as reflected by the course that she ultimately did undertake in 2005. On the basis of the plaintiff's work history prior to the accident, the claim for past economic loss on the basis of a loss of $400 per week commencing from 1 April 2000 is excessive.

[86] I will calculate past economic loss on the basis of a continuation of earnings from the casual work at $70 per week until 30 June 2001 (76 weeks at $70 per week = $5,320) and then at $400 per week from 1 July 2001 until 31 December 2005 (234 weeks at $400 per week = $93,600). Actual net earnings until 31 December 2005 of $4,770 need to be deducted. From 1 January 2006 until 7 August 2007 (which is the date to which there was evidence of the plaintiff's income received from Zen), the plaintiff's actual earnings as a beauty therapist need to be taken into account. For the period that the plaintiff has been employed by Zen, she had mainly worked 30 hours per week which is 25% less than usual fulltime employment. The plaintiff was paid at $16 per hour when she commenced, but the rate seems to have increased toward the end of 2006 to $25 per hour. Apart from what the plaintiff herself was earning at Zen, there was no evidence given of usual conditions or wages for beauty therapists. I will therefore proceed on the basis that when the plaintiff was earning $16 per hour, she could have been earning $640 gross per week which is about $520 net per week and that when she was earning $25 per hour, she could have been earning $1,000 gross per week which is about $780 net per week. That gives notional earnings from 1 January 2006 to 7 August 2007 of $55,380 (39 weeks at $520 per week and 45 weeks at $780 per week). In that same period the plaintiff's actual net earnings from Zen were $42,354 which makes a loss of income between 1 January 2006 and 7 August 2007 of $13,026.

[87] The total calculation of past economic loss is therefore $107,176 which should be reduced by 15% to account for the vicissitudes of life. I therefore assess past economic loss at $91,000. That will result in an amount for lost superannuation calculated at an average of 8% of $7,280.

Loss of future earning capacity

[88] The plaintiff estimates her loss of future earning capacity at $300 net per week which she calculates to be worth $273,000 on the 5% tables over a period of 39 years, but reduces it for contingencies by 15% to claim $232,000.

[89] The first defendant calculates the loss on the basis that she works 30 hours per week and therefore is working 25% less than the usual full working week. On her current earnings the first defendant calculates that to be about $150 net per week and allowing that to age 60 results in a sum of about $130,000 on the 5% tables. The first defendant then reduces that to the sum of $100,000 to take into account the usual vicissitudes of life and the prospect of increased earnings as experience may make available more supervisory or administrative roles.

[90] It appears that the figure of $300 net per week used by the plaintiff in her calculation of loss of future earning capacity is based on her calculation that she is

currently losing $276 net per week. On the figures that I have used to calculate economic loss in the immediate past period, that loss is about $180 per week. As past economic loss has been calculated only until 7 August 2007, the calculation for loss of future earning capacity should represent the loss from that time forward. Using 38 years (multiplier of 902 on the 5% tables), that results in a lump sum of $162,360 which should be reduced by 15% for contingencies. I do not accept that the loss per week needs to be inflated as was done in the plaintiff's calculations. I would therefore assess future economic loss in the sum of $138,000.

Past care

[91] The parties have agreed that the appropriate commercial rate for care is $14 per hour until the beginning of 2002 and $16 per hour from then until trial.

[92] Although the plaintiff's mother said she provided six hours of care on a daily basis whilst the plaintiff was wearing the halo brace (which was for six weeks), Ms Jesser would have allowed 39 ½ hours per week for that period. I will therefore calculate the first period of past care on the basis of 39 ½ hours per week. For the next couple of months Ms Jesser allowed a much greater period for assistance, than appears to have been provided. I will allow 11 hours per week on the basis of the plaintiff's mother's assistance. Thereafter until the end of 2001, I will assess past care on the basis of Ms Jesser's assessment of eight hours per week. Although assistance to the plaintiff may have been provided from January 2002, it does not appear to have been necessary to the full extent assessed by Ms Jesser, as the plaintiff accepted help that was offered by her grandmother, even for tasks that she was able to do. Although at the trial both the plaintiff and her grandmother spoke in terms of Mrs Rogers continuing to provide one hour of assistance per day, that seems largely to be due to Mrs Rogers' willingness to provide assistance for the plaintiff and her son, rather than due to actual need. On the basis that the tasks that the plaintiff requires help for are limited to heavy tasks such as vacuuming and ironing, two hours per week from 1 January 2002 until the date of trial is appropriate. I calculate past care to be $22,742.

Future care

[93] The parties have agreed that the appropriate commercial rate for future care is $17 per hour. The plaintiff claims one hour per day at $17 per hour for 50 years (based on a life expectancy of 57 years) and then reduced by 15% for contingencies which results in an amount of about $113,000.

[94] The first defendant calculates future care on the basis of one hour per week at $17 per hour for 30 years, discounted on the 5% tables, making a sum of about $14,000.

[95] I also consider that future care should be calculated on the basis of two hours per week at $17 per hour for 40 years. That makes a lump sum of abut $30,000.

Conclusion

[96] My findings in relation to quantum can be summarised as follows:

Pain, suffering and loss of amenities	**$**70,000
Interest (2% pa x $30,000 x 7.94 years)	4,764
Special damages	14,000
Interest (5% pa x 7.94 years)	5,558

Future expenses	10,000
Past economic loss	91,000
Lost superannuation	7,280
Interest on past economic loss (2.5% pa x 7.94 years)	19,509
Loss of future earning capacity	138,000
Future superannuation	12,240
Past care	22,742
Interest on past care (2.5% x 7.94 years)	4,514
Future care	30,000
Total	**$429,607**

[97] In view of the findings that I have reached on liability, I make the following orders:

1. The plaintiff's proceeding against the first and second defendants is dismissed.
2. The first defendant's third party proceeding against the second defendant is dismissed.

[98] I will hear submissions from the parties on what orders should be made for costs.