

AUSTRALIA / JUDGMENT

MCCABE v RIECHELMANN

[2023] NSWDC 44

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

District Court

New South Wales

Medium Neutral Citation: MCCABE v RIECHELMANN [2023] NSWDC 44

Hearing dates: 14 – 18 February 2022; 21 – 24 February 2022;

20 – 24 June 2022; 30 June 2022 (directions); 1 August 2022 – 2 August 2022; 12 September 2022 (written submissions - plaintiff); 26 October 2022 (written submissions - defendant); 8 November 2022 (written submissions – plaintiff in reply); 8 December 2022 (oral submissions)

Date of orders: 21 February 2023

Decision date: 21 February 2023

Jurisdiction: Civil

Before: Dicker SC DCJ

Decision: (1) Judgment for the plaintiff against the defendant in the Statement of Claim proceedings.

- (2) Judgment for the plaintiff/cross-defendant against the defendant/cross-claimant in the Cross-Claim proceedings.
- (3) The Cross-claim proceedings are dismissed against the plaintiff.
- (4) The parties are to bring in agreed short minutes of orders reflecting these reasons within 14 days.
- (5) The question of costs of the Statement of Claim proceedings and the Cross-claim proceedings are reserved.

Catchwords: TORTS – battery – allegations of intentional battery by both plaintiff and defendant – whether throwing a glass of wine over a person constitutes a battery – whether intentional or negligent battery – self-defence – assault

EVIDENCE – standard of proof – need for persuasive evidence in relation to allegations of intentional battery with intent to cause injury – whether Court persuaded of either case of plaintiff or defendant on the evidence

Legislation Cited: Civil Liability Act 2002 (NSW)

Evidence Act 1995 (NSW)

Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015

Cases Cited: A v B [2021] NSWDC 491

Argo Managing Agency Ltd v Al Kammessy [2018] NSWCA 176

Barton v Armstrong [1969] 2 NSW 451

Briginshaw v Briginshaw (1938) 60 CLR 336

Croucher v Cachia [2016] NSWCA 132; (2016) 95 NSWLR 117

Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc [2020] NSWCA 294; (2020) 103 NSWLR 658

Fontin v Katapodis (1962) 108 CLR 177

Fox v Percy [2003] HCA 22; (2003) 214 CLR 118

Gautam v Health Care Complaints Commission [2021] NSWCA 85

Goode v Angland [2017] NSWCA 311

Goodrich Aerospace Pty Ltd v Arsic [2006] NSWCA 187

Mason v Demasi [2009] NSWCA 227

Musa v Alzreaiawi [2021] NSWCA 12

Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd (1992) 67 ALJR 170; [1992] HCA 66

Nguyen v Tran [2018] NSWCA 215

Payne v Parker (1976) 1 NSWLR 191

Penfolds Wines Pty Ltd v Elliott (1946) 74 CLR 204

Raad v State of New South Wales [2017] NSWDC 63

Ramsey v Denton [2020] NSWDC 426

Ramsey v Denton [2021] NSWCA 310

Ray v Southon [2022] NSWCA 267

Saravinovska v Saravinovski (No 6) [2016] NSWSC 964

Slaveski v State of Victoria [2010] VSC 441

Southon v Ray [2022] NSWDC 32

State of New South Wales v Abed [2014] NSWCA 419

State of New South Wales v Ibbett (2005) 65 NSWLR 168; [2005] NSWCA 445.

State of New South Wales v McMaster [2015] NSWCA 228; (2015) 91 NSWLR 666

State of New South Wales v Ouhammi [2019] NSWCA 225

Watkins v State of Victoria (2010) 27 VR 543

William Leitch & Co Ltd v Leydon (1931) AC 90

Texts Cited: D Villa, Annotated Civil Liability Act 2002 (NSW), Third Edition, 2018

Category: Principal judgment

Parties: David Terance McCabe (Plaintiff)

Julie Riechelmann (Defendant)

Representation: Counsel:

J Dodd (Plaintiff)

J Morris SC and M Bridger (Defendant)

Solicitors:

McCabe Partners Lawyers (Plaintiff)

De Luca-Leonard, Solicitor (Defendant)

File Number(s): 2018/00365976

Publication restriction: No

Table of contents

The pleadings

Amended Statement of Claim - paragraph 8

Further Amended Defence - paragraph 10

Further Amended Cross-Claim - paragraph 13

Amended Defence to Cross-Claim - paragraph 16

Background facts - paragraph 18

The oral evidence in the proceedings

The evidence of Mr Lavers - paragraph 47

The evidence of Mr Pusell - paragraph 81

The evidence of Mrs Pusell - paragraph 117

The evidence of the plaintiff, Mr McCabe - paragraph 144

The evidence of the defendant, Ms Riechelmann - paragraph 286

The evidence of Ms Melanie Wells - paragraph 396

The evidence of Ms Hart-Waters - paragraph 449

The documentary evidence

Plaintiff's documents tendered

Videos and photographs - paragraph 465

Exhibit B - the plaintiff's bundle of documents - paragraph 472

Medical reports and medical records - paragraph 483

The Plaintiff Mr McCabe - paragraph 484

The Defendant Ms Riechelmann - paragraph 485

Other documents - paragraph 512

Legal Principles Applicable

Principles relating to the torts of assault and battery and trespass to goods

The statutory scheme applicable - paragraph 514

The standard to be applied - paragraph 542

Submissions - paragraph 549

Consideration

Credit and reliability – principles applicable - paragraph 553

Credit and reliability of the witnesses - paragraph 562

Mr McCabe - paragraph 563

Ms Riechelmann - paragraph 568

Ms Wells - paragraph 580

Medical findings

Mr McCabe - paragraph 588

Ms Riechelmann - paragraph 592

Determination of and findings in relation to the central factual issues

The 3 June 2017 incident - paragraph 627

The 15 June 2018 incident - paragraph 633

The 31 March 2018 incident

Intoxication of relevant parties/witnesses on 31 March 2018 - paragraph 641

Phone Hand Injury Allegation - paragraph 647

How did Ms Riechelmann's telephone get into the McCabe unit? - paragraph 655

The alleged deletion of videos from Ms Riechelmann's phone - paragraph 658

The alleged torts of battery said to have been committed by Mr McCabe and Ms Riechelmann near the McCabe unit doorway on 31 March 2018 - paragraph 663

Assault - paragraph 682

Damages

Mr McCabe

2017 incident - paragraph 684

Second 2018 incident involving an assault - paragraph 686

31 March 2018 incident - paragraph 688

Ms Riechelmann - paragraph 696

General damages - paragraph 699

Aggravated and exemplary damages - paragraph 705

Interest on general and aggravated damages - paragraph 708

Past treatment expenses - paragraph 709

Future treatment expenses - paragraph 710

Future economic loss/loss of future earning capacity - paragraph 711

Assault - paragraph 712

Determination - paragraph 713

Judgment

1. These proceedings relate to the interaction between the plaintiff and the defendant on various dates in 2014-2018, but particularly in 2017 and 2018. Throughout this period, the plaintiff, Mr David McCabe, had as a friend a Mr Jon Lavers. From 2010 to 2018 (the precise date in 2018 is disputed), Mr Lavers was in an intimate personal relationship with the defendant, Ms Julie Riechermann. It appears clear that for several years in this eight year period, the plaintiff, Mr McCabe, and the defendant, Ms Riechermann, were not on good terms and had a very poor personal relationship. Mr McCabe thought that Ms Riechermann was not a good partner for his friend Mr Lavers. Ms Riechermann thought that Mr McCabe had too much influence over Mr Lavers, particularly in his dealings with her, and had insulted and belittled her and intimidated her on a number of occasions.
2. From the evidence, it appears that there were two physical incidents between Mr McCabe and Ms Riechermann in 2014. Mr McCabe sought an apprehended violence order from Police against Ms Riechermann which was applied for, and in due course granted, by Sutherland Local Court in December 2014. Ms Riechermann did not defend the application.
3. In 2018, Mr McCabe commenced proceedings for damages against Ms Riechermann in the Local Court by way of Statement of Claim based on four incidents said to give rise to alleged causes of action against her:
 1. Ms Riechermann allegedly assaulting the plaintiff by throwing a glass of wine on the plaintiff's head and back on 3 June 2017. It is alleged that this constituted the tort of battery;
 2. The plaintiff alleging that the defendant Ms Riechermann assaulted and beat him at his home address at Ozone Street, Cronulla on 31 March 2018. It is pleaded that the defendant struck the plaintiff approximately three times to the face resulting in the plaintiff suffering redness around the upper face and scratches to the right arm. A battery is alleged. Mr McCabe later claimed in his oral evidence that Ms Riechermann in fact hit him five times on this occasion;
 3. The plaintiff alleged that the defendant damaged his motor vehicle on 31 March 2018, damaging the bumper bar to the car and leaving hand prints and damage on the boot, back window and on the bonnet. An action in trespass for the damage to the vehicle was brought by the plaintiff. The defendant alleges that the vehicle was repaired for other damage for whom a third party was responsible and therefore the plaintiff has suffered no loss. In due course, this claim was not pressed by the plaintiff, but the event remains relevant; and
 4. The plaintiff alleges that the defendant assaulted him on 15 June 2018 by indicating that she was going to throw a glass of wine over the plaintiff. However, no wine was actually thrown over the plaintiff. Assault and battery are alleged.

1. An Amended Statement of Claim was filed with leave on 15 February 2022. In it, it was alleged that the acts of battery were intentional and done with intent to cause injury to the plaintiff.
2. The defendant, Ms Riechelmann, has filed a Further Amended Cross-Claim on 5 August 2022, seeking damages for the torts of battery and assault with consequential losses arising out of the incident on 31 March 2018. She has pleaded a completely inconsistent and contrary account of what occurred on that occasion to that given by the plaintiff.
3. A number of witnesses were called in the proceedings for each of the parties. The proceedings were hard fought and lasted for 18 hearing days. The original estimate of the parties when the matter was set down for hearing was five days. Fundamentally different accounts were given by the witnesses of what occurred on 31 March 2018. The Court, accordingly, is required to assess the credit and reliability of each of the witnesses in determining its factual findings.
4. It should be noted that at all relevant times, the plaintiff lived at xx Ozone Street in Cronulla in Unit 3 which was on the ground floor of a block of units (during the trial this was often referred to as the first floor). The defendant owned an investment unit on the floor immediately above the plaintiff (referred to in the trial as the second floor) but did not, herself, reside in the unit. It was rented out at the time. Mr Lavers resided in a unit on the floor above the defendant's investment unit (described during the trial as the third floor).

The pleadings

Amended Statement of Claim

1. The plaintiff filed a Statement of Claim in the Local Court on 23 November 2018. In paragraphs 1 to 4, the various causes of action arising from the events described above are pleaded. As stated above, an Amended Statement of Claim was later filed alleging intentional batteries with the intent of causing injury to the plaintiff. An assault was also alleged. It was made clear in his opening by counsel for the plaintiff, that it was submitted that the case fell within s 3B of the Civil Liability Act 2002 (NSW) (CLA) and was thus to be determined under the common law. This was confirmed in the final written submissions.
2. The plaintiff alleges that as a result of the defendant's conduct in the intentional acts of battery and assault, he has suffered loss and damage including trauma and abrasions to his face and psychological symptomatology.

Further Amended Defence

1. A Further Amended Defence was filed by the defendant in this Court on 15 February 2022. In relation to the allegation of a battery in paragraph 1 of the Amended Statement of Claim, the defendant says that this was an act of self-defence arising out of the conduct and behaviour of the plaintiff towards the defendant and was in any case negligent and not intended to cause injury.
2. In relation to the events of 31 March 2018, the defendant pleads that it was the plaintiff who hit her, not the other way around. It is pleaded that the plaintiff placed himself in front of her and struck her on the right hand thereby knocking her mobile phone out of her hand. It is then pleaded that the plaintiff subsequently hit her, and she involuntarily reacted in seeking to protect herself: see paragraphs 5-8. Self-defence is also pleaded.
3. In relation to the allegation of attempting to throw a glass of wine, this is denied by the plaintiff. It is pleaded that it was not an assault or a battery, was not intended to injure and was not intended to cause any apprehension of harm.

Further Amended Cross-Claim

1. On the application of the defendant, Ms Riechelmann, the proceedings were transferred to the District Court. This was consented to by the plaintiff.
2. In a Further Amended Cross-Claim filed on 21 February 2022, the defendant puts forward her alternate version of the events of 31 March 2018 and claims damages for an intentional battery by the plaintiff and for an assault. It is alleged that she suffered bruising as a result of the battery, and also has suffered a consequential depressive order and post-traumatic stress disorder ("PTSD") which has diminished her capacity to work. Economic loss damages are sought.
3. Leave was granted on 1 August 2022 to file an amended version of the Cross-Claim which added, as an alternative, a different battery consistently with the oral evidence of Ms Melanie Wells which will be discussed further below: see paragraph 1(v). This was subsequently filed on 5 August 2022. Aggravated damages are sought.

Amended Defence to Cross-Claim

1. The plaintiff filed an Amended Defence to the Further Amended Cross-Claim on 15 February 2022. In essence, he denies the allegations made by the defendant and also denies that she has suffered any injuries including any requirements for medical treatment, counselling and future medical assistance. In the alternative, the plaintiff says that any actions on his part were in self-defence to the assault and battery committed by the defendant on him. In the further alternative, it is pleaded that his actions were not done with the intent to cause injury to the defendant.

2. It may therefore be seen that there are substantially different factual accounts by the plaintiff and the defendant as to what occurred, including in the principal incident on 31 March 2018.

Background facts

1. Although a number of matters are heavily in dispute between the parties, a number of factual issues were not disputed. In addition, a number of matters became clear from the evidence during the hearing. In due course, I will make factual findings to the extent possible on some of the central issues. What follows are my factual findings on other matters or a recitation of matters not in dispute between the parties.
2. Both the plaintiff and the defendant were born in 1963. They were both nearly 59 years of age at the commencement of the final hearing. The plaintiff is a solicitor who practices partly in the southern area of Sydney and partly in the country. The defendant was a former Qantas flight steward. The defendant took redundancy from Qantas in early 2021 and left that company. There is no evidence she is currently in employment.
3. In July 2010, the defendant, Ms Riechelmann, commenced an intimate personal relationship with Mr Jon Lavers, a friend of the plaintiff, Mr McCabe. Prior to this, the defendant had been in a lengthy marriage. It is alleged by the defendant in her evidence that the defendant's former husband excessively consumed alcohol which caused substantial difficulties in the relationship. I accept that evidence.
4. The evidence discloses that the defendant had been consulting with a psychologist, Ms Brennan, since January 2014 and was diagnosed as suffering from depression. In due course, from at least January 2015, the plaintiff was prescribed antidepressants, Zoloft, by her general practitioner. The dosage was increased in early 2018. By early 2015 the defendant was seeing a psychologist and a hypnotherapist to assist her with her depression and anxiety problems, including her reaction to the plaintiff, Mr McCabe.
5. On 22 March 2019, a Notice to Admit Facts and Authenticity of Documents was served by the solicitor for the plaintiff on the defendant. A number of matters arise as admissions through the failure by the defendant to respond to that Notice.
6. In September 2014, the defendant intentionally hit the plaintiff's face at a restaurant/bar although the degree of force used is disputed. The defendant claims it was a friendly gesture. On 12 October 2014, the defendant intentionally slapped the face of the plaintiff in anger. It seems the slap was with at least moderate force. As indicated above, the New South Wales Police sought an apprehended violence order against the defendant which was made by the Local Court on 12 December 2014 in relation to the defendant for a period of 12 months. Shortly prior to that, the defendant purchased an investment unit at the address where the plaintiff and Mr Lavers lived at xx Ozone Street in Cronulla.

7. The apprehended violence order made by the Local Court caused some difficulties for the defendant because of the fact that the plaintiff and Mr Lavers lived in the same block of flats. The defendant alleges that the plaintiff, Mr McCabe, criticised her to Mr Lavers and frequently denigrated, belittled and insulted her. She consulted her general practitioner and was prescribed antidepressants as referred to above. In early 2015, the defendant's general practitioner, Dr Zobair, referred the defendant again to Ms Brennan, psychologist. The opinion was expressed by Ms Brennan in her report dated 3 March 2015 that the defendant was suffering from depression which had "recently been exacerbated by conflict in her personal relationship". It was agreed with the defendant that she would benefit from receiving regular counselling with Ms Brennan.
8. It appears that in 2015-2016 there were incidents of interpersonal conflict between the plaintiff and the defendant including allegations by the defendant that the plaintiff was staring at her during social occasions. In late 2016, there was a series of highly critical emails exchanged between the plaintiff and the defendant.
9. On 3 June 2017, the defendant, Ms Riechelmann, threw a glass of wine over the plaintiff's head and back. The defendant admitted throwing the wine but asserted that the glass of wine was thrown at the plaintiff in self-defence and negligently. The plaintiff made a complaint to New South Wales Police in relation to this matter. The defendant refused to be interviewed and the Police decided to take no action because of an alleged insufficiency in evidence.
10. There is a dispute between the parties whether in or about March 2018, Mr Lavers terminated his relationship with the defendant. The defendant says that he had not taken this step at that time. The plaintiff said that he had. It is not necessary to determine the accuracy of either account. I accept that there were at least real problems in the relationship between the defendant and Mr Lavers as at 31 March 2018.
11. As at 31 March 2018, the plaintiff, who was a divorced man, was in an intimate personal relationship with a Ms Melanie Wells. Ms Wells and her two children lived with the plaintiff at his unit in Ozone Street in Cronulla. Earlier in the evening on that day, the plaintiff, Ms Wells and her children attended a 60th birthday function for a third party. The defendant, Ms Riechelmann, did not attend the function. Mr Lavers did.
12. Apparently, one of Ms Wells' children left a bag at the function and she returned with her daughter and another child to collect the bag. Mr McCabe returned to the units with Ms Wells' male child.
13. It seems clear, and I find, that on the evening in question, Mr McCabe, the plaintiff, Ms Wells, and the defendant had all consumed alcoholic drinks during the course of the evening. The precise number of alcoholic drinks consumed by each was in dispute and cannot be accurately determined on the evidence. I will consider this issue further below.

14. When Mr McCabe returned with the male child of Ms Wells to his unit, he was informed by a Mr Pusell, who lived in the unit next door with his wife and child on the ground floor, that the defendant, Ms Riechelmann, was in the building and had been knocking for some time on the door of Mr Lavers' unit on the third floor. It appears from the evidence that Mr Lavers was actually at the unit in bed at the time but did not wish to answer the door and see Ms Riechelmann. I am satisfied from the evidence and find that Mr Pusell went up to Ms Riechelmann on the third floor and said that it did not appear that Mr Lavers was at home and she should cease knocking on his door. I prefer his evidence on this issue to that of Ms Riechelmann. Mr Pusell was an independent witness. Despite this, Ms Riechelmann continued to intermittently knock or bash loudly on the door of Mr Lavers' unit, including with a brass door knocker.
15. There are a number of videos and audio recordings in evidence of events which occurred on 31 March 2018: see Exhibit A. Unfortunately, these recordings do not record all of the details of the interactions between the parties on that evening. However, what seems clear is that Mr McCabe took it upon himself to call out to the defendant Ms Riechelmann to "go home" as she was disturbing the residents in the block of units, particularly the children. There then eventuated an extensive verbal altercation between the plaintiff and the defendant. On a number of occasions, the plaintiff told the defendant to "go home". The defendant, Ms Riechelmann, responded in robust terms using colourful and obscene language and suggested to the plaintiff that he should go away and let her be.
16. After some considerable further knocking on Mr Lavers' door (the exact period of time being disputed and unable to be ascertained with any accuracy), the defendant came down the stairs filming with her telephone camera and there was a verbal and, ultimately, a physical confrontation between the plaintiff and the defendant. Some of this is recorded. The Court will set out the alternative versions further in these reasons.
17. Mr McCabe had rung the Police at Cronulla and complained about the defendant's conduct. Following a further altercation between the plaintiff and the defendant, Mrs Pusell apparently used the defendant's mobile telephone, which had fallen to the floor (how was factually disputed), to call the Police again to request their attendance. Ms Wells, at a later stage, actually attended the Cronulla Police Station to request Police attendance on an urgent basis. The circumstances in which she did so are disputed.
18. In due course, the Police attended at the premises. Before their attendance, it is alleged that the defendant damaged the plaintiff's motorcar which was parked near to the units.
19. There is an extensive dispute about Ms Wells' account of what occurred. The defendant says that she (Ms Wells) initially told the Police that the plaintiff was choking Ms Riechelmann and that he had overreacted and was "out of line". However, a written and signed statement was provided to Police in due course by the plaintiff, signed by Ms Wells, partly retracting that suggestion, and stating that upon her observation the plaintiff had acted reasonably.

20. In due course, signed statements were provided to Police by the plaintiff and Mr and Mrs Pusell (all prepared in draft by the plaintiff) suggesting that it was the defendant who was the aggressor and that the plaintiff had acted reasonably.
21. On 5 April 2018, the defendant consulted her general practitioner, Dr Begum.
22. Dr Begum records in his consultation notes certain bruises which he found on the defendant's body including on her knee, chest, back and arm. He is not recorded as finding any bruises on the defendant's neck or throat. Ms Riechelmann gave evidence that she did not have any bruises on her neck despite claiming that she was choked and strangled by Mr McCabe. See also Exhibit G. She also did not dispute the contents of Dr Begum's notes.
23. Eventually, faced with different accounts of what had occurred on 31 March 2018, the Police decided to take no further action in relation to the matter: Exhibit 3, page 160.
24. In 2018, the plaintiff consulted his general practitioner and a psychologist in relation to alleged psychological sequelae from the confrontation with the defendant. Later, in 2019-2021, the defendant consulted her general practitioner and a psychiatrist in relation to alleged psychological injuries arising from the incident.
25. On 15 June 2018, the defendant and the plaintiff were present with various other people at the Cronulla RSL Club. I am satisfied and find for reasons which I set out below that the defendant had a glass of wine in her hand and made a movement clearly indicating that she was going to throw the glass contents over the plaintiff. However, no wine (or other liquid) was actually thrown on the plaintiff. I am satisfied from the evidence that there was a physical altercation between the defendant and Mr Lavers and the defendant was asked by security personnel to leave the Cronulla RSL Club and was escorted from that club.
26. The relationship between the plaintiff and Ms Wells had its own significant problems. It is not in dispute that at some stage in late 2018 Ms Wells "keyed" the plaintiff's car causing some significant damage to its outside panels: see Exhibit 3 page 113. Initially, the plaintiff thought it was Ms Riechelmann who caused the damage and reported it to Police. However, Mr Lavers had filmed Ms Wells damaging the plaintiff's car with a key. Eventually, Ms Wells was charged with an offence of malicious damage. The plaintiff retained a legal practitioner on behalf of Ms Wells to appear for her at the court hearing. Whilst the offence was found to have occurred (it was not denied by Ms Wells), the court did not proceed to record a conviction. In due course, the relationship between Ms Wells and the plaintiff collapsed. Ms Wells now asserts, in a second statement signed in 2020, a contrary account of the night of 31 March 2018 to that given by her in her initial written statement dated 20 May 2018. She says, in substance, that she agreed to change her initial oral statement to Police because of pressure from the plaintiff. In her second statement, she very seriously alleges that the plaintiff "strangled" the defendant.

27. Ms Wells paid a sum of money to the plaintiff to repair his car. It thus seems to be the case that any damage to the car caused by Ms Riechelmann, was repaired and paid for by Ms Wells. The plaintiff ultimately did not press this aspect of his claim (T506.48).
28. In October 2018, the defendant sold her unit at xx Ozone Street, Cronulla. In September 2020, the proceedings were transferred from the Local Court to the District Court with the order made by consent.
29. The evidence establishes that the plaintiff had restrictions and pain to her back and to her wrist which caused difficulties at various stages with her work at Qantas as a steward. As indicated, in early 2021 the plaintiff accepted voluntary redundancy from her employer, Qantas, and was paid a substantial amount in redundancy benefits. The defendant indicated in cross-examination that if she was not made redundant, she would have continued with her work at Qantas despite her psychological/psychiatric issues, but said she was performing at a basic level.

The oral evidence in the proceedings

The evidence of Mr Lavers

1. Oral evidence was given in the proceedings by Mr Jonathan Lavers, also known as Jon Lavers. Mr Lavers at all relevant times lived in Unit 12 at the block of units at xx Ozone Street, Cronulla. At the time of the final hearing, he was 67 years old, retired and a former lifeguard with Sutherland Shire Council.
2. Mr Lavers gave evidence that he started a personal relationship with the defendant, Ms Riechelmann, in July 2010 having met her at a local nightclub. Throughout their relationship, Mr Lavers indicated that he and the defendant lived in different houses while meeting up during the week. At the time, the defendant lived in South Cronulla. Mr Lavers said that he understood the defendant worked as a Customer Service Manager for Qantas Domestic.
3. Mr Lavers gave evidence that the plaintiff Mr McCabe was a friend of his who he had known for some considerable time. He said Mr McCabe often worked in Young, while spending most weekends following his divorce, in Cronulla. He said Mr McCabe owned a unit in his same block of flats where he lived but Mr McCabe's unit was on the ground or first level while his unit was on the third level. Mr Lavers said that he came into contact with Mr McCabe at the block of units as well as attending the gym and swimming training with him and socialising together including at restaurants and bars.
4. Mr Lavers said that the plaintiff and the defendant had met socially as part of his relationship with both of them, with there being no problem until 2014. However, he indicated that the defendant Ms Riechelmann had complained to him in relation to the amount of time he spent with others rather than her, including male friends which included Mr McCabe.

5. Mr Lavers gave evidence of a number of incidents between Mr McCabe and Ms Riechelmann. The first was reported to him as being Ms Riechelmann "tapping" Mr McCabe on the chin. He said he did not witness this. Ms Riechelmann reported to him that this was just a friendly tap whereas Mr McCabe said it was an assertive and aggressive tap. The second incident reported was when Ms Riechelmann threw champagne over Mr McCabe. He could not recall the date of that event.
6. The third incident occurred at a bar called 2230 Bar. He said it was reported to him later, that Ms Riechelmann had slapped Mr McCabe across the face. He said he did not witness this occurring but heard the slap: T58.6. He said that following this, Ms Riechelmann left the premises. Mr McCabe stated to Mr Lavers that he understood Ms Riechelmann did not approve of something he had said and she slapped him and left the venue. Mr Lavers said Ms Riechelmann's version was that she approached him (Mr McCabe) to be friends and Mr McCabe replied that she was a drunk and he did not have to be friends with her. She then slapped Mr McCabe.
7. Mr Lavers was then asked a number of questions about the layout of the block of flats at Ozone Street in Cronulla. He said the block was on three levels with three garages fronting the street. Access to the block of units was by way of a pathway on the right hand side of the block, with Mr McCabe's unit being to the left of the pathway on the ground floor. Mr Lavers said that there was a lockable door at the entrance to the block of flats and it was mostly locked at night but that the keypad entry had not been operable for about 10 years.
8. Mr Lavers gave evidence that as you entered the block of units, Mr McCabe's unit was the first unit to the left with the unit next to it being owned by Mr and Mrs Pusell. He said that his unit was on the third floor of the block and there was a flight of stairs but no lift in the block.
9. Mr Lavers stated that Ms Riechelmann purchased a unit on the second level of the block in 2014. He understood that she paid \$470,000 for the unit and that it was an investment unit (he later corrected the price to \$690,000).
10. In relation to his unit on the third floor, Mr Lavers said that it had a wire security door and a timber lockable door.
11. In relation to the incident at the 2230 Bar, Mr Lavers stated that Mr McCabe said to him words to the effect that Ms Riechelmann had just slapped him across the face. This followed him saying to her that he did not have to be her friend following her seeking to "bury the hatchet" in relation to the personal dispute between them.
12. Mr Lavers gave evidence that after this incident, he maintained his relationship with Ms Riechelmann until 2018. He stated that he was aware that Mr McCabe applied for an apprehended violence order against Ms Riechelmann in 2014 as Mr McCabe told him about it. He agreed he discussed it with Ms Riechelmann and she confirmed that she did not like Mr McCabe.

13. Mr Lavers gave evidence about an incident in 2017 when Ms Riechelmann threw a glass of beverage over Mr McCabe. Mr Lavers said that he had gone to JD's Bar with Ms Riechelmann in June 2017 and there were a lot of people present. He said the bar area was at the top of the stairs accessing the bar/restaurant. After purchasing some drinks, he saw Mr McCabe and some other people and said hello to them. He then went to the toilet and became aware that something had occurred whilst he was in the toilet. The first thing he saw was a lady "dusting" her hair at the top of the stairs with Mr McCabe walking down the stairs. He said he noticed that liquid was across the whole of the back of the shirt Mr McCabe was wearing. He said Mr McCabe came back up the stairs and said, "look what Julie just did". The other lady complained to Mr Lavers that Ms Riechelmann, who she pointed to, just threw wine all over them. When Mr Lavers questioned Ms Riechelmann she effectively said that "they only assume that [I] did it". Mr Lavers said that he apologised to the woman and Mr McCabe left. He said he noticed that Mr McCabe's shirt was saturated across the shoulders: T71.16. Mr Lavers said that he walked home by himself and discussed the matter with Mr McCabe the next day who expressed the view that Ms Riechelmann was "mad" and that he could not keep going out and feeling like he was going to be threatened.
14. Mr Lavers gave evidence that in February or March 2018 he went on a cruise with other male friends. He said he discussed the matter with Ms Riechelmann beforehand who indicated to him that if he went on the cruise they were "finished". He said to Ms Riechelmann that if that was the way she viewed it, that was the way it was, and he went on the cruise. It appeared that after he returned, Ms Riechelmann was still trying to continue with the relationship and sought counselling. Mr Lavers said that he did not go out with Ms Riechelmann or stay over at each other's house after the cruise.
15. Mr Lavers said that the incident on 31 March 2018 was after he had returned from the cruise and after he attended a function. He said he left the function at about 9pm and walked to his unit which was about five minutes away. He said he went to bed and, some time later, he heard Ms Riechelmann knocking on the door of his unit, including using the brass knocker on the unit door. He said he could not hear Ms Riechelmann calling out and he had previously been asleep. He said he received phone calls and text messages from Ms Riechelmann but he did not answer them. Mr Lavers said that he did not want to answer the door and put a pillow over his head so he could not hear the knocking.
16. Mr Lavers gave evidence that he did not answer the door because of an earlier incident at least a couple of years previously where he had allowed Ms Riechelmann into his unit. He said that she pushed him back into the unit from the doorway when he opened the door and was trying to hit him and was throwing items including chairs around his unit and verbally yelling at him. Her acts included throwing a light at him which caused a hole in the floor and in his lounge. Mr Lavers said he tried to restrain her. Mr Lavers stated that Ms Riechelmann cut her hand and was bleeding and he bandaged it and she stayed the night. He said that Police attended but he told them that everything was alright and he had sorted out the problem.

17. Mr Lavers was then asked about an incident which occurred at Cronulla RSL Club a few months after 31 March 2018. He said he was sitting on the main level of the RSL with Mr McCabe and two other male friends with two female friends joining them later. He said that Ms Riechelmann approached them at about 9:30pm and had a conversation with him in relation to how his "crotch" was working for him: T82.17. Mr Lavers said that Mr McCabe was sitting on his left hand side and Ms Riechelmann approached from the right. He noticed a hand movement from Ms Riechelmann with a half-filled glass of wine as if she was going to throw it towards Mr McCabe: T83.9-.20. He said that Ms Riechelmann also was physically grabbing at his crotch area on three or four occasions: T84.50.
18. Mr Lavers said that Mr McCabe went and spoke to a security person at the club who came over and motioned for Ms Riechelmann to move away and he believed she was taken from the premises of the club. In relation to the motion from Ms Riechelmann, Mr Lavers said that as she was holding her glass of wine she made an arm movement as if to throw wine towards Mr McCabe's direction but did not go through with the motion: T85.25.
19. In relation to the earlier incident where Ms Riechelmann had thrown items damaging aspects of his unit, Mr Lavers confirmed that he told Mr McCabe of this incident a few days later. He said that Mr McCabe had enquired in relation to the noise and the commotion outside and in Mr Lavers' unit. Mr Lavers said that he did not inform the Police what had happened in the unit but did tell Mr McCabe that Ms Riechelmann had attacked him and caused damage to his property: T87.5.
20. In cross-examination, Mr Lavers confirmed that he had known Mr McCabe for nearly 40 years. He said Mr McCabe had acted as his solicitor in recent times including in a conveyancing transaction before 2018. Mr Lavers said that he had spoken to Mr McCabe in relation to his evidence as he "had to put a statement together": T88.27.
21. Mr Lavers agreed that he previously had a long-standing romantic relationship with Ms Riechelmann for over eight years. He said they went on holidays together including overseas. He agreed that they had discussions with each other about the good aspects of their relationship and things which bothered them. Mr Lavers also agreed that one thing that he discussed with Ms Riechelmann both face-to-face and in text messages was the fact that Ms Riechelmann felt "intimidated" by Mr McCabe. He said that this was a frequent topic of discussion, and she was not happy about his relationship with Mr McCabe. He agreed that she became quite emotional about the matter and described his friends as having a "boys' club" while stating that she felt awkward in relation to his male friends. He agreed that she had a perception of being intimidated by Mr McCabe. He also agreed that Ms Riechelmann complained that Mr McCabe regularly insulted her, and she avoided places where he might be. Mr Lavers was of the view that she became "a bit obsessed" by Mr McCabe's behaviour. Mr Lavers said that while there were several years where there were no complaints from her and there was a harmonious relationship between the three of them, it deteriorated probably after his 60th birthday. Ms Riechelmann said to him that this had an affect on the relationship. He agreed that in late 2016 and early 2017 Ms Riechelmann said that when she

saw Mr McCabe her heart raced and her stomach churned.

22. In relation to the incident in August 2014, Mr Lavers agreed that Ms Riechelmann complained to him that Mr McCabe had insulted her and her family in relation to their participation in a musical, *The Sound of Music*. He agreed that she told him that Mr McCabe had called her a "drunk" and that no one liked her. He also agreed that Ms Riechelmann complained to him that Mr McCabe was seeking to interfere with their relationship.
23. Mr Lavers was asked a number of questions about the block of units. He corrected evidence given in chief at T61 and said that he understood that Ms Riechelmann bought the unit on the block for \$690,000.
24. Mr Lavers confirmed that he owned two units in the building, on levels three and two, Mr McCabe owned a unit on level one and Ms Riechelmann owned a unit at the relevant times on level two. He accepted that at various times there had been discussions with Ms Riechelmann about the benefit of redeveloping the site where the block of units was situated but nothing had occurred.
25. Mr Lavers agreed that Mr McCabe found out about the development plan and gave evidence that Mr McCabe was not in agreement with it. However, Mr Lavers expressed the opinion that he (Mr McCabe) would have agreed if a proposal had come through "at the right price". Mr Lavers rejected the proposition that Mr McCabe was against a development if Ms Riechelmann had any involvement with it. He said he was not aware of Mr McCabe insulting Ms Riechelmann in relation to the plans for the possible development.
26. Mr Lavers accepted that Ms Riechelmann had complained to him about Mr McCabe calling her a "trolley dolly" concerning her job as a Qantas steward and that she found the comment demeaning. He also agreed that the tension between Ms Riechelmann and Mr McCabe increased after December 2016. Ms Riechelmann had said that Mr McCabe was rude and disrespectful to her and that she had been verbally abused by him.
27. Mr Lavers was then taken to a number of text messages between him and Ms Riechelmann in 2017 and 2018 in which she complained about Mr McCabe and that she was anxious and fearful of him. Whilst accepting that she was intimidated by him, Mr Lavers said that Ms Riechelmann's behaviour to him was "obsessive". Mr Lavers accepted that the various texts he was shown were typical of communications he had with Ms Riechelmann, with her complaining about Mr McCabe and avoiding encounters with him because of the effect it had on her. Mr Lavers further accepted that he bought a "commitment ring" for Ms Riechelmann but did not recall that Mr McCabe referred to the ring in a derogatory manner, although he could have made a comment on it whilst laughing: T107.13. Mr Lavers agreed that he was receiving criticisms from both Mr McCabe and Ms Riechelmann about each other. He accepted that before 31 March 2018, Ms Riechelmann had suffered a severe emotional reaction to Mr McCabe.

28. Mr Lavers was then asked a number of questions about the incident on 31 March 2018. He confirmed that he heard Ms Riechelmann's knocking but said he could not hear what she was saying. He agreed that she was ringing him and sending him texts and that her knocking was insistent and constant. Mr Lavers said that he could not recall whether Mr McCabe was also sending texts to him on that night and whether he read them on that night or later. In relation to Ms Riechelmann's texts where she states that Mr McCabe called her "mad" and "insane", he would not have let her into his unit even if he saw her texts including her requests to let her in. He said he had the intention not to talk to her or let her in on that night.
29. Mr Lavers was then asked questions about a relationship he formed with another woman in 2018. He said he had not entered that relationship as at 31 March 2018.
30. However, Mr Lavers confirmed that although he had not started his new relationship by 31 March 2018, in his mind the relationship with Ms Riechelmann had ended.
31. After being taken to some text messages, Mr Lavers agreed that he spoke to Ms Riechelmann soon after 31 March 2018 and she complained that Mr McCabe had deleted videos from her phone. He agreed that she also said that Mr McCabe had knocked her phone out of her hand and had kicked it into his apartment and that she later asked for her phone back. He said he believed that she had told him that the Police had returned the telephone to her. In relation to her suggestion that Mr McCabe had deleted videos from the phone, he said that if they were deleted they could be retrieved and he assisted her by spending time on her phone attempting to retrieve deleted footage. When taken to a text message for 1 April 2018, Mr Lavers agreed that she thanked him for finding some of the deleted video footage from the night before which he had assisted her in retrieving. There is a question to be determined how and by whom the video footage was deleted.
32. Mr Lavers confirmed that Ms Riechelmann said to him that she was intending to lay charges against Mr McCabe and he sought to persuade her out of that. He rejected the possibility that as at 2 April 2018 a relationship with Ms Riechelmann could have been resumed by him.
33. Mr Lavers was asked about a relationship which had evolved between a person called "Mick" and Ms Melanie Wells who was Mr McCabe's former partner. He said he was told by someone that Ms Wells was seeing someone else in Cronulla while she was still with Mr McCabe but accepted that he was relying on gossip and what he was told. He also accepted that Mr McCabe did not return to Cronulla sometimes on the weekends for various reasons.
34. Overall, Mr Lavers impressed the court as an honest witness who was doing his best to give his evidence in a straightforward and direct fashion. He stated on a number of occasions that he was not good with the timeline of events and his evidence reflected that. He was clearly placed in a difficult position in hearing complaints by Mr McCabe concerning Ms Riechelmann and in hearing alternative complaints and reviewing extensive text messages from Ms Riechelmann about Mr McCabe, particularly that he intimidated her, insulted her and treated her in a demeaning fashion. I formed the impression that Mr Lavers, whilst not

always being good with times, had a reasonably good recollection of the various incidents where Ms Riechelmann was said to have slapped Mr McCabe and thrown wine or attempted to throw wine over him. I also accept that he had a reasonable recollection in relation to the events of 31 March 2018 although he had not seen any of the alleged altercation between Mr McCabe and Ms Riechelmann.

The evidence of Mr Pusell

1. Oral evidence was given to the court by Mr Rodney Pusell. Mr Pusell lives in Unit 4 of the block of units at xx Ozone Street, Cronulla, being the unit immediately next to Mr McCabe's unit on the first or ground floor of the block of units. He said he lived in the unit with his wife, Chantelle Pusell, and their daughter who was now 12 years old.
2. Mr Pusell confirmed that he knew Mr McCabe and saw him about once a fortnight when their paths met: T127.17.
3. Mr Pusell was then asked a number of questions about the evening of 31 March 2018. He said he first began hearing a noise at about 10 o'clock which was loud banging: T127.31. He said he proceeded out of his unit and walked up two flights of stairs to the third floor and saw Ms Riechelmann who was bashing the screen security door on Mr Lavers' unit: T128.5. Mr Pusell said that he knew they had been in a relationship but at that point he knew that they were no longer in a relationship: T128.12. After telling Ms Riechelmann that she was making a lot of noise and she had woken him and his daughter up, she said that she would not be too much longer, and Mr Pusell returned back to his unit: T128.14. He said he sent Mr Lavers a text asking him to answer the door.
4. Mr Pusell said that Ms Riechelmann appeared to be "very much intoxicated": T128.38. She could not stand still, and she was a bit "slurry" in her speech: T128.43. He also noted that she was bashing on the door: T128.43. Mr Pusell said that Ms Riechelmann was loud and aggressive (T129.5) in what she was shouting. After 20 minutes, he said the noise changed with her appearing to commence knocking on the door of Mr Lavers' unit (as opposed to the security door).
5. Mr Pusell said that he proceeded downstairs and went into his unit where he consoled his young daughter who was "quite hysterical": T129.26.
6. Mr Pusell said that in due course, he heard Mr McCabe and Ms Wells return to the unit. He had a discussion with Mr McCabe about Ms Riechelmann bashing on Mr Lavers' door upstairs. Mr Pusell stated that he had not been drinking alcoholic beverages that night as he did not drink at all: T129.49.
7. Mr Pusell gave evidence that he heard Mr McCabe call out to Ms Riechelmann asking her to leave as she was trespassing, and that Mr Lavers was not at home. Mr Pusell had left his door ajar on a latch at this time. He described Mr McCabe and Ms Riechelmann yelling at each other and Ms Riechelmann "yelling obscenities" to Mr McCabe: T130.6.

8. Mr Pusell stated that there was a peephole in the middle of his unit door which was fitted with a fisheye lens which allowed the vision to be expanded to "probably 120 to 140 degrees": T131.40. This gave him a wide view outside his unit: T132.3.
9. Mr Pusell stated that although he did not see Ms Riechelmann come down to the foyer on the ground floor, he assumed she was there because he could hear a "ruckus". At this time, Mr Pusell looked out the peephole of his door and stated that he hoped the situation did not get out of control. He said at this time there was a lot of swearing between Mr McCabe and Ms Riechelmann, with Ms Riechelmann calling Mr McCabe "a fuckwit" and Mr McCabe calling her "crazy" and that she needed to leave. He did not hear any discussion between Ms Riechelmann and Ms Wells. He then heard them refer to "insults" outside the door: T132.43.
10. Mr Pusell then gave the following evidence (by audio visual link) about what he saw:

"Q. What happened after there was a reference to insult that you saw through your lens?

A. That's when it got pretty heated. That's when I - I'm going back a step here, that's when I went to the peephole and saw Julie strike David. I don't know - I was shocked. I don't know if it collected or not. I was like, wow.

HIS HONOUR

Q. When you say you saw "Julie strike David. I don't know if it collected." What do you mean by that?

A. All I saw - because all I could only see - can you see me?

Q. Yes.

A. So I'm just going to turn around. I could only see this part of Dave from the peephole.

DODD

Q. Just stopping you there, sir. Just stop there for a minute.

HIS HONOUR

Q. So you're indicating that you could only see from the peephole the upper back torso of Mr McCabe including the back of his head?

A. Yes, the right-hand side of him, because of the angle faced in.

DODD

Q. Thank you. Then what next could you see?

A. Then I saw a fist and an outstretched arm going in his direction but I don't know if it - when I say collected, I don't know if it hit him in the face from my angle. I couldn't tell.

HIS HONOUR

Q. Can you answer this question? Did you see the - when you say an outstretched arm, whose arm?

A. Julie.

Q. When you say outstretched, what do you mean? Do you mean it was just out in front or was there any movement of it?

A. No, there was a movement. Are you able to visually see me.

Q. Yes.

A. So it was, like, I wouldn't say a hook but--

Q. You're indicating, was it the hand open or closed?

A. Closed.

Q. So you're indicating a closed hand with a movement to the front, arm slightly bent and towards Mr McCabe. Is that a fair summary?

A. Yes.

Q. But you didn't see whether the arm struck Mr McCabe.

A. Correct.

DODD

Q. Sir, did you see that movement once or more than once?

A. Only the once. As I stated, I was shocked. I stepped back and I was like, wow, can't believe that just happened. Things got a lot louder and heated then, and I wasn't going out there." (T132.45-T134.6).

1. Later, the following evidence was given by Mr Pusell (also by audio visual link):

"HIS HONOUR

Q. Mr Pusell, the arm movement from Ms Riechermann you've described, was that the only arm movement towards Mr McCabe that you saw on that evening whilst you were looking the peep hole?

A. That is correct.

Q. Whilst you were looking out the peep hole, did you see any arm movement of Mr McCabe towards Ms Riechermann?

A. Can I answer this in two?

Q. Yes, you answer the way you think gives you the best, most accurate answer.

A. Okay, so, during the - when Julie first came down, Dave had his hand out. I don't know if you can see it - had his hand out. Can you see that?

Q. Yes.

A. Defensive, protecting himself with his hand out, but his hand was open like that.

Q. When he had his hand out, did you see it contact any part of Ms Riechelmann's body?

A. No. He always kept a bit of a distance, and that's when he was saying, "Please leave. You're trespassing. Leave. Leave."

Q. Did you ever see him knock her hand?

A. No.

DODD

Q. I think you said, Mr Pursell [sic], there was two parts to that answer. Have you given his Honour the whole of what your recollection is regarding Mr McCabe's actions, or was there more to it?

A. No, that was it." (T134.19-T135.2).

1. Mr Pusell said that he then retreated to his lounge. He said he could not identify anything occurring from inside Mr McCabe's unit next door. After about 20 to 30 minutes, he then heard a loud bang on the glass with children in Mr McCabe's unit screaming out "help". He said they were very scared: T135.17. He went outside and saw Mr McCabe near his car, with Mr McCabe pointing to marks on his car, including hand-prints and a print on the boot of the car and scratches on the car: T135.26.
2. Mr Pusell then went back inside his unit as Mr McCabe had called the Police and his wife had also called the Police.
3. Later, Mr Pusell said that he could not see whether Ms Riechelmann's arm had come into contact with Mr McCabe because it was obscured by the angle and he had pulled himself back. He said he was shocked "to see a fist come out" from Ms Riechelmann: T135.45-.20.
4. Mr Pusell also gave evidence in relation to the 2015 incident at the block of units at Ozone Street when Ms Riechelmann attended the block. He said he was in his unit at the time and heard loud bashing to the front door to the block of units. Mr Pusell said that he could see the landing of the entrance to the block from the foyer and saw Ms Riechelmann kicking and hitting the front glass door. He initially had thought that someone had forgotten their key. He said that when he went out Ms Riechelmann had kicked her way through the door and was in the unit complex. At this time, he was at his front door. Mr Pusell said that he then went back into his unit. Mr McCabe came out and asked what was going on and he said that Ms Riechelmann had kicked her way through the front door. Mr McCabe began to ring the Police. The discussion occurred in the area between the two units in the foyer.

5. Mr Pusell said that about five to ten minutes later he heard noise from upstairs coming from within a unit. He said he could hear the noise through two floors and that there was a commotion going on. He said he heard banging and the sound of something breaking through being either dropped or thrown. In due course, the Police came but he did not speak to them.
6. Mr Pusell said that about two days later, he discussed the event with Mr Lavers and Mr McCabe outside the unit block. Mr Lavers said to them words to the effect that he had let Ms Riechelmann in and a fight occurred with Ms Riechelmann throwing a statue at him which broke. He said she had cut her hand and he attended to first aid for her: T218.2.
7. Mr Pusell was then subject to a detailed cross-examination, particularly focusing on his evidence in chief as to what he saw of the altercation between Mr McCabe and Ms Riechelmann immediately outside the door to his unit through the peephole to the door. Mr Pusell gave evidence that he suffered memory problems, particularly in the last few years, and that he also suffered depression and stress conditions which were related to a workers compensation claim where Mr McCabe was acting for him: T218.41; T220.19; T255.13. In the course of his evidence, on occasions Mr Pusell was distressed and sought a break. However, I formed the clear view that Mr Pusell was making every effort to concentrate on the questions asked and to provide a careful and detailed answer to them. Although he gave evidence that he was angry and irritated in relation to Ms Riechelmann, particularly concerning the events of 31 March 2018, he rejected the proposition that his anger and irritation towards Ms Riechelmann had coloured his impression of what had occurred on the night of 31 March 2018. He said her conduct in 2015 and on 31 March 2018 made him form a dislike of her and a view that she was not a nice person: T252.41.
8. Mr Pusell confirmed that he did not speak to Police on the night of 31 March 2018 or after that evening. He said he did not consider going to Police to give a statement as to the events of the evening.
9. Mr Pusell stated that as at 31 March 2018 he had been a neighbour of Mr McCabe for several years. He said that Mr McCabe began acting in the workers compensation claim for him from about mid-2018 but he did not appear to be able to recollect whether Mr McCabe was acting for him in relation to that claim as at 31 March 2018.
10. Mr Pusell agreed that Mr McCabe raised with him the issue of providing a statement to Police. He said that Mr McCabe came to him and he verbally gave his account, following which Mr McCabe drafted the statement, gave him a copy and asked him to go through it and adjust it as required. He agreed that following the events of 31 March 2018 he had discussed with Mr McCabe what had happened and told him what he had seen. He said that, to a degree, Mr McCabe also gave his version.

11. Mr Pusell was asked questions about when he heard the children screaming and crying. He denied the proposition that this commenced only when Mr McCabe started shouting at Ms Riechermann. He said his daughter started screaming and becoming "hysterical" when he returned from talking to Ms Riechermann upstairs after his daughter had woken up.
12. Mr Pusell was asked about the period during which Ms Riechermann was bashing on the door upstairs at Mr Lavers' unit on the night of 31 March 2018. He denied the proposition that Ms Riechermann had been knocking on the door for only three to five minutes before Mr McCabe returned and said that it seemed to him to be much longer than that. He said his view was that the bashing had occurred over a period of 20 minutes but that it did not occur during the whole of that period but on a number of instances. He agreed that the banging on the door by Ms Riechermann lasted for about three to five minutes before he went up to talk to her. Initially, Mr Pusell said that he was woken up and at the time his wife and daughter were asleep in bed, but later conceded that he could have been watching television at the time. He also conceded that he could not recall whether, before the incident, his wife was next door in Mr McCabe's unit and prior to that had seen Ms Riechermann arrive at the block of units. He denied the proposition that the period before Mr McCabe started arguing with Ms Riechermann was only about five minutes after the banging on Mr Lavers' door started. He said his recollection was that it continued over the course of 20 minutes: T222.2; T224.23.
13. Mr Pusell agreed that he heard Mr McCabe's voice outside his unit shouting at Ms Riechermann. He did not hear him saying that he had called the Police. Mr Pusell said that he was aware that his wife was in Mr McCabe's unit when the arguing started as he was awake with his daughter.
14. Mr Pusell was then asked questions about when he last saw the video footage and spoke to Mr McCabe. He said he last saw a second video taken by his wife about two to three days previously. It was shown to him by his wife whilst Ms Farrugia was present. He said he last saw Mr McCabe on the Monday before giving evidence when he came into his unit and explained the court process. At this time, he said that his wife, Mr McCabe and himself were present with his daughter coming in and out of the room. He said Ms Farrugia was not present during the conference. Mr Pusell denied discussing his evidence about what he saw looking through the peephole with Mr McCabe on the Monday before giving his evidence and said that he only discussed it with his wife and Ms Farrugia. He also denied discussing the length of time that Ms Riechermann was upstairs knocking at the door with Mr McCabe or any other aspect of his evidence. He further denied asking questions of Mr McCabe as to what he saw on 31 March 2018. When he was taken to his wife's evidence at T178.27, Mr Pusell remained adamant that there had been no discussion about the events of 31 March 2018 with Mr McCabe on that occasion: T229.34.
15. Mr Pusell gave evidence of seeing his wife and Ms Leah Farrugia looking at his wife's video footage before the Monday conference with Mr McCabe. He said it was suggested to him by his wife that some photographs had been deleted from the telephone of Ms Riechermann. He said he told them that if they had deleted anything they needed to tell Mr McCabe. At the

Monday conference, he heard his wife informing Mr McCabe that some photos had been deleted from Ms Riechelmann's phone. Mr McCabe said that he was not aware of that. Mr Pusell said that he only heard a limited part of the discussion between his wife and Mr McCabe about the deletion. Mr Pusell said that at the time he prepared his statement dated 20 May 2018 he was not aware that the second video taken by his wife existed. He agreed that when this statement was prepared, Mr McCabe had said to him that Police may potentially charge him (Mr McCabe) and he needed a statement.

16. Mr Pusell was taken to paragraphs 47 to 48 of his 20 May 2018 statement. He said he believed that statements were made using the word "assault" which is what it sounded like to him at the time. Having listened to the video, he was of the definite view that the word "insult" rather than "assault" was used. He said he put what he heard at the time in the statement: T233.12.
17. Mr Pusell was then subject to a detailed cross-examination in relation to what he saw when he was looking through the peephole out into the foyer from the door of his unit. Mr Pusell stated that he did not see Ms Wells whilst he was peering through the peephole: T233.41. When he saw Ms Riechelmann's arm move towards Mr McCabe, he said Mr McCabe was standing between the two units directly in front of the mid-wall between the units, about 40cm away: T233.48-T234.19. He denied that Mr McCabe's body was substantially taking up the whole view from the peephole and later stated that he was taking up about a third of the view with him being able to see aspects of the foyer: T234.23. Mr McCabe was facing between the entrance door of the units and the door of his (Mr McCabe's) unit. He said that there were two occasions on which he was looking through the peephole and this was the second occasion. On the first occasion, he heard Mr McCabe calling up to Ms Riechelmann saying she was "mad" and "crazy" and asking her to leave: T236.42.
18. Mr Pusell later gave evidence that he went back to the peephole when the argument between Ms Riechelmann and Mr McCabe became louder and he realised they were standing immediately outside his unit. He said that it took him between 20 and 30 seconds to go to the peephole and look out after the arguing increased in intensity. It was then that he looked out the peephole and saw Ms Riechelmann strike at Mr McCabe: T236.8; T238.16-.28; T240.18; T241.15. Mr Pusell described the arm movement of Ms Riechelmann as neither involving an open hand or a fist but a hand substantially curled and apparently towards forming a fist: T247.12-.50. Mr Pusell gave evidence that he did not see when looking through the peephole:
 1. Ms Riechelmann standing next to the balustrade about 50cm from the steps arguing and holding up a mobile phone in Mr McCabe's direction;
 2. Mr McCabe striking Ms Riechelmann's hand while she was holding her phone;
 3. Ms Riechelmann moving towards Mr McCabe in an attempt to get her phone back;
 4. Ms Riechelmann trying to pick up the phone;

5. Mr McCabe's arm around the neck of Ms Riechelmann and pulling backwards.
1. Mr Pusell said he only saw Mr McCabe defending himself using an outstretched arm trying to get Ms Riechelmann to stay back. He also said he did not hear a crash at this time or the sound of a body hitting up against a wall. Mr Pusell said that when he saw Ms Riechelmann's arm thrown out in the direction of Mr McCabe, he was shocked to see it and sat down in his unit. Mr Pusell said he heard the word "assault" used and agreed that this was heard by him after, but it could have been before, he saw Ms Riechelmann striking out at Mr McCabe with an outstretched arm: T241.15. Mr Pusell also gave evidence that he did not hear Ms Wells say words to the effect "Stop, David".
2. Mr Pusell said that once he had sat down in his unit he could hear noises but not exactly what was said. Mr Pusell agreed that the second video taken by his wife was different to his recollection, as what he saw out the peephole was not in the video. He said what he saw was "not something I'm going to forget": T242.49. Mr Pusell said what he had seen had "affected" him: T242.48. Mr Pusell denied the proposition that what he saw involving Ms Riechelmann moving her arm forward was ten or so seconds after he heard the word "assault" used by her and said that there was no truth to that proposition and that it was not plausible: T244.32-49. He similarly rejected the proposition of seeing Mr McCabe with his arm up towards Ms Riechelmann's neck looking to push her out of the units. He said he only saw Mr McCabe raise his arm and hold his hand out with his arm outstretched with his fingers extended. He denied that it was possible that the incident he saw was 80cm along the stair railing towards the entrance door to the block of units or that Ms Riechelmann was reaching out to the railing: T245.4; T246.39-T246.7. Whilst agreeing that he only saw the action in a split second, he said he did not recall Mr McCabe having a mobile phone in his hand. Mr Pusell gave the following answer:

"If you want to be precise – you keep mentioning fraction of a second – however long it takes to strike. All I saw was the arm come out and go towards Dave's face. If you took two seconds, one second, three, I couldn't tell you exactly. I saw what I saw": T248.33.

1. Mr Pusell said he did not see a mobile phone in Ms Riechelmann's hand coming forward: T248.47.
2. Mr Pusell was then taken to the conversation with Mr McCabe standing near his motor vehicle which he gave evidence about in chief. While he agreed that he did not set out this conversation in his statement of May 2018 he recalled having it and saying to Mr McCabe words the effect "I can't believe she did this to your car": T250.25. Prior to that, Mr Pusell said that he heard a bang outside which he thought was to the window of Mr McCabe's bedroom which was the reason for him going outside: T250.33-45. He said that following the bang, the children started screaming for what he described as the third time: T250.48. He said he did not see Ms Riechelmann when he arrived there. Mr Pusell gave evidence that he returned to his unit while Mr McCabe waited outside for the Police.

3. Mr Pusell said that soon after, Ms Riechelmann profusely apologised to him when she saw him at the beach. He told her that she had traumatised his daughter and that he wanted nothing to do with her: T251.45.
4. In re-examination, Mr Pusell confirmed that in more recent times he has had problems with his memory and that he suffered from chronic depression and stress: T255.13-19.
5. I have referred above to my impression of Mr Pusell. Despite his stated dislike of Ms Riechelmann and his admitted memory problems, I confirm that I formed the clear impression that he was making every effort to give clear, precise and truthful answers. He made concessions where appropriate and was willing to reconsider, and at times alter, his evidence upon further reflection. However, he was clear in his recollection as to what he saw when he looked out the peephole on his door on the second occasion. I have no hesitation in accepting his evidence that this was his recollection and that he recalled seeing Ms Riechelmann striking out with her arm outstretched and her hand curled towards Mr McCabe's face. The precise circumstances of this must be considered in the light of all the evidence in the case. I do not accept his evidence that Ms Riechelmann was banging or bashing on Mr Lavers' door for 20 minutes before Mr McCabe's arrival. It may have seemed to be for a long time but it is inconsistent with the evidence of Mrs Pusell which I prefer on this issue.

The evidence of Mrs Pusell

1. Oral evidence was given in the proceedings by Mrs Chantelle Pusell. Mrs Pusell is the wife of Mr Rodney Pusell.
2. Mrs Pusell gave her version of the events of the evening of 31 March 2018 in her evidence in chief. She stated that she left the block of units at Ozone Street with a friend, Ms Leah Farrugia, to collect Ms Farrugia's daughter who was with Mr McCabe and Ms Wells. However, a telephone call to Ms Farrugia on the way indicated that Ms Wells was coming home with Ms Farrugia's child. Mrs Pusell gave evidence that they ran into Ms Riechelmann and had a short conversation with her before Ms Riechelmann walked into the apartment building and went out of sight. Mrs Pusell later gave evidence that Ms Riechelmann appeared to be in a hurry: T160.35.
3. Mrs Pusell stated that in due course, Mr McCabe and Ms Wells arrived at Mr McCabe's unit. She said that her husband Mr Pusell told her to be quiet as Ms Riechelmann was "screaming upstairs". Mrs Pusell said that she heard a woman screaming out upstairs to "open the door" and banging on a door. Mrs Pusell stated that she then started to film and record on her mobile phone the incident which included the banging noise. She told her husband to shut the door as her daughter may wake up. She said she was in the foyer for about five to ten minutes,

4. Mrs Pusell stated that the yelling and banging continued on and off and then she heard Mr McCabe yell to stop banging as "you have frightened the children" and saying words to the effect to "leave the building and go home". Mrs Pusell stated that Ms Riechelmann responded that maybe "she was concerned for the well-being of [her] partner". She said there was a lot of swearing with obscenities forwarded by Ms Riechelmann to Mr McCabe. At this time, she heard Mr McCabe saying to Ms Riechelmann that he would call Police if she did not leave. Mrs Pusell said that Mr McCabe was in the foyer, with Ms Wells coming in and out of Mr McCabe's unit. The three children in Ms Wells' company were inside Mr McCabe's unit, with Ms Farrugia. At this time, she saw the children trying to come out of the unit, with Mr McCabe telling them to go back inside. Mrs Pusell said she followed Ms Farrugia and the children into the unit and took her telephone with her.
5. Mrs Pusell said that she heard Ms Riechelmann come downstairs and there was a loud conversation with Mr McCabe. At this time, she said Ms Farrugia had her telephone and was starting to film using it from inside Mr McCabe's unit. Mrs Pusell said that she was standing next to Ms Farrugia. Mrs Pusell said that the door to Mr McCabe's unit was ajar and there was a gap. Mrs Pusell said that she saw Mr McCabe and Ms Riechelmann close together arguing with Mr McCabe saying that Ms Riechelmann needed "to leave".
6. Mrs Pusell noticed a telephone come through the door on the floor. She later said that she believed the phone "bounced" on the floor. She said she did not know whose phone it was and did not see how the phone got on the floor. She later gave evidence that she did not see Mr McCabe push the phone into his unit using his foot. She noticed the phone on the timber floor inside the unit near the entrance to Mr McCabe's unit. Mrs Pusell said she picked the telephone up: T149.46. During her evidence, she said that it sounded like the phone had been knocked by the door and fell on the floor, but it seemed clear from her evidence that she did not see this: T149.40. Mrs Pusell said that when she picked up the telephone she was filming on her telephone. She said Ms Farrugia had passed her telephone to her just before the other telephone had fallen on the floor. Mrs Pusell then continued filming.
7. Mrs Pusell stated that as the screaming and yelling between Mr McCabe and Ms Riechelmann became more intense, she called the triple zero emergency line using the telephone which she had picked up. She was put through to Cronulla Police Station and reported the disturbance.
8. At this time, the door opened. Mrs Pusell said that she saw Mr McCabe leaning forward with his arm outstretched trying to keep Ms Riechelmann away from him. She said that she saw Ms Riechelmann lunging forward trying to hit Mr McCabe: T151.48-T152.16. Although initially Mrs Pusell said that she believed Ms Riechelmann had her hand closed in a fist, she later said that she was not sure of this: T152.16 cf T164.47. Mrs Pusell then said that she heard Mr McCabe asking Ms Riechelmann to leave and Ms Riechelmann calling out Mr Lavers' name. She then gave evidence that she saw Mr McCabe lunging forward to keep Ms Riechelmann from him with her trying to "swing" at him: T152.30. She stated she did not see Ms Riechelmann strike Mr McCabe. She said that Mr McCabe's arm was outstretched. In

relation to Mr McCabe's arm, Mrs Pusell gave evidence that she could not see whether his arm was connecting with anyone but believed it came into connection with Ms Riechelmann: T153.35.

9. Mrs Pusell then gave evidence that she went back inside the McCabe unit as the children were screaming in fright and she saw them as a priority. She said she went to the front room in the unit with Ms Farrugia. This was a bedroom, the windows of which faced the side walkway to the entrance to the units. At that time, the three children, Ms Farrugia and Mrs Pusell were in the bedroom, the lights were initially on and then they were turned off. She stated that she and Ms Farrugia stayed with the children comforting them. She then stated that she gave the telephone that she believed to be Ms Riechelmann's which she had used to call the Police to Ms Farrugia.
10. Mrs Pusell gave evidence that the window in the bedroom was slightly open. She then saw Ms Riechelmann's arm reach through the window and make the blind move. This caused the children to scream. She later gave evidence that Ms Riechelmann asked for her phone to be returned. She then gave evidence that Ms Riechelmann continued to bang on the glass windows as she walked down the side of the unit. She heard a large noise in the course of the banging and later saw the air-conditioner pushed inside the kitchen window where it had fallen on the floor. Mrs Pusell said that she stayed with Ms Farrugia in the dark bedroom with the children. Although Ms Farrugia had the telephone of Ms Riechelmann, it ended up being placed back on the kitchen bench by either Ms Farrugia or Mrs Pusell.
11. In due course, the Police arrived, and a Policeman entered Mr McCabe's unit seeking a phone. Mrs Pusell indicated that there was a phone on the bench and the policeman took it. Mrs Pusell gave evidence that she did not see Mr McCabe with Ms Riechelmann's phone and that although she was not sure, she believed that the phone was on the bench for about 10 to 15 minutes before the policeman took it. Mrs Pusell denied in her evidence in chief that Mr McCabe came back into the unit before the policeman came in to take the telephone: T158.14.
12. Mrs Pusell was then subject to a detailed cross-examination in relation to the events of 31 March 2018 and, in particular, to the access to Ms Riechelmann's phone and what she saw in relation to the altercation between Mr McCabe and Ms Riechelmann. In cross-examination, Mrs Pusell gave evidence that there were two videos of the evening on her telephone. The first had been taken by her when Ms Riechelmann was upstairs. The second had partially been taken by Ms Farrugia and the remainder by her. Mrs Pusell said that she gave the two videos to Mr McCabe not long after the incident: T159.20. Mrs Pusell said that she had reviewed the second video taken by her recently before giving her evidence.
13. Mrs Pusell gave evidence that she saw Mr McCabe outside the unit with his phone and having an argument with Ms Riechelmann. She said she could not be sure that the lens of the telephone camera of Mr McCabe was directed towards Ms Riechelmann: T162.15. She agreed that Mr McCabe was describing Ms Riechelmann as an "idiot" and that she was

"mad". She also agreed that he was telling her to leave and go home. Mrs Pusell agreed that she did not see Ms Riechelmann come down the stairs. She agreed that she heard Ms Riechelmann say the words "you assaulted me" while she was in the unit of Mr McCabe with the door largely closed: T162.42.

14. Mrs Pusell was asked about the telephone which came into the unit. She confirmed that she did not see how the phone went from Ms Riechelmann's hand to the floor and also did not see how the phone came into the unit. At this stage, she confirmed that she believed the phone "bounced" on the floor as it fell. When the phone fell, the three people in the foyer were Mr McCabe, Ms Riechelmann and Ms Wells. At this time, Mrs Pusell agreed that she could not see what was happening outside Mr McCabe's unit in the foyer: T163.43.
15. Mrs Pusell agreed that her ability to see outside was improved when the door was opened slightly: T164.9. She said Ms Farrugia opened the door for her as she was filming on her own phone and telephoning the Police on the phone which had come into the unit. In relation to the suggestion that she saw Mr McCabe with his arm up pushing Ms Riechelmann, Mrs Pusell said that she did not see Mr McCabe push Ms Riechelmann. She said she only saw Mr McCabe's arm stretched out: T164.23. In relation to the suggestion that Mr McCabe appeared to be moving towards Ms Riechelmann, Mrs Pusell said that she saw him holding his arm up, stretched out and that Ms Riechelmann was coming towards him with him saying to her that she should leave. Mrs Pusell said that she did not see Mr McCabe's hand at the neck of Ms Riechelmann: T164.37. In relation to the suggestion that, contrary to her evidence in chief, she saw Ms Riechelmann's hand come up with an open palm and not a fist, Mrs Pusell said that she was not sure: T164.47. She agreed that any incident relating to a clenched fist was not shown on the video. Soon after, Mrs Pusell gave evidence that although she was not sure about a fist it looked to her like Ms Riechelmann was trying to reach out to him or hit Mr McCabe in some way: T165.20. Mrs Pusell agreed that her sight may have been at a different angle to what was being filmed on her phone.
16. Mrs Pusell said that at that stage she had formed a view that Mr McCabe was intoxicated: T166.13. She agreed that in some ways Mr McCabe was being aggressive and he was shouting at Ms Riechelmann to leave the premises and described her as a "mad woman": T166.34.
17. Mrs Pusell said that soon after this she moved back to the bedroom and Mr McCabe and Ms Wells returned to the unit and shut the door. Then, Ms Wells appeared to be upset with Mr McCabe and stated to him that she thought he was "out of line" which Mr McCabe disputed. Mrs Pusell agreed that Ms Wells appeared upset and annoyed, but she was not crying. She agreed with the proposition that Ms Wells was of the view that Mr McCabe had overreacted: T167. Mrs Pusell gave evidence that Mr McCabe then went back outside the unit.
18. There was then extensive cross-examination in relation to the deletion of photographs and videos. Mrs Pusell agreed that she had not deleted any video footage from her phone. Numerous questions were asked of Mrs Pusell in relation to whether anyone had deleted

photographs or video footage from Ms Riechelmann's telephone. Although Mrs Pusell's evidence was inconsistent to some degree in relation to this issue, her evidence appeared to be that she gave the phone to Ms Farrugia and Ms Farrugia deleted one or more photographs from Ms Riechelmann's phone and at least one video before they had a discussion that they should not delete any further material from the phone. It appeared to be the case that they were of the view that close-ups of Ms Well's face at the least should be deleted from the phone. In some places in her evidence, Mrs Pusell said that she saw Ms Farrugia delete video footage from the phone of Ms Riechelmann. Later, while expressing her belief that one video and a couple of photos were deleted by Ms Farrugia, Mrs Pusell said that she was not sure of it. Mrs Pusell was consistent in her denials that she had deleted anything and said that Ms Farrugia was holding the telephone of Ms Riechelmann. Mrs Pusell gave evidence that when the telephone was placed on the bench by either her or Ms Farrugia, Mr McCabe and Ms Wells were not in the unit. She stated that she did not see Mr McCabe return to the unit but believed she would have known as it was a small unit. She then stated that he did not come back into the unit before the Police arrived: T201.42.

19. Mrs Pusell then gave evidence of a recent conversation with Mr McCabe in which she told him that photos and a video were deleted from Ms Riechelmann's phone. She said she had originally told her husband of this, and he told her that she had to tell Mr McCabe. Mrs Pusell said that she told Mr McCabe this during a general discussion with Mr and Mrs Pusell as to what they saw on the night of the 31 March 2018 incident. Mr McCabe said to Mrs Pusell that the information about the photos and video being deleted was new to him.
20. Upon further detailed cross-examination, Mrs Pusell stated that she believed one or two photos and a video on Ms Riechelmann's phone were deleted by Ms Farrugia. Mrs Pusell then said that although she could be wrong, she believed that at least one video was deleted by Ms Farrugia: T170.18-.29; T181.29; T182.1; T182.19; T183.3 ("I'm sure it was one or two photos and a video"); T183.13; T185.3-.17; cf T180.48; T181.20; T186.27-.43; and T187.8. In other parts of her evidence Ms Pusell said that she did not know what was deleted: T181.11; T186.20.
21. Mrs Pusell was then asked questions about her statement dated 13 June 2019 and, in particular, paragraph 4 of that statement in which Mrs Pusell confirmed that she did not interfere with Ms Riechelmann's mobile phone and did not delete any material stored on the phone. Mrs Pusell stated that she did not delete any material from the phone: T187.40. Mrs Pusell said that she wrote that in her statement "because Leah [Farrugia] and I wanted to be anonymous about that situation": T188.8. However, Mrs Pusell accepted that as at June 2019, she did not think that either her or Ms Farrugia had deleted or interfered with the telephone because if she had thought that she would have told Mr McCabe: T188.45-T189.2.
22. Mrs Pusell was then asked some questions about the preparation of her June 2018 statement with Mr McCabe. Mrs Pusell gave evidence that she had discussed the events of the night with Mr McCabe and he prepared a draft statement which he asked her to review and correct: T189.32; T189.39-.49; T190.10-.37. At this time, Mrs Pusell said she did not look at

any video footage when she made the statement: T191.3. Mrs Pusell stated that Mr McCabe gave to her his version of what had occurred a few weeks after the incident on 31 March 2018 and told her that Ms Riechelmann had punched him. She said that Mr McCabe showed her his cheek "[be]cause it was all red". Mrs Pusell pointed to the left cheek just below the eye which she said was swollen: T192.25-.41. She confirmed that Mr McCabe told her that he had been punched several times: T192.49.

23. Mrs Pusell was then shown video footage which was part of Exhibit A being video 22425 (video 8) (four minutes and 18 seconds). Mrs Pusell confirmed that this was the video taken by her and Leah Farrugia with the majority being taken by her. Mrs Pusell said that she heard Ms Riechelmann say "is that an assault" and did not see the phone hit the floor. She also did not see Mr McCabe kicking the phone into the hallway of his unit. She said Ms Farrugia gave her the phone: T197.3-21 and T197.34-.49. Mrs Pusell expressed the opinion that Mr McCabe was trying to close the door to his apartment to stop Ms Riechelmann trying to get in, although that was an assumption she made: T198.3-.8.
24. Although Mrs Pusell confirmed that she saw Mr McCabe lunging with his left arm towards Ms Riechelmann when the door opened again, she stated that she did not believe he was pushing Ms Riechelmann but rather holding her back as she was "trying to come at him": T198.31-.48. While agreeing that at this time Ms Riechelmann was calling for "Jon", she did not know whether Ms Riechelmann was trying to get past Mr McCabe to go back up the stairs to Mr Lavers' unit: T199.8; T200.19. Mrs Pusell gave clear evidence that she did not see Mr McCabe push Ms Riechelmann: T200.24-.32.
25. Mrs Pusell agreed that Ms Wells asked where Ms Riechelmann's telephone was. At the time, she did not know whose phone she was using to call the Police. She said she did not hear Ms Riechelmann stating to Mr McCabe that he had slapped the phone out of her hand: T201.4-.12. When shown the video, Mrs Pusell agreed that Ms Wells accused Mr McCabe of acting "out of line", which he denied. Mrs Pusell said that after this, Ms Wells and Mr McCabe left the unit but that Mr McCabe did not return to the unit before the Police arrived. This evidence would indicate that there was no time for Mr McCabe to have accessed Ms Riechelmann's phone to have deleted any of the material on it: T201.20-.42. I accept Mrs Pusell's evidence and make that finding: cf defendant's submissions. Mrs Pusell appeared clear on this issue. Mrs Pusell confirmed that she was not drinking alcohol on the night of 31 March 2018: T203.40.
26. Mrs Pusell impressed the court as an honest and straightforward witness. I formed the clear impression that she was doing her best to give her evidence truthfully. It was clear that, having regard to the period which had passed, Mrs Pusell had difficulties recalling all the details of the events of 31 March 2018. Her evidence in relation to the deletion of videos from Ms Riechelmann's phone was inconsistent, as discussed above. In the end, I formed the firm view from the evidence that Mrs Pusell's best recollection was that Ms Farrugia had deleted photos and at least one video from Ms Riechelmann's phone whilst it was in their possession and before it was placed on the kitchen bench in Mr McCabe's unit and

ultimately handed to a Police officer. I find that Mr McCabe did not have the opportunity on Mrs Pusell's evidence to delete any videos. I reject the submission by Ms Riechelmann that Mr McCabe was obliged to call Ms Farrugia otherwise a *Jones v Dunkel* inference should be drawn. There was no evidence that Ms Farrugia was, or could be regarded as being in, Mr McCabe's "camp". Nor would it be expected that he would be the party who would call her as a witness: see *Payne v Parker* (1976) 1 NSWLR 191 at 201-2.

27. Despite being Mr McCabe's neighbour for some considerable time, I did not form the view that Mrs Pusell was biased towards him in any way. She clearly had formed the view that Ms Riechelmann was acting in a disruptive and unreasonable way on the evening in question by continually banging on Mr Lavers' door and shouting obscenities at Mr McCabe. However, having seen her give evidence, I am not of the view that this opinion affected her evidence. In particular, I accept her evidence that she did not see Mr McCabe knock the phone out of Ms Riechelmann's hand, kick the phone back into the foyer of his unit, take active steps to push or strike Ms Riechelmann or see Ms Riechelmann strike Mr McCabe. I accept her evidence that her best recollection is that she recalls Ms Riechelmann making an arm movement in Mr McCabe's direction as if to hit him but did not recall whether it was with a closed or open fist. Clearly Mrs Pusell's evidence must be considered in the light of all of the evidence before the Court.

The evidence of the plaintiff, Mr McCabe

1. Lengthy oral evidence was given by the plaintiff and cross-defendant, Mr David McCabe. He was cross-examined for over three days by senior counsel for the defendant.
2. Mr McCabe gave evidence that he was a lawyer by profession and lived and worked principally in Young in regional New South Wales as well as having an office at Taren Point in Sydney. He also owned unit 3 at the block of units at Ozone Street Cronulla. As at 2018, Mr McCabe gave evidence that he worked in Young from Monday to Friday and travelled to Cronulla about three out of every four weekends.
3. Mr McCabe gave evidence that he bought his unit in Ozone Street in 2011, initially with his sister. He bought out her share probably in about 2014: T260.18. Mr McCabe gave evidence that he had known Mr Jon Lavers since 1984 when he worked as a lifeguard during university breaks. He said they had become close friends. Mr McCabe said Mr Lavers owned two units at Ozone Street including Unit 12 on the third floor where Mr Lavers lived.
4. Mr McCabe then gave evidence about his contact with Ms Riechelmann, the defendant. He said he first met her in 2011 after Mr Lavers and she had met: T261.10-.18. Mr McCabe stated that he continued to socialise with Mr Lavers after 2011 but not on a regular basis. He said he also saw him at the block of units and they did swimming and gym training together. Mr McCabe said he met up occasionally with Mr Lavers and Ms Riechelmann socially but not on a regular basis. They also attended some of the same functions on occasions. At this time, the relationship between Mr McCabe and Ms Riechelmann was going well: T263.29.

5. Mr McCabe gave evidence about the incident in September 2014 at JD's Bar and Bistro in Cronulla. Mr McCabe was at the bar with the Blewitt brothers. Mr Lavers and Ms Riechermann also attended the bar at around 10pm. Mr McCabe gave evidence that he was standing at a table in the Bar and Bistro when Mr Lavers and Ms Riechermann entered. He said that the "first thing" that occurred was that Ms Riechermann came up to him and slapped him across the face with her right hand. He gave evidence that he had said nothing to Ms Riechermann before she had done that: T264.29-.49. Mr McCabe said he was shocked as nothing like this had ever happened to him before and he just walked out and did not engage in conversation. He said he felt upset, emotional and "had a fear": T265.19. He said his left cheek had a tingling sensation. Later that evening, he received an abusive text message from Ms Riechermann: T265.36-T266.2. He said he raised the matter with Mr Lavers.
6. Mr McCabe then gave evidence that about a month later, on 12 October 2014, he was at another bar in Cronulla called 2230 with various persons including one of the Blewitt brothers. He said he saw Mr Lavers and Ms Riechermann arrive and sit outside in another area of the bar. He said Mr Lavers came over to say hello and then bought some drinks. Mr McCabe said that Ms Riechermann came over to him and said she was purchasing a unit in the block of units in Ozone Street and then criticised a text he had sent to Mr Lavers. Mr McCabe said it was a text between the two of them and was not intended to go further: T267.5-.24. The conversation between them then apparently became argumentative as she continued to talk about the text. Mr McCabe said words to her to the effect that Mr Lavers "should have someone else" after which Ms Riechermann struck him with an "open-handed, extremely heavy slap to the face", much more forceful than the previous slap: T268.9-.15. Mr McCabe said the whole right-hand side of his face was tingling and numb and he was in a state of shock, was upset and was embarrassed. Ms Riechermann then stormed off without saying anything else. Mr McCabe told Mr Lavers what had happened when he returned with the drinks. The next day, Ms Riechermann sent him an email stating in effect: "If you feel you've got to take me to court, then take me to court, big boy": T269.3.
7. Mr McCabe said that he reported the incident to New South Wales Police at Cronulla and gave a statement at the Miranda Police station a few weeks later. He stated that the Police eventually applied for an apprehended violence order which required him to attend twice at Sutherland Local Court. Mr McCabe said he was feeling apprehensive that if he met Ms Riechermann, anything could happen physically, including once again being slapped in the face: T270.6.
8. Mr McCabe gave evidence about an incident at the Ozone Street block of units in 2015. He said he was sitting in his unit in the lounge room at the time. He said he heard smashing on the front entrance door to the block with loud banging and shouting from Ms Riechermann, including swearing: T271.25. He said Ms Riechermann forced the door open to the units and he saw her enter the block but did not say anything to her.

9. Mr McCabe said he went outside his unit a couple of minutes later and knocked on the Pusells' door and had a discussion with Mr Pusell: T272.2. He said he stayed at the entrance to his unit with the door open and noticed yelling from the floors above from Ms Riechelmann including her using obscene language: T272.22. Mr McCabe said he then heard loud smashing and crashing noises for about 10 minutes with thuds. He said he then rang the New South Wales Police who attended about two hours later: T273.6-.17. He said that after some time, the Police came and knocked on his door and spoke to him.
10. Mr McCabe said he had a conversation with Mr Lavers the next day in which Mr Lavers said that Ms Riechelmann had arrived at his unit and picked up chairs and threw them around. She then picked up a wooden lamp that had a crystal wave design on it and threw it at him. The lamp landed on the lounge and damaged the floor and lounge in Mr Lavers' unit. In doing these acts, Ms Riechelmann cut her hand and Mr Lavers said that he bandaged and attended to the hand. Mr McCabe said that Mr Lavers told him that he had to pin Ms Riechelmann down on the lounge with both of his feet onto her arms so that he would not get hit anymore by her. Mr Lavers said to Mr McCabe that he was given a "bloody lip" by Ms Riechelmann: T274.41-T275.2. Mr McCabe said that he felt following this incident that Ms Riechelmann was "a very violent and aggressive female" (T275.20) and he felt unsafe in his unit as the unit was on the ground floor. Mr McCabe said he felt nervous and apprehensive about what could happen because of what he described as the "violent and aggressive nature" of Ms Riechelmann (T275.33).
11. After this incident, Mr McCabe said that his and Ms Riechelmann's paths seldom crossed and if they were at a function, he avoided her and Mr Lavers.
12. Mr McCabe then gave evidence about an incident on 3 June 2017 at JD's Bar and Restaurant. He said he arrived at about 10 o'clock and met with the Blewitt brothers. He said he was standing at the bar some distance from the top of the stairs into the bar. Mr McCabe said he noticed that Mr Lavers and Ms Riechelmann entered the bar with Mr Lavers coming over to say hello. Mr McCabe said he decided at some stage to leave to go home and walked along the bar and saw a physiotherapist he knew called Fabrice. He went to go down the stairs and noticed that a young lady was coming up the stairs. Mr McCabe said that he was about to put his foot down on the first step of the staircase when he felt "an explosion of liquid on my back, going from my shoulders down to the waist, and on the back of my hair": T279.17. Mr McCabe said he felt shock and "nerves" when this happened.
13. Mr McCabe gave evidence that the lady coming up the stairs yelled out "she did it" and pointed her finger. When Mr McCabe turned around, Ms Riechelmann was about a half a metre from him. He asked who threw the glass and he said Ms Riechelmann hid behind the person Fabrice. The other woman coming up the stairs said "she threw it" and pointed at Ms Riechelmann. Mr McCabe said Ms Riechelmann just stood there "and grinned". Mr McCabe said he was "a bit angry" because he had his "entire clothes and head saturated in some form of liquid as [he] was proceeding out to go home": T280.13. Again, Mr McCabe said that he felt nervous and said to Ms Riechelmann that he would take the matter further: T280.18.

14. Mr McCabe gave evidence that following the 3 June 2017 incident at the JD's Bar and Restaurant, he received a text the next day from Ms Riechelmann in which she apologised for anything she had done wrong and said it was not intentional. Mr McCabe said that he contacted Police in relation to the incident but, after enquiries, they indicated that they were not carrying out any further investigations and referred to the lack of CCTV footage and their lack of knowledge of any witnesses. Mr McCabe said he felt in shock and had a tightness in his chest when he was told the Police response and wondered whether there was anything he could do to stop Ms Riechelmann from attacking him. He said this caused him concern and he was apprehensive of her. He stated he once saw Ms Riechelmann at the North Cronulla Hotel and left immediately as he felt nervous.
15. Mr McCabe gave evidence in chief in relation to the important incident on 31 March 2018. He said he had been to a 60th birthday party at the North Cronulla Surf Club which about 60 to 70 people attended. He said he attended the event with Ms Wells and her two children as well as Mr Lavers and other friends. Ms Leah Farrugia's female child also attended. Mr McCabe said that he had been drinking mid-strength beer and had consumed between 10 and 12 glasses of beer (T285.42), with Ms Wells drinking the same number of glasses of champagne. He said he bought her a glass of champagne every time he went to buy himself a glass of beer (T285.49).
16. Mr McCabe said he left the function with Mr Steve Blewitt and his child and with Ms Wells' son at about 9:45pm to 9:50pm. Ms Wells stayed at the function. Mr McCabe said that they proceeded along the Esplanade and then he returned with Ms Wells' son to the block of units.
17. Mr McCabe gave evidence that he bumped into Mrs Pusell and Ms Farrugia just outside the main entrance to the block of units. He then proceeded in with Ms Wells' son and opened the door and let him into his unit. The main door to the block of units was open and not blocked at that time. Mr McCabe said he met Mr Pusell who told him that Ms Riechelmann had been there for half an hour banging on the door (of Mr Lavers' unit) very loudly (T2887.33) and that he had gone up to speak to her. She said to Mr Pusell that she was just trying to wake up her partner. Mr McCabe said he heard continuous very loud knocking and "smashing" on a door. This continued for about five to ten minutes. Mr Pusell went inside his unit. Mr McCabe said that he called out to Ms Riechelmann asking her to leave and that there were children downstairs. At about this time, Ms Wells returned with her daughter and Ms Farrugia's child. Mr McCabe told Ms Riechelmann that she was an "idiot" and she shouted an obscenity at him. He said that the banging and smashing on the door, including with the door knocker, continued. Mr McCabe called out that he was calling the Police and then rang the Police to report the incident.

18. Mr McCabe gave evidence that Mr Pusell had indicated to him that Ms Riechelmann was intoxicated (T289.13). Mr McCabe said he also formed that view from her banging on the door for an extensive period, the fact she was agitated, spoke a bit slower, was holding onto the railing and the fact that she would not leave the block of units. Mr McCabe gave evidence of his conversation with Ms Riechelmann in which she questioned his sobriety.
19. Mr McCabe gave evidence that in due course, Ms Riechelmann came down the stairs with him standing between his unit and Mr Pusell's unit with his back fairly close to the wall. Ms Riechelmann had a telephone in her hand and was pointing it at him. He gave evidence that he stated to Ms Riechelmann that she should leave and asked her whether she could hear the children. He stated that Ms Riechelmann came across towards him and held the telephone about 30cm away from his face. At this time, Ms Wells came out and stated that Mr Lavers had "a new girlfriend" and Ms Riechelmann expressed an obscenity to her. Mr McCabe said that she (Ms Riechelmann) should leave the block. Mr McCabe said that he described Ms Riechelmann to her face as a "drunk Qantas steward" and that she should leave the units. He said that he asked her to leave the units on many occasions.
20. Mr McCabe gave evidence that Ms Riechelmann came closer to him and said words to the effect: "This is an insult. This is an assault". He said at that time she hit him with her right arm in a fist and said the words "get fucked" as she did so: T293.24-T296.23. He stated that her right hand in a fist shape hit his left eye in the area around his eye socket. At this time, he had one hand on the handle to his unit door and the other hand had a phone in it. Mr McCabe stated that Ms Riechelmann's phone went down on the floor but he did not strike the phone out of her hand or kick her phone back into his unit. Mr McCabe said that he closed the door of his unit as he thought she was trying to get into the unit.
21. Mr McCabe said that Ms Riechelmann followed the first punch with four other punches using her fist. The second hit his face or arms and he held his hands up to protect his face. The third punch also hid his face or his hands. He said each of the three punches was given with a lot of force. Another two punches were also directed at him by Ms Riechelmann. Mr McCabe said that he tried to get some distance between Ms Riechelmann and himself by putting his right hand out in an extended fashion with an open hand resting on her chest in order to keep her away. Later punches were thrown by her which landed on his arm after the first five punches. Mr McCabe said that at this time he was standing out the front of his unit on the right-hand side of the unit facing out: T296.23. He said he did not know where Ms Wells was as he was focusing on the punches directed at him: T296.26.
22. Mr McCabe said that they then moved from in front of the door of his unit to be closer towards the wall supporting the stair balustrade. He said he tried to push Ms Riechelmann away and asked her to leave the premises. He said his arm was in contact with Ms Riechelmann's chest below the neck in the sternum area. At this time, Ms Riechelmann was yelling loudly "Jon" a number of times. He said he was hanging onto the railing at this time with one arm with his other arm outstretched asking her to leave and go home. See T293.17-T297.20.

23. Mr McCabe said that Ms Riechelmann then came back on his left-hand side and tried to force herself past him and he tried to block her. He did not know whether she was trying to go up to Mr Lavers' unit or into his unit. He said at this time, Ms Riechelmann asked for her phone and he called out to keep the phone as the Police would be interested in it. Mr McCabe said he did not know where the phone was at that time. Whilst hearing that the phone had dropped to the floor, he did not know where it ended up. In the course of interaction, Mr McCabe said that Ms Riechelmann accused him of knocking the phone out of her hand and he accused her of punching him in the face.
24. At this time, Mr McCabe said he went into his unit and shut the door with Ms Riechelmann standing immediately outside the unit door. He believed that she was trying to get into his unit. Ms Riechelmann asked for her phone back and referred to Ms Wells. At this moment, he was inside the unit with Ms Wells but did not make any enquiries about the whereabouts of Ms Riechelmann's phone.
25. Mr McCabe said he was never behind Ms Riechelmann during the various altercations: T301.37.
26. Mr McCabe said that at this time he felt a tightness in his chest, his legs were weak and he was leaning up against the wall of his unit feeling physically drained and nearly sick. He said his face was tingling and the tingling increased on the left-hand side of his face and cheek around the eye. He said he also felt a "bit of pain" in the right arm. Mr McCabe said he spent about five minutes inside his unit leaning up against the wall, having a brief conversation with Ms Wells and walking around the entrance area to the unit.
27. Mr McCabe gave evidence that in due course he opened the door and went outside the units and down the pathway towards Ozone Street. He said he saw Ms Riechelmann sitting on the boot of his car with her heels resting on the bumper of his motor vehicle. Whilst keeping a distance from Ms Riechelmann, Mr McCabe said that he asked her to get off his car. She then lifted her knees up and pushed down hard on the bumper bar of his car twice and then used her hands to hit hard on his boot, back windscreen and the roof of his car. She then proceeded back into the block of units. Ms Riechelmann remained in his vision the whole time: T304.
28. Mr McCabe stated that in proceeding along the pathway to the units, Ms Riechelmann pushed her arms into the open window through blinds and he heard the children scream. He said Ms Riechelmann said words to the effect "give me my phone back, Mel". When she passed by his lounge room window, she hit the window with a large bang and, using her hand, pushed out an air conditioning unit where it backed onto the window: see Exhibit B page 23. Mr Pusell then came around to the front of the units and they had a conversation about the marks on his car. About five minutes after this, the Police arrived and he had a conversation with them. He said he saw Ms Riechelmann later as she proceeded down the path with Police. Even later still, he saw her sitting on a brick wall. Mr McCabe said he had no further interaction with her: T307.

29. Mr McCabe gave evidence that when the Police arrived, he felt emotionally drained and in shock and had sweating palms. Two days later, he took photographs of himself and his car. In relation to the photographs of himself, he was attempting to show bruising on his left cheek around the eye socket and on his right arm. Mr McCabe was asked to circle the areas with a pen and the marked-up photographs became Exhibit C in the proceedings.
30. Mr McCabe gave evidence that the scratches to the boot and bumper bar of the car was where Ms Riechelmann had been sitting and placing her feet and that there were no markings or damage to his car prior to the events of 31 March 2018. At that time, he did not fix the damage but obtained a quote.
31. Sometime later, he said that Ms Wells was angry at him and scratched his car all around with a sharp object. Ms Wells paid for the damage to the car after he obtained two quotes. The repairs also fixed up the earlier damage which had been caused by Ms Riechelmann. Only a scratch on the tint of the window shading was left. All other damage, including that caused by Ms Riechelmann, was repaired and Mr McCabe said he had since sold the motor vehicle. As Ms Wells had paid him, he had no out-of-pocket costs relating to the damage caused by Ms Riechelmann.
32. Mr McCabe then gave evidence in chief about an event on 15 June 2018. He said he was at the Cronulla RSL Club watching a football game with various persons including Mr Lavers. They were sitting at a tall table with four to five chairs around it. There were a lot of people there. Mr McCabe gave evidence that Ms Riechelmann approached the group and grabbed Mr Lavers in the genital area asking words to the effect: "How's it feeling now": T315.26. He said Mr Lavers got off the chair and tried to hold Ms Riechelmann away. Mr McCabe said that she grabbed Mr Lavers again in the crotch area and Mr Lavers told her to "calm down". Both were standing at the time. Mr McCabe said he was seated next to Mr Lavers and Ms Riechelmann had a wine glass in her hand. Mr McCabe said that she proceeded to make a movement with the wine glass as if she was going to thrust it in his direction and he thought he was going to be affected by its contents: T316.17. Mr McCabe said that nothing hit him and he did not see anything in the glass. He said he caused there to be distance between himself and Ms Riechelmann. At the time she made the arm movement with the glass, he said he was about a metre away: T316.46.
33. Mr McCabe said he felt sweaty and nervous and thought he was going to be assaulted again. Mr McCabe gave evidence that he proceeded to security officers and pointed to Ms Riechelmann who was still in conversation with Mr Lavers. He said the guards went over and escorted Ms Riechelmann outside. Once Ms Riechelmann left, he said he had sweaty palms, tightness in the chest, breathing problems and felt tense. He said other than when having dealings with Ms Riechelmann, he had never felt that way before.
34. Mr McCabe gave evidence that he saw his general practitioner, Dr Girgis, soon after in June 2018 and told him about his concerns. The cost of that attendance was paid by Medicare. He gave evidence that Dr Girgis referred him to Mr Ireland, psychologist, who he saw three

times and paid \$85 per attendance. Mr McCabe said he told Mr Ireland how he was feeling at the time and he talked to him about handling anxiety and distress. He saw Mr Ireland every month for three months. Coping mechanisms were discussed with Mr Ireland. Mr McCabe said that not seeing Ms Riechelmann helped him with his concerns and anxiety. After three to four months, he said he felt fine but if he saw Ms Riechelmann he became nervous and had sweating palms.

35. Mr McCabe gave evidence that as at March 2018 he was in a relationship with Ms Wells. The damage to his vehicle was caused by Ms Wells in September 2018 and the relationship with her continued until June 2019. He lived with Ms Wells and her two children in his unit at Cronulla from 2018 to 2019 and they remained in his unit for two to three months after the relationship ended without any rent being charged by him. During this time, he stayed at his mother's place.
36. Mr McCabe identified an email from Ms Wells to him dated 3 April 2018 which became Exhibit D in the proceedings which was to the following effect:

"I have spoken with Sutherland Police and I have chosen not to provide a statement on Saturday night's incident.

What I am in the course of doing is pursuing an AVO against Julie for the protection of my children who were terrified on Saturday.

In all my communication with the Police including on Saturday night, I always said your actions were provoked."

1. Mr McCabe was subject to a lengthy and detailed cross-examination by senior counsel for the defendant. Mr McCabe gave evidence that he completed a Diploma in Law at the Solicitors' Admission Board which included the subject of ethics. During his studies, he worked in his father's law firm as a clerk from the mid-1980s: T323.34 and .47. Mr McCabe said that he mainly undertook workers compensation matters with a small amount of conveyancing. He did not undertake criminal work and had not undertaken motor vehicle accident work since 1997-1998: T324.34-.49. He gave evidence that he was admitted as a solicitor in June 1992.
2. Mr McCabe did not recall when he first met with Ms Riechelmann after she and Mr Lavers commenced dating in July 2010: T325.22. He agreed that occasionally between 2010 and 2013 he saw Mr Lavers and Ms Riechelmann socially but it was probably only about two or three times a year: T325.26. He stated that he was close friends with Mr Lavers and would see him reasonably frequently. Mr McCabe said he had been to Ms Riechelmann's residence on one occasion in 2011-12.
3. Mr McCabe said that he began to dislike Ms Riechelmann in 2014. He denied that prior to 2014 there were instances where he had said things to which she had taken offence including in relation to her clothes. He did not recall "unfriending" her on Facebook. In relation to his social life, Mr McCabe said that he did not often go out to drink with friends

and did not drink with colleagues. Mr McCabe denied that he was a reasonably seasoned drinker and described himself as a "normal drinker", although he accepted that he would drink about eight drinks over three to four hours on social occasions: T326.42.

4. Mr McCabe gave evidence that he recalled Mr Lavers buying Ms Riechelmann a ring but could not recall whether it was a diamond ring or the date. He denied saying sarcastically words to the effect "when is the wedding?": T327.22.
5. Mr McCabe was asked about the incident in June 2014 at JD's Restaurant. It was suggested to him that Ms Riechelmann only tapped him lightly on the cheek with her right hand and said "Hi, no surprises you are here". Mr McCabe disputed this and said the tap was not light: T327.50.
6. Mr McCabe was then asked about the second incident at the 2230 Bar. He denied that he had placed a critical comment on Facebook relating to the Sound of Music musical in which Ms Riechelmann and her family were involved shortly prior to the incident. He said that the discussion between them related to a private text or email that he had sent to Mr Lavers: T328.33-39 and T329.18. Mr McCabe accepted that prior to going to the 2230 Bar, he had been to a Polar Bears Swimming Club event and had attended a lunch. Going to the bar was a "follow on" from the lunch. He denied that when Ms Riechelmann arrived, he was intoxicated and estimated that he had drunk "probably about eight" schooners of beer: T329.42. Mr McCabe said he was not aware whether Ms Riechelmann was intoxicated on this occasion but there was nothing in her behaviour to suggest that she was: T330.10-17.
7. Mr McCabe disputed that Ms Riechelmann came up to him, told him that she had bought a unit in the Ozone Street block and requested that they be peaceful and friendly to each other. He said he could not recall that: T330.47. Mr McCabe said that the discussion was after Ms Riechelmann had become aggressive in relation to his private email to Mr Lavers. Mr McCabe agreed that he said words to the following effect to Ms Riechelmann: "I don't like you. No one likes you. You're an alcoholic. Jon should have broken up with you ages ago. No one likes you": T331.43. However, Mr McCabe denied that he was struck immediately after he said this but agreed that Ms Riechelmann did in due course slap him across the face "very forcefully": T331.6. Mr McCabe denied insulting Ms Riechelmann and her relationship with Mr Lavers: T332.40. He said that Mr Lavers "would be better off without you": T332.44. Mr McCabe denied that he was attempting to destroy Ms Riechelmann's relationship with Mr Lavers, to humiliate and demean her or that what he had said to her was after a request by her to put the past behind them: T332-T334.29. He also denied wanting to get her out of Mr Lavers' life and his life. Mr McCabe specifically denied provoking by insulting Ms Riechelmann: T335.3. He also denied then seeking to punish her by reporting the matter to Police and seeking an apprehended violence order. Mr McCabe said that Ms Riechelmann could have "walked away, but she didn't": T336.6. He denied being deliberately offensive to Ms Riechelmann and that she responded physically: T336.10. He also denied that the reporting of the matter to Police was the first step in a campaign by him to cause to create trouble for Ms Riechelmann in a number of aspects of her life: T336.20.

8. There was then considerable questioning about Mr Lavers approaching Mr McCabe on Ms Riechelmann's behalf in relation to a traffic matter. Mr McCabe agreed that he gave Mr Lavers advice but denied that there was any retainer with Ms Riechelmann or that he had proffered her legal advice on a serious occasion. He also denied that Mr Lavers was Ms Riechelmann's agent in seeking that legal advice: T336.41-T340.49. Mr McCabe denied that advice was being sought on a serious occasion, that it was clearly confidential and was subject to client legal privilege and stated that what occurred was criminal activity by Ms Riechelmann which he reported to Police: T340.30-.41. Mr McCabe denied that the lack of action by Police caused him a degree of frustration: T341.6.
9. Mr McCabe was then asked about the 31 March 2018 incident. He agreed that he was aware that initially Ms Riechelmann was arrested by Police in relation to a charge of assault when they first arrived: T341.26. He said he was not notified at the time that Ms Riechelmann was released and that he was a person of interest with respect to a charge of assault: T341.40. He agreed that the Police wanted to interview him and that he said he did not wish to be interviewed and that he would provide a statement. He agreed that not only did he provide his own statement but statements from Mr and Mrs Pusell and Ms Wells. He said he was not aware that Ms Farrugia was involved until the present hearing. Mr McCabe agreed that he realised the Police were relying on the statements as to what actually occurred before they decided what to do: T343.4-.13 and T344.1.
10. In relation to the statements of Mr and Mrs Pusell, Mr McCabe said that they told him what they remembered. He said he did not recall telling them what he remembered of the evening before they prepared their statements: T344.24-.47-T345.34 and T345.50-T346.23.
11. Whilst Mr McCabe said he realised it was important for the statements not to involve the tainting of the evidence of a witness, he took their statements rather than refer them to Police. At this time, he was not experienced in Local Court or criminal matters: T346.27-.41. Mr McCabe said that he prepared notes of his conversations with the witnesses but did not keep them: T348.19. Mr McCabe denied wanting to control the information that the Police were going to get and said that he wanted the Police to be told the truth as to what the witnesses saw: T349.
12. Mr McCabe gave evidence that he interviewed Mr Pusell and Mrs Pusell separately in his unit and the interview with Mr Pusell took about an hour. No other persons were present. He assumed that Mrs Pusell would have played Mr Pusell the video and that most likely the video was played in the course of him taking instructions from Mrs Pusell for her statement: T350.24.
13. Mr McCabe also gave evidence that he prepared the statements served for the witnesses in the proceedings and witnessed their signatures before forwarding them to the defendant's solicitors: T351.18-.33.

14. Mr McCabe was asked a number of questions about the preparation of the statements made soon after the 31 March 2018 incident of Mr Pusell and Ms Wells. These were prepared at about the time Mr McCabe himself prepared his statement dated 14 May 2018. Mr McCabe agreed that he prepared a draft of Mr Pusell's statement and gave a copy to him once it was signed. He also agreed that he prepared Ms Wells' statement in draft dated 20 May 2018 and got her to sign it. He said he was not aware of any rule prohibiting two witnesses being interviewed together. He also said he was not aware of a rule forbidding a person to coach a witness when preparing a statement but regarded it as common sense and said he did not do it. Mr McCabe said he was not aware of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 and had never looked at the Rules. He said he had never heard of those Rules as at May 2018. He also gave evidence that he was not aware of similar rules promulgated by the Law Society of New South Wales that applied prior to 1 July 2015. Mr McCabe said he was not aware that he had to know the Rules and believed that the statements which he had taken were true to the best of the witnesses' knowledge. This evidence of Mr McCabe seems very surprising and somewhat concerning. I think it very likely that Mr McCabe would have studied earlier solicitors' rules when he completed his legal studies course. However, he may have forgotten this. The defendant submits that the court should find that Mr McCabe was lying in his evidence but, having considered the matter carefully, I am unable to be satisfied on the evidence to make that serious finding.
15. It was put to Mr McCabe that he took the statements from various witnesses in his capacity as a solicitor which he denied. Whilst admitting that he was a lawyer, he said he probably did not take the statements as a lawyer and was not paid for the work. He said he prepared the statements in order to take down the witness' memory of what had occurred on the evening. He agreed that he used his skills as a solicitor to draft the statements but was of the view that he merely took them as a person preparing statements as to a factual matter.
16. It was suggested to Mr McCabe that when he prepared the statements, he was also a person of interest in the Police investigations. He said he was not aware of that at the time or that the Police were considering whether to charge him in relation to an alleged assault on Ms Riechelmann on 31 March 2018. He accepted he was a person present during the altercation and was a witness to events but denied that this thereby created "every chance" that by taking the statements there would be a pollution by him of the evidence. When he was taken to Rule 25 of the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 relating to a solicitor not conferring with more than one lay witness at the same time unless the solicitor believes on reasonable grounds that special circumstances required such a conference, Mr McCabe said he was not aware of the rule: T358.40. Mr McCabe said he was not acting as a solicitor but was preparing separate statements and defending himself: T362.6; T363.26. He said the Police had not obtained a statement from Mr or Mrs Purnell and he regarded them as being able to provide important statements in relation to the truth.

17. Mr McCabe denied that he set about presenting statements to provide exculpatory evidence for himself. He also rejected the proposition that he obtained the statements in order to obtain a conviction of Ms Riechelmann for an assault on him on 31 March 2018. He said the statements speak for themselves. He denied the proposition of wanting to "nobble" the witnesses and include material that was wrong. Mr McCabe said he did not know at the time what was in dispute. He said that the allegation of Ms Wells' that he had acted inappropriately shocked him. Mr McCabe rejected the proposition that he prepared the statements first and simply handed each to the witness to sign. It was suggested to Mr McCabe that he emailed the statements to Mr and Mrs Pusell but he remembered handing them a statement. He said he believed the email version was the second version. It is noted that Mr and Mrs Pusell's evidence negated the proposition that Mr McCabe prepared a draft statement without consulting with them first. They stated that each had discussed the events with Mr McCabe before a draft was prepared which they then reviewed and changed when necessary.
18. It was again put to Mr McCabe that before preparing the statements of Mr Pusell and Ms Wells he was aware that the Police may potentially charge him in relation to the events of 31 March 2018 which he denied. He also denied that at that time he was concerned about being charged by the Police. Mr McCabe denied that he clearly prepared his statement with a view to having Ms Riechelmann charged with assault and said he prepared his statement to set out the facts. He said he regarded Ms Riechelmann as violent and dangerous and was concerned about his own safety and wanted to tell the truth in order for the Police to make up their own mind how to proceed. When Mr McCabe was asked whether he had adopted a "neutral position" in relation to what the Police would do, he gave evidence that it was always up to the Police to decide what to do, and he prepared the statements in order to tell the truth. Mr McCabe was then taken to paragraph 127 of his 14 May 2018 statement in which he sets out his desire for Ms Riechelmann to be charged. He said he prepared the statements to show the truth of what had occurred. Mr McCabe denied that he had "crafted" the statements in order to ensure Ms Riechelmann was charged and he was not charged:
T370-1.10
19. In my view, these answers of Mr McCabe should not be accepted in their entirety. It appears clear from the evidence that Mr McCabe was aware from the events of the night of 31 March 2018 that there was a dispute factually as to what had occurred. I find as a fact that he declined to be interviewed by Police and prepared statements for himself, Mr and Mrs Pusell and Ms Wells for the purpose at least partly of protecting himself and attempting to ensure he was not charged and in order to bring facts to the attention of Police which would make it more likely that Ms Riechelmann was charged. In the end, it was the Police decision as to which course they would adopt.
20. Mr McCabe was then cross-examined in some detail in relation to the statement of Melanie Wells dated 20 May 2018. Mr McCabe agreed that he prepared the statement and witnessed Ms Wells' signature but said the statement was in her own words. Mr McCabe was taken to

paragraphs 33-34 of the statement where his version is partly set out and he accepted that he told Ms Wells in relation to his version of what he described as "earlier events": T372.15. He denied that he wanted to influence Ms Wells' evidence to show that he had acted reasonably. He said the purpose of the statement was to tell the truth. He also denied coaching her as a witness and said he was not acting as a solicitor in obtaining the statement. When it was suggested to Mr McCabe that he was aware that Ms Wells was an eyewitness to the events of 31 March 2018 in the hallway, Mr McCabe said he was not aware whether Ms Wells was there for the entire time in the hallway. He stated that he had no idea where Ms Wells was when he was hit in the face a number of times by Ms Riechelmann: T373.33. In particular, Mr McCabe said that he was not aware that Ms Wells was in the hallway outside his unit the entire time even though he had been through the video several times.

21. Mr McCabe was asked questions about the reference in Melanie Wells' first statement to her drinking 10-12 glasses of champagne. He denied that this information came from him and not Ms Wells and said he was getting glasses of champagne for her at the same time as he obtained glasses of beer for himself. He said Ms Wells was giving her version of events in her statement. In relation to his own consumption of schooners of beer, Mr McCabe said that he had about 10 schooners of beer on 31 March 2018 but it could have been 12 but denied that it could have been 14. He also denied that he was "heavily intoxicated" when he came home. He said he was intoxicated but not heavily and the beers were drunk by him over a four-hour period. He also stated that they were Great Northern brand beers which were mid-strength beers. Mr McCabe denied that he made reference to Ms Wells' champagne consumption in the statement as she had been a witness to him assaulting Ms Riechelmann. Mr McCabe said he never assaulted Ms Riechelmann. He also denied putting in material relating to Ms Wells' alcohol consumption and memory problems to ensure the Police did not charge him with the assault of Ms Riechelmann. He said what was put in Ms Wells' statement was what she had said to him. Mr McCabe denied that one source of information for Ms Wells' statement was the video footage and said what Ms Wells had said was the only source in preparing her 2018 statement.
22. It was put to Mr McCabe that he had his arm straight out on Ms Riechelmann's chest at one stage to which he agreed. It was then put to him that he was pushing her to the door. Mr McCabe gave evidence that Ms Riechelmann was coming towards him and he was pushing her away. He said he was trying to get Ms Riechelmann to leave the block of units but she kept coming back towards him: T378.1. Mr McCabe said the material in paragraphs 14-21 of Ms Wells' statement was Ms Wells' version.
23. Mr McCabe was taken to paragraph 26 of Ms Wells' statement where Ms Wells said that he had a "hand" around Ms Riechelmann's throat: T279.5. He said that this was what Ms Wells had said to him in relation to her recollection of the events of the night. He denied being very selective in what he included in the statement and that Ms Wells' statement was either crafted by him or was a "complete concoction" by him: T379.46.

24. Mr McCabe was then asked a number of questions about Ms Wells' statement dated 15 April 2020. He was referred to that part of the statement where Ms Wells said she had only consumed five glasses of champagne. He said that Ms Wells was minimising the amount of alcohol which she had drunk on the night. He also denied that he was behaving aggressively to Ms Riechermann and said that he had asked her to leave at least three times before she assaulted him and about 15 times thereafter.
25. It was put to Mr McCabe that when Ms Riechermann came down the stairs and got close to him that he grabbed her phone out of her hand and threw it into his unit. This reflected paragraph 8 of Ms Wells' statement dated 15 April 2020. It should be noted however that this is inconsistent with paragraph 1(iv) of the Amended Statement of Cross-Claim filed on 21 February 2022 by Ms Riechermann which pleads that Mr McCabe:

"Intentionally struck [Ms Riechermann] on her right hand in which she was holding her mobile phone thereby causing the phone to fall to the ground and as a consequence causing an injury to [Ms Riechermann's] hand".

1. It is also inconsistent with Mr Riechermann's oral evidence. Mr McCabe denied grabbing the phone out of Ms Riechermann's hand and throwing it into his unit.
2. Mr McCabe was taken to paragraph 10 of Ms Wells' statement dated 15 April 2020 which is annexed to her affidavit of 21 April 2021 and in which she states:

"10. David then strangled Julie around the throat. I was so worried about the escalating violence and the time it was taking for the Police to arrive that I decided to run to Cronulla Police Station for assistance."

1. This event was said to have occurred after Ms Riechermann had walked down the stairs and there was a discussion about Mr McCabe's sister: see paragraphs 8-9 of the Wells statement. In paragraph 13 of her second statement Ms Wells says:

"A Police officer asked me what I saw and I told him that he strangled her to the point where her face was going red and she could not breathe. I said that is when I ran off to the Police station to get assistance. The Police officer wrote down my statement in his notebook and then asked me to come back inside the unit with him where David was".

1. Mr McCabe denied that this had occurred. He also denied that Ms Wells had said to him that she had observed him "strangling" Ms Riechermann until she was red in the face. He said he did not wish to conceal that from Police in order to avoid being charged and to get Ms Riechermann to be charged. He also denied being concerned that his ability to practise as a solicitor may be affected if he was convicted of such a crime.
2. Mr McCabe was then taken to Exhibit D which was an email from Ms Wells to him sent on 3 April 2018 some three days after the March 2018 incident. In particular, Mr McCabe's attention was drawn to the sentence in the email where Ms Wells said: "In all my communication with the Police including on Saturday night, I always said your actions were

provoked". It was put to Mr McCabe that at the time, Ms Wells was unemployed, was living with him and was financially dependent on him. Mr McCabe said that he could not recall whether Ms Wells was unemployed at the time but agreed that she was living with him with her children. He said he could not recall whether she was financially dependent on him or whether she had sold her house. He was of the view that she was not financially dependent. He accepted that he looked after her and she did not pay rent. Mr McCabe also accepted that as at 3 April 2018, Ms Wells said that he had been provoked. He said that five punches had been thrown at him. He denied attempting to "strangle" Ms Riechermann as Ms Wells alleges in her second statement: T390.1. Mr McCabe stated that while this was Ms Wells' account, it did not happen as stated and he had his arm up against Ms Riechermann's sternum but not her neck. Mr McCabe accepted that a Police officer said that one of them had to leave the unit and that he stayed at his mother's house as he thought it was the best thing to do.

3. Mr McCabe denied being angry with Ms Wells for her having said he had a hand around Ms Riechermann's throat and said that he did not "understand what she had said". He agreed that about this time Ms Wells had left the unit with her children to stay at serviced apartments for a couple of nights but was not sure precisely when this occurred but accepted it was within a week after the alleged assault. Mr McCabe again denied being angry with Ms Wells at this time but agreed that after Ms Wells spoke to Police, the Police "unarrested" Ms Riechermann, that is decided not to charge her with assault.
4. Mr McCabe was then asked a number of questions in relation to his nine page statement of 35 paragraphs dated 20 May 2020. He agreed that he looked at the video footage for the preparation of that statement. Mr McCabe accepted that he had prepared the statement for the purposes of the proceedings but said that his recollection was that it was first sent to Ms Wells at her address in Cronulla in the light of Ms Wells' second statement. It was then provided to the defendant's solicitor: T397.48-T398.13. Mr McCabe said that he believed Ms Wells' statement of 15 April 2020 was contradictory with her statement dated 14 May 2018 and to the Police reports, and these were matters which he addressed in his 20 May 2020 statement: T400.26-45. One aspect he addressed, was the amount of alcohol which Ms Wells had consumed on the night of 31 March 2018 which differed in the statements: T400.49. Mr McCabe referred to the Police conclusion in their records that the witnesses were deemed too intoxicated for statements to be reliable: T401.2-30. Mr McCabe said that he did not know whether Ms Wells was capable of giving a statement on 1 April 2018 but denied suggesting that Ms Wells was so intoxicated that she could not remember anything of the events of 31 March 2018: T401.44.
5. In relation to Ms Wells' intoxication on the night, Mr McCabe said that he assumed that she was intoxicated having regard to her consumption of numerous glasses of champagne. He said she was lying as to her consumption in her 2020 statement. In the end, he said that he was not observing her level of intoxication at the time but, having regard to her consumption, she "probably would be highly intoxicated": T404.25. Mr McCabe said it was obvious that all persons concerned had consumed alcohol on the evening in question:

T403.45 and T404.9. Although Mr McCabe asserted that he had an actual recollection of asking Ms Wells how many drinks she had had on the night of the incident for the purposes of preparing her statement, and that she had replied "10 to 12 glasses of champagne", having regard to the form of his answers, I am not satisfied that he did have any actual recollection. In my view, he was merely reconstructing that evidence based on the contents of Ms Wells' first statement: T405.19-.45. Mr McCabe denied the proposition that he prepared Ms Wells' first statement for her to sign without "any regard to what had actually happened": T405.47; T408.11 and T408.30. Mr McCabe said that he did not think that he had any regard to the video footage before preparing his statement of 20 May 2020 but rather looked at the statements of Ms Wells and the Police record in order to deal with inconsistencies in her statements: T409.49 and T411.34.

6. It was put to Mr McCabe that in preparing paragraphs 16-26 of his statement dated 20 May 2020, he was seeking to indicate that Ms Wells was not present in the foyer. Mr McCabe said that he was not aware that Ms Wells was present when he was struck by Ms Riechelmann, and that Ms Wells had pointed out to Police that "she walked in after the incident had started": T412.11. Mr McCabe said that whilst Ms Wells was present when he had his right arm out raised and rested on Ms Riechelmann's sternum area he was not aware whether Ms Wells was in the foyer when punches were thrown by Ms Riechelmann at him: T414.9-.18 and T415.5. Mr McCabe also disputed that he grabbed the phone out of Ms Riechelmann's hand and threw it into the unit: T414.45. Mr McCabe denied that the only three people in the hallway at the time the phone fell to the ground were him, Ms Riechelmann and Ms Wells: T415.5.
7. Mr McCabe confirmed that as far as he could recall, he was not told that he was a person of interest by the New South Wales Police. He agreed that he had text messages with a member of the Police when he sent statements to him and video footage. He did not recall being contacted on 7 April 2018 by Constable Brooks indicating that he was being treated as the potential offender.
8. Mr McCabe agreed that in the week after the altercation, he told Ms Wells to vacate his unit. He said he had to live somewhere, and he had been told by Police to leave. He agreed this had occurred by 7 April 2018. However, Mr McCabe denied telling Ms Wells not to give a statement to Police.
9. Mr McCabe was further cross-examined about his evidence (at T361) that he believed he provided his statements in a private capacity or as a private citizen. He confirmed this evidence. Mr McCabe said that he believed that these statements were prepared or dictated by him on weekends, but he accepted that they were typed up in his office as he did not type. He said he also used his secretary to send the various statements to witnesses and they were sent on his business email. Following the commencement of proceedings, Mr McCabe accepted that he prepared the statements, including that of Mr Pusell dated 5 July 2020, likely in his capacity as a solicitor. This was also the case for the later statements prepared and served in relation to Mrs Pusell. Mr McCabe agreed that statements served after the

commencement of legal proceedings were prepared in his capacity as a solicitor but confirmed that statements prepared for Police were prepared as a private citizen and not as a solicitor.

10. Although Mr McCabe said that he did not know that he had obligations as a solicitor not to interview two witnesses at the same time, he said that he had not interviewed two witnesses at the same time. However, he agreed that as a solicitor he had to be extremely careful not to engage in activities which may lead to the pollution of a witness' evidence. He said his aim was to get the truth from the witnesses. He accepted that he was also a witness. Mr McCabe denied that he was advocating a position in his answers in evidence. He further denied that interviewing witnesses and drafting statements had the potential to pollute witnesses and evidence. Mr McCabe stated that in his view it was a simple assault, that he was a victim and he wished to provide witness statements. He denied that he took statements in order to control the information provided to Police, to manipulate the evidence and to limit the chance of him being charged. Mr McCabe also denied including information in witness statements which he believed to be correct to be sent to Police and stated that he included what the witnesses had told him had occurred. He denied his purpose in including the information was to avoid being charged with an offence and to make it likely that witnesses would be reluctant to change their story later. Mr McCabe agreed that prior to preparing the statements it was most likely that he had sat down and looked at the videos which he had. Mr McCabe denied that he had drafted the statements of Mr and Mrs Pusell without regard to their independent recollections.
11. As I have indicated above, I find that it is very likely that Mr McCabe did believe at the time that he may have been considered a person of interest to Police having regard to his conversation with Ms Wells in front of the Police officer concerning what she believed he had done to Ms Riechelmann. I therefore think it very likely and find that he thought it important to provide witness statements to minimise his potential exposure to charges.
12. Mr McCabe was cross-examined at some length in relation to a letter to the solicitor for the defendant dated 6 May 2020. This letter related to an appointment for Ms Riechelmann to see Dr Roberts, psychiatrist, on 26 May 2020 and expressed an indication to the defendant's solicitor that Ms Riechelmann would be attacked as to her credibility. It also included an offer to settle the proceedings. The letter, in addition, raised what were alleged to be serious defamations by Ms Riechelmann of Mr McCabe. The letter alleged Ms Riechelmann had committed perjury in the past.
13. Mr McCabe denied that the allegation of perjury arose out of advice he had given to Mr Lavers concerning Ms Riechelmann. He said he expressed his opinion to Mr Lavers only as a friend and was not providing legal advice. He denied using the information provided to threaten Ms Riechelmann and stated why he was merely indicating the basis that her credibility would be in issue. He confirmed that he had previously provided this information to Police. Although appearing to accept that people are entitled to prepare statements for court, Mr McCabe gave evidence that parts of the statements of Ms Riechelmann contained

serious defamatory material in relation to him which horrified him. He said that the defendant's solicitor later apologised in relation to the matter in a letter. Whilst denying that he was making threats, in the letter, Mr McCabe said that the defamatory material was in his view offensive, disgusting and upsetting.

14. Mr McCabe was also asked about a letter he wrote to Ms Wells dated 15 June 2020 enclosing two statements of his. This letter included that Ms Wells was to be subpoenaed, would be treated as a hostile witness and referred to the penalty for perjury. He denied, however, that this was a threat to Ms Wells. He said her second statement was inconsistent with the facts and her earlier statement. He denied that a fair reading of the letter was that he was making a threat to Ms Wells in relation to potential perjury. He said that he believed it was an appropriate way of addressing a letter to a witness as a solicitor and as a plaintiff, adding that he did not know Ms Wells was represented by any legal representative.
15. Mr McCabe was then subject to a very detailed cross-examination in relation to the events of 31 March 2018. Mr McCabe agreed that he had been to a party on 31 March 2018 and said that when he returned to the units, Ms Wells was not there but Mrs Pusell was there. He agreed that he heard knocking upstairs and said that he was told by Mr Pusell that Ms Riechelmann had been knocking for about half an hour on Mr Lavers' door. Mr McCabe agreed that on the night of 31 March 2018, he accused Ms Riechelmann a number of times of being "mad" and "insane". He said he was of this view because of the length of time she had been knocking. He also stated that he heard her himself knocking loudly for 15 minutes and that this was for a period a lot longer than that shown on the videos. Mr McCabe said that after asking Ms Riechelmann to leave, she kept on banging on the door and he rang the Police. He said it was about 10 minutes after he had arrived home. He accepted that he was intoxicated at the time.
16. Mr McCabe gave evidence that he believed the five punches in the assault by Ms Riechelmann on him were unprovoked. Mr McCabe stated he had asked Ms Riechelmann to leave on several occasions. He said that while some of these were shown on the video, he had asked her to leave on several occasions before the video footage commenced.
17. It was put to Mr McCabe that he was insulting Ms Riechelmann which he denied. He also denied that calling her "mad" and "insane" many times was insulting and said it was a matter of fact having regard to her conduct. He also denied that calling her a "drunk Qantas steward" was insulting.
18. The video shows Mr McCabe calling Ms Riechelmann a number of names and her responding using an obscenity to him. In my view, and I find, the words used by Mr McCabe were indeed insulting. It is difficult to regard describing someone as "mad" and "insane" as not insulting them even in the context of them knocking at someone's door loudly on a number of occasions over a fairly lengthy period.

19. Mr McCabe gave evidence that when Ms Wells told Ms Riechelmann that Mr Lavers had "another girlfriend", that appeared to make Ms Riechelmann more angry. He stated that Mr Lavers had told him that he had a new girlfriend and he believed that the relationship had broken up between Mr Lavers and Ms Riechelmann. This also seems to have been the view held by Ms Wells at the time from her comments to Ms Riechelmann.
20. Mr McCabe was then shown the eight videos which were part of Exhibit A and asked questions about them: T447 and following. In relation to the first video, loud knocking and banging can be heard at various times throughout the video. It is not in issue that this was due to Ms Riechelmann. There appears to be a discussion between Mr McCabe and Ms Riechelmann where Ms Riechelmann is on a higher level and Mr McCabe is on the ground or first level. Part of the video appears to be taken by Mrs Pusell on the first flight of stairs near the ground floor. Mr McCabe agreed that he called Ms Riechelmann an "idiot" and she replied with an obscenity. Mr McCabe also appears to be telephoning the Police from just inside his unit door. Some children with him are coming out of the unit.
21. Mr McCabe agreed that Ms Riechelmann eventually came downstairs with her telephone in her right hand pointing it at him. He agreed that in due course he moved slightly away from his doorway, with the door remaining still open. He agreed that the first video depicted him with his mobile phone in his hand.
22. Mr McCabe was then shown the second recording which is 47 seconds in length: T450. The recording indicates a verbal interchange between Mr McCabe and Ms Riechelmann in which Mr McCabe tells Ms Riechelmann to go home and knock on someone else's door and that she was upsetting everyone in the block. He informs Ms Riechelmann that he has called Police. Mr McCabe also calls out to Ms Riechelmann that she is "insane" and "mad". As well as appearing to knock and bang loudly on Mr Lavers' door, Ms Riechelmann yells obscenities at Mr McCabe on three occasions.
23. Mr McCabe agreed that this exchange occurred with Ms Riechelmann at the top of the stairs and him talking out to her. He denied shouting at her but agreed that he had raised his voice. In my view, Mr McCabe was at least calling out loudly. Mr McCabe again denied that calling Ms Riechelmann "insane" and "mad" was insulting and said that she was not acting normally having regard to the time she was banging on Mr Lavers' door. He denied that his intention at the time was just to insult her. He agreed that it was obvious that Ms Riechelmann's intention was to get Mr Lavers to open his door. He denied that he wished to interfere with her attempts at this and said he was asking her to leave having regard to the time she had spent knocking on the door and the complaints he had received from Mr Pusell.

24. The third video shown to Mr McCabe was 1:44 minutes in length. It appears to have been taken by Mrs Pusell from the first flight of stairs. It records loud knocking and banging within the block of units. Mr McCabe is recorded and shown as telling children to "go inside". Ms Riechelmann is heard stating that she is inquiring about the welfare of her partner. Mr McCabe is heard describing her as an "idiot" and she is recorded yelling out an obscenity in response. Mr McCabe agreed that the video showed the entrance to his doorway.
25. The fourth video was then shown to Mr McCabe. It is one minute 52 seconds in length. It appears to have been taken by Ms Riechelmann from the third floor of the block. In it, Mr McCabe is heard apparently talking to Police and describing Ms Riechelmann as "crazy" and "mad". Loud knocking and banging is heard on a door, it appears by Ms Riechelmann. Mr McCabe is heard saying that her knocking on the door was waking up the entire block. Ms Riechelmann is heard commenting sarcastically on Mr McCabe's description of her.
26. The fifth video was shown to Mr McCabe which is 22 seconds in length. It appears to have been taken by Ms Riechelmann and records her knocking loudly on the door and filming both on the level she was at and down the stairs.
27. The sixth video was shown to Mr McCabe. This is 37 seconds in length. It appears to have been taken by Ms Riechelmann and commences from the second floor proceeding down to the first or ground floor: T457. It records Mr McCabe being outside his unit but away from the doorway. In his evidence, Mr McCabe agreed that he was about a metre away from his door and had his mobile phone in his right hand. He also agreed that Ms Riechelmann would have to pass him to get out of the block of units. The video records Mr McCabe saying to Ms Riechelmann that she had upset everyone and the Police were coming. Mr McCabe appears to be grinning. Mr McCabe is recorded as using an obscenity and describing Ms Riechelmann as "mad" and "insane". He tells Ms Riechelmann to leave the block of units and Ms Riechelmann uses an obscenity. Ms Wells is recorded as saying that Mr Lavers had another girlfriend and Ms Riechelmann is recorded as using an obscenity to Ms Wells. In the video, Mr McCabe appears to be intoxicated and he agreed that he was slurring his words in the video. At this time, Ms Riechelmann appears to place her phone recording the video near Mr McCabe's face and then Ms Wells' face. Mr McCabe denied that that irritated him and said he was smiling. He also denied insulting Ms Riechelmann. Again, in my view, the use of the words "mad" and "insane" were insults by Mr McCabe of Ms Riechelmann. However, Ms Riechelmann used obscenities both to Mr McCabe and Ms Wells.
28. The seventh video was shown to Mr McCabe: T459-60. This is 22 seconds in length. Mr McCabe is recorded as saying to Ms Riechelmann that she was a "drunk Qantas steward" and she needed to go home. In cross-examination Mr McCabe agreed that he was intoxicated but denied that he was aggressive. He also denied lurching towards Ms Riechelmann but accepted that he had moved a step towards her. The video records Ms Riechelmann placing her telephone apparently filming close to the faces of both Mr McCabe and Ms Wells. Although it is a matter of impression, I do not accept that Mr McCabe was "lurching"

towards Ms Riechermann or that he was acting in an aggressive as opposed to an assertive fashion.

29. The important eighth video was then shown to Mr McCabe: T461 and following. This is four minutes and 19 seconds in length. Mrs Pusell gave evidence that the beginning of this video was taken by Ms Farrugia and then she took the balance of the video. It is taken from inside Mr McCabe's unit looking towards the door of the unit. On occasions, the door is opened to various degrees so that the video records what is occurring outside in the foyer between Mr McCabe and Ms Riechermann. The video shows Ms Wells either at the door or outside the door of the unit in the foyer and then returning into the unit, later, with Mr McCabe. This is the most significant video footage which is part of Exhibit A. Both parties rely on this video as supporting their cases. The court has reviewed the video several times.
30. Mr McCabe agreed that the video showed Ms Riechermann placing her phone into his face. He agreed that Ms Wells was at the doorway and Ms Riechermann was outside. The eighth video records an apparent altercation or event immediately outside Mr McCabe's unit door which is not shown clearly and a later altercation in the foyer which is shown further towards the exit to the block of units and close to the wall supporting the stair balustrade. At various stages Mr McCabe is describing Ms Riechermann as "mad", "insane", "a drunk", and requesting Ms Riechermann to get out of his unit and to leave. Mr McCabe raises his voice aggressively on occasions. Ms Riechermann addresses various obscenities to Mr McCabe and on one occasion to Ms Wells. There is a sound which is said by both parties to be the sound of Ms Riechermann's telephone hitting the ground. There is an issue as to how it hit the ground and this is disputed. Mr McCabe denied striking or grabbing the phone from Ms Riechermann's hand. He also denied kicking it into the unit.
31. The video records Ms Riechermann twice claiming that Mr McCabe slapped the phone out of her hand with Mr McCabe claiming that Ms Riechermann hit him in the face.
32. Later in the video, Mr McCabe is shown with his arm outstretched and with Ms Riechermann apparently seeking to come back into the block of units. In due course, she eventually moves to his left and he pushes her further out towards the exit to the units. The video then shows the two of them having a conversation with Mr McCabe being loud and close to Ms Riechermann. She then seeks the return of her telephone.
33. The video strongly suggests that Ms Riechermann's phone hit the ground in the foyer. I am unable from the video alone to determine how it hit the ground. The video also shows the telephone in the unit of Mr McCabe. I think it likely and find that Mr McCabe did use his foot to push the video into the unit. I am unable to determine whether this was due to him wanting to retain the phone as a record for when the Police came or to prevent Ms Riechermann filming further.

34. Although Mr McCabe is loud and is shown pushing Ms Riechermann at one stage out of the units, I am unable to infer or conclude from the video that, on the balance of probabilities, he had any intention to hurt her at the time. Rather, he was seeking to have her leave the block of units and to prevent her entering the units further. Whether he had any right to do so is a separate question.
35. In the course of the video, Mr McCabe is recorded as conveying to Ms Riechermann that his mother thought Ms Riechermann was "mad". However, he denied that this was being conveyed as an insult. He also denied that he was moving towards Ms Riechermann in an aggressive manner. He further denied that he wanted to intimidate Ms Riechermann in saying that the Police were coming to arrest her. He denied threatening her. Mr McCabe denied that he was goading and insulting Ms Riechermann so that she would lose her temper and physically react. He said he was not aware that the video was being taken of him.
36. It appears that Mr McCabe used the words "hold on, I'll just take, hold on" shortly before there is a sound which appears to be the phone hitting the floor. He denied any intention to take the phone or striking it out from Ms Riechermann's hand.
37. From the video and the exchange recorded, as well as the later evidence of Ms Wells and Ms Riechermann, I am not satisfied that Mr McCabe punched Ms Riechermann's hand or struck her hand in any way and certainly not with the intention of injuring her. Mr McCabe claimed that Ms Riechermann dropped the phone in the course of hitting him in the face: T467-8. He denied that he was making up the evidence of Ms Riechermann hitting him or that he wanted to stop her filming his behaviour.
38. Mr McCabe gave evidence that when Ms Riechermann first hit him, she had a closed fist, possibly with her hand around her phone but he was not sure of this. He stated that she dropped the phone after she hit him: T471.3-.35. He said her fist hit the left-hand side of his face and the punch "came out of nowhere": T471.40. He said he did not hear her drop the phone at the time. Mr McCabe denied making up the version of her punching him and that it was concocted by him.
39. It was put to Mr McCabe that he strangled Ms Riechermann which he denied. He also denied that Ms Riechermann said "Are you serious?" as she responded with disbelief to what he had done.
40. Mr McCabe was taken to that part of the video when Ms Wells said to him that he "acted out of line" which he denied at the time. He agreed that Ms Wells was of the view that he had acted "out of line" but he disagreed with that.
41. Mr McCabe stated that when he went into the unit with Ms Wells he could not recall speaking to anyone else and said that he lent against the wall for about five minutes. He said Ms Wells then left but she did not say where she was going. He said he did not recall speaking with either Ms Farrugia or Mrs Pusell and said he could not see them in the front room: T488.22.

42. Mr McCabe then gave evidence that after he had returned to the unit for about five minutes he went out the front of the unit, past the letterbox and saw Ms Riechelmann sitting on the boot of his car. He said he probably still had his phone but was not taking a video. Mr McCabe gave evidence that he stayed out the front of the unit until the Police arrived. Mr McCabe stated that he told the Police what had occurred, in particular that he had been punched on the face and scratched on the arm by Ms Riechelmann. He said he did not see the Police officer taking notes.
43. Mr McCabe agreed that the Police officer came in with Ms Wells and the Police officer asked Ms Wells what she had just told him and Ms Wells said "you had her around the neck": T491.4. Mr McCabe said that shocked him as he never grabbed Ms Riechelmann around the neck but had his arm extended in trying to keep her away. He said he was shocked that Ms Wells was not supporting his account of what had occurred: T491.43.
44. In my view, the eighth video shows Ms Riechelmann and Mr McCabe acting differently at different points in time. Initially, Mr McCabe does not appear to be either intimidating or aggressive and appears to find the situation somewhat amusing. After the alleged first altercation, Mr McCabe then appears to become more serious with his arm outstretched preventing Ms Riechelmann from coming back into the units. He does appear to be somewhat aggressive when he pushes her as she attempts to get around him to his left in the latter part of the video, but I could discern or infer upon a number of reviews of the video, no intention on his part to injure her as I have indicated above. I also did not discern any intention by either Mr McCabe or Ms Riechelmann to intimidate the other. Clearly Ms Riechelmann was somewhat aggressive when she was placing her telephone, apparently recording, into the faces of Mr McCabe and Ms Wells earlier in the video.
45. Mr McCabe was asked further questions in relation to the time of the alleged assaults between him and Ms Riechelmann. He was referred to his evidence at T471.5 when he states that he assumed Ms Riechelmann "dropped the phone and it rolled in the doorway". Mr McCabe said he did not see this happen at the time. He stated that he only saw the phone on the floor when he looked at the video footage. He claimed that he had no idea that the phone had hit the floor or what had happened to it.
46. It was put to Mr McCabe that the phone dropped on the floor and Ms Riechelmann reached for it and then he grabbed her by the throat and she hit his eye with her open hand but not a closed fist in the course of the melee between them: T494.3. Mr McCabe rejected this proposition. He gave evidence that he could not recall whether Ms Riechelmann had her phone in her clenched hand at the time she hit him but assumed that she did. He said he had no recollection of the phone hitting the ground. He denied striking Ms Riechelmann's hand with the result that the phone hit the ground or grabbing the telephone from her and throwing it into his unit. He also denied kicking the phone into his unit.

47. In relation to the defendant's version of events, Mr McCabe denied grabbing Ms Riechelmann around the neck or throwing her into the wall. However, he accepted that after he came into the unit with Ms Wells as shown at the end of video 8 and before the Police arrived, that he was aware that Ms Riechelmann was calling out for her phone to be returned. At that time, Mr McCabe said he was not aware where the phone was or that it was in his flat: T493.47; T495.40. He said he did believe that the phone should be kept for the Police to view the video. At this time, Mr McCabe said he did not know where the phone was. He denied the suggestion that he knew the phone was likely to contain incriminating material including film of him striking Ms Riechelmann's hand: T496.6. He denied that he deleted any material from Ms Riechelmann's phone.
48. Mr McCabe agreed that Ms Wells had left the unit and that he knew she was concerned about the matter escalating. He also agreed that he was in his unit for five minutes before he went out the front of the block of units but denied using his phone to film Ms Riechelmann: T496.29-.49. Mr McCabe said his conversation with Ms Riechelmann was limited to when he saw her sitting on the boot of his car and asking her to get off it.
49. Mr McCabe was asked further questions about the preparation of his statement and his use of the video evidence for it. He denied the propositions that he was seeking to control information to prevent an independent investigation by Police or that he carefully manipulated information in his statement to support his opinion. He said he presented the truth consisting of his opinion as to what had occurred and the video evidence.
50. Mr McCabe said the second video taken by Mrs Pusell was given to Police close to the time when the statements were sent off to them and prior to them making their decision not to proceed with charges. This gains some support from his correspondence with Police which is part of Exhibit E. See email dated 14 May 2018.
51. Mr McCabe was asked questions about the alleged damage committed to his car by Ms Riechelmann on the night of 31 March 2018. It was put to him that she did not damage the car with her feet or hit the car with her hand, which he denied. Mr McCabe was taken to paragraph 114 of his statement dated 14 May 2018 where he refers to Ms Riechelmann stamping her feet on the "tow bar" not the bumper bar of his car. Mr McCabe said that he did not have a tow bar and that the damage was to the bumper bar as shown in the photographs. It seems clear from this evidence that this was an error in Mr McCabe's statement. Mr McCabe said he went to stay at his mother's house on the night of 31 March 2018 and placed his car in security lock up parking at his mother's premises. He said he took the photographs of his car on the following Monday morning in Young when he returned there for work purposes. He denied applying powder to the car to accentuate the damage and said he believed it was from dust on his trip to Young on country roads. Mr McCabe said that although he believed he did tell Police about damage to the car, he did not ask the Police to inspect it for fingerprints. Mr McCabe said that the car was repaired and resprayed following damage done to it by Ms Wells in 2018. He said that at the time he commenced proceedings in November 2018, the damage had not been repaired. Counsel for the plaintiff indicated

that the plaintiff was not pressing the claim for damages in relation to Mr McCabe's car.

52. Mr McCabe gave evidence that the Police became aware of video footage taken by Mr Lavers showing Ms Wells damaging Mr McCabe's car. In due course, Ms Wells was arrested and proceedings were taken against her. Mr McCabe agreed that he prepared a letter dated 5 October 2018 in relation to Ms Wells' conduct, in which he was complimentary of Ms Wells' character and reputation and advised that he no longer wanted to proceed on the damage to the car. Mr McCabe gave evidence that he sent the letter to try to get the Police to withdraw the malicious damage charge against Ms Wells.
53. Mr McCabe was then asked questions in relation to the air conditioning unit that Ms Riechelmann was alleged to have pushed in from the window to his unit on the night of 31 March 2018: see Exhibit B page 23. Mr McCabe said that the bracket to the air conditioning was held in place by vertical timber parts of his window frame and rested in the window frame. He said it was the rectangular hard plastic vent which went the length of the window which fell out.
54. Mr McCabe was taken to Police records where Officer Brooks recorded the events of 31 March 2018 on 1 April 2018. They provide:

"The POI [Mr McCabe] states that the VIC [Ms Riechelmann] attacked him unprovoked and grabbed him by the throat and scratched his left arm. At this time her mobile phone dropped on the floor and somehow during the altercation it went inside the POI apartment."

1. Mr McCabe said he did not tell the Police that Ms Riechelmann grabbed him by the throat but said that she had punched and scratched him. He said he only showed scratches on his arm when the Police arrived as his eye was only tingling and the bruise came up later. He said he did not believe that he told the Police how many times he had been punched but said he told them he had been punched in the face. Mr McCabe denied that after 4 May 2018, a number of attempts were made to contact him to be interviewed and said that he recalled one telephone call. He said he did not recall Constable Brooks informing him that he was a person of interest in relation to the assault.
2. Mr McCabe was asked a number of questions about some photographs of the block of units, the ground floor foyer area and internal views of his unit. The photographs show that the foyer area on the ground floor was carpeted and Mr McCabe's unit had a polished timber floor. Mr McCabe confirmed that these ground coverings were in place as at 31 March 2018: T521.14. The photographs became Exhibit 1 in the proceedings.
3. Mr McCabe was then cross-examined in some detail about his letter of instructions to Dr Roberts dated 8 October 2020 and letters that he wrote to the defendant's treating psychiatrist and a medico-legal expert psychiatrist instructed by the solicitors for the defendant.

4. It was put to Mr McCabe that he had included in the letter to Dr Roberts, a number of his personal observations in relation to alcoholism and alcohol use disorder (see page 1 of the letter). Mr McCabe said he believed he was quoting from a book and needed to provide some background because of the voluminous number of documents which had been provided to Dr Roberts. Mr McCabe also accepted that he had referred to parts of his statement on page 5 of the letter. Despite this, Mr McCabe denied trying to provide editorial comment to "poison" Dr Roberts' mind in his assessment of Ms Riechelmann. Mr McCabe said he believed he was stating facts and was assisting having regard to the amount of annexures provided. He said he did not believe the case was like a "simple, frank injury" (T525.20) but related to incidents over a four-year period from 2014 to 2018. After some cross-examination, Mr McCabe agreed that probably if he had his "chance now" he would not put material relating to psychiatric opinion concerning alcoholism in the letter as he had done: T525.45. Mr McCabe accepted that rather than just referring Dr Roberts to the documents he did provide his own commentary on the veracity of the defendant as a witness in circumstances where he was also a witness: T526.16-.39. Despite being a witness and a party, Mr McCabe said he did not see any conflict with his role as a party and a solicitor in the situation: T527.13.
5. Mr McCabe was then asked numerous questions about his attitude to, and dealings with, Ms Riechelmann. He stated that his dealings with her had shown her to be unpredictably and uncontrollably aggressive (T527.24) and she would attack him without provocation (T527.28). He believed that on the occasions when she had contact with him, she had been drinking excessively (T527.35). He denied that the tension between the two of them escalated when she bought into the unit block: T527.43.
6. Mr McCabe was asked questions about emails he had sent to Ms Riechelmann in relation to the proposed redevelopment of the block of units. He denied that these were offensive but agreed that he had called her a Qantas steward and a "trolley dolly". He claimed that she had used worse names for him and later said that she had described him as narcissistic. He agreed that the text exchanges were a symptom of the tension that was growing between them: T527.7. Mr McCabe, in particular, denied that he was involved in an ongoing campaign to belittle and denigrate Ms Riechelmann and interfere in her personal relationship with Mr Lavers. Mr McCabe also denied that he attended to see his general practitioner Dr Girgis and then a psychologist, Mr Ireland, to create an evidential basis for a civil claim against Ms Riechelmann. Mr McCabe further denied saying to Ms Wells that he wanted to "clean out" Ms Riechelmann and to ensure that she ended up with nothing and paid all her money to him: T531.35-.49. Mr McCabe denied that his actions were him seeking to ventilate his dislike of Ms Riechelmann, impose a financial penalty upon her and involved threatening and intimidating behaviour: T532.38.
7. Mr McCabe was then asked about text messages which he sent to Ms Wells' new partner Mr Michael Sitka. Mr McCabe gave evidence that his relationship with Ms Wells broke up in 2020 and she left his unit some two months later. He agreed that he did not talk to her

afterwards, although a sexual relationship with her continued until near the end of the period when he was away from the unit: T535.6. Her new partner, Mr Sitka, was a person who Mr McCabe knew. Mr McCabe denied that he was seeking to interfere in the relationship but accepted that his messages to Mr Sitka concerning Ms Wells were inappropriate and should never have been sent. He did not dispute in his evidence the assertion that he wanted to denigrate her. He said he wanted to destroy her reputation with the new man in her life but there were reasons for it: T535.37-T536.5. Mr McCabe agreed that he suggested in the texts that he had sexual relations with Ms Wells at a time when she had formed a relationship with Mr Sitka. Mr McCabe denied that his further statement of 20 May 2020 of 17 pages was where he again sought to denigrate her and destroy her reputation: T536.42. Mr McCabe denied that his statement was an attempt to dissuade Ms Wells from giving evidence: T538.3.

8. Mr McCabe was asked questions about a letter dated 6 July 2020 which he agreed that he sent to Dr Keller, the treating psychiatrist for the defendant: T538.50. Mr McCabe agreed that prior to sending the letter to Dr Keller, he did not have an authority from the defendant's solicitor or the defendant to send the letter and did not give any warning to the defendant's solicitor or the defendant that he was about to send the letter: T539.8-15. This was despite the fact that Mr McCabe knew that he had to obtain an authority every time he approached a treating doctor in the workers compensation area in which he worked: T539.25. Mr McCabe was asked about parts of the letter which referred to a large amount of material sent to the treating doctor and with him providing what was described as "editorial comment". Mr McCabe denied that, and said the letter stated the facts which he believed had occurred: T539.45. Mr McCabe agreed he asked for a modification of Dr Keller's opinion and that he thought it was an appropriate letter to send to a treating doctor. He said he did not consider that the provision of the information may interfere with an ongoing clinical relationship between the defendant and Dr Keller: T541.20. Mr McCabe said he was just setting out the facts to Dr Keller to see what his opinion was.
9. Mr McCabe was then taken by senior counsel for the defendant to a letter which he sent to Dr McClure, a psychiatrist who had provided a medico-legal report to the solicitor for the defendant relating to the defendant. Mr McCabe agreed he provided a bundle of further information to Dr McClure, including one of his statements and the statement of Mr Lavers: T542.
10. Mr McCabe denied that he had made attempts to intimidate, goad and insult Ms Riechelmann to provoke a response from her and to degrade her reputation. He also denied that he insulted and goaded Ms Riechelmann on 31 March 2018 with the intention of denigrating her in the eyes of neighbours, friends, and her peer group. He denied that he expected her to lash out as she had done in the past. He also denied that he in fact lost his temper and attacked her and concocted a story to blame her for what was in fact a savage attack where he had grabbed Ms Riechelmann by the throat until she could not breathe and her face went red and then threw her to the floor. He denied that there was a savage and

brutal attack by him and that he continued with a concoction of what had occurred which included persuading Ms Wells to change her statement and prepare statements for others to control their evidence. He also denied making attempts to interfere with Ms Riechelmann's evidence and Ms Wells' evidence by the use of threats: T542.21-.39.

11. In re-examination, Mr McCabe was asked to clarify aspects of the methodology he applied to obtain statements including the redrafting of them if necessary. The evidence established that Mr McCabe's secretary, Ms Roberts, forwarded various correspondence to the Police officer involved, Constable Brooks, and various witnesses including Ms Wells and Mrs Pusell. The various correspondence and draft statements became Exhibit E in the proceedings. An email from Mr McCabe to Senior Constable Brooks dated 14 May 2018 refers to Mr McCabe's statement and indicates that Mr McCabe would send two videos of the incidents. Mr McCabe confirmed that he sent the two videos to Constable Brooks soon after 14 May 2018: T545.9.
12. Included as part of Exhibit E was an email exchange with Ms Wells in which Mr McCabe forwarded a draft statement to her and asked Ms Wells whether it was "OK". Ms Wells replied on 16 May 2018: "all fine": T545.31. A draft of Ms Wells' statement was sent by Mr McCabe to Constable Brooks. Later, a signed version was sent to Constable Brooks on 21 May 2018. Mr McCabe could not recall whether the draft statements which were part of Exhibit E were first drafts or not: T546.35.
13. By the time Mr McCabe had sent his letter to Ms Wells of 15 June 2020, he had already served the first statement of Ms Wells in his case: T548.36. Mr McCabe indicated that he expected to call Ms Wells in his case and then he saw her new statement of 15 April 2020 when it was served on him. Mr McCabe said that the letter forwarded to Ms Wells in which he indicated that an application would be made for her to be declared a hostile witness was sent because the latter statement of hers was entirely different to the 2018 statement which he had served: T549.46.
14. In relation to the messages sent to Mr Sitka, Mr McCabe said he was drunk when he sent them: T542.12. Mr McCabe said he was disgusted with himself now in relation to the messages and had rendered apologies in relation to his comments: T552.30.
15. Mr McCabe was then shown video 7 which is part of Exhibit B, part of which shows Ms Riechelmann holding her telephone filming. Mr McCabe said that she held the phone about 10cm away from his face: T553.2. Mr McCabe was then shown a part of video 8 where Ms Wells said he had acted "out of line" which Mr McCabe had denied: T553.40. Mr McCabe said that just before Ms Wells said this, she said words to him to the effect, "You did well out there": T553.44.

16. Having listened to video 8 several times it appears to me that Ms Wells did say "You did well out there" to Mr McCabe when he came in from the confrontation with Ms Riechermann. It is unclear from the video whether this was said seriously or sarcastically by Ms Wells. Having regard to her later comments to Mr McCabe that he "acted out of line", I am unable to conclude that it was a comment made commending Mr McCabe's conduct with Ms Riechermann.
17. Following oral evidence by Ms Wells, which suggested a second "strangling" incident between Mr McCabe and Ms Riechermann on 31 March 2018, Mr McCabe was recalled for further cross-examination so that Ms Wells' allegations could be put to him for his response. It was put to Mr McCabe that after that part of Exhibit A video 8 towards its end showing him inside his unit having a discussion with Ms Wells where she expressed the opinion that his conduct was "over the top", and prior to him going outside and seeing Ms Riechermann sitting on his car, there was an intervening event. The event occurred where he and Ms Wells were standing near the glass doors at the exit of the foyer of the block of units. It was suggested that Mr McCabe, facing Ms Riechermann, placed his hands around her neck and squeezed her throat until her face started to go red. Mr McCabe denied this version: T1063.50-.23. Mr McCabe said that after the events shown at the end of Exhibit A video 8 where he and Ms Wells were in his unit, Ms Wells departed but he was not aware that she had gone to the Cronulla police station: T1064.30. He denied the suggestion that Ms Wells fled because of escalating violence he had inflicted on Ms Riechermann: T1064.35.
18. Further, Mr McCabe rejected the suggestion that following strangling Ms Riechermann, in accordance with the version of Ms Wells, Ms Riechermann fell on her knee and then fell against the external wall of his unit in the foyer: T1064.40.
19. Therefore, it was put to Mr McCabe that instead of there being one attack in accordance with the evidence of Ms Riechermann (see T542-543), there were in fact two attacks by him, the first being as stated by Ms Riechermann and the second being that described by Ms Wells. He denied both suggestions: T1065.5-.12. Mr McCabe also denied that when he saw Ms Riechermann sitting on his car this was after the second "strangling" incident involving Ms Riechermann in the presence of Ms Wells: T1065.42.
20. Mr McCabe was questioned about his verbal response when the policeman came into the flat with Ms Wells and asked Ms Wells to repeat what she had just said to the policeman. A version of this is set out in Ms Wells' first statement. Mr McCabe said that he did not respond to the allegation as he was in shock. He denied the suggestion that his lack of response was due to him knowing what was alleged was true: T1066.31-42.
21. Mr McCabe gave evidence that after the events shown at the end of Exhibit A video 8 when he and Ms Wells were inside his unit, some five minutes passed before he went outside with him initially leaning against the wall of his unit as shown in video 8 and then him proceeding to the living area of the unit for a short period before proceeding outside and seeing Ms Riechermann leaning against his car. He denied that in this five minutes' period

the second "strangling" incident occurred as put him by Senior Counsel for Ms Riechelmann: T1067.7.

22. In answer to a question from the Court, Mr McCabe expressed the opinion that Ms Wells was mistaken in believing that he had choked or strangled Ms Riechelmann because she had misconstrued the acts shown in video 8 when he was attempting to prevent Ms Riechelmann re-entering the units to go up the stairs by placing his arm out in front of him: T1067.30-43.
23. In re-examination, Mr McCabe denied exiting his unit after entering it with Ms Wells before he proceeded outside and saw Ms Riechelmann sitting on his car: T1068.42-48.
24. I will consider Mr McCabe's credit and reliability in some detail further below.

The evidence of the defendant, Ms Riechelmann

1. The defendant, Ms Riechelmann, gave extensive oral evidence at the final hearing. She had previously also given statements in relation to the events involving Mr McCabe, particularly those of 31 March 2018.
2. In a text sent on 31 March 2018 at 11:37pm to Mr Lavers, Ms Riechelmann stated as follows:
"Oh police called because I was knocking on your door McCabe punched my phone out of my hand physically took me by the throat assaulted me until Mel made him stop then charged me!! Crazy woman! I just wish you had told me you had someone else. Why would you bother coming to see Maxine" (Exhibit 3 page 136).
 1. Following the alleged assault by Mr McCabe, Ms Riechelmann gave evidence relating to the matter generally consistent with her claims. This includes in a conversation with a Ms Hart-Waters, in a statement provided to police on 17 April 2018 (Exhibit 3 page 179, particularly at paragraphs 7-11) and in her accounts given to various doctors.
 2. In her oral evidence in chief, Ms Riechelmann gave evidence of her relationship with Mr Lavers and meeting Mr McCabe. She said the initial relationship which she had with Mr McCabe was "okay" and there was some socialising between her, Mr Lavers and Mr McCabe. Ms Riechelmann said that at all relevant times she was working for Qantas and had spent 15 years as an international flight attendant and then 20 years as a domestic flight attendant. The places she attended socially with Mr Lavers included the Cronulla Sharks rugby league games, related functions and various clubs and restaurants in the Cronulla area.
 3. Ms Riechelmann gave evidence that over time, her relationship with Mr McCabe became strained and his negative behaviour to her which was isolating or offensive increased.
 4. Ms Riechelmann gave evidence that in mid-2014 at JD's nightclub after a rugby league game, she walked past Mr McCabe and tapped him on the chin with an open hand, fingers extended and separated in a crossing and upwards motion without any force. She said Mr McCabe said nothing and just looked at her up and down.

5. In August 2014, Mr McCabe made a comment to Mr Lavers in a telephone message which Ms Riechelmann read, that Mr Lavers was out with "the von Trapp family" when Mr Lavers and Ms Riechelmann were attending a dancing event at NIDA where Ms Riechelmann's daughter was participating.
6. In October 2014, Ms Riechelmann gave evidence that she was looking to invest in a property and purchased a property in the block of units at xx Ozone Street, where Mr Lavers and Mr McCabe lived, with the hope that there was a development opportunity. On the day of the purchase, she went with Mr Lavers to the 2230 bar to have drinks to celebrate. Whilst at the bar Ms Riechelmann said she had a discussion with Mr McCabe in which he said that he did not have to be friends with her and that she was an alcoholic and nobody liked her. Ms Riechelmann said that Mr McCabe was extremely intoxicated at the time and stated that Mr Lavers could do better.
7. Ms Riechelmann said she was completely insulted in relation to her relationship with Mr Lavers and slapped Mr McCabe with her right hand with her fingers extended and together. Ms Riechelmann said the slap was with "medium force" and then she left the bar to go home.
8. Ms Riechelmann gave evidence that she subsequently had a phone call from police who wanted her to make a statement following a complaint from Mr McCabe. Ms Riechelmann said she attended at Miranda police station and gave a formal statement.
9. Following this, Ms Riechelmann said that an apprehended violence order was made against her for 12 months: Exhibit 3 page 174. Ms Riechelmann said she did not challenge the order and sought to comply with it and did not breach it.
10. Ms Riechelmann gave evidence that the order changed the manner in which she socialised with Mr Lavers. On many occasions they socialised separately, and she attended limited venues.
11. Ms Riechelmann gave evidence that in 2015 she had difficulties in her relationship with Mr Lavers and there was an incident at Mr Lavers' unit in January 2015. She stated that police were called, and she pushed at Mr Lavers but they reconciled.
12. Ms Riechelmann gave evidence about her emotional state in January 2015 and following. She said she believed she was in an extremely stressful relationship having regard to the presence of the apprehended violence order and the difficulties in socialising. She said she attended the Miranda Medical Centre and obtained a referral to Ms Kate Brennan, psychologist, who she saw on several occasions. She was also prescribed antidepressants which she continues to take in a different dosage.

13. Ms Riechelmann stated that whenever she saw Mr McCabe after January 2015 she had heart palpitations with her heart racing, her stomach churning and on one occasion she had a panic attack and was unsteady. After talking to her hypnotherapist, she returned to the particular function. Ms Riechelmann gave evidence that when she saw Mr McCabe it brought on her anxiety.
14. Ms Riechelmann gave evidence that during the term of the apprehended violence order she visited Mr Lavers from time to time at his unit but only if Mr Lavers advised that Mr McCabe was not home or it was "safe to come".
15. Ms Riechelmann said that in the first part of 2016 she continued to receive psychological assistance on occasion. At about this time, Ms Riechelmann proposed the redevelopment of the xx Ozone Street property as developers were interested in the property due to its location. As part of this proposal, Ms Riechelmann sent various email correspondence to unit owners. Mr McCabe sent an email to Ms Riechelmann proposing "to put past misunderstandings behind us" but Ms Riechelmann rebuffed his advances and indicated clearly that no personal contact between them was welcome: Exhibit 3 page 115. There was further insulting email correspondence between Ms Riechelmann and Mr McCabe: Exhibit 3 page 116 and following. Mr McCabe was resistant to the development proposals. Ms Riechelmann then decided to step away from the project and the proposed development did not continue.
16. In December 2016, Ms Riechelmann attended a nightclub and felt someone was watching her and noted that Mr McCabe was watching her while she danced. She said she felt shaky and left the premises. Ms Riechelmann said that despite Mr Lavers wanting her to be friends with Mr McCabe, she wanted no contact with him: Exhibit 3 page 115. In the email correspondence, Mr McCabe described Ms Riechelmann as a "trolley dolly" and that she should see a psychiatrist: Exhibit 3 page 120. Ms Riechelmann said she found the correspondence negative and derogatory as well as extremely confronting. Ms Riechelmann described in her evidence an overwhelming sense of intimidation from Mr McCabe.
17. Ms Riechelmann gave evidence about attending a function at JD's Bar on 4 June 2017. She and Mr Lavers went there after attending another function. Ms Riechelmann described Mr McCabe watching her dance at the nightclub which made her feel uncomfortable and intimidated. She said she left the dance floor and went over to a group of other people, including speaking to her physiotherapist.
18. Ms Riechelmann said that while she was standing in the group, she had a vision of Mr McCabe coming towards her. She said she threw her glass of champagne in the direction that Mr McCabe was coming towards her but she did not see where the champagne landed. Ms Riechelmann said she felt frightened and anxious when she saw the vision of Mr McCabe. After sheltering behind her physiotherapist and his partner, Ms Riechelmann said that she soon after left with Mr Lavers as she felt that the incident was upsetting and confronting.

19. In evidence were lengthy texts sent on 5 June 2017 between Mr Lavers and Ms Riechelmann: Exhibit 5. Ms Riechelmann said that she had "anger issues" and did not know why she "threw that drink". Later in the text she said that she was not "negating my responsibility in this" and that she knew what she did was "wrong" and accepted that she would "suffer the consequences". It appears from the texts that Ms Riechelmann agreed that she threw the drink at Mr McCabe due to being angry and anxious but accepted that what she did was wrong. Ms Riechelmann accepted that the texts with Mr Lavers on 5 June 2017 reflected her state of mind at the time. Ms Riechelmann said that she received a phone call from police in relation to the incident but nothing eventuated. Thereafter she took further steps to avoid Mr McCabe.
20. In October 2017, she had various exchanges with Mr Lavers which showed her distress and anxiety in relation to Mr McCabe. It is clear from these texts that Ms Riechelmann was anxious and aggravated by Mr McCabe's conduct. Ms Riechelmann said that as at June 2017 she was seeking medical assistance and had commenced psychotherapy sessions through a program at her work. These problems were causing difficulties in her relationship with Mr Lavers.
21. Ms Riechelmann gave evidence that in late 2017 and early 2018 she was having difficulties in her relationship with Mr Lavers with their relationship breaking up several times. In late 2017, they went on a holiday to Vietnam. During the holiday, Mr Lavers disclosed to her that he was going on a three day cruise with "the boys club" which included Mr McCabe. She said she found it very upsetting and gave an ultimatum to Mr Lavers that if he went on the cruise that would be the end of the relationship. He decided to go on the cruise anyway. However, when Mr Lavers returned, Ms Riechelmann stated that they were still seeing each other and were attending a marriage counsellor at Miranda both together and separately. Ms Riechelmann gave evidence that as far as she was aware, as at 31 March 2018 she was still in a relationship with Mr Lavers with them spending overnight stays with each other.
22. Ms Riechelmann then gave extensive evidence in chief about the events of 31 March 2018. She stated that she spoke to Mr Lavers in the morning for about 30 minutes and then travelled on a return day trip with her job at Qantas to Cairns. She believed she returned to her car at the end of the day at about 5:30pm. She knew that Mr Lavers was attending a 60th birthday party. She stated that between seven and ten o'clock she had three mixed drinks with spirits being two gins and tonic and a whiskey and water. She said she had not eaten dinner when she had these drinks. Ms Riechelmann said that she knew Mr McCabe was attending the birthday party and decided not to attend with Mr Lavers.
23. Ms Riechelmann said that she attempted to call Mr Lavers to meet him, and had a missed telephone call from him at 10pm. She proceeded to the North Cronulla Surf Club to collect Mr Lavers and ran into the person whose birthday party it was, who said he had left 15 to 20 minutes ago. She noticed Mr McCabe on the dance floor at the other end of the function. Ms Wells was with him.

24. Ms Riechelmann said that she decided to walk up the hill to the Ozone Street block of flats and ran into Ms Farrugia and Mrs Pusell who were going to find Ms Wells. She said she had a discussion with them in the street for a few minutes. She said she then proceeded to the apartment block where the door to the block of units was open. She did not meet anyone in doing this.
25. Ms Riechelmann said that she then went up the stairs to Mr Lavers' apartment. In the block of the flats there were light buttons which stayed on for a period of time before they went off. Ms Riechelmann said that she knocked on the door to Mr Lavers' unit and then believed that she rang Mr Lavers. After not getting any response, Ms Riechelmann gave evidence that she stayed on Mr Lavers' level for a short period and then heard footsteps. This was Mr Pusell coming up the stairs. She said she informed him that she was trying to get Mr Lavers' attention. Ms Riechelmann said that Mr Pusell did not say anything to her which was inconsistent with his oral evidence: see T128.15; cf T703.31. I prefer Mr Pusell's evidence on this point to that of Ms Riechelmann. Having seen Mr Pusell and having heard his evidence as to his annoyance with Ms Riechelmann's knocking, I think it very likely that he would have said something to Ms Riechelmann in relation to the knocking on Mr Lavers' door.
26. Ms Riechelmann claimed that she only knocked a couple of times on the door before Mr Pusell attended and that it was a "normal knock": T703. She said she began to knock louder when Mr McCabe arrived as she was a bit panicked and felt "trapped": T704.22. Ms Riechelmann appeared to me to be downplaying the extent and degree of her knocking on Mr Lavers' door in her evidence. From the video evidence and the evidence of Mr Pusell, I accept Mr Pusell's evidence that there had been loud knocking by Ms Riechelmann for several minutes before Mr McCabe returned to the block of units. In due course, Ms Riechelmann said that she began to use the brass knocker on the door and that this made a lot of noise. Ms Riechelmann said she continued to knock including loudly, because she thought that Mr Lavers had perhaps fallen asleep: T705.36.
27. Ms Riechelmann then gave evidence in relation to the verbal exchanges with Mr McCabe, with him calling from downstairs saying that she was "crazy" and "mad". She said these exchanges were recorded on the video. Ms Riechelmann accepted that the exchanges became abusive including from her.
28. Ms Riechelmann then gave evidence of her going down the stairs with her telephone in her right hand recording and filming as she did so: T706. She stated that she was hesitant in doing so and felt "trapped": T706.16. She saw Mr McCabe standing near his unit door. She agreed that the video evidence depicted what was occurring between them. Ms Riechelmann said that she and Mr McCabe were arguing as she descended the stairs. She came face-to-face with Mr McCabe: T707.49-T708.4. At about this time, Ms Wells said to her words to the effect "Lavo's got a new girlfriend". Ms Riechelmann said that this was the first she had heard of it and she did not believe it and thought that Mr McCabe and Ms Wells were baiting her.

29. Ms Riechelmann then gave her evidence in chief in relation to the alleged battery incident as follows:

"Q. Did something happen during this discussion after you saw Mel?

A. I saw Mel - I was looking towards Mel, and I had my phone up. So I was looking at her, I didn't know what I was videoing, because I was looking at her. And then all of a sudden my phone was punched out of my hand, and I heard this noise of it hitting timber. Distinct noise, where it had landed.

Q. When we talk about timber, what was the floor surface in the stairwell area?

A. In the hallway there is carpet. But the - there's a timber hallway in Mr McCabe's apartment, so the door was slightly open, which I presumed it had dropped at the front of the doorway.

Q. Did you look down to see where it was?

A. I just bent over to pick it up. I didn't really register to look; I think I was in - quite shocked that it had occurred. That I - it was like, is that assault? So I was in shock, and I just bent down to pick it up off the floor.

Q. When you say, "is that assault", what was it that made you say that?

A. I don't really know.

Q. What had just happened?

A. Well, the phone had just been punched out of my hand. So I'd been struck.

Q. What did that cause you to think?

A. That I'd been assaulted.

Q. So you then bent down. What then happened?

A. As I bent down to pick up the phone, my bag on my left-hand side had fallen out. And Mr McCabe had come over the back of me, over my right-hand side, across my chest, and I was - as he was coming towards me, I was like - excuse me, your Honour, but "Eff off, eff off". And his arm came across my body, across here, and then up around my neck, and he pulled me backwards towards the - the wall of the stairs. And as I'm pulled backwards I could see the whites of his eyes. I was so - my neck was so stretched out with his arm around my neck, and pulled that way.

HIS HONOUR

Q. Just so I understand this correctly. You say that you bent down to pick up your phone, and then Mr McCabe came from behind you, and with his right arm across the front of your body, him standing behind. Across your chest or throat?

A. He was coming - he came across my chest, and then as he pulled me back, up around my throat, and I was - I had to pull my fingers here, to breathe.

Q. Indicating where your chest joins your neck. Is that what you're indicating, or higher?

A. Higher. I couldn't breathe. I couldn't speak; I could not breathe." (T708.31-T709.29).

1. Ms Riechermann said that she remained on her feet as Mr McCabe released her from the hold: T709.37. During this incident, Ms Riechermann said that Ms Wells was in the foyer: T710.26. The evidence of this incident given by Ms Riechermann is inconsistent with that of Ms Wells who said she did not recall seeing the battery as alleged by Ms Riechermann. Ms Riechermann then said that she was thrown by Mr McCabe against the wall and landed on her right leg and right knee in the following evidence:

"A. After I was released - this is difficult for me to describe because I recall being thrown against the hall wall and landing on my right leg and my right knee, and I don't know how I got there.

Q. I thought you said you remained on your feet.

A. I thought I did too. That's what I think. I think I was on my feet and then I recall - remember hitting a wall.

Q. And landing on your knee?

A. Yeah. Or across my right-hand side of my body and my knee and my right shoulder." (T711.35-45).

1. Ms Riechermann then said that after she was released, she wanted to go to Mr Lavers by going upstairs. She said she did not recall what happened at that time: T712.30. She then stated that she remembered going upstairs, knocking on Mr Lavers' door and crying. She decided to go downstairs and wait for the police. Ms Riechermann did not remember whether the act of Mr McCabe putting his arm around her chest and throat was the only time that he took action of that nature: T712.42. However, Ms Riechermann did not give evidence of another occasion. Ms Riechermann claimed that for the period after being gripped by Mr McCabe she had a "gap in her memory": T713.1.
2. Ms Riechermann gave evidence that she recalled knocking on Mr McCabe's door and asking for her phone to be given back and then proceeding outside. The police then arrived, and she spoke to them and gave her account. In due course, the police informed her that she was not a person of interest but was regarded as a victim: T714.13. Ms Riechermann gave evidence that she was extremely upset and very stressed at this time. She said she felt breathless but did not notice any effects on her body. She said she told police that she had taken videos but when she looked at her phone there was nothing there. She believed she had taken three or four videos.

3. Ms Riechelmann gave evidence that when she went home she sent a couple of messages to Mr Lavers and called him the next morning: see Defendant's Court Book page 92. Ms Riechelmann informed Mr Lavers that she could not find the videos on her phone and he assisted her in locating them in the deleted files. She thanked him for his assistance: see her 1 April 2018 text, Exhibit 3 page 136.
4. Ms Riechelmann gave evidence that overnight, apart from being mentally traumatised, her body was also "traumatised" and she had severe pain in the back, across the shoulder and chest and at the right knee: T716.28 and following. Ms Riechelmann said that her knee was very swollen and she had bruising on her right forearm. She also described bruises on her back and chest.
5. Ms Riechelmann gave evidence that shortly after, she attended a Dr Begum and described to that doctor the assault and the anxiety and injuries which she had arising from it: T717.22.
6. Thereafter, Ms Riechelmann gave evidence about being anxious, not sleeping well, having bad dreams, finding leaving her apartment a challenge and sleeping a lot. She said these symptoms had eased but she continued having bad dreams on occasions. She confirmed various photographs of bruises and swelling to her body taken some days after the incident.
7. As stated above, Ms Riechelmann confirmed providing a statement to police: see Exhibit 3 page 179. She confirmed it was true and correct.
8. Ms Riechelmann said that she had communications with Mr Lavers at about this time about pressing charges and he discouraged her from taking the matter further. Ms Riechelmann said that the police said to her they would not be proceeding because of Ms Wells' statement which was different to her account.
9. Ms Riechelmann gave evidence in chief in relation to professional medical treatment which she had received after the incident. She stated that she started to see a Ms Amanda Brown, psychologist, and a Dr Keller, psychiatrist, on referral from her general practitioner. She said that each of these medical professionals asked questions in relation to the incident and she answered the questions truthfully. She also gave information to the medical professionals in relation to her previous marriage and her difficulties with her husband as well as information relating to both her relationship with Mr Lavers and her dealings with Mr McCabe.
10. Ms Riechelmann gave evidence that after the 31 March 2018 incident, she began drinking alcohol more regularly to numb the feelings she was experiencing. However, her ability to do so was limited by her job with Qantas which meant that the alcohol consumption had to occur on her days off. She states that after the COVID-19 pandemic stopped her work earlier in 2020, her return to work was indicated as being December 2020. However, she asserted that she was unsuccessful in the return to work for reasons relating to "my injuries and disabilities".

11. Ms Riechelmann said that she continued to see Dr Keller and Ms Brown, her treating psychiatrist and psychologist, respectively, seeing each of them about every three months. She said she was not seeing Dr Keller prior to the 31 March 2018 incident. Ms Riechelmann also confirmed that she saw a Dr McClure, psychiatrist, for a medico-legal report in relation to the 31 March 2018 incident. She stated that she saw Dr Roberts, psychiatrist, briefed on behalf of Mr McCabe, for the purposes of a medico-legal report, spending 45 minutes to one hour in the consultation.
12. In relation to her weekly wage prior to her redundancy, Ms Riechelmann said that she earned between \$1,500-\$1,800 per fortnight: T727.35.
13. Ms Riechelmann stated that in relation to the flat that she owned in the Ozone Street block of units, this was negatively geared, with her contributing to the mortgage payments from her income. She said that as at 31 March 2018 she wished to hold the unit as long as she could to sell it to a developer. After the March 2018 incident, she said she no longer attended body corporate meetings as Mr McCabe was on the committee and she decided that she would sell as she no longer had a relationship with Mr Lavers and Mr McCabe was there. She stated that she was of the view that it was better for her mental health to sell: T729.13.
14. In relation to the 2020 statement of Ms Wells, Ms Riechelmann said that she asked her to come forward and provide a statement to tell the truth. She said she had very limited discussions with Ms Wells: T731.41-T732.7.
15. Ms Riechelmann was then shown the nine videos which were part of Exhibit A. In relation to video one, Ms Riechelmann said that initially there was light knocking from her and then louder knocking and then heavier knocking when she used the large brass knocker on the door. She agreed that she was persistent in her knocking in order to attempt to obtain Mr Lavers' attention: T734.20.
16. Ms Riechelmann gave evidence that video six was taken by her as she was walking down the stairs and having exchanges with Mr McCabe and then Ms Wells. Ms Riechelmann asserted that her telephone was filming at the time it was struck from her hand as far as she knew: T737.17.
17. In relation to video eight, the noise on the video was the phone dropping to the floor. Ms Riechelmann said she just had the phone punched out of her hand. She stated that the banging and crashing sounds before the door opened was her being strangled and Mr McCabe assaulting her.
18. In relation to why she attempted to return to go upstairs at the end of video eight, despite on her evidence being recently violently assaulted, Ms Riechelmann said that she was going up to Mr Lavers' apartment to go to Mr Lavers "to be safe": T741.3.

19. Ms Riechelmann gave evidence that on 1 April 2018, the day after the 31 March 2018 incident, she rang a friend, Ms Debbie Hart-Waters, and confided in her as to what had occurred, particularly that Mr McCabe had punched her telephone out of her hand and had strangled her and she was very upset. Ms Riechelmann gave evidence that Ms Hart-Waters rang her up and checked on her over the course of the day. She said she told Ms Hart-Waters about her injuries and in particular the swelling to her knee.
20. In relation to the part of the incident where the phone of Ms Riechelmann fell, Ms Riechelmann gave evidence that she recalled the phone hitting the timber floor. There was evidence that the foyer was carpeted at the time but the entrance area to Mr McCabe's flat had a timber floor. Ms Riechelmann said that after the phone was punched out of her hand she believed that there was some discussion about an "assault" and then she bent down to pick up the phone: T746.
21. Ms Riechelmann was extensively cross-examined in relation to her medical history including in relation to her psychological problems prior to the 31 March 2018 incident. Ms Riechelmann gave evidence that her family doctor who she had consulted for many decades was a Dr Kerrie Callan at Miranda, although she also attended the Miranda Medical Centre when Dr Callan was not available to see her. She agreed that she saw different doctors at the Miranda Medical Centre.
22. Ms Riechelmann gave evidence that she had taken the antidepressant Zoloft during her marriage due to stressors in the marriage and had done so since about 2007, although she accepted that it could have been longer. She said she was still taking Zoloft as at 2014-15. Ms Riechelmann said that Dr Callan had prescribed her Zoloft and she had received other prescriptions from doctors at the Miranda Medical Centre.
23. Ms Riechelmann accepted that she had been referred to a psychologist, Ms Kate Brennan, and had commenced seeing her from early 2014 relating to problems with depression: Exhibit B page 96 and following.
24. Ms Riechelmann was then cross-examined in relation to attendances at the Miranda Medical Centre from early 2015. She agreed that she complained about low mood and difficulties with concentration and confidence as well as having a stressful job and relationship. She accepted that she had time off work in 2015 due to depression. In addition, Ms Riechelmann accepted that her general practitioner had arranged a mental health plan for her which involved her seeing Ms Brennan, psychologist. Ms Riechelmann also accepted that she had time off work due to stress at the end of 2015. Ms Riechelmann described attending a number of psychologists and that this was a regular thing for her.

25. Ms Riechelmann accepted that she was taking Zoloft six weeks before the 31 March 2018 incident and was taking it on a regular basis. She agreed that she had depressive symptoms and medication for those symptoms for some 10 years prior to 2018. She agreed that she needed, in her view, to take Zoloft to deal with her depressive symptoms in the course of her day-to-day life. She also agreed that the amount of Zoloft she took increased from 50mg per day to 100mg per day in 2015 after the apprehended violence order was made against her.
26. Ms Riechelmann was asked about her attendance with Dr Begum on 5 April 2018 where there was reference in the notes to the incident and the injuries she had received. Ms Riechelmann said that in her view she needed medical treatment but was uncomfortable to go to the doctor and her girlfriend insisted that she should go. She said she went to "document" the injuries she had received.
27. Ms Riechelmann then gave evidence about a number of back injuries she had received which resulted in operations. The first was 15 or 16 years ago and the second back operation was in 2021, involving a discectomy. She agreed that she had injured her back in July 2018 in the course of her work. After her first back procedure, she returned to work. After her second procedure in 2021, she said that her back was fine. As well as the work injury incident in July 2018, Ms Riechelmann said she had received another injury later in 2021 which required the second operation.
28. Ms Riechelmann said she returned to work in April 2020 and was then stood down by Qantas due to the COVID-19 pandemic. She accepted that she was paid by Qantas until January 2021 when she then received an extensive redundancy payment from Qantas: Exhibit B page 185. Her 2021 injury was shortly after she received her redundancy payment. This had caused numbness in her legs sciatic pain in the right leg arising from what she understood to be a herniated disc. Importantly, Ms Riechelmann stated that if she had not been made redundant in 2021, she could see no reason why she could not have returned to work after the second back operation: see T793-T794 especially at T794.3; see also T822.33.
29. Ms Riechelmann accepted that prior to 3 June 2019, Dr Callan had not referred her to a psychiatrist. She also agreed that her solicitor recommended that she see a psychiatrist.
30. Ms Riechelmann did not recall when she first consulted Dr Callan after the 31 March 2018 incident, but the records suggested it was on 6 June 2018 on a matter involving an injury to her left knee which was not the knee allegedly injured in the incident. By 6 June 2018, Ms Riechelmann accepted that her other bruises arising out of the incident had resolved.
31. In relation to other physical injuries unconnected to the incident, Ms Riechelmann accepted that in 2018 she complained about an aggravation to her back and an injury to her right thumb.

32. Ms Riechelmann was asked a number of questions about her consultations with Dr Keller, psychiatrist. She agreed that she first saw Dr Keller in July 2019. She said that she provided him with her medical history prior to 31 March 2018. This included the history of her marriage and her relationship with Mr Lavers. Ms Riechelmann could not recall whether she told Dr Keller that she had been prescribed Zoloft for some period prior to March 2018 but said that she told him a lot of her history.
33. Ms Riechelmann was then asked a number of questions about her consultation with Dr McClure. She agreed that her solicitor had recommended that she see Dr McClure, psychiatrist, in 2019 to determine whether she had PTSD for the purposes of her court case. Ms Riechelmann was asked a number of questions about the history she provided to Dr McClure in relation to the 31 March 2018 incident. She agreed that she told Dr McClure that she decided to leave after knocking a number of times on Mr Lavers' door. It was put to her that she did not decide to leave but she decided to confront Mr McCabe by filming with her phone right up to his face. Ms Riechelmann agreed that she did this with the filming but disagreed that she decided to confront Mr McCabe. She said that Mr McCabe had in fact got in her face verbally.
34. Ms Riechelmann was asked about what she did after she left the block of units. She said she sat on Mr McCabe's car and then on the fence. She agreed that Mr McCabe had asked her to get off his car. She disagreed with the proposition that she had stamped on the bumper bar to his car or bashed the windows of the car.
35. Ms Riechelmann was then asked some questions about the history she had provided Dr McClure about physical injuries at work. She agreed that she told Dr McClure that she had a wrist injury which gave rise to a workers compensation claim and that she had had surgery to her left wrist. She accepted that it was possible that she told Dr McClure that her psychological symptoms were more pronounced since she was not going to work and her wrist injury. She agreed that in relation to her psychological symptoms as described to Dr McClure, that she had psychological symptoms for 10 years before the incident. She said the question of her symptoms of anxiety and depression depended on a question of degree.
36. Ms Riechelmann was then asked a number of questions about her work and her earnings between 2017 and 2020. She agreed that her earnings in the financial year ending 30 June 2019 were similar to the earnings in the financial year ending 30 June 2018. While her earnings reduced in 2020, Ms Riechelmann agreed that she had been stood down earlier in the calendar year 2020 and the COVID-19 pandemic had prevented her receiving part of her usual benefits for the last three months of the financial year. She agreed that she was paid her salary at a base rate up to the time of her redundancy. It was put to Ms Riechelmann that her work performance did not suffer as a result of her alleged psychological injuries. She said she was still going to work and was utilising sick leave but her standard of work had dropped. However, she accepted that this did not affect her income. Further, she agreed that if she had not been stood down at Qantas she would have kept working after April 2020 in her existing role: T822.17-.33.

37. Ms Riechelmann was asked some questions about the history she had provided to Dr Roberts, psychiatrist. She agreed that she had a telephone consultation with Dr Roberts in 2020. She also agreed that she had described having an alcoholic husband. She described having treatment from a psychologist and psychiatrist. She also agreed that she had told Dr Roberts that she had problems with her memory and concentration: T824.29.
38. Ms Riechelmann was then cross-examined about the other incidents relating to Mr McCabe. She agreed that she met Mr Lavers in about July 2010 and a few months later met Mr McCabe. Sometime later, she formed the view that he was socially inept at times and was derogatory about women. She described their relationship as mutually not liking each other. However, she accepted that they socialised together a few times and had been to each other's homes.
39. Ms Riechelmann gave evidence about the incident on 23 September 2014 at the nightclub JD's. She agreed she had no interaction with Mr McCabe that evening and had physically touched him on her arrival. She described the touching as a "friendly tap" on the face, being "lightly on the chin": T839.8. Prior to that time, Ms Riechelmann agreed that Mr McCabe had not spoken to her and was not looking in her direction. She said the tap was not premeditated. She agreed that he had not given permission for her to touch him on the face. She denied that it was a slap: T839.49. She also said she did not intend to harm him. She denied feeling "entitled" to touch Mr McCabe's face. She agreed this was in the context of neither Mr McCabe nor her liking each other: T840.38.
40. Ms Riechelmann said she was notified on her way home by a girlfriend that Mr McCabe had made a derogatory comment in relation to her after the incident. She agreed she sent a text to him and in that text she may have used an obscenity in describing him: T841.13. Ms Riechelmann denied threatening Mr McCabe but agreed she had abused him in the text. Ms Riechelmann agreed that the event where she tapped or slapped Mr McCabe was one of the grounds on which police sought an apprehended violence order against her late in 2014: T843.38. Ms Riechelmann agreed that despite the application for the apprehended violence order referring to a slap she did nothing to defend the application other than provide a statement to police: T846.4-.8.
41. Ms Riechelmann agreed that she saw Mr McCabe at the 2230 restaurant on 12 October 2014 being the day she had agreed to purchase her unit. She was aware that Mr McCabe was at the bar when she arrived with Mr Lavers. She said she had been asked by Mr Lavers to "extend an olive branch" to Mr McCabe, as she was buying a unit in the block. Ms Riechelmann said she spoke first to Mr McCabe saying she was purchasing a unit in the property and proposed becoming friends due to their mutual relationship with Mr Lavers. Ms Riechelmann said that Mr McCabe responded with derogatory comments saying he was not interested in becoming her friend, that nobody liked her, she was an alcoholic and Mr Lavers could do a lot better: T853.35.

42. In response, Ms Riechelmann agreed that she hit Mr McCabe by slapping him and she could have walked away: T853.39-.48. Ms Riechelmann said she slapped Mr McCabe with her right hand in anger: T854.17. She conceded that this was the second ground in support of the police application for an apprehended violence order. Significantly, Ms Riechelmann agreed that her slap "was forceful and violent": T856.42. Ms Riechelmann also agreed that a week later she goaded Mr McCabe by sending him a text message: T857.6. However, Ms Riechelmann denied that her dislike for Mr McCabe had turned into hatred and said it was a very uncomfortable situation for her to be in.
43. Ms Riechelmann agreed that she went to the Ozone Street apartments in January 2015 after having an argument with Mr Lavers. She said the front door to the block of units was shut. Ms Riechelmann denied bashing or kicking the door to the units but agreed that she pushed the lock and forced the door. She then proceeded up to Mr Lavers' unit.
44. She knocked on his door and was allowed entry and agreed that she was then physically violent to Mr Lavers by pushing him. She then threw a lamp across the room although denied throwing it at Mr Lavers: T859.48. She could not say why she threw the lamp. Ms Riechelmann agreed that she was acting violently to Mr Lavers and he had to hold her down on the lounge.
45. Ms Riechelmann accepted the police were called.
46. Ms Riechelmann said that she perceived the situation with Mr Lavers and Mr McCabe as being extremely stressful at this time and she sought further psychological treatment with a psychologist. She also continued with antidepressants and underwent hypnotherapy: T861.43-T862.10. Soon after, she saw Mr McCabe at a function and had a panic attack: T862.14. Ms Riechelmann said that as at 2015 she was having symptomatology which included heart palpitations, churning stomach, sweaty palms and unsteadiness. She was taught breathing exercises.
47. Ms Riechelmann confirmed that in 2016 she was still seeing a psychologist from time to time and was taking Zoloft continually but in different doses.
48. Ms Riechelmann was then taken to a series of emails between her and Mr McCabe in November-December 2016 relating to the proposed development of the Ozone Street property. This involved the development of both xx and xx Ozone Street. For this purpose, Ms Riechelmann had contact with developers. Mr McCabe did not want to sell and eventually the proposal became unviable.
49. Ms Riechelmann conceded that Mr McCabe sent a conciliatory email to her on 15 November 2016 but she replied some weeks later that she wanted no personal contact with him: T869.26-.50. There was then a series of very critical emails between the two of them: Exhibit 3 page 115 and following.

50. Ms Riechelmann conceded that despite her indicating in her first email on 5 December 2016 that she wanted no further personal contact with Mr McCabe, she continued to have email contact with him over the next few days. She accepted from her 6 December 2016 email that she had discussed Mr McCabe with her psychologist and had described Mr McCabe as a narcissistic bully: T879.19-41. Ms Riechelmann agreed that by February 2016 she hated Mr McCabe: T880.44.
51. Ms Riechelmann said that in the first half of 2017 she avoided contact with Mr McCabe. On 4 June 2017, Ms Riechelmann said she attended a function at the Wanda Beach Surf Club and then proceeded to JD's Bar. She said she saw Mr McCabe there while she was on the dance floor. Ms Riechelmann said that she stood with other people apart from the group involving Mr McCabe.
52. Ms Riechelmann gave evidence that she next saw Mr McCabe when she saw him coming towards her group. She did not know whether he was going towards the stairs at the nightclub. Ms Riechelmann agreed that she threw her glass of drink towards Mr McCabe but did not know whether she splashed the back of his shirt. She said he was not proceeding down the stairs at the time: T883.28; T884.27. Ms Riechelmann said she did not see where her drink landed: T884.38-43. Ms Riechelmann accepted that she "resorted to violence again against Mr McCabe": T885.9. Ms Riechelmann said she threw the drink towards Mr McCabe to get distance between him and her and to ward him off: T885.20-31. She described Mr McCabe as taking menacing actions towards her by staring at her while she was on the dance floor and looking her up and down: T886.28. She saw that as sufficient justification to ward him off by throwing her drink on him: T886.32.
53. Ms Riechelmann stated that she thought she felt justified in throwing something at Mr McCabe as he was approaching her: T887.32.
54. There was then cross-examination of Ms Riechelmann in relation to an exchange of texts which she had with Mr Lavers the next day on 5 June 2017. In summary, Ms Riechelmann said that she felt anxious and fearful in relation to Mr McCabe and could not go anywhere without having those feelings. She was fearful of him approaching her and said that "fight or flight" was her instinct to protect herself. She claimed that the situation with Mr McCabe "has affected my mental health". Ms Riechelmann said that she had "anger issues" due to feeling "anxious, alone, nervous and disrespected". She said she did not know why she threw the drink at Mr McCabe. She then stated as follows: "Don't think I am negating my responsibility on this! I know what I did on Saturday was wrong, I don't know why but I will suffer the consequences". Ms Riechelmann made reference to contemplating taking out an apprehended violence order against Mr McCabe. She denied that this was simply "bluster" on her part (T887.43) but there was no evidence that such an order was sought. Ms Riechelmann accepted that when she talked about "fight" that included throwing the champagne over Mr McCabe the night before, slapping him at the 2230 Bar and touching his face in September 2014: T888.48-8. Ms Riechelmann accepted that her "anger issues" would on occasions result in violence by her: T891.10. Ms Riechelmann also accepted that what she

did in the throwing the drink incident was wrong: T895.18. Ms Riechermann said she was contacted by the police (Exhibit B page 47) but the matter did not go further. Ms Riechermann agreed that she sent a text to Mr McCabe the next day apologising for the throwing her drink incident. In the text she asserted that there was no intent or thought by her "it just happened": T896.11.

55. Ms Riechermann was then asked about the photos of her alleged injuries to her body taken a few days after the event on 31 March 2018 and, she believed, before she saw Dr Begum on 5 April 2018. She marked the areas of the bruising on parts of her body and the photographs became Exhibit G in the proceedings.
56. Ms Riechermann agreed that after June 2017, she was having significant psychological problems and saw a psychologist through her employer Qantas. She conceded that she was struggling day-to-day. She also accepted that her psychological problems were aggravated in early 2018 in relation to Mr Lavers' decision to go on the cruise with his male friends including Mr McCabe which she found very upsetting particularly in the light that she had given an ultimatum to him about their relationship. She denied that she was trying to resurrect the relationship and said that both she and Mr Lavers were.
57. In relation to the evening of 31 March 2018, Ms Riechermann said she had three mixed drinks in the period between 7pm and 9:30pm and they were simple single nips of spirits in each. She said her sobriety was "reasonable" at that time.
58. Ms Riechermann was subject to a detailed cross-examination on her initial attempts to get Mr Lavers to answer the door. She said she initially knocked on the door but accepted that she later banged on the door including using the brass knocker in order to get Mr Lavers' attention. She agreed she heard footsteps on the stairs and recognised Mr Pusell but he said nothing to her although she said to him words to the effect that she was trying to wake up "Jon". As stated above, this is inconsistent with Mr Pusell's evidence where he said that he stated something to Ms Riechermann. Ms Riechermann said that she thought Mr Lavers was at home and messaged him. She agreed that one of the messages informed him that her "knuckles were sore". She agreed that this was because she had been knocking on the door so many times and then banging with the brass knocker. She accepted that when she was banging with the knocker it was 10:15pm on a Saturday night. Ms Riechermann asserted that she was knocking normally until the situation changed with the exchange with Mr McCabe when her knocking became louder.
59. Video one was then shown again to Ms Riechermann which was taken by Mrs Pusell. It was put to Ms Riechermann that she was not trying to summons Mr Lavers by her loud knocking but was simply trying to make a racket through making a big noise. Ms Riechermann said she felt like a trapped animal but agreed that she had made a big noise by her knocking at 10:15pm.

60. The second video was shown to Ms Riechelmann. She denied the reference to Mr McCabe's sister in the video in the course of loud knocking was an attempt to "bait" Mr McCabe. She could not give a persuasive reason as to why she mentioned his sister. In answer to the question why she did not just leave, Ms Riechelmann said that was because Mr McCabe was at the bottom of the stairs at that time, and she was scared and intimidated by him.
61. When shown video three she agreed that it was in substance the same as video one.
62. Video four was shown to Ms Riechelmann. She agreed that Mr McCabe did not come up the stairs or attempt to drag her out of the units and during the course of this video she had undertaken persistent knocking. She said she did not think of the noise she was making.
63. Video five was played to Ms Riechelmann. Ms Riechelmann said that the pattern of her knocking was being "playful". She said she presumed Mr Lavers was home and was hoping he would open the door. She agreed she did not call out to Mr Lavers but could give no reason why she did not. She denied making a racket to annoy other people in the block of units.
64. Ms Riechelmann was shown video six. She agreed that as she was coming down the stairs Mr McCabe was initially closer to the stairs and then took a number of steps back from the stairs closer to his unit entrance. She agreed that he then leant his right shoulder against the wall near his unit entrance. Ms Riechelmann accepted in her oral evidence that Mr McCabe's movement (having moved further towards his entrance door to his unit), meant that no one was in her way preventing her leaving the block of units and she could walk out. She agreed that in this video she had her telephone filming very close to Mr McCabe's head.
65. Ms Riechelmann was then shown video seven. She denied that she had her telephone filming in Mr McCabe's face and said that he moved his face closer to her telephone. She said she did not form a view of Ms Wells' intoxication at this time. She could not recall whether she was calling out to Mr Lavers at this time.
66. Ms Riechelmann then gave evidence that she recalled after the assault being on the floor near the entrance door to the block of units by herself. After being shown Exhibit 1 photograph I, she stated that she ended up being on the right-hand side of the photograph on the floor near the wall. She said at this time Mr McCabe and Ms Wells were not in the foyer. She was unsure when she was on the floor when compared to Mr McCabe's arm allegedly coming around her shoulder from behind in the course of the assault. She said she hit the wall with her right shoulder and knee and was left there.
67. Ms Riechelmann was taken to her evidence at T708. She agreed that at the time she was filming she was looking at Ms Wells and not at her hand holding the telephone. She also significantly agreed that she did not know what contact was made with her hand which caused her phone to hit the floor: T931.41. She accepted that she did not see her telephone being punched out of her hand but said that she knew it happened and felt it: T931.48. She later gave evidence in re-examination that she had marks on her hand as a result of this. Ms

Riechelmann said that she did not drop the phone but she heard the phone hitting the timber floor. She then bent down to pick the phone up and believed she was looking at the floor. She could not say how Mr McCabe got behind her to reach over with his arm across her chest and then around her throat. She agreed that she initially remained on her feet whilst this occurred as best she could recall but asserted that she was pulled backwards in the direction of the wall near the stairs.

68. Ms Riechelmann said in due course Mr McCabe released her from his hold and she eventually hit the wall landing on her knee: T711.35. She could not recall Mr McCabe grabbing her again after he released her. Ms Riechelmann said she could not recall how she got to be next to the wall. When asked whether Mr McCabe touched her again, Ms Riechelmann said that he could have but she had no recollection of it. She could not state the period of time after she was strangled before she ended up against the wall.
69. Ms Riechelmann was then shown video eight. Ms Riechelmann was asked whether Ms Wells was standing just outside the doorway to Mr McCabe's unit as shown in video eight at the time she bent over and the alleged assault occurred. She said she did not know. She later said she did not recall during the assault she alleged against Mr McCabe whether Ms Wells was standing in the position as shown at 1.49 minutes in video eight: T937.19. Ms Riechelmann stated that she remembered bending down to pick up the phone and said she did not remember anything else after that, except that she was thrown against a wall and then she went upstairs to knock on Mr Lavers' unit door. She also remembered Ms Wells calling out to Mr McCabe to stop: T940.48-T941.6. Ms Riechelmann then clarified it further to say that she did not remember the period after the alleged assault except as to particular aspects: T941.23. Ms Riechelmann later said that as far as her memory was concerned, the strangulation by Mr McCabe was at the front door of Mr McCabe's unit when she bent down to get her phone: T941.45.
70. Ms Riechelmann was then taken to Exhibit G where on some of the photographs she marked her bruises. Ms Riechelmann said that as well as the bruise circled she also had a higher bruise further up towards her right shoulder which was less pronounced: T942.15-T943.16. Significantly, Ms Riechelmann did not indicate any bruising on her neck in the photograph that was part of Exhibit G: T943.18-.24. Ms Riechelmann also confirmed that when she saw Dr Begum on 5 April 2018 she indicated to him where the bruising was: T943.28. Ms Riechelmann said the details from Dr Begum were probably better than her memory: T945.13. In relation to the event where Mr McCabe allegedly threw Ms Riechelmann against the wall, Ms Riechelmann said that she did not remember Ms Wells being there when that occurred: T948.37. Ms Riechelmann said that she did not know the relevant sequence of events: T949.5.

71. Ms Riechelmann asserted that Ms Wells called out for Mr McCabe to stop strangling her by saying "David, stop, stop" loud and urgently: T950.9. Ms Riechelmann accepted that having seen video eight she did not hear any loud and urgent call from Ms Wells to Mr McCabe to stop: T950.24. Ms Riechelmann denied that her evidence that a sharp object was pressed into her back was an invention on her part and that the strangling incident and her being thrown against the wall were also inventions.
72. Ms Riechelmann agreed that after the incident in the foyer she went outside and sat on Mr McCabe's car. She agreed that it was unusual to sit on someone else's car: T955.16. She denied that she stomped her feet on the bumper bar of the car or hit the windows of the car with her hand. She also denied seeing Mr Pusell outside with Mr McCabe at the time she was near his car: T955.40.
73. Mr McCabe's version of events was put to Ms Riechelmann, and she denied it. In particular, she denied punching Mr McCabe's face a number of times.
74. Ms Riechelmann was then asked a number of questions about the incident on 15 June 2018 at the Cronulla RSL Club. She agreed that she was asked to leave by security at the Club. Ms Riechelmann gave evidence that she saw Mr Lavers and Mr McCabe sitting at a bar table and she came up to the table. Ms Riechelmann denied grabbing at Mr Lavers but admitted making a gesture in that direction and calling him a "soft cock." She denied that she made three or four attempts to grab at Mr Lavers' crotch area. She agreed that Mr Lavers said to her to "settle down" a number of times.
75. Ms Riechelmann was asked about the glass she was holding and making a throwing attempt in Mr McCabe's direction. She said she believed that the glass was empty, but she did not really recall: T961.43. Ms Riechelmann said she did not know if she made a motion to throw the contents of the glass anywhere but accepted that it was possible that she made a motion to throw some wine over Mr McCabe as she had done previously: T962.1. Ms Riechelmann said she believed it would have been a movement "in jest": T962.14.
76. In re-examination, Ms Riechelmann said the problems she was having psychologically in 2017 with Mr Lavers' relationship with her included the problems of him having a friendship with Mr McCabe and the difficulties that posed for their relationship.
77. In relation to the alleged punch on her telephone outside Mr McCabe's unit entrance, Ms Riechelmann said she felt the force of the blow on her hand. She said she had two large marks across the front of her fingers from the impact to the back of her hand: T963.4-.11.
78. I will consider Ms Riechelmann's credit and reliability in some detail below.

The evidence of Ms Melanie Wells

1. Oral evidence was given in the proceedings by Ms Melanie Wells, the former defacto partner of Mr McCabe. In addition, there were before the court two signed statements of Ms Wells in evidence.
2. In her first statement dated 20 May 2018, given several weeks after the events of 31 March 2018, Ms Wells provides considerable detail in relation to the events of that day. In her oral evidence, Ms Wells indicated that this statement was partially correct and partially incorrect and did not include significant evidence, in particular her observations of Mr McCabe "strangling" Ms Riechelmann: see T584.31-T591.19.
3. The signed statement dated 20 May 2018 of Ms Wells was part of Exhibit F in the proceedings. Important aspects of this statement include:
 1. In paragraph 4, Ms Wells stated that on the evening of 31 March 2018 she had "about 10-12 glasses of champagne";
 2. In paragraph 5, Ms Wells states that she cannot recall everything that occurred on the evening of 31 March 2018 or what she said to police. The statement included: "My memory is impaired by the amount of alcohol I had consumed that evening";
 3. In paragraph 10, Ms Wells says that when she arrived at Mr McCabe's unit at the block of flats in Ozone Street, she was told that Ms Riechelmann had been banging on John Lavers' door "for about half an hour";
 4. Before giving some limited account of a discussion with Ms Riechelmann, Ms Wells states that she cannot recall everything. In paragraph 12, she provides:

"All I can remember was seeing David McCabe's right arm out straight holding Julie Riechelmann away from him. David's hand was on Julie Riechelmann's neck/chest area".

A similar statement is made in paragraph 32 of the 20 May 2018 statement, where Ms Wells says again that she cannot remember the events that occurred before the police arrived. These stated recollections of what occurred appear generally to be consistent with the end of video 8 (Exhibit A);

1. In paragraphs 14 to 18, Ms Riechelmann gives her account of when she left the units to go to Cronulla Police Station to report the physical incident between Mr McCabe and Ms Riechelmann;
2. In paragraphs 22 to 26, Ms Wells sets out an account she gave to a police officer in which she first told the police officer that "both of them were at each other's throats", and then later said to Mr McCabe "you had your hand around her throat". There was then stated to be a discussion between the police officer, Ms Wells and Mr McCabe about Mr McCabe going to his "parent's" and Ms Wells remaining in the unit. This should be compared to the somewhat different police record at Exhibit B page 56;

3. In paragraph 31, Ms Wells sets out the police officer saying that everyone was "really drunk" and that he would call Ms Wells during the week to get a statement;
 4. In paragraph 34 of the statement, Ms Wells states that having been told of the actual events leading up to Mr McCabe holding Ms Riechelmann away, she now believed that Mr McCabe acted in a "reasonable manner". She retracted that paragraph of her first statement in her oral evidence: T590.47-T591.9;
 5. In paragraph 35, Ms Wells refers to Ms Riechelmann's "aggressive behaviour" at one stage. In her oral evidence, she said that Mr McCabe had been the one acting aggressively: T591.9;
 6. Nowhere in her statement does Ms Wells say that Mr McCabe was "strangling" Ms Riechelmann with two hands. Paragraph 26 refers to her saying to Mr McCabe that he had his hand (not hands) "around her throat".
1. Ms Wells' second statement, signed in April 2020, which was annexed to an affidavit dated 21 April 2021, became Exhibit 2 in the proceeding. Ms Wells gave evidence that this statement was provided by her to Ms Riechelmann's solicitors at the request of Ms Riechelmann.
 2. Important aspects of Ms Wells' second statement include the following:
 1. In paragraph 3, Ms Wells states that she had "about five glasses of champagne" while she was at the 60th birthday party on 31 March 2018. This should be contrasted to paragraph 4 of her first statement where she said she had about 10-12 glasses of champagne;
 2. In paragraph 3 of the statement, Ms Wells also says that she has "full memory of all of the events that occurred during the evening". This should be contrasted with paragraph 5 of her first statement where she states that she could not recall everything that occurred. In her oral evidence, Ms Wells stated that she did not recall a number of matters including conversations at the unit before the relevant confrontation she gave evidence about: see T571; T573.8, T609.41. She also did not recall the centrally important strangling incident referred to by Ms Riechelmann in her evidence;
 3. In paragraph 7 of the second statement, Ms Wells states that Mr McCabe had consumed a large amount of alcohol and he was yelling at Ms Riechelmann to stop knocking and his behaviour was "aggressive". This is consistent with Ms Wells' oral evidence. This is also similar to paragraph 8 where Ms Wells states that Mr McCabe did not stop "yelling abuse" at Ms Riechelmann.
 4. Paragraphs 7 and 8, in terms of what Mr McCabe did and his allegedly aggressive demeanour, appear to be somewhat inconsistent with paragraph 34 of Ms Wells' first statement: see also T590.49-T591.9;
 5. In paragraph 8 of the second statement, Ms Wells indicated that when Ms Riechelmann got close to Mr McCabe "he grabbed her phone out of her hands and threw it into his unit". This is significantly inconsistent with Ms Wells' oral evidence in chief where she said that Mr McCabe "knocked" the phone out of Ms Riechelmann's hands (T572.48; T573.27) and also

with Ms Riechelmann's oral evidence. It is, of course, also inconsistent with Mr McCabe's evidence. The phone incident is not referred to in Ms Wells' first statement made soon after the events in question;

6. In paragraphs 9 to 10, Ms Wells recounts a conversation between Ms Riechelmann and Mr McCabe about his sister and Ms Wells states that Mr McCabe "then strangled Julie around the throat". There thus appears to be a claimed temporal connection between the "sister" comment and the alleged strangling incident. In her oral evidence, Ms Wells said that there was some gap between the "sister" discussion and the strangling. Further, in her oral evidence Ms Wells stated that the alleged strangling occurred after the end of the events shown in video 8 which was part of Exhibit A: T627.40; T630.1. That version is also inconsistent with Ms Riechelmann's initial pleaded case, with Ms Riechelmann's oral evidence and Mr McCabe's evidence. As set out below, Ms Wells gave evidence that Mr McCabe "strangled" Ms Riechelmann with his arms directly out in front of him and with his hands on each side of her throat facing her: T576.46-T577.6; T578.29-.36; T590.13; T590.33. That account is inconsistent with her first statement in paragraph 26 when she says that he had his "hand around her throat" and paragraph 23 of the first statement when she says that she told police that both of them "were at each other's throats". It is also inconsistent with Ms Riechelmann's oral evidence and pleaded case as to what occurred;
7. In paragraphs 13 to 15, Ms Wells gives an account in her second statement of her telling the police that Mr McCabe was strangling Ms Riechelmann which is inconsistent with the account in her first statement when the word "strangling" or "strangled" was not used: cf T589.25-.42;
8. In paragraphs 21 to 26 of the second statement, Ms Wells gives evidence about her contact with Mr McCabe after 31 March 2018, her withdrawal of her oral statement to police and the preparation of the first statement. Ms Wells states, consistent with her oral evidence, that Mr McCabe said to her on several occasions that she had to change her statement as he would lose his livelihood and his right to practice as a solicitor. Ms Wells states in paragraph 23 of her second statement that she felt extremely pressured and bullied by Mr McCabe and was fearful of him after witnessing his aggressive behaviour towards Ms Riechelmann. This is inconsistent with Ms Wells' first statement and her later "keying" his car, apparently not fearful of his reaction;
9. In paragraph 26 of the second statement, Ms Wells says she was fearful of Mr McCabe and she scanned the statement, said it was "all fine" and signed it. In her oral evidence, Ms Wells said she did this even though it was inaccurate;
10. In her oral evidence in chief, Ms Wells said that she could not recall sitting down with Mr McCabe and providing him with details for the purposes of preparing her first statement, despite the first statement having a number of paragraphs which she said were correct and involved discussions between her and third parties such as the police to which Mr McCabe was not privy: T582.25; T582.47. However, later, Ms Wells said that she must have had some

discussions with Mr McCabe to provide him with the information so he could prepare her first statement;

11. In paragraph 29 of her second statement, Ms Wells says that her relationship with Mr McCabe "was very volatile".
1. Ms Wells gave extensive oral evidence and was cross-examined in detail about the events of 31 March 2018.
2. In her evidence in chief, Ms Wells stated that as at 31 March 2018 she was living with Mr McCabe with her children at his unit in Ozone Street in Cronulla. She gave evidence in relation to attending a 60th birthday party at the North Cronulla Surf Club. She said she had drinks at the party and was intoxicated but assessed her consumption as being about five glasses of champagne. That is consistent with paragraph 3 of her second statement but inconsistent with paragraph 4 of her first statement. She described her level of intoxication as her being not "overly intoxicated" and that she could "remember everything": T570.2.
3. Ms Wells gave evidence that as she approached the block of units, she saw Chantelle Pusell and Leah Farrugia outside who told her that Ms Riechelmann was at the block of units. Ms Wells said that she had heard about Ms Riechelmann and had met her once. Ms Wells said that when she arrived at Mr McCabe's unit, Mr McCabe was standing at the doorway with Mr Pusell yelling at Ms Riechelmann. She could not see Ms Riechelmann who appeared to be upstairs.
4. Ms Wells described Mr McCabe as intoxicated with an "aggressive" demeanour while shouting out at Ms Riechelmann: T571.26. Ms Wells said that she could not recall what each was saying to the other but later gave evidence that it included obscenities.
5. Ms Wells said that she could hear noise from upstairs by Ms Riechelmann banging on Mr Lavers' door: T571.35.
6. Ms Wells gave evidence that Ms Riechelmann in due course walked down the stairs to the foyer holding her telephone in her hand filming. She did not recall which hand Ms Riechelmann held the telephone in and could not recall what she was saying at the time. She said the telephone was pointing at Mr McCabe.
7. Ms Wells gave evidence in chief that when Ms Riechelmann reached the bottom of the stairs, there was a conversation about what Mr McCabe allegedly did to his sister and, sometime thereafter, Mr McCabe knocked the telephone out of Ms Riechelmann's hand: T572.39-T573.16. Ms Wells stated that Mr McCabe was near the doorway to his unit at that time and the telephone fell to the ground but she did not recall it bouncing.
8. This account is inconsistent with the accounts of both Mr McCabe and Ms Riechelmann as well as with video 8 which is part of Exhibit A which has the "sister" discussion well after the other witnesses say the telephone was either knocked or fell to the ground. Ms Wells gave evidence in chief that there was further discussion after the phone had been knocked from

Ms Riechelmann's hand by Mr McCabe in which Ms Riechelmann said words to the effect that Mr McCabe's mother wanted Ms Wells to leave and Ms Wells said that Mr Lavers now had another girlfriend: T573.37-.43. This account also is inconsistent with the evidence of Mr McCabe, Ms Riechelmann and video 8 which shows that the phone had fallen to the ground after the conversation concerning Mr McCabe's mother. Ms Wells gave evidence that she did not recall Ms Riechelmann striking or attempting to strike Mr McCabe. This is inconsistent with the evidence of Mr McCabe and Mr Pusell.

9. Ms Wells states that she did observe Mr McCabe "strangling" Ms Riechelmann. She gave evidence that she only saw this once (T578.36) and Mr McCabe had his arms out straight in front of him with his hands on either side of Ms Riechelmann's throat whilst he strangled her: T577.1-.6. Ms Wells said that she did not recall Ms Riechelmann saying anything while the strangling was occurring but she recalled Ms Riechelmann's face becoming red: TT574.18.
10. This account of Ms Wells is inconsistent with the pleaded case of Ms Riechelmann and Ms Riechelmann's oral evidence. Ms Wells also gave evidence that the strangling incident occurred after the end of video eight which is part of Exhibit A which is also inconsistent with Ms Riechelmann's oral evidence and the pleaded case. Further, Ms Wells stated that the strangling incident occurred after the discussion between Ms Riechelmann and Mr McCabe about Mr McCabe's sister. The "sister" discussion occurred towards the end of video eight which is part of Exhibit A. Ms Wells said that the strangling incident was not shown in video 8. Ms Wells said that she was so concerned about the strangling incident that she proceeded quickly to the Cronulla Police Station to report it. Up to the strangling incident, Ms Wells said that she had not seen Ms Riechelmann strike or attempt to strike Mr McCabe.
11. Ms Wells in her evidence said that the door to Mr McCabe's unit closed at some time and at that time there were three persons in the foyer to the ground floor block of units being her, Ms Riechelmann and Mr McCabe: T576.26.
12. Ms Wells then gave oral evidence in chief about her attendance at the Police Station where the police officer asked her how much she had had to drink. When she returned, a policeman was standing outside the block of units and she told him what she had seen. He then took her into Mr McCabe and asked her to tell Mr McCabe what she saw. Ms Wells said that she told Mr McCabe that she had seen him strangling Julie with his hands around her throat. Ms Wells stated that she saw the policeman write the statement in his notebook at the time.
13. Ms Wells evidence in chief about the strangling incident may be seen at T574.10-.33 and T576.46-T577.6 and T578.33. In essence, Ms Wells said that Mr McCabe used both his hands to strangle Ms Riechelmann, with his arms outstretched in front of him to their full extent and with his hands in a similar position on each side of her throat with the strangling incident occurring on only one occasion. Ms Wells stated that after she repeated the account to police to Mr McCabe in the presence of the police officer, the police officer said that he

would call during the week and get statements "as everyone was intoxicated": T579.23.

14. Ms Wells gave evidence that on the night in question she did not see any sign of injury on Mr McCabe's face or neck: T579.34. At some stage, Mr McCabe told Ms Wells that Ms Riechelmann was about to be charged by the police and then she came back and gave her statement and "it changed everything": T579.49.
15. Ms Wells gave evidence that she stayed at the Quest Apartments at Cronulla with her children for a week which she paid for and then she came back to Mr McCabe's unit. In due course, Ms Wells told the police officer that she wished to "retract" her statement by having it removed entirely: T580.23-.42. She said she told the police officer that she wished to retract the statement as it was causing her a lot of trouble in her home life: T580.45. By this Ms Wells said that Mr McCabe had said to her that he wished her to change the statement because if he was charged, he would "lose his livelihood". She said that Mr McCabe said this to her on a number of occasions: T581.6.
16. In due course, Ms Wells said that she received a proposed statement from Mr McCabe's secretary: see the statement in Exhibit F.
17. Ms Wells then was taken to her 2018 statement. She indicated which paragraphs of that statement were accurate and which were not accurate. As to paragraph 5 of her first statement in relation to her memory, Ms Wells said that she had a good recollection of what occurred on the night of 31 March 2018 and that is what she told police: T586. However, she said that now there were some things that she no longer recalled: T586.17. Ms Wells said that there was nothing in the statement about Mr McCabe strangling Ms Riechelmann because Mr McCabe did not want anyone to know that he had strangled Ms Riechelmann: T587.50. Ms Wells said that she did not raise this issue with Mr McCabe as they never spoke about the "type of assault that happened": T588.7.
18. As set out above, Ms Wells indicated that when Mr McCabe had his arms outstretched with his hands around Ms Riechelmann's neck, strangling her, he was face-to-face with Ms Riechelmann: T590.33. Ms Wells also stated that after the "strangling" incident, she never saw Mr McCabe with his arm outstretched holding Ms Riechelmann away from him: first statement paragraph 12 cf T590.29-.43. Ms Wells described Mr McCabe's behaviour as being "extremely aggressive" and not reasonable and that he had "assaulted" Ms Riechelmann: T591.5-.9. This evidence should be compared with paragraph 34 of Ms Wells' first statement.
19. Ms Wells gave evidence that she signed the first statement because she "really thought that I had no choice at the time, particularly when the person that I was living with ...in a relationship ... was telling me that he would lose his livelihood, if I didn't change my statement": T591.23. Ms Wells confirmed that she understood that her first statement would be submitted to the police and that they would rely on it: T591. Ms Wells said that she was prepared to let the police rely on it due to what Mr McCabe had said to her about the effect on his livelihood and due to tensions in the household. This evidence did not reflect well on Ms Wells' credit or reliability.

20. Ms Wells was then asked some questions about her 15 April 2020 statement which was annexed to her 21 April 2021 affidavit: see Exhibit 2. She said she provided this statement after Ms Riechelmann reached out to her to be a witness. The statement was prepared by her and provided to Ms Riechelmann's solicitor, and she signed it and agreed that it was correct.
21. Ms Wells was then taken to a statement of Mr McCabe dated 20 May 2020 which included material purporting to relate to her sexual history. She said she was "extremely traumatised" on reading the statement and was upset by it, as she was concerned that the information could become public if she continued with her second statement. Despite this, she still was willing to give evidence.
22. Ms Wells was then subject to an extensive cross-examination.
23. Ms Wells confirmed that at some point she had "keyed" Mr McCabe's car by running a key on the doors and the boot or bonnet of the car. This "keying" involved running a key over the paintwork of the vehicle: T606 and following. Ms Wells agreed that at the time she "keyed" Mr McCabe's car she did not like Mr McCabe and that they had a "volatile relationship": T608.10-23. Ms Wells accepted that Mr McCabe wrote a letter on her behalf to the police in relation to the incident: T608.30.
24. Ms Wells denied that she had tailored her evidence to assist Ms Riechelmann in her claim against Mr McCabe: T608.37; T609.27. Despite denying that she had tailored her evidence, Ms Wells conceded that she did not remember conversations which occurred on the night of 31 March 2018: T609.41; see also T610.24-30. This was also despite Ms Wells conceding that she recalled what she had said to police as set out in paragraphs 14-18 of her first statement: Exhibit F; T611.24-30. Ms Wells said that apart from what was in her statement, she did not recall in detail anything else that was said in the foyer of the apartment block: T612.47.
25. In response to the suggestion that she could not recall the detail of what was said because she was intoxicated at the time, Ms Wells said that "everyone was intoxicated": T613.12. However, she denied that she had consumed 10 to 12 glasses of champagne at the party. She also denied that Mr McCabe got a drink for her every time he got a drink himself and said she had five to six glasses of champagne, not 10 to 12 glasses of champagne at the party.
26. Ms Wells gave evidence that Mr McCabe and Ms Riechelmann were using obscenities in their exchanges with each other when, according to her evidence, Mr McCabe was yelling aggressively at Ms Riechelmann: T616.4-11. However, Ms Wells could not recall the exact words being used: T616.50.
27. At T618, Ms Wells gave evidence that after she observed Mr McCabe strangling Ms Riechelmann using both hands, she did not go inside the unit but went to the police station: T618.1-14. Ms Wells said she did not go back into Mr McCabe's unit before she went to the police station: T619.9. Soon after, in her evidence, Ms Wells said that while she saw Ms Riechelmann being abusive and yelling at Mr McCabe, she was verbally abusive only and

she did not see her strike Mr McCabe: T619.17-.25. Ms Wells said she was "confused" about the events of the night: T620.13. Ms Wells said that despite indicating in an email to Mr McCabe that she would pursue an apprehended violence order against Ms Riechelmann, she did not do so: see Exhibit D.

28. At T622-T623, counsel for Mr McCabe put the sequence of Ms Wells' evidence in chief to her which she confirmed as being accurate. In particular, Ms Wells confirmed that the discussion in relation to Mr McCabe's sister occurred before he allegedly knocked the phone out of Ms Riechelmann's hand, before there was a reference by Ms Riechelmann to Mr McCabe's mother's views and before Mr McCabe put his arms out and around Ms Riechelmann's throat and "strangled" her: T623.23. Ms Wells said that Ms Riechelmann was not "making any moves" towards Mr McCabe. That evidence is inconsistent with the video evidence in video 8 which shows Ms Riechelmann approaching Mr McCabe very closely, apparently filming with her telephone, soon after she came down the stairs. Ms Wells described her memory of the events as being a "reasonable memory" with a "very good" memory of the "actual strangling" and the events after that: T623.45. Ms Wells then clarified her evidence by saying that she was not sure if the "strangling" incident happened immediately after the conversation about Mr McCabe's sister, although it was certainly after that conversation: T624.21. Later, Ms Wells said that there was further discussion including by her saying that Mr Lavers had a girlfriend before the "strangling" occurred: T624.44.
29. Ms Wells was then shown video eight which is part of Exhibit A from 1.45 on the video. This shows the latter part of the video where there is a loud interaction between Mr McCabe and Ms Riechelmann, although initially Ms Riechelmann is not shown in the video. Ms Wells gave evidence that this part of the events was not when Mr McCabe strangled Ms Riechelmann because at that time, the unit door was closed. However, she confirmed it was after the conversation in relation to Mr McCabe's sister. Ms Wells accepted that the video did show Mr McCabe having his arm outstretched consistent with paragraph 12 of her first statement: T626.5-T627.1. Although Ms Wells had previously indicated that paragraph 12 of her statement was incorrect, she accepted that that was what was depicted in the video part shown to her. Ms Wells said that the "strangling" incident occurred after the end of video 8 and said she was not "making it up": T627.46. At one stage, Ms Wells suggested that the video might have been falsified in some way: T628.10.
30. It was put to Ms Wells that what she was trying to do in her evidence was to reconstruct what had occurred on 31 March 2018 having seen part of video eight which was itself part of Exhibit A. Ms Wells expressed the opinion that "the video's reconstructed", in the sense of not showing the whole series of events: T627.48-T628.6. Whilst Ms Wells accepted that the end of video eight showed both she and Mr McCabe inside Mr McCabe's unit with the door closed and with her suggesting that he had acted "out of line", Ms Wells gave evidence that she and Mr McCabe went back out into the hallway of the block of units and the "strangling" incident occurred after the end of the events shown in video eight: T629.33-T630.1. This is inconsistent with Ms Riechelmann's initial pleaded case and her evidence. Ms Wells rejected

the suggestion that her version of the "strangling" incident did not occur: T632.2.

31. The entirety of video eight was then played to Ms Wells. She agreed that she heard Ms Riechelmann's phone hitting the ground in the course of the audio-visual representation. Ms Wells also accepted that her recollection that the discussion about Mr McCabe's sister had occurred before the phone went out of Ms Riechelmann's hand was inconsistent with the video: T634.30-.47. When Mr McCabe's version was put to Ms Wells of Ms Riechelmann striking him after the phrase "is that assault" was stated by Ms Riechelmann, Ms Wells said that she did not recall Ms Riechelmann striking Mr McCabe: T635.29. Ms Wells said that she did not recall what was happening when Ms Riechelmann said a number of times to Mr McCabe, "get fucked" as shown on the video: T636.7-.11.
32. After seeing the video, Ms Wells still stood by her evidence that the "strangling" event occurred after the end of video eight showing her and Mr McCabe standing by the door of Mr McCabe's unit and inside the unit: T637.16-.40.
33. Ms Wells gave evidence that she did not say to Mr McCabe that he had "crossed the line" after he had strangled Ms Riechelmann: T637.50. Ms Wells stated that, having seen the entirety of video eight, she did not wish to change her prior evidence given before seeing the video: T638.30. Ms Wells also said that she did not recall being in the unit with Mr McCabe prior to her alleged strangling incident: T638.37; T639.16; T639.47.
34. Having heard the various statements shown on the video whilst she and Mr McCabe were in the unit where Ms Riechelmann was requesting her phone, Ms Wells said it did not assist her recollection: T639.49-T640.23; T640.17; T642.3.
35. Ms Wells then gave evidence about where she was when the "strangling" incident occurred. She said she could not recall any of her movements, Mr McCabe's movements or Ms Riechelmann's movements between the discussion about Mr McCabe's sister and before the "strangling" incident with her then leaving for the police station: T649.1-.18. Ms Wells said that when Mr McCabe put his hands out to strangle Ms Riechelmann, she was behind him, close to the glass entry door to the units: T649.29-.47. Ms Wells gave evidence that she did not take any action to try and stop Mr McCabe strangling Ms Riechelmann, or go to the assistance of Ms Riechelmann: T650.28-.36. This seems very surprising indeed if this incident had occurred, having regard to their relationship at the time.
36. Ms Wells was then asked some questions about the preparation of her 2018 statement. She said she did not recall sitting down with Mr McCabe and him asking her to give her recollection but accepted that she must have discussed the events with him in order for him to prepare the detail in the draft statement: T654.48-T656.19. Ms Wells also agreed that Mr McCabe's secretary forwarded the statement to her on 16 May 2018 and she replied to the effect, "all fine": see Exhibit D. Ms Wells said that she did not recall signing the 2018 statement but accepted that the statement in Exhibit F had her signature on it. She also agreed that there was no reference to "strangling" in the first statement. Ms Wells claimed that she "made a mistake" in adopting the 2018 statement and it was not accurate: T658.32.

37. Ms Wells was asked some further questions about where she was located at the time Mr McCabe allegedly strangled Ms Riechelmann. She stated that at this time, Ms Riechelmann, Mr McCabe and her were in the foyer to the block of units. She was closest to the glass doors being the entry to the block. Ms Riechelmann had her back to the stair wall. Mr McCabe had his two arms outstretched with his two hands around the neck of Ms Riechelmann with her face going red. Ms Wells said that she then ran out of the door to the block of units and proceeded to the police station to seek their attendance. Ms Wells could not recall how long Mr McCabe was strangling Ms Riechelmann or whether she called out to Mr McCabe. She said the only action she took to stop him was to run to get assistance from the police. This appears to be inconsistent with Ms Riechelmann's version: see T952.44.
38. Ms Wells gave evidence that as at 1 January 2018 she had a contract as a manager and had been in this position since August 2017. This full-time role concluded at the end of January 2018 and in February 2018 she secured a position with another company in which she worked reduced hours from 9:30am to 2pm. At the time of the incident on 31 March 2018, Ms Wells said she was not unemployed and received an income through which she provided for her children. However, she lived in Mr McCabe's unit with her children rent free until July 2018.
39. Ms Wells also gave evidence that at the time she signed her May 2018 statement she was in employment, had received settlement proceeds from the sale of her matrimonial home, had funds and was not financially dependent on Mr McCabe.
40. In relation to her 2018 statement, Ms Wells confirmed that Mr McCabe sent a draft of the statement through his secretary to her on 16 May 2018 asking whether it was "okay" without any directions in relation to the statement. After checking it over, she replied soon after "all fine". Ms Wells agreed that she did not suggest any amendments to the statement: T755-T756. However, she stood by the accuracy of her evidence in chief that Mr McCabe said to her that she needed to change her initial statement as he may lose his livelihood if she did not.
41. Ms Wells was then asked further questions about the incident in the foyer. She said she did not recall Ms Riechelmann punching Mr McCabe, including punching him with the phone in her hand. She also did not recall the telephone falling to the floor after punching Mr McCabe.
42. In relation to her 2020 statement in Exhibit 2, Ms Wells gave evidence that she wrote the statement herself at home and forwarded it to Ms Riechelmann's solicitors. She believed that she forwarded it to Ms Riechelmann's solicitors in electronic form. She did not know whether the solicitors had retyped her version.
43. In relation to paragraph 8 of the second statement made in 2020, Ms Wells was taken to that part which suggested that Mr McCabe "grabbed" the phone from Ms Riechelmann's hand and threw it into the unit. Initially, Ms Wells said that the telephone was "knocked" by Mr McCabe out of Ms Riechelmann's hand, but after being taken to paragraph 8 in the statement, she said that Mr McCabe "grabbed it" and threw it into his unit. After further

questioning, Ms Wells said that Mr McCabe either grabbed the phone out of Ms Riechelmann's hand or knocked it from her hand. She accepted that paragraph 8 of her second statement said that Mr McCabe "grabbed" it out of her hand but stated that the phone ended up in Mr McCabe's unit. While acknowledging that there was a difference between the two descriptions, Ms Wells said she had given her recollection of the night but could not account for the difference between the two possibilities while accepting that she had adopted the second statement: T765-T769.49.

44. After further questioning, Ms Wells said she did not recall Ms Riechelmann punching Mr McCabe including five times but accepted that it might have occurred: T770.29.
45. Ms Riechelmann's version of the assault by Mr McCabe outside his unit door was put to Ms Wells and importantly she stated that she did not recall that incident and it was not consistent with her recollection of the night: T772.40-T772.31. When it was put to Ms Wells that it did not happen, she said that she did not recall it but it might have happened: T772.35.
46. In re-examination, Ms Wells confirmed that living in Mr McCabe's unit rent free with her children was a significant financial benefit to her and from February 2018 her gross salary was substantially reduced with her reduced working hours.
47. Ms Wells stated that she found the events of 31 March 2018 to be an extremely traumatic incident: T774.40.
48. I consider Ms Wells' credit and reliability in some detail further below.

The evidence of Ms Hart-Waters

1. Oral evidence was given in the proceedings by Ms Debra Hart-Waters, a longstanding friend of Ms Riechelmann. Ms Hart-Waters gave evidence that she had regular contact with Ms Riechelmann on a weekly basis including in 2018. Ms Hart-Waters stated that she had met both Mr McCabe and Mr Lavers prior to the incident on 31 March 2018 and understood that Mr Lavers had been Ms Riechelmann's longstanding partner. She described Ms Riechelmann prior to March 2018 as "very vivacious" and "fun loving".
2. Ms Hart-Waters gave evidence of receiving a telephone call from Ms Riechelmann on 1 April 2018, probably before 9am. In the course of the telephone conversation, Ms Riechelmann gave her account of the events of the previous evening including that Mr McCabe had knocked the telephone out of Ms Riechelmann's hand and had tried to "choke" her. Ms Riechelmann informed Ms Hart-Waters that the police had been called and that Ms Wells had also indicated that Mr McCabe had tried to choke her.
3. Ms Riechelmann, had told Ms Hart-Waters that she had a very sore neck and throat and Ms Hart-Waters had indicated to Ms Riechelmann that she needed to seek medical attention. Ms Hart-Waters stated that Ms Riechelmann was crying as she had the telephone conversation with her. Ms Hart-Waters gave evidence that she accompanied Ms Riechelmann to the Miranda police station to file a report and went into the station with her. There was only one

policeman on duty and he said that he could not take a statement and they needed to go to Sutherland police station in order to do so.

4. Ms Hart-Waters stated that Ms Riechermann was wearing a loose scarf at the time which she took off to show her neck, although nothing was documented at the time. Ms Hart-Waters said that Ms Riechermann's neck was very red. Ms Hart-Waters indicated that the redness she saw was on the lower part of the neck where the base of the larynx met the points of the collarbone: see T1030.13-.24. This is different to Ms Riechermann's evidence.
5. Ms Hart-Waters said that they did not proceed to Sutherland police station as Ms Riechermann said she was exhausted. She indicated that Mr McCabe had been brought up in conversation with Ms Riechermann thereafter on a couple of occasions. She indicated that she understood that Mr McCabe and Mr Lavers had entered a restaurant where her daughter was working. She had also indicated when they were in Cronulla that they could not go a particular way as "they [being a reference to Mr McCabe and Mr Lavers] might be there".
6. Ms Hart-Waters described a change in the demeanour of Ms Riechermann which was "very different". She said that she appeared to lose confidence, be very guarded and was not the same as she used to be. On occasion she became quite agitated.
7. In cross-examination, Ms Hart-Waters was shown certain photos of Ms Riechermann and asked to assume that they were photos of Ms Riechermann taken a few days after the 31 March 2018 incident. Ms Hart-Waters was, in particular, shown the photo numbered 63 in Exhibit G but without the circled area shown on that page. She then marked with a pen where she recalled the bruising on Ms Riechermann's neck and upper collarbone area which she encircled. This was marked as Exhibit H in the proceedings.
8. Ms Hart-Waters was then shown page 63 which is part of Exhibit G and asked to assume that the part circled was what Ms Riechermann indicated was the area of bruising: T899.24-.33 and T100.14-.37. Ms Hart-Waters agreed that the bruising circled by Ms Riechermann in Exhibit G was not the same area of bruising as she had marked in Exhibit H. Ms Hart-Waters said that she could not explain the difference in the area marked as being bruised and stated that her recollection was that it was from the neck down.
9. This is very significant as the area marked as bruised by the defendant Ms Riechermann was quite different to the area marked as red by Ms Hart-Waters.
10. Ms Hart-Waters agreed that she had known Ms Riechermann since school from Year 7, was seeking to assist her including in giving her evidence. However, she denied that she had tailored her evidence to assist Ms Riechermann. Ms Hart-Waters agreed that Ms Riechermann had told her that she had been banging on the door of Mr Lavers' unit but did not recall her saying that she had been banging on the door for some time. In relation to the conversation with Ms Riechermann where she indicated that Mr McCabe had tried to choke her, Ms Hart-Waters conceded that there would have been more to the conversation than merely a five minute conversation but she did not recall the remainder of it.

11. In relation to her advice to Ms Riechelmann to seek medical attention, Ms Hart-Waters said that Ms Riechelmann did not seek that attention on that day and she could not recall whether she sought the attention the next day. It was put to her that her evidence was incorrect that Ms Riechelmann's neck was very red but she maintained her evidence.
12. Ms Hart-Waters was then cross-examined in relation to her evidence that after the events of 31 March 2018 Ms Riechelmann's demeanour had changed and she avoided areas in Cronulla where Mr Lavers and Mr McCabe may be. She agreed that Ms Riechelmann was very upset at the end of the relationship. However, she stated that the end of the relationship probably contributed to her change of demeanour but put this down not to Mr Lavers ending the lengthy relationship, but also the conduct of Mr McCabe. She added that she understood that most of the time Mr McCabe and Mr Lavers were in each other's company.
13. Ms Hart-Waters accepted that Ms Riechelmann kept working in her job at Qantas right up to April 2020 when the COVID-19 pandemic hit the travel industry. She also accepted that Ms Riechelmann took a redundancy. However, she disputed that the events of 31 March 2018 did not affect Ms Riechelmann's work as on occasion she called in sick due to anxiety as what had occurred to her had "unnerved" her: T1039.28. Ms Hart-Waters said that she understood that Ms Riechelmann after the incident had seen a counsellor and in due course had consulted a psychiatrist.
14. Ms Hart-Waters was asked about the other incidents involving Mr McCabe. She said she was aware that Ms Riechelmann had thrown a glass of drink on Mr McCabe and had slapped him. In addition, she was aware that police had obtained an apprehended violence order against Ms Riechelmann. She was not aware that Ms Riechelmann had "grabbed" Mr Lavers' crotch in June 2018 but was aware that she had been asked to leave the Cronulla RSL Club. She added that she had never seen Ms Riechelmann slap anyone. It was put to Ms Hart-Waters that Ms Riechelmann was very angry with Mr Lavers which she denied. She said it appeared to her that Ms Riechelmann was disappointed rather than angry with Mr Lavers.
15. Overall, Ms Hart-Waters appeared to be an honest witness who was doing her best to give her evidence truthfully and comprehensively to the best of her recollection. It was clear that she did not have a full recollection of the conversation with Ms Riechelmann on the morning of 1 April 2018, but did recall the allegation that Mr McCabe had attempted to choke Ms Riechelmann. This evidence is relevant to the accuracy of the allegation by Ms Riechelmann as it amounted to a recent complaint made the next day after the alleged incident.
16. However, the difference between Ms Hart-Waters' recollection of the redness on Ms Riechelmann's neck area compared to Ms Riechelmann's own recollection of her bruising is significant and raises some doubts as to the accuracy of Ms Hart-Waters' recollection. There was also no expert medical evidence on this point of difference. I find that it is likely that Ms Riechelmann, who herself had the bruises complained of, would have a better recollection as to where she had been bruised or marked on the area of her upper front torso at and near

her neck. Accordingly, I prefer her evidence on this point to the extent there is any difference to that of Ms Hart-Waters.

The documentary evidence

Plaintiff's documents tendered

Videos and photographs

1. The plaintiff tendered a number of videos and photographs which became Exhibit A in the proceedings. Some of these have already been referred to above. In relation to the photographs, a photograph of Mr McCabe taken two days after the 31 March 2018 incident appears to show a mark on the left side of his face. This is consistent with Mrs Pusell's evidence. There are also photographs appearing to show marks on Mr McCabe's forearm. In relation to the pleaded claim concerning Mr McCabe's car, there are photographs indicating marks on the car. There is also a photograph of a dislodged air conditioning unit said to be the item dislodged by the defendant Ms Riechelmann placing her arm through the windows of Mr McCabe's unit in Ozone Street at Cronulla.
2. The videos in Exhibit A relate to various aspects of the events of 31 March 2018. As stated above, some of the videos were taken by Ms Riechelmann and some were taken by Ms Farrugia and Mrs Pusell.
3. The videos do not show or record clearly the main physical altercation alleged between the plaintiff and the defendant or the altercation alleged by Ms Wells in her oral evidence. Some of the videos are in substance audio videos only in the sense that little is shown in the visual recording. The videos show interaction between the defendant, Ms Riechelmann, and various persons.
4. The videos also record abusive dialogue between the plaintiff and the defendant. On numerous occasions, the plaintiff tells the defendant to "go home" as she has been knocking for some time on the door of Mr Lavers' unit on the third level of the block. Although later, there is some use of obscene language by Mr McCabe, most of the obscene language recorded comes from the defendant, Ms Riechelmann. The videos indicate that initially Mr McCabe rang the Police in relation to Ms Riechelmann's loud knocking on Mr Lavers' door and when there was an altercation between the plaintiff and the defendant, Mrs Pusell rang the Police again.
5. Mr McCabe is recorded in his conversation with Police as saying that the children in the block of units were upset by Ms Riechelmann's conduct. The videos also record Ms Wells informing Ms Riechelmann that Mr Lavers had "another girlfriend", with Ms Riechelmann replying to that using offensive language. The nature of the interaction between the plaintiff and the defendant would suggest that both were intoxicated to various degrees at the time. I will consider this further below.

6. The eighth video of four minutes and 18 seconds has been covered in detail in the summary of the evidence. It shows an interaction between the plaintiff and the defendant with Ms Wells being present for some of the time. I am satisfied from the video, and find, that Ms Riechelmann had a number of opportunities to leave the premises when she came down the stairs and that Mr McCabe did not prevent her from leaving. They came into contact and exchanged various forms of insults, with Mr McCabe telling Ms Riechelmann to leave the block of apartments. In the eighth video, Ms Riechelmann is recorded as asking twice "Is that assault?". Mr McCabe is recorded as telling her to get out of his unit. Ms Wells is recorded as calling out to Mr McCabe. Later, Ms Wells is recorded as saying to Mr McCabe that he "acted out of line" a number of times, which Mr McCabe denied. Ms Riechelmann is also recorded as seeking her telephone to be returned and asserting that Mr McCabe "slapped the phone out of [her] hand" to which Mr McCabe replied: "You hit me in the face". The contents of the videos are at least generally consistent with each of the party's cases. What is clear is that Ms Riechelmann had knocked on Mr Lavers' door for a fairly lengthy period and did not comply with requests from Mr McCabe to leave the units including as she was upsetting children. Most, but not all, of the obscene language was directed by Ms Riechelmann towards Mr McCabe. There was however abusive language from Mr McCabe to Ms Riechelmann.
7. Exhibit G consists of photographs of Ms Riechelmann. She circled some areas on the photographs as areas of bruising. No bruises on the neck were circled by her despite her account of being strangled. This is generally consistent with Dr Begum's notes recording the bruises observed on 5 April 2018.

Exhibit B - the plaintiff's bundle of documents

1. The plaintiff tendered a bundle of documents which became Exhibit B in the proceedings. At page 1 of Exhibit B is a Notice to Admit Facts and Authenticity of Documents. This does not appear to have been disputed by the defendant. The Notice to Admit Facts relates to the alleged batteries by the defendant of the plaintiff in 2014 and the making of an apprehended violence order in December 2014 for a 12 months' period. Paragraph 4 of the Notice refers to the defendant throwing a drink over the plaintiff as the plaintiff was leaving JD's Bar and Grill on 3 June 2017. The authenticity of a smash repairs quote dated 14 June 2018 allegedly relating to damage to Mr McCabe's car was not disputed.
2. At pages 6-10 of Exhibit B is an application for an apprehended violence order by the Police against the defendant and the final order made by Sutherland Local Court against the defendant on 10 December 2014 concerning Mr McCabe.
3. The bundle of documents tendered includes photographs of alleged damage caused to Mr McCabe's car by the defendant on the evening of the 31 March 2018 incident as well as photos of alleged injuries to Mr McCabe himself which have already been discussed.

4. From page 24 of Exhibit B are various COPS entries in the New South Wales Police Force computer system relating to the 31 March 2018 incident. These record that the initial informant was Mr McCabe and the second informant was Mrs Pusell. The latter is recorded as saying that the female yelling and screaming sounded intoxicated and was swearing at the top of her voice. Mrs Pusell is recorded by the Police officer taking the complaint as saying that Ms Riechelmann had "now tried to hit [informant's] other [neighbour]" apparently referring to Mr McCabe. The narrative details are largely but not entirely consistent with the parties' cases. It is recorded that Ms Riechelmann "was very erratic in her behaviour and was aggressive with Police at times. Police could smell alcohol on her breath and she appeared highly intoxicated". A witness is recorded as stating to Police that "she walked in after the incident had started and saw both parties grabbing each other around the throat". The narrative later says "all parties including the [witness – Ms Wells] were highly intoxicated. As a result they were deemed [too] intoxicated for statements to be reliable. Contact will be made on night shift 1 April for statements to be obtained": see Exhibit B page 56. Contrary to Ms Riechelmann's oral evidence, it is recorded in the police notes that Ms Riechelmann claimed that she had been "punched" by Mr McCabe.
5. It is later recorded in the COPS entry that having regard to the statements and the video recordings, no determination could be made in relation to the alleged assault and that Mr McCabe and Ms Riechelmann "are both aggressors in this matter. Further to this both parties had the opportunity to leave at any time. As a result Police are unable to form a prima facie case in this matter and as such no formal action will be taken against [Mr McCabe]": Exhibit B page 56.
6. There are other Police records relating to the incidents alleged on 3 June 2017, January 2015 and 2014. No Police action was taken in relation to the 2015 and 2017 incidents. There are also occurrence entries in relation to events in 2018 including the alleged assault on Mr McCabe on 2 July 2018.
7. Included in the plaintiff's bundle are income tax returns and assessments for the defendant Ms Riechelmann from 2015 to 2021 issued by her employer, Qantas. These show Ms Riechelmann being employed as a flight attendant or steward and earning gross wages from Qantas as follows:

Financial year ending Amount of wage Net rent from unit

2015 \$98,512 \$-12,964

2016 \$101,148 \$-16,990

2017 \$114,236 \$-21,135

2018 \$115,589 \$-26,626

2019 \$110,802 \$-16,366

2020 \$97,244 nil

2021 \$26,008 nil

1. Ms Riechelmann's earnings did not reduce to any significance after the 31 March 2018 incident in the next financial year.
2. The net rental loss referred to in the table above relates to the net rental loss concerning the unit which Ms Riechelmann had purchased in the same block of flats at Ozone Street Cronulla where Mr McCabe and Mr Lavers live. A claim relating to loss on the sale of the unit was not pressed.
3. Part of the documents in Exhibit B are documents produced on subpoena by the Miranda Medical Centre. Some of these documents will be considered under the medical records part of these reasons below. Some documents relate to employment and health issues concerning the defendant in her employment at Qantas. These documents suggest that at various times Ms Riechelmann suffered from injuries at work at Qantas. The documents include references to:
 1. Lower back pain and right hip pain with there being "on and off back issues with work for a long time" (29 July 2008) – page 102; and
 2. Back pain (17 July 2018) – page 125.
1. Also in the plaintiff's bundle was a letter from Qantas to the defendant dated 15 February 2021 enclosing a final payment calculation to the defendant as a "termination prepayment" dated 31 January 2021 in the net amount of \$220,702.74. This consisted of a lump sum termination payment, long service leave, annual leave and certain allowances.

Medical reports and medical records

1. Part of the plaintiff's tender bundle, Exhibit B, consisted of various reports and medical records relating to the plaintiff and the defendant.

The Plaintiff Mr McCabe

1. In Exhibit B was a report by Mr Luke Ireland, psychologist, dated 11 June 2019 concerning the plaintiff. Mr Ireland records that the plaintiff was referred to him by the plaintiff's treating general practitioner Dr Girgis on 22 June 2018 for the treatment of "anxiety, stress and depression in the context of alleged assaults on his person by his neighbour, reported to me as an individual named Miss Julie Riechelmann". The history provided was of the plaintiff presenting with some difficulties relating to ongoing intrusive thoughts around the risks associated with seeing Ms Riechelmann in public and what she may do to him with associated generalised anxiety and depression. The plaintiff reported sudden flashbacks of "the alleged assault" with recurrent distressing dreams and physical responses. Whilst Mr Ireland said that he usually preferred not to give a formal diagnosis, if a formal diagnosis was to be sought his "provisional diagnosis" would be post-traumatic stress disorder. The

prognosis was stated as being that Mr McCabe "may suffer long-term challenges navigating his mental health" because of the fluctuating nature of the diagnosis and external factors outside Mr McCabe's control. A proposed treatment plan was put forward with Mr McCabe's plan to be reviewed at a minimum of every six months.

The Defendant Ms Riechelmann

1. Part of Exhibit B was a report of Dr John Roberts, psychiatrist, dated 13 November 2020 concerning the defendant. Ms Riechelmann reported to Dr Roberts that she felt depression and anxiety. It was recorded that Ms Riechelmann was taking daily antidepressants. Ms Riechelmann reported feeling bad bouts of depression, difficulty in getting out of bed, not coping and feeling safe at home and staying at home. She is recorded as avoiding parts of Cronulla as she did not want to see Mr McCabe and Mr Lavers.
2. Ms Riechelmann reported a history of seeking psychiatric or psychological assistance when she was married, as her husband was said to be an alcoholic. Ms Riechelmann also claimed to have seen both a psychologist and a psychiatrist because of the way she said she was treated by Mr Lavers and Mr McCabe. Ms Riechelmann referred to drinking to intoxication in relation to alcohol and that it had been frequent but was not the case for quite a while, being a number of months. To Dr Roberts, the defendant's manner was consistent with the presence of depression, and he diagnosed major depressive disorder with comorbid substance use disorder relating to alcohol. Dr Roberts noted that persons suffering from significant depression and alcohol excess are potentially prone to inappropriate behaviours. This included poor impulse control and irrational behaviours.
3. Of somewhat lesser value, were Dr Roberts' opinions concerning the assumptions of conduct of Ms Riechelmann relating to the plaintiff. On the assumptions given, he described the conduct of 31 March 2018 as being consistent with Ms Riechelmann being intoxicated and exhibiting poor impulse control, secondary to intoxication.
4. Dr Roberts expressed the opinion that he did not consider interaction with Mr McCabe to be the substantial cause of Ms Riechelmann's psychopathology since, from the history given, she was experiencing psychopathology consistent with her current symptoms at about the time her marriage came to an end, some 11 to 12 years prior to the consultation. Dr Roberts expressed the opinion that the defendant's presentation related to depression with comorbid alcohol use mainly as a substance use disorder. He stated the following in his report:

"From the psychiatric viewpoint her behaviour is characterised by poor impulse control as a consequence of her substance use disorder namely alcoholism and her being depressed. On reasonable psychiatric grounds a mental illness of major depression and substance use disorder could give rise to inappropriate behaviours. She presents as a person who cannot control her interactions with in this case [Mr McCabe], and on reasonable psychiatric grounds it is a mental illness that is responsible for much of her behaviour ... I would consider that due to her mental illness there may arise a propensity for her to respond to situations i.e. blaming [Mr McCabe] for

the ending of the relationship with Jon Lavers rather than her own behaviours."

1. Part of Exhibit B were substantial medical records from the Miranda Medical Centre relating to the defendant. These records include a GP mental health treatment plan dated 7 January 2015 for Ms Riechelmann due to her having "low mood recently with difficulty in her concentration and confidence ... stressful job ... is on Zoloft" (page 106). The defendant's general practitioner, Dr Zobair, referred the defendant to Ms Brennan, psychologist. In a report dated 3 March 2015, Ms Brennan expressed the opinion "that [the defendant] was suffering from depression which has recently been exacerbated by conflict in her personal relationship" (page 99). The medical consultation notes for the Miranda Medical Centre refer to the defendant having various psychological problems at various times and being prescribed with the antidepressant Zoloft including in 2015-16 and 2018 (page 98).
2. The medical records importantly also refer to a consultation with Dr Begum on 5 April 2018. The notes record that Ms Riechelmann "was physically assaulted by [her] partner's friend on 31 March 2018" and that she wished to document her injuries as she was going to make a statement to Police. The account recorded in the notes is substantially consistent with the defendant's version of the incident given in the proceedings. Dr Begum recorded bruises over the plaintiff's left knee, left forearm, left arm, right scapula, right chest and right forearm. A scratch mark was indicated on Ms Riechelmann's right elbow (pages 91-92 and 132). There are no further consultations in relation to the alleged injuries in the assault after 5 April 2018.
3. Also tendered as Exhibit 3 were some records of Ms Riechelmann's usual general practitioner, Dr Kerry Callan. Dr Callan had referred Ms Riechelmann to Dr Keller on 3 June 2019 and stated:

"Thank you for seeing Julie Riechelmann...for help with her severe anxiety. She is due to go to court on a charge of assault which is causing extreme anxiety...She has had a lot of stress in the past, with an alcoholic husband and recently a work injury. Her solicitor is concerned about PTSD": see Exhibit F.

1. Also as part of Exhibit 4 were a number of treating and medico-legal reports.
2. A report was provided by Dr A McClure, consultant psychiatrist, dated 17 September 2019. In the report, it is recorded that Ms Riechelmann provided a history of years of difficulties and conflict with the plaintiff, Mr McCabe. In relation to the incident on 31 March 2018, a history was recorded of Ms Riechelmann knocking on the door of Mr Lavers' unit "several times" and Mr McCabe complaining to Ms Riechelmann and he and Ms Wells goading her, including with saying that Mr Lavers had started a new relationship. A history from Ms Riechelmann in relation to the alleged battery by Mr McCabe is provided, which is essentially consistent with that pleaded in the Cross-Claim.

3. Dr McClure records that Ms Riechelmann's psychological symptoms had become more pronounced since she left work some three months before the consultation because of her wrist injury. He records Ms Riechelmann saying that she developed symptoms of anxiety and depression following the 31 March 2018 incident. He also records a past psychiatric history for Ms Riechelmann of psychological treatment following difficulties with her previous relationship and in her relationship with Mr Lavers. Dr McClure notes the GP mental health treatment plan prepared by Dr Zobair, general practitioner, on 7 January 2015.
4. In his report, Dr McClure diagnosed an adjustment disorder with mixed anxiety and depressed mood. He expressed the opinion that there would be a gradual recovery, particularly once the litigation had concluded. The doctor indicated that he expected a full recovery. He formed the opinion, based on the history provided, that the main cause of the adjustment disorder was the incident on 31 March 2018 due to the conduct of Mr McCabe.
5. It is noted that Ms Riechelmann was working fulltime until she sustained an injury to her left wrist and that the relevant workers compensation insurer had accepted liability for the injury.
6. Dr McClure recommended continuing psychiatric consultation for 10-15 sessions with her treating doctor, Dr Keller. A letter to Dr Keller from a Dr K Callan (general practitioner) dated 3 June 2019 (part of Exhibit F) refers to a charge of assault against Ms Riechelmann and provides: "She has had a lot of stress in the past, with an alcoholic husband and recently a work injury. Her solicitor is concerned about? PTSD."
7. Included as part of Exhibit 4, were three reports of Dr A Keller, Ms Riechelmann's treating psychiatrist.
8. In the first report dated 28 February 2020, Dr Keller provides a history of negative interaction with Mr McCabe which was described as causing "enormous stress" for Ms Riechelmann. Dr Keller referred to the fact that Ms Riechelmann was referred by her general practitioner in June 2019 for help with her "severe anxiety". Ms Riechelmann described persistent symptoms of depression and anxiety including hyper-arousal, ruminations, low self-esteem and self-worth and an intense feeling of vulnerability when exploring new intimate relationships. She acknowledged consuming excessive amounts of alcohol in the months leading up to the initial psychiatric appointment. Dr Keller recommended Ms Riechelmann increasing a dose of antidepressants.
9. Dr Keller diagnosed Ms Riechelmann as suffering from persistent depressive disorder with her symptoms likely to continue to fluctuate in intensity in the short term until the legal proceedings were resolved with the long term prognosis being more positive. Dr Keller expressed the opinion that it was not possible to isolate a single main cause for the diagnosis of persistent depressive disorder with the causes of depression being multi-factorial, including in relation to her earlier marital problems. Dr Keller expressed the opinion that Ms Riechelmann was likely to have suffered from persistent depressive disorder prior to the 31 March 2018 incident, but that that incident was a significant recent stressor that

perpetuated her levels of stress. He expressed the opinion that although Ms Riechelmann was not incapacitated for work on the basis of her persistent depressive disorder, she would require psychiatric treatment in the immediate future and probably for at least another two years.

10. In a report dated 5 May 2020, Dr Keller also was of the view that Ms Riechelmann met the criteria for post traumatic stress disorder arising from the incident on 31 March 2018 and from previous experiences of harassment and intimidation of lesser intensity from Mr McCabe. In relation to the diagnosis of post traumatic stress disorder, Dr Keller was of the view that Ms Riechelmann's capacity to work in her normal role as a Flight Services Manager was impaired to a mild degree. However, he noted that Ms Riechelmann did not indicate that she was experiencing particular problems in the workplace. She regarded work as a distraction from her other troubles. Psychological treatment for 12 to 24 months at a minimum was recommended.
11. In his third report dated 2 February 2021, Dr Keller considered the report of Dr Roberts. Dr Keller noted that Dr Roberts had formulated a diagnosis for Ms Riechelmann of major depressive disorder with co-morbid substance use disorder relating to alcohol. Dr Keller agreed that there was a mood disorder described by Dr Roberts as a major depression but preferred the diagnosis of persistent depressive disorder. He disagreed with the presence of alcohol use disorder as it was not a pervasive alcohol misuse disorder. Dr Keller stood by his diagnosis of post traumatic stress disorder. He expressed the opinion that the impact of post traumatic stress disorder on Ms Riechelmann's ability to compete in the open market for alternative employment following her termination as a Flight Services Manager for Qantas, was likely to be significant. He was of the view that Ms Riechelmann was highly unlikely to maintain open market employment due to her condition and prognosis. Her age was also relevant to that.
12. On the fourteenth day of the hearing when the lay evidence was close to concluding, Senior Counsel for the defendant foreshadowed an application for leave to amend the defendant's Amended Statement of Cross-Claim and for leave to rely on a number of further medical reports: T964.1 and following. This arose out of the inconsistency between the evidence of Ms Riechelmann and Ms Wells as to what occurred in the foyer on the evening of the incident on 31 March 2018. In summary, Ms Riechelmann said that she was grabbed from behind by Mr McCabe with him placing his right arm around her and then pulling her head back in a forceful fashion which choked her. Ms Wells said that she does not recall seeing this incident and that a strangling incident face-to-face occurred after the event shown in Video 8. Ms Riechelmann, referred to the fact that she had a "gap in her memory with limited recollections after the choking incident": T965-T967.

13. After hearing argument and submissions, the Court granted leave to the defendant to rely on a number of further medical reports: see Exhibit 6. This was in the context of leave being granted to the defendant to file a Further Amended Statement of Cross-Claim adding as a particular of the battery on 31 March 2018: "and/or alternatively, at a later time in the corridor, choked by the use of two hands around her throat until she went red in the face". This reflected Ms Wells' oral evidence.
14. In a report dated 24 June 2022, Dr A McClure considered a request to provide a medical or psychiatric explanation for Ms Riechelmann's stated lack of memory of the incident described by Ms Wells (assuming it occurred in the manner described by Ms Wells). Dr McClure gave several hypothetical medical explanations for the phenomenon of forgetting including alcohol intoxication, hypoxic brain injury and the effect of trauma on memory storage.
15. In relation to alcohol intoxication, Dr McClure expressed the opinion that moderate intoxication (or more) may reduce the reliability of memory but said this was a matter for a drug and alcohol physician or neurologist to comment on rather than a psychiatrist.
16. In relation to hypoxic brain injury, Dr McClure stated that attempted strangulation may reduce or entirely abolish the flow of blood to the brain, thereby depriving the brain of oxygen which may give rise to amnesia. Again, he was of the view that this was a matter for a neurologist rather than a psychiatrist.
17. In relation to the effect of trauma on memory storage, Dr McClure said that exposure to highly traumatic events generates very high levels of anxiety, and the conscious brain may not recall the event but the unconscious brain does. In addition, he noted that a psychiatric disorder may arise out of an event or situation which the subject cannot recall, including PTSD.
18. Dr Roberts was also asked for his opinion. In a report dated 24 June 2022, Dr Roberts noted that he had been asked whether there was any medical or psychiatric explanation for Ms Riechelmann's stated lapse of memory of the incident described by Ms Wells. He expressed the opinion that if the account of strangulation was assumed, then from the medical/psychiatric viewpoint, the inability of Ms Riechelmann to relate the events described by Ms Wells, assuming the description to be true and accurate, would be the result of strangulation induced loss of consciousness where awareness is "abolished". He states that on the assumptions given, a state of unconsciousness involving a lack of awareness may have been induced. Dr Roberts stated that "transiently circumscribed loss of awareness [is] a not unanticipated consequence of an act of strangulation".
19. Having regard to the opinion of Dr McClure as to his limited expertise, the defendant's instructing solicitors retained Professor James Brew, a consultant physician and neurologist. Dr Brew appeared from his report to be highly qualified and experienced. In his report dated 7 July 2022, Professor Brew expressed the following opinions:

1. He did not consider it likely, on the balance of probabilities, that the "amnesic event" of Ms Riechelmann being unable to recall Ms Wells' strangling incident had a neurological cause. That was because there was a well-defined period of lack of memory which was short in duration as opposed to a limited memory in patches only. He was of the view that a discrete well-defined start and stop period for a memory lapse would be unusual for a neurological cause except in the case of epilepsy;
 2. In relation to hypoxia causing brain damage, Professor Brew noted that Ms Riechelmann had reportedly complained of neck pain on the morning of 1 April 2018. He expressed the opinion that this did support the possibility of hypoxia secondary to strangulation. However, importantly, he noted that the lack of bruising around the neck would be "unusual". No bruising was indicated around the neck in the general practitioner notes when Ms Riechelmann attended soon after the 31 March 2018 incident. Professor Brew stated that strangulation causing hypoxia leading to amnesia remained "possible but not definite, pending further evidence"; and
 3. Professor Brew rejected alcohol intoxication as a possible explanation for the amnesic episode. He said he considered this to be unlikely given the limited alcohol consumption by Ms Riechelmann (as reported by her) on the night. He was of the view that much greater alcohol intoxication would be required to cause memory lapse and there was no suggestion that there were the physical signs of heavy intoxication such as slurred speech, incoordination and gait difficulties on the part of Ms Riechelmann. She was also, it appeared, able to climb and descend the stairs in the apartment block without difficulty.
1. I will consider these reports further below.

Other documents

1. Exhibit 4 included photographs relating to bruising to the defendant said to arise from the incident.
2. Also included in the evidence tendered is Ms Wells' statement of 20 May 2018 which has been discussed in detail above: see Exhibit F.

Legal Principles Applicable

Principles relating to the torts of assault and battery and trespass to goods

The statutory scheme applicable

1. In their pleadings, the parties have relied on intentional acts as constituting the torts of battery, assault and, in the case of Mr McCabe's car, trespass to goods. In the end, the latter claim was not pressed at the final hearing.
2. In *Croucher v Cachia* [2016] NSWCA 132; (2016) 95 NSWLR 117, Leeming JA (with whom Beazley P and Ward JA agreed) stated as follows in paragraph 20:

"20. Battery is one of three forms of trespass to the person, the others being assault and false imprisonment. While it is conveniently and conventionally labelled as an "intentional tort", in contrast with negligence, such labels can obscure the necessary analysis of (a) the elements of the tort and (b) how the tort is affected by statute. As it is put in Clerk & Lindsell on Torts (20th ed, 2010, Sweet & Maxwell) at 986, "in this context 'intention' has a very particular meaning".

1. Although the defendant Ms Riechelmann pleaded that the wine throwing act in 2017 was committed by her only negligently and involuntarily and as part of an act of self-defence by her, both parties relied on intentional acts of the plaintiff and the defendant in their claims and disavowed negligence. That is, the tort of negligence was not pleaded by either of the parties except by the defendant Ms Riechelmann as a form of defence to the wine throwing incident (see Amended Defence paragraphs 1 and 2).
2. Section 3B(1) of the Civil Liability Act 2002 (NSW) ("CLA") provides as follows:

"3B Civil liability excluded from Act

- (1) The provisions of this Act do not apply to or in respect of civil liability (and awards of damages in those proceedings) as follows—
 - (a) civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death or that is sexual assault or other sexual misconduct committed by the person—the whole Act except—
 - (ia) Part 1B (Child abuse—liability of organisations), and
 - (i) section 15B and section 18(1) (in its application to damages for any loss of the kind referred to in section 18(1)(c)), and
 - (ii) Part 7 (Self-defence and recovery by criminals) in respect of civil liability in respect of an intentional act that is done with intent to cause injury or death, and
 - (iii) Part 2A (Special provisions for offenders in custody)."
1. Therefore, as sexual assault or other sexual misconduct is not alleged in the present case, the whole of the CLA is excluded in relation to the torts alleged (if satisfied) apart from certain parts of the CLA, including Part 7 which, inter alia, deals with self-defence. The wine throwing incident may attract the CLA provisions depending on factual findings made by the Court.
2. A close review of s 3B(1) of the CLA makes clear that the provisions of the CLA do not apply to or in respect of civil liability:
 1. Of a person in respect of an intentional act;
 2. That is done by the person with "intent to cause injury or death".

1. No intent to cause death of a person is involved or alleged in the present case. Accordingly, in order for the CLA not to apply in the case of the torts of battery alleged in the present case, there must be established an intentional act that is done by a person "with intent to cause injury". The word "injury" is not defined in s 3 of the CLA. The term "personal injury" is defined in s 5 (for Part 1A of the CLA) and s11 (for Part 2 of the CLA). "Injury" is defined in s 26A of the CLA but that only applies to Part 2A of the CLA. It is established that the definition of "personal injury" in s 11 (the same as in s 5) does not directly apply to s 3B(1)(a) of the CLA: see the discussion in *State of New South Wales v Ibbett* (2005) 65 NSWLR 168; [2005] NSWCA 445 at [5]-[11] per Spigelman CJ; and at [218] per Basten JA. See also Ipp JA at [124]-[125]. It seems that harm caused by the apprehension of physical violence such as anxiety or stress is enough to establish assault: see Ibbett at [11] and [125]. In relation to the tort of assault, therefore, no physical contact with the plaintiff is required to establish the tort. It seems, as a result, that "injury" in s3B was intended in the case of a tortious assault to indicate anxiety, stress or apprehension in the context of a belief that something was intended to be thrown or used with violence.
2. It is established that the requirement of a party to prove an intention "to cause injury or death" in s 3B(1) of the CLA requires proof of an actual subjective intention on the part of the defendant in question: see *Dickson v Northern Lakes Rugby League Sport & Recreation Club Inc* [2020] NSWCA 294; (2020) 103 NSWLR 658 at [4]-[9] and [19]. It is not enough for the act to be deliberate. Similarly, negligence, recklessness or a presumed intention to cause injury or death is insufficient: see at [19]. Many forms of battery will thus not fall within s 3B(1)(a): at [7]. They would fall within the general provisions of the CLA.
3. Both parties deny any intention to cause injury in their pleadings.
4. The pleadings in the matter refer to the parties acting in self-defence. The plaintiff/cross-defendant refers to s 52 of the CLA. The defendant/cross-claimant refers to self-defence both at common law and under s 52 of the CLA. It appears from s 3A of the CLA, that self-defence at common law is not excluded. It is established that self-defence is available as a defence to battery at common law and that it is preserved as a defence alongside s 52 of the CLA: *Croucher v Cachia* at paragraphs 46-47.
5. Section 52 of the CLA which relates to self-defence provides as follows:

"52 No civil liability for acts in self-defence

 - (1) A person does not incur a liability to which this Part applies arising from any conduct of the person carried out in self-defence, but only if the conduct to which the person was responding—
 - (a) was unlawful, or

- (b) would have been unlawful if the other person carrying out the conduct to which the person responds had not had a mental health impairment or a cognitive impairment at the time of the conduct.
- (2) A person carries out conduct in self-defence if and only if the person believes the conduct is necessary—
 - (a) to defend himself or herself or another person, or
 - (b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
 - (c) to protect property from unlawful taking, destruction, damage or interference, or
 - (d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response in the circumstances as he or she perceives them.

- (3) This section does not apply if the person uses force that involves the intentional or reckless infliction of death only—

- (a) to protect property, or
- (b) to prevent criminal trespass or to remove a person committing criminal trespass."

1. It is therefore necessary to consider the applicable principles for the torts of battery and assault, the common law defence of self-defence and the statutory defence of self-defence under s 52 of the CLA.
2. I considered *Croucher v Cachia* in some detail in *Raad v State of New South Wales* [2017] NSWDC 63. *Croucher v Cachia* involved an altercation between two neighbours which resulted in one being seriously injured by gardening shears which were held (and allegedly wielded) by the other party. The injured plaintiff brought actions in battery and negligence in the alternative, with the defendant denying that he intentionally or negligently injured the plaintiff and pleading self-defence under the CLA.
3. In paragraphs 191-192 and 196-7 of *Raad* I stated inter alia as follows:

"191. In *Croucher v Cachia* Leeming JA gave the leading judgment. Beazley P and Ward JA agreed with Leeming JA's reasons.

192. Leeming JA stated the following in relation to the application of Section 3B to the facts of that case at paragraphs [31]-[35] and [115]-[118]:

[31] The consequence of s 3B(1)(a) (noting that no question of sexual assault or sexual misconduct arises in this litigation) is that a key question is whether Mr Croucher is liable "in respect of an intentional act that is done by the person with intent to cause injury or death". If so, then various limiting provisions on damages in the Act, including the prohibition upon exemplary damages in s 21, cease to apply.

...

[33] There is some subtlety in the application of s 3B(1)(a) and s 21. It will be seen that s 3B(1)(a) does not operate upon the particular cause of action, but instead upon the particular act which gives rise to the civil liability and the intent of the person doing that act (I pass over the question whether and if so how s 3B(1)(a) applies to intentional omissions to act). This was the point made by Basten JA in *Dean v Phung* [2012] NSWCA 223 at [10]: "the statutory scheme is not identified by reference to a particular cause of action".

[34] A cause of action in battery may be established where the defendant's conduct is either intentional or alternatively merely negligent. The former would engage s 3B(1)(a) and the latter would not. In other words, the language of "intentional tort" is an unsafe guide to whether s 3B(1)(a) is engaged; it is necessary instead to look at the character of the underlying conduct, as explained in *White v Johnson* [2015] NSWCA 18 ; 87 NSWLR 779 at [132].

[35] Not only is s 3B(1)(a) directed to the character of the conduct rather than the nature of the cause of action; the same is true of s 21, even though that section refers to "negligence". It is to be recalled that "negligence" is defined in s 5 more broadly than the tort to mean "failure to exercise reasonable care and skill". That definition is expressed to be only for the purposes of Part 1A. An identical definition is likewise given in s 27 for the purposes of Part 3. Section 21 is in Part 2, in which Part "negligence" is not defined. However, it has been held that s 21 is to be read as extending to all cases, however pleaded, where damages are awarded flowing from a failure to exercise reasonable care and skill: *New South Wales v Ibbett* [2005] NSWCA 445 ; 65 NSWLR 168 at [118] (Ipp JA) and [200]–[209] (Basten JA). (I shall put to one side how s 21 applies to the circumstances identified by Gleeson CJ, McHugh, Gummow and Hayne JJ in *Gray v Motor Accident Commission* [1998] HCA 70 ; 196 CLR 1 at [22]: "there can be cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff".)

...

"[115] As noted above, s 3B(1)(a) excludes the applicability of many sections of the Civil Liability Act to "civil liability of a person in respect of an intentional act that is done by the person with intent to cause injury or death".

[116] Her Honour appears to have proceeded implicitly on the basis that the cause of action in battery is one which engages s 3B(1)(a) and therefore is not subject to the limitations of the Civil Liability Act. Section 3B(1)(a) would undoubtedly apply if there were a finding that Mr

Croucher had intended to injure Mr Cachia, but on balance I consider that the better reading of the judgment is that her Honour found merely that he was recklessly indifferent to the prospect that opening and shutting the shears and thrusting them at Mr Cachia would cause injury.

- [117] It is far from clear that conduct which is reckless, even if it amounts to an "intentional tort" such as battery, engages s 3B(1)(a). It is perfectly clear that a battery which involves merely negligent conduct will not engage s 3B(1)(a). This is because, as noted above, s 3B(1)(a) looks to the nature of the conduct found to occur, rather than to the cause of action which has been pleaded.
- [118] Basten JA referred to the "somewhat awkward terminology of s 3B" in *New South Wales v Ibbett* [2005] NSWCA 445 ; 65 NSWLR 168 at [197]. In *Hayer v Kam* [2014] NSWSC 126, when dealing with a strike out application, Hoeben CJ at CL expressed the view that, subject to authority, he would have accepted the submission that s 3B(1)(a) "excluded any reliance upon concepts such as 'recklessness'": at [38]–[39], a view which I regard as being not without force. However, even so his Honour regarded an allegation of recklessness as sufficiently arguable not to be struck out. It may also be noted that D Villa, *Annotated Civil Liability Act 2002 (NSW)* (2nd ed, 2013, Lawbook Co) at 55–56 notes that the position is unclear but expresses the view that "it would be consistent with the purpose of the exclusion that recklessness be sufficient for the purposes of s 3B(1)(a)" [emphasis added].
193. Accordingly, it appears from that authority that unless it could be established that the civil liability of a person in respect of an intentional act was done by the person with intent to cause injury or death or perhaps recklessly, an intentional act tort only negligently causing injury would fall within the CLA. That is because Section 3B(1)(a) of the CLA looks to the nature of the conduct found to have occurred, rather than to the cause of action which has been pleaded. I generally accept the plaintiff's written submissions in chief on this issue at [198]–[199].
- ...
196. The decision in *Croucher v Cachia* also provides guidance in relation to the torts of battery and trespass to the person. Leeming JA stated the following at paragraphs [20]–[25]:
- "[20] Battery is one of three forms of trespass to the person, the others being assault and false imprisonment. While it is conveniently and conventionally labelled as an "intentional tort", in contrast with negligence, such labels can obscure the necessary analysis of (a) the elements of the tort and (b) how the tort is affected by statute. As it is put in *Clerk & Lindsell on Torts* (20th ed, 2010, Sweet & Maxwell) at 986, "in this context 'intention' has a very particular meaning".
- [21] A defendant who directly causes physical contact with a plaintiff will commit a battery unless the defendant proves that the defendant was "utterly without fault". The requisite direct contact will be present if the defendant uses an instrument (such as gardening shears): *Darby v DPP* [2004] NSWCA 431 ; 61 NSWLR 558 at [73].

- [22] Although battery is an intentional tort, a battery may occur when the defendant is merely negligent. It was in those circumstances that a unanimous High Court said in *Williams v Milotin* (1957) 97 CLR 465 at 474 that "[i]t happens in this case that the actual facts will or may fulfil the requirements of each cause of action" (ie battery and negligence).
- [23] Within the allegations concerning battery, Mr Cachia's pleading alleged that "[t]he attack was intentional and designed to inflict serious injury" (para 7). That allegation was, strictly speaking, unnecessary in order to establish liability (although, arguably, the allegation was intended to engage s 3B(1)(a) of the Civil Liability Act thereby permitting the award of damages at common law including exemplary damages — see below). It is clear law in this country that trespass to the person caused by a blow does not require the plaintiff to prove anything about intention. I cannot put the point more clearly than did Jacobs JA, with Manning and Moffitt JJA agreeing, in *Timmins v Oliver* (unreported, New South Wales Court of Appeal, 12 October 1972). Jacobs JA was writing three months after the commencement of the Supreme Court Act 1970 (NSW) which would bring to an end common law issue pleading refined by Baron Parke which had been said by Cotton LJ, shortly after it had been abolished a century earlier in England, in *Spedding v Fitzpatrick* (1888) 38 Ch D 410 at 414, to "conceal as much as possible what was going to be proved at the trial". Jacobs JA rejected a demurrer to two bare declarations alleging that the plaintiff had sustained injuries from the defendants driving a motor boat against him, saying:

"Nothing more has ever been required in an action based on trespass than an allegation of the battery and it is too late in the day to change this now. ... Can we as the curtain falls for the last time on declarations in trespass which have held the stage for centuries say that the play has all this time been played wrongly and according to a bad script? I think not."

- [24] The fact that the onus lay on the defendant, and the nature of what was required to be proven, was explained by Windeyer J in *McHale v Watson* (1964) 111 CLR 384 and by Street CJ (with whom Ferguson and James JJ agreed) in *Blacker v Waters* (1928) 28 SR (NSW) 406 at 410, in both cases tracing the matter back to *Weaver v Ward* (1616) Hob 134 ; 80 ER 284. There it was said that no man may be excused of a trespass "except it may be judged utterly without his fault". The position in this respect is essentially unchanged four centuries later.

- [25] As Gummow J said in *Stingel v Clark* [2006] HCA 37 ; 226 CLR 442at [47]:

"[I]n *McHale v Watson*, Windeyer J demonstrated that, contrary to the view taken by Diplock J in *Fowler v Lanning*, in an action for trespass to the person by a blow or missile it was for the defendant to aver and prove the absence of intent and negligence on the defendant's part, rather than for the plaintiff to aver and prove that the defendant acted either intentionally or negligently."

Gummow J dissented in the result, but the statement of principle reproduced above is uncontroversial. Further, "negligence" means, in this somewhat unfamiliar context, an absence of fault on the part of the defendant (this is another way in which "negligent" bears a variety of meanings, depending upon the context: see *Paul v Cooke* [2013] NSWCA 311 ; 85 NSWLR 167 at [39]–[41])" (emphasis added).

197. *Croucher v Cachia* seems to stand for the following relevant propositions:

- (a) A defendant who directly causes physical contact with the plaintiff will commit a battery unless the defendant proves that the defendant was utterly without fault. In the present case the Police officers concerned would have to show that any battery occurred within their lawful authority;
 - (b) Although battery is an intentional tort, a battery may occur where the defendant is merely negligent;
 - (c) Trespass to the person caused by a blow does not require the plaintiff to prove anything about intention;
 - (d) In relation to a trespass to the person, the onus rests on the defendant to show that the trespass was committed by the person utterly without his fault and without negligence;
 - (e) Negligence means an absence of fault on the part of the defendant;
 - (f) The CLA will apply to an intentional tort if the injury to the plaintiff giving rise to civil liability was occasioned by an intentional act without the intention to cause injury or death."
1. *Croucher v Cachia* has been confirmed by the New South Wales Court of Appeal in later cases: see for example *State of New South Wales v Ouhammi* [2019] NSWCA 225; *Dickson*, above at [177] and following.
 2. What is alleged by the parties in relation to the batteries pleaded in the present case is that they were intentional acts of physical contact "with intent to cause injury" thus seeking to take the causes of action pleaded outside the CLA.
 3. In relation to the tort of assault which is also relied on, guidance is provided in relation to it in *Croucher v Cachia*. Leeming JA stated at paragraph 42 as follows:

"42. There is a tortious assault where the act of a person causes another person reasonably to apprehend a threat of force or violence...".

1. At paragraph 99 of *Croucher v Cachia* Leeming JA stated as follows:

"99. I also do not accept that a finding that Mr Cachia was committing an assault was not available on the evidence. In addition to what was said in *Barton v Armstrong*, to which I have earlier referred, the elements of a civil assault were more elaborately stated by Sheller JA, with the agreement of Priestley and Heydon JJA, in *Rixon v Star City Pty Ltd* [2001] NSWCA 265; 53 NSWLR 98 at [56]- [58], in terms which emphasised the irrelevance of the defendant's intention to carry out the threat:

"A traditional definition of assault is 'an overt act indicating an immediate intention to commit a battery, coupled with the capacity of carrying that intention into effect'; see Clerk & Lindsell 12-12. The irrelevance of the intention to carry the battery into effect is demonstrated by the act of presenting an unloaded firearm in such circumstances that if it had been loaded its discharge would have been likely to cause injury. Such an act is an assault unless the person at whom it is pointed knows that it is empty; see generally Clerk & Lindsell 12-13.

According to Fleming, *The Law of Torts*, 9th ed, at 31-32:

'Assault consists in intentionally creating in another person an apprehension of imminent harmful or offensive contact. ... there may be an assault without battery if the threat to inflict unlawful force is not in fact carried out. ... Since the gist of assault lies in the apprehension of impending contact, the effect on the victim's mind created by the threat is the crux, not whether the defendant actually had the intention or the means to follow it up. The intent required for the tort of assault is the desire to arouse apprehension of physical contact, not necessarily to inflict actual harm.'

Proof of assault requires proof of an intention to create in another person an apprehension of imminent harmful or offensive contact; see, for example, *Hall v Fonceca* [1983] WAR 309. If the assault lies in creating an apprehension of impending contact, proof of the assault does not require proof of an intention to follow it up or carry it through."

1. It appears, therefore, that a tortious assault is an overt act indicating an immediate intention to commit a battery coupled with the capacity of carrying that intention into effect. The gist of the tort of assault lies in the apprehension of impending contact. Proof of assault requires proof of an intention to create in another person an apprehension of imminent harm or offensive contact. It does not require proof of an intention to follow it up or carry it through. It would appear therefore that the concept of a tortious assault includes an intentional threat of throwing something at a person provided the act gives a reasonable apprehension of impending contact which is harmful or offensive.
2. In the Amended Statement of Claim filed on 15 February 2022, the plaintiff pleads damaging acts by the defendant to the plaintiff's motor vehicle in paragraph 3, leading to damage to the vehicle assessed at \$2,877.37. It is pleaded in paragraph 4B that the actions taken were intentional acts done by the defendant and done with intent to cause injury to the plaintiff's vehicle or were intentional and amounted to trespass causing damage to the vehicle: see paragraphs 4B-4C. There is a tort of trespass to chattels. It consists of an act of direct interference with personal property in the possession of another without lawful

justification: *Penfolds Wines Pty Ltd v Elliott* (1946) 74 CLR 204 at 224-225 and 229. All trespass actions are actionable per se and without establishing damage: *William Leitch & Co Ltd v Leydon* [1931] AC 90. Therefore, even if no loss is suffered by a plaintiff, nominal damages may be recovered: *Slaveski v State of Victoria* [2010] VSC 441. If goods are damaged or destroyed, a plaintiff is entitled to compensatory damages. In the end, the claim for damage to the car was not pressed in final submissions.

3. The principles relating to self-defence must be considered, both at common law and under the CLA.
4. It is clearly established that at common law, self-defence may provide a defence to an allegation of tortious assault or battery. The onus is on the defendant in a particular case to establish the defence of self-defence. The defendant will need to establish:
 1. That he or she subjectively believed there was a threat of imminent harm to them;
 2. That this threat required them to use physical force in self-defence; and
 3. There were reasonable grounds to subjectively believe that the force actually used by them was necessary in the circumstances: see *Fontin v Katapodis* (1962) 108 CLR 177 at 181 where McTiernan J stated:

"It is clear that Fontin had a right to defend himself against being beaten by Katapodis. The question is whether, in the circumstances, it was reasonably necessary for him to throw the piece of glass at Katapodis in order to protect his right of personal safety."

1. All the circumstances must be considered: see Owen J at page 186.
2. In *Watkins v State of Victoria* (2010) 27 VR 543 at [71]–[72], Ashley JA and Beach AJA stated:

"In the context of a civil proceeding, the defendant must have believed at the time when he committed the relevant act that what he was doing was necessary; and that belief must have been based on reasonable grounds. The second element does not involve a test about what a hypothetical reasonable person might have believed in the circumstances, but rather whether the defendant had reasonable grounds for his belief, in the circumstances as he perceived them to be. ... a person who has reacted instantly to imminent danger cannot be expected to weigh precisely the exact measure of self defensive action which is required."

1. See also *State of New South Wales v McMaster* [2015] NSWCA 228; (2015) 91 NSWLR 666 at [156], [166]–[169] per Beazley P (with whom McColl and Meagher JJA agreed) and *Ray v Southon* [2022] NSWCA 267 at [14].
2. In relation to the statutory defence of self-defence in s 52 of the CLA, in *Croucher v Cachia* at paragraph 42, Leeming JA said in relation to s 52 that the section depends upon whether the conduct to which the defendant was responding was (or would have been) "unlawful". It was held that unlawful conduct included conduct which was merely tortious as opposed to criminal (such as trespass to the person through a battery or an assault). Leeming JA stated

that a tortious assault occurs where the act of a person causes another person reasonably to apprehend a threat of force or violence relying on *Barton v Armstrong* [1969] 2 NSW 451 at 455. His Honour confirmed in paragraph 43 that the onus of establishing the elements of self-defence under s 52 lies on the defendant. Once a plaintiff's conduct has been found to be unlawful, s 52 prescribes two necessary conditions to establish a defence of self-defence:

1. It must be demonstrated that there is the requisite subjective belief on the part of the defendant as set out in the section; and
2. That the defendant's conduct was a reasonable response to the circumstances as perceived by him or her. It raises both subjective and objective elements. His Honour confirmed that self-defence was available as a defence to both tortious assault and battery.

1. In *Southon v Ray* [2022] NSWDC 32 Abadee DCJ stated as follows at [80]:

"80. Section 52 is different to the common law in another critical respect. Under the common law, a defendant must show that he or she actually believed it is necessary to act and that such belief was based on reasonable grounds. Section 52 makes it sufficient [if] the defendant honestly holds that the conduct was necessary to achieve one (or more) of the enumerated grounds in s 52(2). Then it must be shown that the response is reasonable having regard to the circumstances as the defendant perceives them to be. As Mr Villa explains in his text book, that means that a defendant can rely upon self-defence if he actually, albeit mistakenly, believes, that his conduct is necessary in any of the circumstances in s 52(2). However, against this, the question is not whether the defendant considers that the response is reasonable; but whether the response objectively was in fact reasonable."

1. See also D Villa, *Annotated Civil Liability Act 2002 (NSW)*, Third Edition, paragraph 7.52.090. The decision of Abadee DCJ in *Ray v Southon* was confirmed on appeal: [2022] NSWCA 267.

The standard to be applied

1. In the current case, serious allegations are made against the plaintiff and the defendant by each other. It is alleged that each has committed the tort of battery by intentional acts that were done with the intent to cause injury. Assaults are also alleged.
2. In *Briginshaw v Briginshaw* (1938) 60 CLR 336 Dixon J stated the following at 361-363:

"This mode of stating the rule for civil cases appears to acknowledge that the degree of satisfaction demanded may depend rather on the nature of the issue. ... But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters "reasonable satisfaction" should not be produced by inexact proofs, indefinite testimony, or indirect inferences. ... This does not mean that some standard of persuasion is fixed intermediate

between the satisfaction beyond reasonable doubt required upon a criminal inquest and the reasonable satisfaction which in a civil case may, not must, be based on a preponderance of probability. It means that the nature of the issue necessarily affects the process by which reasonable satisfaction is attained. When, in a civil proceeding, a question arises whether a crime has been committed, the standard of persuasion is, according to the better opinion, the same as upon other civil issues. ... But, consistently with this opinion, weight is given to the presumption of innocence and exactness of proof is expected."

1. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* (1992) 67 ALJR 170; [1992] HCA 66 at [2], the majority of the High Court explained the principle in *Briginshaw*, as follows:

"2. The ordinary standard of proof required of a party who bears the onus in civil litigation in this country is proof on the balance of probabilities. That remains so even where the matter to be proved involves criminal conduct or fraud ((1) See, e.g., *Hocking v. Bell* [1945] HCA 16; (1945) 71 CLR 430, at p 500; *Rejtek v. McElroy* [1965] HCA 46; (1965) 112 CLR 517, at pp 519-521). On the other hand, the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove. Thus, authoritative statements have often been made to the effect that clear ((2) *Briginshaw v. Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, at p 362; *Helton v. Allen* [1940] HCA 20; (1940) 63 CLR 691, at p 701; *Hocking v. Bell* [1944] NSWStRp 31; (1944) 44 SR (N.S.W.) 468, at p 477 (affirmed in *Hocking v. Bell* (1945) 71 CLR, at pp 464, 500); *Rejtek v. McElroy* (1965) 112 CLR, at p 521; *Wentworth v. Rogers* (No.5) (1986) 6 NSWLR 534, at p 539 or cogent ((3) *Rejtek v. McElroy* (1965) 112 CLR, at p 521) or strict ((4) *Jonesco v. Beard* (1930) AC 298, at p 300; *Briginshaw v. Briginshaw* (1938) 60 CLR, at p 362; *Helton v. Allen* (1940) 63 CLR, at p 711; *Hocking v. Bell* (1944) 44 SR (N.S.W.), at p 478 (affirmed in *Hocking v. Bell* (1945) 71 CLR, at pp 464, 500); *Wentworth v. Rogers* (No.5) (1986) 6 NSWLR, at p 538) proof is necessary "where so serious a matter as fraud is to be found" ((5) *Rejtek v. McElroy* (1965) 112 CLR, at p 521). Statements to that effect should not, however, be understood as directed to the standard of proof. Rather, they should be understood as merely reflecting a conventional perception that members of our society do not ordinarily engage in fraudulent or criminal conduct ((6) See, e.g., *Motchall v. Massoud* [1926] VicLawRp 43; (1926) VLR 273, at p 276) and a judicial approach that a court should not lightly make a finding that, on the balance of probabilities, a party to civil litigation has been guilty of such conduct. As Dixon J. commented in *Briginshaw v. Briginshaw* ((7) (1938) 60 CLR, at p 362; and see, also, *Helton v. Allen* (1940) 63 CLR, at p 711):

"The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved ..." ..."

1. Section 140 of the Evidence Act 1995 (NSW) provides as follows:

"140 Civil proceedings: standard of proof

- (1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.
- (2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account—
 - (a) the nature of the cause of action or defence, and
 - (b) the nature of the subject-matter of the proceeding, and
 - (c) the gravity of the matters alleged."
1. It may therefore be seen that the legal onus rests on the person alleging the battery or assault. That party must satisfy the civil burden of proof on the balance of probabilities. However, the authorities and s 140 oblige the court to take into account the nature of the allegations made by the parties, here of serious activity constituting a battery or assault, in deciding whether or not the court is satisfied to that standard. This is particularly the case where it is alleged that there was an intention by the relevant party to cause injury. See also *Nguyen v Tran* [2018] NSWCA 215 at [62]-[64] and *Gautam v Health Care Complaints Commission* [2021] NSWCA 85 at [88]. In the latter case, the Court of Appeal held that the test stated by a tribunal that the tribunal "must be convinced (or at the very least comfortably satisfied) that the alleged conduct actually occurred" "correctly encapsulates the test and is commonly used".
2. In *Musa v Alzreaiawi* [2021] NSWCA 12 Gleeson JA (with whom Bell P and Macfarlan JA agreed) stated as follows at [40]-[42] and [50]:

"40. It has been said that s 140(2) provides for no new principle: *Palmer v Dolman* [2005] NSWCA 361 at [40] per Ipp JA (Tobias and Basten JJA agreeing); *Bale & Anor v Mills* (2011) 81 NSWLR 498; [2011] NSWCA 226 at [71]- [72] (Allsop P, Giles JA and Tobias AJA). It reflects the principles stated in *Briginshaw v Briginshaw*, where Dixon J said at 362:

The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters 'reasonable satisfaction' should not be produced by inexact proofs, indefinite testimony, or indirect inferences.
41. It is well accepted that the principles in *Briginshaw v Briginshaw* elucidate the list of matters in s 140(2): *Director General of Department of Community Services; Re Sophie* [2008] NSWCA 250 at [50] per Sackville AJA (Giles JA and Handley AJA agreeing); *Bale v Mills* [2011] at [71]; *Bibby Financial Services Australia Pty Ltd v Sharma* [2014] NSWCA 37 at [205] (Gleeson JA, Beazley P and Barrett JA agreeing); *El-Wasfi v State of New South Wales; Kassas v State of New South Wales* [2017] NSWCA 322 at [123] (Leeming JA, Simpson and Payne JJA agreeing).

42. Importantly, the requirement stated in *Briginshaw v Briginshaw* that there should be clear and cogent proof of serious allegations, does not change the standard of proof, but merely reflects the perception that members of the community do not ordinarily engage in serious misconduct: *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* at 171; *Palmer v Dolman* at [46].

...

50. Nonetheless, in my view, no principled basis was advanced for extending the remarks in *Neat Holdings* to the present case. Moreover, to accept that submission would be inconsistent with the requirement in s 140(2)(c) of the Evidence Act in a case such as the present where fraud is alleged against a party. The primary judge correctly had regard to the gravity of Mr Musa's allegation that Ms Alzreaiawi forged or was party to the forgery of Mr Musa's signature on the transfer, in the sense referred to in *Neat Holdings* at 171, which is referred to at [42] above. There was no error in her Honour requiring "actual persuasion" on the balance of probabilities of Mr Musa's version of events. As this Court said in *Morley v Australian Securities & Investments Commission* [2010] NSWCA 331; (2010) 247 FLR 140 at [750] "[r]eferences in the authorities to "actual persuasion" should be understood as equivalent to the state of "satisfaction", as that word is used in s 140". (An appeal was allowed, but no exception was taken to this statement.)"
1. Accordingly, the court in the present case has to be conscious of the gravity of the allegations made and the need to be satisfied that they are made out on the balance of probabilities. This has been stated as a need for the court to be comfortably satisfied of the allegations.

Submissions

1. Detailed written and oral submissions were provided to the Court by the parties.
2. In his written submissions filed on 12 September 2022, Mr McCabe submits, in general summary, as follows:
 1. The background to the relationship between the plaintiff and the defendant established that the defendant hated the plaintiff by 2017, the defendant would resort to violence with little or no provocation, there was no suggestion of any violence on the part of the plaintiff against the defendant, and there was no suggestion of any resort to violence by the plaintiff at all to any person (paragraphs 1-11);
 2. In relation to the 3 June 2017 incident, the defendant ("at the very least") intended to "shock" the plaintiff by throwing the drink over him and cause damage to his clothing (paragraphs 12-18);
 3. By early 2018, the relationship between Mr Lavers and the defendant was strained. When the defendant attended the block of units on 31 March 2018, her knocking and bashing on Mr Lavers' door was loud and insistent. The conversations between the plaintiff and the

defendant are shown in the audio/visual material. It should be rejected that the defendant was concerned about the welfare of Mr Lavers because of his non-response to her knocking. The defendant's conduct involved using swear words to the plaintiff and Ms Wells on numerous occasions. Neither party relies upon the "pushing and shoving" between them at the doorway to the units as giving rise to a cause of action (paragraphs 19-28);

4. There is conflicting evidence between Mr Pusell, the defendant, the plaintiff and Ms Wells. Ms Wells was present in the foyer but rejects the versions of both the plaintiff and the defendant. It was submitted that Ms Wells' evidence could not be relied upon at all because of its inconsistencies and the Court will be left with conflicting evidence from the plaintiff and the defendant and the evidence of Mr Pusell (paragraphs 29-34);
5. The authorities establish that objective evidence should be relied upon where possible and the logic of events and not purely credibility assessments of witnesses (paragraphs 35-41);
6. The Court has the "enormous benefit of the contemporaneous audio-visual evidence" (paragraph 42). However, it is not complete. The video evidence is inconsistent with the defendant's version that the plaintiff had moved around behind her and strangled her from behind. The interchange between the plaintiff and the defendant outside the plaintiff's unit doorway is consistent with the plaintiff's version of the defendant hitting him five times, with a "verbal punctuation" on each occasion. The unit door is pulled shut, most likely by the plaintiff, which was inconsistent with him at the same time strangling the defendant from behind her as she alleges. The defendant being able to advance and yell out for Mr Lavers and shove against the plaintiff and push past him is inconsistent with her version of being strangled and being injured. It is also inconsistent with her being thrown against the hall wall and landing on her right knee. The defendant's lack of recollection as to a number of aspects of the evening is significant. The audio-visual evidence is consistent with the plaintiff's version and inconsistent with that of the defendant. Her alleged actions are also consistent with her hatred of the plaintiff. On the other hand, there is no evidence that the plaintiff ever previously assaulted or battered the defendant (paragraphs 42-52);
7. The bruising evidence is consistent with the plaintiff's version of the incident and inconsistent with the defendant's version. Based upon the defendant's version of events, the plaintiff should have suffered no bruising or other injuries at all. However, his face was clearly injured. The defendant identified bruising at about her collarbone and not at her neck. This is consistent with the notes of Dr Begum on 5 April 2018. The defendant specifically attended Dr Begum to document her injuries. The defendant in her own evidence did not suggest she had any bruising about her neck: Exhibit G. The defendant's evidence was inconsistent with that of her friend Mrs Hart-Waters (paragraphs 53-56);
8. Ms Wells' evidence was inconsistent and unimpressive. It was inconsistent with the versions given by both the plaintiff and the defendant not only regarding the key events and the video evidence, but also what happened thereafter. The second strangling incident was "invented" by Ms Wells and should be rejected. Ms Wells could not remember a number of events

shown on the video (paragraphs 58-66). In oral submissions it was emphasised that Ms Wells, despite being in the foyer to the unit block at the relevant time, did not see the strangling incident alleged by Ms Riechelmann;

9. In relation to the 15 June 2018 incident, the evidence of the plaintiff and Mr Lavers should be preferred. It was not an action done "in jest" as alleged by the defendant (paragraphs 67-70);
 10. The defendant's Cross-Claim is solely based on the alleged events of 31 March 2018. The conflict in the evidence should be resolved in favour of the plaintiff. Ms Wells' evidence was unreliable. The Cross-Claim should be dismissed. The various medical expert reports of Drs McClure, Roberts and Brew did not assist the plaintiff and did not provide a convincing explanation for the conflict in the evidence between the defendant and Ms Wells (paragraphs 71-76);
 11. The Civil Liability Act 2005 does not apply to the plaintiff's claims (paragraphs 77-80);
 12. In the light of the evidence as to the plaintiff's condition and reaction to the relevant incidents, the plaintiff should be awarded general damages for physical and psychological injuries assessed at \$60,000, the out of pocket expenses of Mr Ireland should be allowed and the plaintiff should be awarded exemplary damages in the amount of \$50,000 (paragraphs 81-87);
 13. For all these reasons, the plaintiff's claims should be allowed and the Cross-Claim of the defendant should be dismissed.
1. Detailed written submissions were also relied on by the defendant, Ms Riechelmann. In her written submissions filed on 26 October 2022, Ms Riechelmann, submits, in general summary, as follows:
 1. For various reasons set out in the written submissions, the plaintiff Mr McCabe should not be regarded as a witness or person of truth. He took various actions to destroy the reputation of Ms Wells and to cast doubt on Ms Riechelmann's reliability. He took various steps after the March 2018 incident to manipulate information given to the police to prevent himself being charged, including in preparing statements for three witnesses. His evidence that he had never read the Professional Conduct Rules should be rejected. In summary, the evidence of Mr McCabe should be rejected unless "independently corroborated by contemporaneous documents or eyewitness accounts": paragraphs 2-3;
 2. While there was long-standing tension between Mr McCabe and Ms Riechelmann, Mr McCabe engaged in a campaign to belittle and denigrate Ms Riechelmann, and interfere with her relationship with Mr Lavers. On a number of occasions, he would manipulate and exaggerate the accounts of her conduct and misrepresent the facts. This should be taken into account in assessing his evidence, reliability and credibility. His description of Ms Riechelmann's actions towards him was exaggerated. On a number of occasions Mr McCabe demonstrated "outright aggression": paragraph 4;

3. The June 2017 incident, involving throwing a glass of wine towards Mr McCabe, did not involve a battery. There were doubts that the incident was intentional and, even if it was, the act of throwing the contents of the glass of wine was not done to cause "injury" within the CLA. In oral submissions, Senior Counsel for the defendant recognised the relevance of the Court of Appeal decision in Ibbett, above, to the term "injury" in s 3B(1) of the CLA. Further, any non-economic loss if the incident was negligent did not satisfy s 16 of the CLA: paragraphs 5-6;
4. In relation to the 13 March 2018 incident if the battery is accepted, there was only apprehension and no contact. Section 3B of the CLA does not apply and the "negligence" claim does not exceed the threshold: paragraph 9. Again, in oral submissions the decision of the Court of Appeal in Ibbett was noted in relation to the tortious assault alleged and the concept of "injury";
5. In relation to the 31 March 2018 incident, it is "binary" with either one account being correct or the other false. Although Ms Riechelmann had consumed three mixed spirits drinks after about 7pm there was no sign of intoxication. The accounts of Mr Pusell and Mr McCabe as to the length of time Ms Riechelmann was "bashing" on Mr Lavers' door should not be accepted. Mr Pusell was not an impressive witness. Mr McCabe's evidence as to the time of Ms Riechelmann banging on the door is another manipulation by him of the facts. Ms Riechelmann was concerned about Mr Lavers' welfare when he had not responded to her knocking on his door. Mr McCabe's complaints to police were another attempt by him to deploy manipulation and distortion to poorly characterise Ms Riechelmann. Mr McCabe could easily have retreated inside his unit and closed the door to await the police but he elected to remain outside his unit in the foyer, to goad Ms Riechelmann. He was "spoiling for a fight". Mr McCabe was clearly intoxicated and unnecessarily aggressive. There was no basis for his allegation that Ms Riechelmann was intoxicated on the night: paragraphs 10-24;
6. There is inconsistent evidence as to who assaulted who and how. Mr Pusell's evidence was limited and it should be rejected by the court. He saw what he did through the peep hole in the door of his unit. He did not see Ms Riechelmann's arm strike Mr McCabe. Even if he did see this there was no evidence to support any proposition that this was a violent act against Mr McCabe. Mr McCabe's evidence of a five punch assault by Ms Riechelmann should be rejected as a fanciful allegation. The evidence "smacks of reconstruction" and appears to be inconsistent with the video evidence. Ms Wells was in the hall at the time it did not see Ms Riechelmann strike or attempt to strike Mr McCabe at any time. Ms Wells did not see any sign of injury to Mr McCabe's face. He sought no immediate medical assistance. It is possible Mr McCabe was unintentionally struck on the face when he lunged towards Ms Riechelmann. Mr McCabe's evidence is inconsistent about the number of times he claims Ms Riechelmann struck him. See the Amended Statement of Claim: paragraphs 25-30;
7. There is conflicting evidence about what happened to Ms Riechelmann's mobile phone. The court should accept that Mr McCabe punched the mobile telephone out of Ms Riechelmann's hand constituting a battery. This is consistent with her comment recorded on the video. Mr

McCabe had a vested interest in getting the mobile telephone away from her. The fact Ms Wells cannot recall the details of Mr McCabe grabbing at Ms Riechelmann when recounting her recollections to the court does not erode the evidence given by Ms Riechelmann and in court the video supports Ms Riechelmann's account: paragraphs 31-40;

8. The court would accept Ms Riechelmann's account of the first strangling incident. It was reported by her to police on the night, it was reported to Mr Lavers, she had bruises to the upper chest and it is consistent with Ms Hart-Waters' evidence. The court should reject Mr McCabe's account and accept Ms Riechelmann's account that she was choked and thrown to the floor by Mr McCabe before he went back into the unit: paragraphs 41-43;
 9. The court should also accept Ms Wells' account of the second strangulation incident. That is, there were two strangling incidents. The fact Ms Riechelmann could not remember the Wells' incident is not decisive. It is consistent with Ms Wells' statement to police which was not challenged by Mr McCabe on the night: paragraphs 44-54;
 10. The photographs of the bruises on Mr McCabe's face would not satisfy the Court of him having been punched five times to the left eye socket with force. The evidence relating to Ms Riechelmann's bruising, particularly from Ms Hart-Waters, is persuasive. Dr Begum's notes are not determinative as the examination was some days later and bruising may have abated. The neck bruising could also not have been recorded by Dr Begum: paragraphs 55-59;
 11. Mr McCabe should be held by the court to have deleted video from Ms Riechelmann's phone. The mobile phone was placed on the kitchen bench in Mr McCabe's unit where it was capable of being accessed by Mr McCabe. Mr McCabe had a powerful motive to destroy whatever video footage remained: paragraphs 60-68;
 12. Mr McCabe's claim regarding the assault on him by Ms Riechelmann on 31 March 2018 should be dismissed. Ms Riechelmann's Cross-Claim against Mr McCabe should be upheld with substantial damages as set out in the table in the submissions totalling \$600,000-\$630,000: submissions paragraph 69-74.
1. Written reply submissions filed 8 November 2022 were relied on by the plaintiff. In general summary, these submissions:
 1. Disputed that the plaintiff waged a "campaign" against the defendant – paragraph 1;
 2. Submitted that the plaintiff had a valid reason for preparing drafts of the various statements forwarded to the Police – he wanted the truth to be told – paragraphs 2-6;
 3. Argued that the video evidence was consistent with the plaintiff's version of events – paragraph 7;
 4. Made detailed submissions about the incident on 31 March 2018 including that the plaintiff did not make any aggressive movements to the defendant, that there was no satisfactory direct evidence that the defendant was injured by the plaintiff's sunglasses, that there were

major problems with Ms Wells' evidence and that there was no evidence that the plaintiff deleted anything from the defendant's phone – paragraph 11-20. In oral submissions, it was emphasised that the telephone was on the ground or with Mrs Pusell at the time of the Riechelmann first alleged incident and thus could not have recorded it. Mr McCabe would thus have no reason to delete any video;

5. Made detailed submissions in relation to the defendant's damages claims including that the 31 March 2018 incident did not affect the defendant's capacity to work in her job, that symptoms of the defendant were really related to the breakup of her relationship with Mr Lavers or were of a long standing nature or were connected to the fact of the litigation. In addition, it was submitted that the defendant's income tax returns showed similar earnings after the 31 March 2018 incident and did not support even the grant of a buffer for economic loss.

Consideration

Credit and reliability – principles applicable

1. Numerous issues were raised by the parties in their submissions in relation to the credit and reliability of the various witnesses. Vigorous attacks were made by the parties on each other, and the central witnesses called. Heavy reliance was placed by both parties on the video and photographic evidence which were Exhibits A, G and H in the proceedings. The way the case was pleaded and argued, requires the Court not only to make a number of factual findings but also to make findings in relation to credit and reliability.
2. In determining which witness or group of witnesses is to be preferred on the various issues, the Court is not obliged to accept one witness only or one version only. In *A v B* [2021] NSWDC 491 I stated the following in paragraph 203:

"203 In determining its factual findings in a particular matter, a court is not bound to accept any of the evidence which a particular witness attests to and similarly may accept part only of a particular witness's evidence: *Cubillo v Commonwealth* (No 2) [2000] FCA 1084; (2000) 103 FCR 1 at [118]- [123]; *Danckert v Tonkin* [2015] NSWSC 1570 at [152]. Accordingly, it does not follow from the fact that part of the evidence of a witness is rejected that other aspects must also be rejected and that is so even if it be found that the witness was lying: *Sangha v Baxter* [2009] NSWCA 78 at [155]- [156]; *Croucher v Cachia* [2016] NSWCA 132 at [129]."

1. I also note the comments of Ipp JA in *Goodrich Aerospace Pty Ltd v Arsic* [2006] NSWCA 187 at [20], relied on by the defendant. A witness may be honest but have a limited or ultimately incorrect recollection of a matter.
2. In *Saravinovska v Saravinovski* (No 6) [2016] NSWSC 964 Kunc J set out in detail the legal principles applicable to fact finding and credit, particularly where serious findings are urged to be made. At paragraph 467, Kunc J stated that evidence is to be preferred which is inherently probable in the circumstances or is given by a witness against their interest. His

Honour noted that evidence of independent witnesses being persons who have no reason to be partisan may be decisive in resolving the conflicting evidence of interested parties. His Honour referred to appellate authority cautioning against global credit findings.

3. An important matter relied on by both parties was the various film evidence taken on mobile phones which was part of Exhibit A. As was stated by Sackville AJA (with whom McColl JA agreed) in *Argo Managing Agency Ltd v Al Kammessy* [2018] NSWCA 176 at paragraph 54, while film footage is undoubtedly useful, it is important to bear in mind the limitations of such evidence: "Courts have repeatedly warned about the dangers of relying on photographic evidence, particularly in relation to perspective and distance ... Similar warnings have been given in relation to CCTV footage". No expert evidence was called to assist in interpreting the film evidence. However, relevant witnesses were examined in detail about the video evidence which assisted the court and must be taken into account.
4. In relation to Mr Pusell, he gave evidence about what he saw through the peephole in the door with a fisheye lens. No expert evidence was given in relation to the effect of a fisheye lens on a person's perception. Mr Pusell accepted that his view through the peephole was limited. Ms Riechelmann made submissions that his evidence was limited and should not be accepted. As indicated above, I found Mr Pusell to be an honest witness.
5. It is important to consider the different versions of events in the context of any independent evidence or contemporary independent documents or independent witness accounts which indicate that one version is more likely than the other. What is the apparent logic of events in the light of clearly established facts is also relevant.
6. In *Fox v Percy* [2003] HCA 22; (2003) 214 CLR 118 at [31] the majority of the High Court stated as follows:

"31. Further, in recent years, judges have become more aware of scientific research that has cast doubt on the ability of judges (or anyone else) to tell truth from falsehood accurately on the basis of such appearances. Considerations such as these have encouraged judges, both at trial and on appeal, to limit their reliance on the appearances of witnesses and to reason to their conclusions, as far as possible, on the basis of contemporary materials, objectively established facts and the apparent logic of events. This does not eliminate the established principles about witness credibility; but it tends to reduce the occasions where those principles are seen as critical."

1. I also take into account the evidence suggesting that Mr McCabe, Ms Wells and Ms Riechelmann were intoxicated to various degrees on the night of 31 March 2018. I note that it was submitted by Ms Riechelmann that she was not intoxicated: submissions paragraphs 11(D) and 22. That was contrary to the view of the relevant attending police officer and Mr Pusell (who had previously worked at an hotel). This is considered further below.

Credit and reliability of the witnesses

1. I now turn to consider my views in relation to the various witnesses in the light of their evidence. I have already commented in relation to Mr and Mrs Pusell, Mr Lavers and Ms Hart-Waters. I had the advantage of seeing Mr McCabe, Ms Riechelmann and Ms Wells give evidence, including being cross-examined in some detail, over an extensive period.

Mr McCabe

1. The events of the evening of 31 March 2018 do not place either Mr McCabe or Ms Riechelmann in a good light. For reasons which I will set out below, in my view Mr McCabe, Ms Riechelmann and Ms Wells were intoxicated to various degrees on the evening. Ms Riechelmann, late in the evening at about 9.30pm, turned up to the block of units at Ozone Street and knocked and then banged loudly on Mr Lavers' door on and off over an unreasonable period. It must have been clear to her that he was either not there or did not want to open the door to her. I reject the proposition that she was seeking simply to check on his welfare or believed he was asleep. I conclude and find that she wanted him to open the door so that she could talk to him and potentially re-establish or improve their relationship which had faltered.
2. In the course of the various interchanges between Mr McCabe and Ms Riechelmann, various insults and obscenities were exchanged. Contrary to Mr McCabe's evidence, I find that he did insult her on a number of occasions, calling her "mad", "insane" and a "drunk Qantas steward". He was irritated by her activities and presence and made his opinion clear that he thought the apparent termination of the relationship with Mr Lavers was a good outcome. However, I accept his evidence that he wanted Ms Riechelmann to leave the block and that he was concerned that the inhabitants of the unit block, including children, were upset or disturbed by Ms Riechelmann's activities. As well as insulting Ms Riechelmann, I am satisfied, despite Mr McCabe's denials, that he was on occasions goading her having regard to the position she was in with there being no answer at Mr Lavers' door to her loud knocking.
3. There were numerous aspects of Mr McCabe's evidence which caused concern to the Court. Some of these are as follows:
 1. Mr McCabe denying that he was insulting Ms Riechelmann on the night in question when he clearly was from the language he used in the video evidence;
 2. His denials that he was aware that he was a person of interest to Police, when in my view, it was clear to him that the Police were considering all parties involved and wanted to take a statement from him, particularly in the light of what Ms Wells said about his conduct towards Ms Riechelmann in the presence of a Police officer. The effort Mr McCabe took in obtaining and preparing statements is strong evidence of his belief and concerns as to the risks in his position;

3. His denials that he wanted to control the obtaining of information for Police in circumstances where I am satisfied that he was doing just that by refusing an interview with Police, preparing his own statement and then preparing draft statements (and obtaining signed statements) for Police from Mr and Mrs Pusell and Ms Wells;
4. His evidence that he had never seen or read the Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015 (NSW) and their predecessors despite being a solicitor admitted for a lengthy period of time. This, at the least, is a very surprising and concerning claim in the light of the fact that he agreed he had studied ethics. I think it likely that he did study an earlier version of the relevant solicitors Rules. However, he may well have forgotten doing so in the light of the nature of his practice. I am unable to find, on the evidence, that he lied to the Court on this matter. I accept the plaintiff's submissions on that point;
5. His apparent lack of knowledge of the ethical obligations in the various Rules in relation to conducting interviews of witnesses;
6. His approach to Ms Riechelmann's treating psychiatrist with a letter containing material attacking her without obtaining the authority of Ms Riechelmann or her solicitor (as he should have done);
7. Entering into correspondence with Ms Wells about her evidence and alleged inconsistencies with it in circumstances where she had provided a second and differing statement. I am satisfied that at least one probable purpose of this letter was an attempt to discourage Ms Wells from giving evidence at any final hearing;
8. Discussing with Mrs Pusell the deletion of materials on Ms Riechelmann's phone while Mr Pusell was in the room. At the time, the plaintiff, Mr McCabe, was acting as a solicitor, was the plaintiff and was an important witness;
9. Sending a letter to Dr Roberts in which he gave opinions on alcohol abuse and provided comments on statement evidence including an allegation that certain matters indicated a "delusional mind" in Ms Riechelmann;
10. Corresponding by text with Ms Wells' new partner which was clearly inappropriate and dishonourable as it contained intimate details allegedly about the sexual practices of Ms Wells and himself. To his credit, Mr McCabe admitted the texts were inappropriate in his oral evidence and in correspondence.
1. In addition, in many of his answers, Mr McCabe was, in my view, a strong advocate for his position. I accept he appears on his evidence to be of the view that he was the innocent party on the evening of 31 March 2018. However, he took every opportunity in his evidence to emphasise that view and that he believed he was only setting out the truth in the various witness statements.

2. I formed the clear impression and find that Mr McCabe was using his evidence on many occasions to promote his case, to be an advocate and to place Ms Riechelmann in a very poor light. I accept the defendant's submissions on this issue. For all of the above reasons, in my view some real caution should be exercised before accepting the evidence of Mr McCabe on the central issues unless it is consistent with, or supported by, independent or objective evidence, proper inferences, the video evidence or the logic of events. However, despite these various matters I have referred to, I did not form the view, as submitted on behalf of the defendant, that Mr McCabe should be found generally not to be a witness of truth. On a number of matters, there was support for aspects of his evidence in the evidence of Mr and Mrs Pusell and Mr Lavers, particularly (in the case of Mr Lavers) as to the incidents in 2014-15 and 2017.

Ms Riechelmann

1. The defendant, Ms Riechelmann, gave extensive oral evidence and, in particular, was cross-examined in detail.
2. As set out above, Ms Riechelmann gave evidence that she had suffered from depression for many years, including for a lengthy period prior to the 31 March 2018 incident, and had been prescribed Zoloft with the dosage increased prior to the 31 March 2018 incident. She asserts, and this is supported by the medical evidence, that her condition worsened after the 31 March 2018 incident and her breakup with Mr Lavers. In my view, Ms Riechelmann's psychological issues and the traumatic events of 31 March 2018 are of some relevance to an assessment of her reliability. For example, she gave evidence that she had poor memory. She also said she had a "gap" in her memory in relation to the events of 31 March 2018.
3. Ms Riechelmann clearly strongly disliked Mr McCabe from at least 2014. Her oral evidence even went so far as to say that she "hated" him from 2016 at the latest. The email exchanges between Ms Riechelmann and Mr McCabe in December 2016 showed that she wanted no personal contact with him and she held strong animosity towards him: Exhibit 2. This is confirmed in the 2017 text exchanges with Mr Lavers: Exhibit 5. Both Ms Riechelmann and Mr McCabe had strong views about the incident on 31 March 2018 and were clearly partisan in their opinions as to it.
4. Mr McCabe had also been a causing influence in the police applying for an apprehended violence order against Ms Riechelmann at the end of 2014.
5. Ms Riechelmann blamed Mr McCabe for a number of the problems which she had in her relationship with Mr Lavers over a number of years.
6. All of these matters show that Ms Riechelmann had a strong interest in propounding her case against Mr McCabe in her Cross-Claim.

7. In oral evidence, Ms Riechelmann in some places, in my view, intentionally downplayed her initial conduct on the night of 31 March 2018 in relation to her knocking on Mr Lavers' door, acting unreasonably and in insulting Mr McCabe. In the end, she agreed that she had said a number of obscenities to Mr McCabe but put it in the context of him insulting her. In my view, Ms Riechelmann's conduct in loudly knocking for some time on Mr Lavers' door was persistent and clearly unreasonable in the circumstances.
8. Ms Riechelmann's stated inability to remember in detail what occurred after the alleged battery outside Mr McCabe's doorway is also relevant to her reliability. She gave no persuasive evidence in relation to the strangulation incident alleged by Ms Wells other than claiming a "gap" in her memory. I note the expert medical evidence as to this issue.
9. Ms Riechelmann had also acted violently to Mr McCabe in the past including slapping him in 2014 and throwing liquid in his direction in 2017. These matters are mentioned in emphasising her poor opinion of Mr McCabe and her intense dislike of him.
10. In my opinion, Ms Riechelmann gave inaccurate evidence in relation to the 2017 incident and the attempted throwing of the glass contents at Mr McCabe later in 2018. I have discussed these matters above. Her evidence as to these incidents was unpersuasive, downplayed her conduct and is rejected.
11. I have also taken into account the final reports and evidence of Drs McClure and Roberts and that of Professor Brew as to the possibility of Ms Riechelmann suffering an amnesiac event as a result of being strangled or as a result of the trauma which could explain her failure to recall the "strangling" incident outlined by Ms Wells. I accept that there is a possibility of this although in my view it is unlikely in the light of all of the evidence including the evidence of Mr and Mrs Pusell, Mr McCabe, Ms Riechelmann and the video evidence. Ms Riechelmann's conduct after the alleged first strangling incident seems to confirm a person who is alert and able to engage in conversation. For example, she discussed the matter with Police and claimed her telephone back.
12. These matters in my view indicate that I should exercise some real caution in accepting Ms Riechelmann's evidence of the 31 March 2018 incident unless it is supported by other reliable or contemporaneous or independent or objective evidence. Having said that, Ms Riechelmann appeared to be a reasonably direct witness in her answers on many occasions and conceded many things which were against her interest, particularly in the latter stages of her evidence. This was to her credit and I take it into account in assessing her evidence. She could have taken the opportunity to embellish or expand her evidence in her favour more than she did so.

Ms Wells

1. Ms Wells appeared to be a reluctant but intelligent witness who gave her evidence directly and confidently.

2. It was clear to me that despite this, she had been upset by the events of 31 March 2018 and found her involvement in providing her two statements to be difficult and confronting.
3. Before she viewed in court the video evidence which is part of Exhibit A, Ms Wells gave a version of events which had a number of inconsistencies with the video evidence, particularly video eight.
4. Further, her account of the alleged "strangling" incident was significantly and relevantly different to that of Ms Riechermann. In addition, her evidence was that the "strangling" incident occurred after the events shown at the end of video eight whereas on Ms Riechermann's evidence, a choking or strangling incident occurred much earlier, soon after she had descended into the foyer from upstairs. This raises a clear question: if, as appears to be the case, Ms Wells was in the foyer during the first alleged strangling incident, why did she not recall it if it had occurred as Ms Riechermann claims?
5. In my view, once she had seen video eight, Ms Wells appeared to be much less confident in relation to her recollection of the events of 31 March 2018. Also, her evidence in relation to paragraph 8 of her second statement as to whether Mr McCabe had "grabbed" Ms Riechermann's telephone out of her hand and thrown it into his unit or knocked it out of Ms Riechermann's hand was in my view inconsistent and somewhat unclear and was unimpressive. In my opinion, where it is inconsistent, her evidence in her second statement as to this incident with the telephone is to be preferred as it was recorded closer to the events in question than her oral evidence. The evidence also suggests this statement was prepared by her independently of the defendant's solicitors. There was nothing in her first statement as to how Ms Riechermann's phone left her hand.
6. I formed the clear impression from her evidence that Ms Wells objected to having to give detailed oral evidence and, in particular, objected to being cross-examined in some detail and tested on her evidence. While she did not recall either of them, in the end she stated that both Mr McCabe's version and Ms Riechermann's version of the first alleged strangling incident may have occurred: T770.1-29; T771.19-T772.35.
7. I find that having regard to the relationship between Ms Wells and Mr McCabe, which Ms Wells herself described as "volatile", and the circumstances in which it ended, including the offensive texts sent to Ms Wells' current partner, there exists a significant degree of animosity between Mr McCabe and Ms Wells. This is partly supported by Ms Wells giving her second statement which is significantly inconsistent with her first statement. That animosity is relevant to an assessment of the reliability and independence of Ms Wells' account of the 31 March 2018 incident, and particularly Mr McCabe's involvement in it.
8. The inconsistency between Ms Wells' initial factual version in her oral evidence and the video evidence, the significant differences between her account of the "strangling" incident and that of Ms Riechermann, the differences as to the timing of the alleged "strangling" incident, Ms Wells' inconsistent evidence regarding paragraph 8 of her second statement and the animosity between Ms Wells and Mr McCabe, all lead me to the conclusion that

some real caution should be exercised before accepting Ms Wells' evidence as to the events of 31 March 2018, particularly in relation to her version of the "strangling" incident, unless it is confirmed or supported by other evidence or may properly be inferred from other evidence. In particular, Ms Wells did not appear to be a witness of such reliability as to be preferred overall to Mr McCabe or Ms Riechelmann as to the events of 31 March 2018.

Medical findings

Mr McCabe

1. In the Amended Statement of Claim, Mr McCabe particularises his injuries and disabilities resulting from the alleged batteries and assaults as including "abrasion to the face" and "psychological symptomatology resulting in chronic adjustment disorder with depressed and anxious mood". Mr McCabe submits that these injuries are established by the evidence.
2. The abrasion to the face appears to have been of a reasonably minor nature. An allegation was made of injuries to an arm, but these were not apparent on the photographic evidence and it is unclear how they occurred. At the least, they were minor.
3. In my view, the psychological injury claimed is not established by the medical evidence. Whilst the referral from Dr Girgis on 22 June 2018 refers to anxiety, stress and depression, Dr Girgis has no apparent qualifications in psychology or psychiatry. There is no evidence of Mr McCabe missing work or avoiding work. He appears to have attended social events after the 31 March 2018 incident without difficulty. Anxiety and stress often arise from being in a position of conflict. There are no further recent reports from Dr Girgis. The psychologist Mr Ireland indicated in his report that he preferred not to give a formal diagnosis and his "provisional diagnosis" was post-traumatic stress disorder. This was not confirmed as a formal diagnosis. There is no later report. In my view, this qualified opinion is not sufficient to establish this serious psychiatric medical condition on the balance of probabilities. It is also not the injury particularised.
4. There was no evidence that the events of 31 March 2018 affected Mr McCabe's general life in other than fairly minor ways. It is to be expected that participating in traumatic events involving conflict and the police would cause some anxiety and stress, but I am not satisfied on the evidence that it gave rise to any recognised psychiatric condition, particularly post-traumatic stress disorder, justifying an award of substantial damages, in the event that liability is established.

Ms Riechelmann

1. It is submitted by Ms Riechelmann that the medical evidence and her oral evidence establish first, that she had a psychiatric condition after 31 March 2018, and secondly, that the psychiatric condition was caused by or aggravated by the battery/batteries and assault alleged to have been committed by Mr McCabe on 31 March 2018.

2. Mr McCabe submits that Ms Riechelmann already had long-standing depression and other psychological symptoms prior to 31 March 2018 and that PTSD and depression have not been established as being caused by any alleged tortious act: see in particular the plaintiff's written reply submissions.
3. In my view, the evidence established clearly that Ms Riechelmann had a long-standing psychological condition prior to the events of 31 March 2018.
4. Ms Riechelmann gave evidence that she had psychological issues for at least a decade before 31 March 2018, partly arising from the stressors of her former marriage where her husband was an alcoholic: T779.16.
5. Ms Riechelmann also had what she considered to be a stressful job in working at Qantas: T779.19. Ms Riechelmann gave evidence that she was prescribed Zoloft, an antidepressant, for a period during the end of her marriage in 2007-2008: T779.31-.38; T780.24-.40.
6. The evidence also establishes that Ms Riechelmann had been meeting regularly with Ms Kate Brennan, psychologist, since January 2014, that is before the two 2014 incidents with Mr McCabe. By letter dated 3 March 2015, Ms Brennan expressed the opinion that Ms Riechelmann was suffering from depression which had recently been exacerbated by conflict in her personal relationship (presumably this is a reference to Mr Lavers and possibly Mr McCabe): Exhibit B page 99. Ms Brennan stated her treatment included psycho-education for depression and cognitive behavioural therapy. It was agreed that Ms Riechelmann would benefit from receiving regular counselling: Exhibit B page 99.
7. From this evidence, I find that Ms Riechelmann was displaying symptoms of depression from early 2014 and was diagnosed with depression from March 2015.
8. Further, the records of Miranda Medical Centre show that Ms Riechelmann was placed on a mental health treatment plan on 7 January 2014 with the diagnosis by Dr Zobair being depression: Exhibit B page 106. The plan referred to Ms Riechelmann having low mood recently with difficulty in her concentration and confidence with a difficult marriage relationship as her husband was an alcoholic. She referred to her stressful job.
9. The records of the Miranda Medical Centre show that the defendant was prescribed Zoloft on 7 January 2015 and continued to be prescribed Zoloft at various times between 2015 and February 2018, before the incident on 31 March 2018.
10. The medical notes of Dr Zobair for 7 January 2015 also seem to indicate that the dose of Zoloft was increased to assist with Ms Riechelmann's depression. Having regard to Ms Riechelmann's oral evidence and the notes at Exhibit B page 97, it appears that Ms Riechelmann had been prescribed Zoloft at 50mg per day prior to 7 January 2015 and Dr Zobair increased the dosage to 100mg per day on 7 January 2015. Dr Zobair described Ms Riechelmann as being tearful, sad and depressed with a low mood: Exhibit B page 97.

11. There are various notes in the Miranda Medical Centre records referring to the plaintiff having depression, seeing Ms Brennan and continuing on her Zoloft medication: see Exhibit B page 96 (23 April 2015), Exhibit B page 97 (15 October 2015), Exhibit B page 95 (30 December 2015 – "doesn't feel can cope with work"), Exhibit B page 94 (6 January 2016), Exhibit B page 94 (5 March 2016 – "refer psychologist") and Exhibit B page 92 (20 February 2018 - prescription printed for Zoloft 100mg one daily). Accordingly, a general practitioner at the Miranda Medical Centre prescribed Zoloft to Ms Riechelmann only several weeks before the 31 March 2018 incident.
12. The correspondence in evidence also suggests Ms Riechelmann was having mental health issues. In her 6 December 2016 email to Mr McCabe, Ms Riechelmann refers to advice given to her by her psychologist about Mr McCabe. In her text messages with Mr Lavers in June 2017, following the 4 June 2017 incident involving Mr McCabe, Ms Riechelmann states that the issues with Mr McCabe and its effect on her relationship with Mr Lavers had "affected my mental health" and that she was "scared" with "anger issues" including feeling anxious, alone, nervous and disrespected: Exhibit 5, pages 63-64.
13. In her oral evidence, Ms Riechelmann conceded taking a week off work in January 2015 because of her depression and family situation: T781.8. At a function in early 2015, Ms Riechelmann had a panic attack on seeing Mr McCabe and had to call her psychologist for assistance.
14. In addition, the effect of the apprehended violence order on Ms Riechelmann made in December 2014 was significant according to her oral evidence.
15. These matters clearly establish to my satisfaction that Ms Riechelmann was on the antidepressant Zoloft for extensive periods from at least January 2015 right up to the date of the 31 March 2018 incident. In addition, it is established by the evidence that Ms Riechelmann was suffering from depression in 2014-15 and had various psychological symptomatology including anxiety and symptoms of fear right up to the 31 March 2018 incident.
16. In *Ramsey v Denton* [2020] NSWDC 426 I stated in paragraphs 223-227 as follows:

"[223] In *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208, Ipp JA (with whom Mason P agreed) considered the High Court cases of *Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158 and *Purkess v Crittenden* [1965] HCA 34; (1965) 114 CLR 164. The court held in *Seltsam* that the onus of proof that a defendant must discharge when making the allegation that a plaintiff's pre-existing condition or injury was a contributing factor to the injury sued upon arising from the negligent act or omission was not an onus to prove that the pre-existing condition or injury had made a material contribution to the plaintiff's injury. A pre-existing condition or injury that was proved to have possible, not probable, ongoing consequences to a plaintiff must be taken into account by the court in assessing causation and damages. There was no requirement that evidence adduced by the defendant must be sufficiently precise and definite to displace the inference that the disabling condition or pain from which the plaintiff suffered was caused by the accident in

question: at [100]. Ipp JA said that what was said by the High Court in *Watts v Rake* and *Purkess v Crittenden* had to be qualified by the principles stated in *Malec v JC Hutton* [1990] HCA 20; (1990) 169 CLR 638. Ipp JA stated the following in *Seltsam* at paragraphs 104-109:

"[104] What was said in *Watts v Rake* and *Purkess v Crittenden* now has to be qualified by these principles (cf *Commonwealth of Australia v Elliott* [2004] NSWCA 360 at [81]). *Malec* has an important bearing, for example, on the way in which a court must determine whether a defendant has discharged the "disentangling" evidentiary burden on it of showing that part of the plaintiff's condition was traceable to causes other than the accident and that, had there been no accident, the plaintiff would have suffered disability from his pre-existing condition.

[105] Where a defendant alleges that the plaintiff suffered from a pre-existing condition, the evidential onus as explained in *Watts v Rake* and *Purkess v Crittenden* remains on the defendant and must be discharged by it. Nevertheless, to the extent that the issues involve hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring, the exercise of "disentanglement" discussed in those cases is more easily achieved. That is because the court is required to evaluate possibilities in these situations — not proof on a balance of probabilities.

[106] Without intending to give an exhaustive list of possibilities, it may be that, had the defendant's negligent act not occurred, a pre-existing condition might have given rise to the possibility that the plaintiff's enjoyment of life and ability to work would have been reduced and to a susceptibility to further injury; in addition, other causes entirely unrelated to the defendant's negligent act might have contributed to the plaintiff's ultimate condition.

[107] Appropriate allowances must be made for these contingencies. A proper assessment of damages requires the making of a judgment as to the economic and other consequences which might have been caused by a worsening of a pre-existing condition, had the plaintiff not been injured by the defendant's negligence. A pre-existing condition proved to have possible ongoing harmful consequences (capable of reasonable definition) to the plaintiff, even without any negligent conduct on the part of the defendant, cannot be disregarded in arriving at proper compensation.

[108] As was pointed out in *Newell v Lucas* [1964-5] NSWLR 1597 (at 1601 per Walsh J, with whose judgment Hardie and Asprey JJ agreed), the court must determine whether a comparison may be made between the plaintiff's condition prior to the injuries sustained by the defendant's negligence (including the plaintiff's economic and other prospects in that condition) and the plaintiff's condition and prospects after the injuries. Nothing in *Watts v Rake* and *Purkess v Crittenden* precludes the judge from carrying out this exercise.

[109] Of course, if the evidence does not adequately establish the pre-existing condition or its possible consequences (as was the case in *Purkess v Crittenden*), it would not be possible to carry out such a comparison and assessment. In regard to the possible consequences, a scintilla of evidence would not suffice. The evidence must be such that a reasonable person could draw from it the inference that the possible consequences contended for by the defendant existed (see *McCormick, Evidence*, 5th ed, para 338, p 511)."

224. In *Metro North Hospital and Health Service v Pierce* [2018] NSWCA 11, White JA (with whom Macfarlan and Payne JJA agreed) gave the leading judgment. The issue in that case was whether the plaintiff's epilepsy was a progressively deteriorating condition which contributed to his disability. White JA stated the following at paragraphs 110-115:

"[110] The primary judge accepted that the Hospital's negligence materially contributed to an increased burden of Ms Pierce's epilepsy. Ms Pierce submitted that accordingly the Hospital had the onus of adducing evidence that the worsened burden of her incapacity was partly the result of her pre-existing condition. In *Purkess v Crittenden* Barwick CJ, Kitto and Taylor JJ said (at 168):

... where a plaintiff has, by direct or circumstantial evidence, made out a prima facie case that incapacity has resulted from the defendant's negligence, the onus of adducing evidence that his incapacity is wholly or partly the result of some pre-existing condition or that incapacity, either total or partial, would, in any event, have resulted from a pre-existing condition, rests upon the defendant. In other words, in the absence of such evidence the plaintiff, if his evidence be accepted, will be entitled to succeed on the issue of damages and no issue will arise as to the existence of any pre-existing abnormality or its prospective results, or as to the relationship of any such abnormality to the disabilities of which he complains at the trial. It was, we think, with the character and quality of the evidence required to displace a plaintiff's prima facie case that *Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158 was essentially concerned. It was, in effect, pointed out that it is not enough for the defendant merely to suggest the existence of a progressive pre-existing condition in the plaintiff or a relationship between any such condition and the plaintiff's present incapacity. On the contrary it was stressed that both the pre-existing condition and its future probable effects or its actual relationship to that incapacity must be the subject of evidence (ie either substantive evidence in the defendant's case or evidence extracted by cross-examination in the plaintiff's case) which, if accepted, would establish with some reasonable measure of precision, what the pre-existing condition was and what its future effects, both as to their nature and their future development and progress, were likely to be. That being done, it is for the plaintiff upon the whole of the evidence to satisfy the tribunal of fact of the extent of the injury caused by the defendant's negligence.

[111] This was said in the context of a personal injury case arising from a motor vehicle accident. The plaintiff experienced severe and disabling pain in her cervical region. There was evidence that before the accident she suffered from degenerative changes in the spine which were most marked in the cervical region. It was asserted for the defendant that it was probable that at some unspecified time she would have become similarly disabled even if she had not been injured in the motor vehicle accident. The High Court held that the

medical evidence upon which the defendant relied, that was accepted by the trial judge, did not establish with any reasonable degree of precision the extent of the plaintiff's pre-existing condition or its likely future effects (at 169).

[112] In the present case the Hospital discharged its evidentiary onus of establishing that Ms Pierce's pre-existing condition was one of likely progressive deterioration. She had the legal burden of establishing the extent to which the Hospital's negligence damaged her. No reasonable precision was possible either of the likely progression of her epilepsy in the absence of the telemetry event, nor of the extent to which the defendant's negligence worsened her existing condition. The defendant's negligence in the present case was in the treatment of an existing condition that is factually remote from the circumstances in *Watts v Rake* and *Purkess v Crittenden*.

[113] In *Seltsam Pty Ltd v Ghaleb* [2005] NSWCA 208; (2005) 3 DDCR 1, Ipp JA, with whom Mason P agreed, said in relation to *Malec v J C Hutton Pty Ltd*:

103 Therefore, according to *Malec*:

- (a) In the assessment of damages, the law takes account of hypothetical situations of the past, future effects of physical injury or degeneration, and the chance of future or hypothetical events occurring.
- (b) The court must form an estimate of the likelihood that the alleged hypothetical past situation would have occurred.
- (c) The court must form an estimate of the likelihood of the possibility of alleged future events occurring.
- (d) These matters require an evaluation of possibilities and are to be distinguished from events that are alleged to have actually occurred in the past, which must be proved on a balance of probabilities.

104 What was said in *Watts v Rake* and *Purkess v Crittenden* now has to be qualified by these principles (cf *Commonwealth v Elliott* [2004] NSWCA 360 at [81]). *Malec* has an important bearing, for example, on the way in which a court must determine whether a defendant has discharged the 'disentangling' evidentiary burden on it of showing that part of the plaintiff's condition was traceable to causes other than the accident and that, had there been no accident, the plaintiff would have suffered disability from his pre-existing condition.

[114] The fact that Ms Pierce suffered epilepsy that was likely to deteriorate progressively was to be determined on the probabilities. The likely extent of the progression of her condition was an issue to which the principles in *Malec v J C Hutton Pty Ltd* applied. The fact that Ms Pierce's epilepsy was a progressively deteriorating condition was established on the balance of probabilities.

- [115] For these reasons I reject Ms Pierce's challenge to the primary judge's finding that her epilepsy condition as it existed before the telemetry event of 5 January 2010 was likely to deteriorate progressively."
225. In *Gulic v Angelovski* [2018] NSWCA 161 Sackville AJA (with whom Beazley P and McColl JA agreed) gave the leading judgment. The case was a claim under the Motor Accidents Compensation Act 1999 (NSW) ("MACA"). At paragraphs 34-38 Sackville AJA stated as follows:
- "[34] The parties' submissions did not direct close attention to the principles applying where a plaintiff who claims damages for loss of earning capacity by reason of the defendant's negligence suffered from pre-existing injuries or disabilities prior to the date the negligence occurred. Although the principles were not in dispute, it is convenient to refer to them.
- [35] Section 5D of the Civil Liability Act 2002 (NSW) (CL Act) was in force at the notional trial date. Section 5D(1)(a) provides that a determination that negligence caused particular harm requires the negligence to be a necessary condition of the relevant harm. Section 5E of the CL Act states that in proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.
- [36] A plaintiff is entitled to damages for any diminution in his or her earning capacity resulting from injuries sustained by reason of the defendant's negligence. But the plaintiff is not entitled to damages for the degree of incapacity that arose from conditions pre-dating the defendant's negligence. It is therefore ordinarily necessary to assess the plaintiff's earning capacity prior to and following the accident. That task includes assessing the plaintiff's economic prospects at the relevant times.
- [37] The plaintiff must adduce evidence that the injuries sustained in consequence of the defendant's negligence are or may be associated with his or her post-accident inability to exploit fully his or her earning capacity. Evidence of this character ordinarily establishes a prima facie case that the defendant's negligence caused the plaintiff's diminished earning capacity. If the defendant contends that the plaintiff's current diminished earning capacity is due in whole or in part to a pre-existing injury or condition, the defendant has the burden of adducing evidence to that effect. The evidence must be such as to enable the court to draw an inference as to the consequences for the future of the pre-existing condition. If evidence of this kind is adduced, the plaintiff retains the burden of proving that the loss of earning capacity was caused by the injuries sustained as a consequence of the defendant's negligence.
- [38] In applying these principles it may be necessary to allow for possibilities and contingencies. For example, a defendant may discharge the evidential onus by adducing evidence that, had the accident not occurred, the plaintiff's ability to work might have been compromised in any event by a pre-existing condition. In such a case an allowance must be made for the possibility of a deterioration in the plaintiff's earning capacity occurring independently of the defendant's negligence. Conversely, a plaintiff whose earning capacity is diminished at

the date the accident occurred may be entitled to damages that take account of the chance that his or her earning capacity would have increased but for the injuries sustained in the accident."

226. In *Dal v Chol* [2018] NSWCA 219, White JA considered the effect of a subsequent motor vehicle accident on the plaintiff's claim for damages in relation to an earlier accident. White JA stated as follows at paragraph 5:

"[5] The appellant did not plead nor seek to prove that the second motor vehicle accident in July 2015 had contributed in any degree to the respondent's present incapacity to perform the kind of work that he performed as a motor vehicle mechanic prior to the 2013 collision. No submission to that effect was advanced on appeal or before the primary judge. This Court held in *Kessey v Golledge* [1999] NSWCA 424 at [46] that the defendant bore the onus of adducing evidence that the plaintiff's incapacity at trial was caused or contributed to by a second accident. This is consistent with *Purkess v Crittenden* (1965) 114 CLR 164 at 168; [1965] HCA 34 and *Watts v Rake* (1960) 108 CLR 158 at 163–164; [1960] HCA 58 where the High Court held that if the defendant alleged that the injured plaintiff's incapacity was wholly or partly due to a pre-existing condition, the onus of adducing evidence of that matter lay on the defendant. That must be so a fortiori if the defendant contends that a later injury has contributed to the plaintiff's incapacity. The only relevance of the second motor accident is that it brought to an end the respondent's employment with Evapco."

227. See also the discussion in *Kabic v AAI Limited trading as GIO* [2019] NSWCA 247 where the Court of Appeal also confirmed *Seltsam*, above, and *Metro North*, above: at [170]–[172]. The Court of Appeal emphasised that the approach to assessing damages in relation to hypothetical and future events in *Malec v J C Hutton Pty Ltd* [1990] HCA 20; (1990) 169 CLR 638 at [640] and [642]–[643] applied also to past hypothetical events. Justice White (with whom Meagher and McCallum JJA agreed) stated as follows at paragraph 174:

"174. The submission did not acknowledge that the principles in *Malec v J C Hutton Pty Ltd* apply also to past hypothetical events. That is, that in the assessment of past economic loss, account should be taken of the possibility that if he had not been injured, Mr Kabic might have been unable to work as a formworker even up to trial, that was more than five years after his injury."

1. Although the decision in *Ramsey v Denton* was overturned by the Court of Appeal on another ground, the statement of principles at first instance was not questioned: *Ramsey v Denton* [2021] NSWCA 310 at [53].
2. The expert reports concerning Ms Riechelmann's medical conditions obtained after the 31 March 2018 incident recorded various diagnoses. Dr Roberts, psychiatrist, in his report dated 13 November 2020 noted the history of Ms Riechelmann seeking psychological assistance when she was married and thereafter and diagnosed major depressive disorder with comorbid substance use disorder relating to alcohol. Ms Riechelmann conceded that she increased her alcohol consumption on various days after the incident. In his report, Dr McClure, psychiatrist, diagnosed an adjustment disorder with mixed anxiety and depressed mood with Ms Riechelmann's psychological symptoms becoming more pronounced since

she left work.

3. Dr Keller, the plaintiff's treating psychiatrist, diagnosed post-traumatic stress disorder in his report. He also diagnosed persistent depressive disorder.
4. Dr Keller had access to Dr Roberts' report with the extensive earlier history in preparing his third report but stood by his diagnosis of post-traumatic stress disorder. Dr Keller has reviewed Ms Riechelmann on a number of occasions. The plaintiff gave evidence of dreams involving Mr McCabe and Mr Lavers since the 31 March 2018 incident.
5. In my view, taking into account the various medical reports, the plaintiff's oral evidence, and in particular, the plaintiff's evidence as to her condition, I find that the plaintiff had either depression or persistent depressive disorder as at 31 March 2018 which was aggravated by the events of 31 March 2018. Having regard to the plaintiff's evidence of her symptoms and the reports of Dr Keller, I prefer Dr Keller's view that the plaintiff also has PTSD. He has seen the plaintiff far more frequently than Dr Roberts or Dr McClure, is her treating psychiatrist and I found his report to be persuasive on this issue.
6. However, the medical conditions of the plaintiff did not appear to unduly affect her capacity for work at Qantas. She was able to continue with her duties at Qantas in 2018-19 and only ceased because of her redundancy due to the COVID-19 pandemic. She also had other work injuries.
7. I accept the plaintiff's evidence that, absent redundancy, she would have been able with her various symptoms to continue working at Qantas. This is supported by her work history from 31 March 2018 to the end of 2019. Accordingly, the aggravation of her medical symptoms and the acquisition of PTSD (which appears to have been reasonably moderate and not heavily debilitating) did not appear to affect the capacity of the plaintiff to work in her job as a steward for Qantas. That is relevant to the plaintiff's damages' claim for loss of future earning capacity.
8. Therefore, if it is established that the defendant was subject to a tortious battery (or batteries) or an assault by Mr McCabe on 31 March 2018, I find that that tortious act (or acts) aggravated the plaintiff's depression and caused PTSD. I find that the evidence before the Court satisfies me that the plaintiff has discharged his evidentiary burden of showing that the defendant had long standing depression and anxiety prior to the 31 March 2018 incident and that this would have continued but for the 31 March 2018 incident but was aggravated by it. There was no indication that the defendant was likely to cease taking Zoloft, particularly with the stressors in her job and her history of depression, absent the 31 March 2018 incident.
9. I turn to consider the three reports obtained on behalf of the defendant following the evidence of Ms Wells.

10. Dr McClure deferred to a neurologist or alcohol specialist in relation to the possible theories of alcohol induced amnesia or hypoxia secondary to strangulation or some other neurological cause.
11. Professor Brew, a well-qualified neurologist, whose opinions I accept, rejected alcohol induced amnesia due to the limited consumption of alcohol by Mr Riechelmann on the night. He also rejected as unlikely a neurological cause due to the period governed by the memory loss being well defined. He expressed the opinion that hypoxia secondary to strangulation was possible but not definite. Dr Roberts expressed a similar view.
12. I am not satisfied that these opinions support a finding of either alcohol induced amnesia or a neurological cause. On her evidence, which I accept on this issue, Ms Riechelmann had only a fairly limited consumption of alcohol on the relevant evening. She had no reported epilepsy, a condition raised by Professor Brew in his report as an explanation for amnesia of an event. Her absence of memory was for a well defined period.
13. Ms Riechelmann apparently reported no neck or throat bruising to her general practitioner on 5 April 2018 consistent with a significant degree of pressure in these areas: see also Exhibit G. Mere redness in the area not leading to bruising as reported by Ms Hart-Waters (see also Exhibit H) does not appear to be consistent with significant pressure. There was no expert evidence that redness in the area alone was consistent with memory loss due to hypoxia secondary to strangulation. Professor Brew also noted the lack of reported neck bruising in his report. Having regard to these matters, I am not satisfied that hypoxia secondary to strangulation has been established as a likely as opposed to a possible cause of Ms Riechelmann's lack of memory.
14. That leaves as a possible explanation for Ms Riechelmann's lack of memory of the Wells' strangling incident the effect of trauma on memory storage as raised by Dr McClure.
15. I accept the opinion of Dr McClure that a highly traumatic event may lead to a lack of conscious recollection of the event including in the context of PTSD. Ms Riechelmann reported having gaps in her memory and only recalling a few events after the first alleged incident such as going back up to Mr Lavers' door and slumping near the external foyer door to Mr McCabe's unit.
16. However, the evidence shows Ms Riechelmann otherwise to be alert and able to converse, including after what she alleges was the first choking or strangling incident (on the assumption it occurred as she stated). The following is noted:
 1. Ms Riechelmann was able in her oral evidence to give extensive detail in relation to the alleged first incident;
 2. Ms Riechelmann was able to attempt to go back up the stairs as shown towards the end of video 8 after the alleged first incident;

3. Ms Riechelmann was able to have a lucid (but limited) conversation with Mr McCabe in relation to his sister as shown at the end of video 8;
 4. Ms Riechelmann was aware she had lost her telephone and was able to demand its return as shown on the video evidence;
 5. Ms Riechelmann was able to go outside, sit on Mr McCabe's car and have a conversation with him after the alleged second incident;
 6. Ms Riechelmann was able to bang on Mr McCabe's external unit window and demand the return of her telephone after the second alleged incident;
 7. Ms Riechelmann waited for the police to arrive and, on the evidence, was able after the alleged second incident to have a conversation with police officers upon their arrival alleging an attack by Mr McCabe and provide some detail: see Exhibit 3 pages 160, 166;
 8. Ms Riechelmann was able to send SMS messages to Mr Lavers later that evening after the alleged second incident.
1. However, Ms Riechelmann did refer to having gaps in her memory as stated.
 2. Further, there was no clear evidence that Drs McClure and Roberts had viewed the video evidence in Exhibit A and taken specifically into account the various matters I have mentioned in the penultimate paragraph in coming to their opinions.
 3. This analysis leads me to the conclusion that the effect of trauma on memory storage may be a possible explanation for Ms Riechelmann's gaps in memory and her apparent inability to recall the Wells' alleged second incident but is not a likely explanation having regard to the factors I have mentioned and the expert medical evidence. Dr McClure in his report describes trauma as being a "hypothetical medical explanation" for forgetting.

Determination of and findings in relation to the central factual issues

The 3 June 2017 incident

1. The plaintiff, Mr McCabe, pleads in his Amended Statement of Claim that on 3 June 2017 Ms Riechelmann committed a tortious trespass against him constituting a battery by throwing a glass of wine over his back and head.
2. Mr McCabe's oral evidence supports this factual allegation.
3. Ms Riechelmann claims that this act by her was an act of self-defence and a negligent and involuntary response to an apparent approach by Mr McCabe towards her when she was standing with friends at the JD's restaurant and bar in Cronulla. It is pleaded that the act was not intended to cause injury to Mr McCabe: Amended Defence paragraphs 1-2. "Injury" as used in s3B(1)(a) of the Civil Liability Act is not specifically defined in the Act but was considered in Ibbett, above. In her oral evidence, Ms Riechelmann denied throwing the drink following Mr McCabe walking past her: T886-7.

4. Mr Lavers' evidence supports the conclusion that Ms Riechelmann threw a glass of wine on Mr McCabe and that it saturated the rear of his shirt, his rear shoulders and his back: T69.30; T70.48-T71.28.
5. Having considered the different versions in the evidence, I clearly prefer the evidence of Mr McCabe and Mr Lavers on this issue. I found Ms Riechelmann's evidence at T886-7 to be unpersuasive and I reject it.
6. I am comfortably satisfied and find as follows:
 1. Ms Riechelmann saw Mr McCabe approach the area where she was standing with others. She had seen him watching her earlier in the evening;
 2. Ms Riechelmann threw the glass of wine over Mr McCabe's head, rear shoulders and back once he had passed her and was approaching the stairs in the restaurant/bar – this is consistent with and established by Mr McCabe's and Mr Lavers' evidence. I reject Ms Riechelmann's version that she threw the wine towards Mr McCabe as he approached her. If she had, it is unlikely that his back and shoulders and head as opposed to his front would be wet from the wine. I prefer Mr Lavers' and Mr McCabe's evidence on this issue. Mr Lavers was clear and persuasive in his evidence as to the incident. It was consistent with Mr McCabe's evidence. I did not perceive any bias in Mr Lavers' evidence;
 3. Ms Riechelmann did not believe she was in any danger from Mr McCabe at the time she threw the wine as he had passed her and was walking away from her towards the stairs. She acted as she did as she disliked Mr McCabe and was angry with him;
 4. The glass of wine was thrown by Ms Riechelmann at Mr McCabe intentionally and not merely negligently or involuntarily. As Mr McCabe had passed her, Ms Riechelmann must have formed the intention to throw the contents at Mr McCabe who was walking away from her;
 5. It was intended by Ms Riechelmann to injure Mr McCabe in the sense of saturating his clothes, shoulders, back and head and causing him distress, anxiety and agitation. In my view, this can be comfortably inferred from the evidence;
 6. I reject the suggestion that Ms Riechelmann was acting in self-defence whether at common law or under the CLA. There was no unlawful or tortious conduct being committed by Mr McCabe. There was no threat, actual or apparent, from him at the relevant time. He had walked past her. The conduct of Ms Riechelmann was not reasonable objectively or in the circumstances in which she was placed. Her subjective reaction in the circumstances faced by her was manifestly unreasonable. Her conduct was also not a reasonable response to the circumstances as perceived by her. Once Mr McCabe had walked past her, there could be no perceived threat to her;

7. These conclusions gain some support from Ms Riechelmann's text to Mr Lavers soon after, where she says that she had "anger issues", knew what she did "on Saturday was wrong" and she "did not know" why she threw the drink: Exhibit 5.
8. The tort of battery was thus committed by Ms Riechelmann in relation to Mr McCabe on 3 June 2017. I will assess damages further below. I reject the submission of Ms Riechelmann that the requirements for a battery had not been satisfied: written submissions dated 25 October 2022 paragraphs 6-8. If this was correct, persons could intentionally throw glasses of liquid at each other without any tortious consequences. That could include glasses of coloured liquid. I think it very unlikely that this was intended by the framers of the CLA. See also Ibbett, above at [5]-[11], [125] and [218] relating to the definition of "injury" in s3B(1)(a) of the CLA. This reasoning would, in my view, extend to a battery of the type committed here. Mr McCabe, was stressed, agitated and anxious immediately after the throwing of the drink.

The 15 June 2018 incident

1. Mr McCabe pleads that Ms Riechelmann assaulted him on 15 June 2018 by having a glass of wine in her hand and moving the glass in his direction so as to indicate she was going to throw the contents of the glass over him but without doing so: Amended Statement of Claim paragraph 4.
2. Ms Riechelmann in her Amended Defence denies that the movement of the arm with the glass as alleged was an assault or battery, claims it was not intended to injure and was not intended to cause any apprehension of harm: paragraphs 11A and 12B.
3. I reject there being a tortious battery as there was no contact physically with Mr McCabe by any part of Ms Riechelmann's body or the contents of her glass: see T316.24.
4. Mr McCabe's evidence supports his factual claim: T316.13-T316.39.
5. Ms Riechelmann's evidence was somewhat unclear as to the incident. She said she thought she was holding an empty glass but did not really recall. She accepted it was possible that she made a motion to throw some wine over Mr McCabe but did not know. She said it would have been a "jest movement.": see T961.39-T962.15.
6. Mr Lavers' evidence supports Mr McCabe's version: see T83.4-.20; T85.12-.29. Mr Lavers supports the glass being half full with wine: T83.20; T85.25. Mr McCabe did not see liquid in the glass.
7. I am comfortably satisfied and find as follows:
 1. Mr McCabe and Mr Lavers were present at the Cronulla RSL Club on 15 June 2018;
 2. Ms Riechelmann attended the Club, saw Mr Lavers and walked over to him;
 3. Mr McCabe was sitting at a table next to Mr Lavers;

4. Ms Riechelmann was holding a half full glass of wine. Mr Lavers' evidence was clear on this issue whereas the evidence of Mr McCabe and Ms Riechelmann was less certain. I accept Mr Lavers' evidence;
5. Ms Riechelmann made a movement towards Mr McCabe with her wine glass as if she was going to throw its contents in the direction of Mr McCabe. I prefer the evidence of Mr McCabe and Mr Lavers as to this incident. Their evidence was clearer, more definite and more persuasive than that of Ms Riechelmann. I reject her evidence that the movement was to put the glass to her mouth rather than to move it towards Mr McCabe. This would involve a quite different movement of the arm;
6. Mr McCabe had an honest and reasonable apprehension at the time that he was about to be hit by the contents of the glass directed by Ms Riechelmann. I accept his evidence as to this matter. It is believable and consistent with the movement and the circumstances and Mr Lavers' evidence;
7. Ms Riechelmann intended to create a concern or apprehension or distress in Mr McCabe by the movement of the half full glass of wine towards him and did so. It was not a movement "in jest".
1. The tort of assault has thus been established. Actual contact is not required for the tort unlike with a battery. The facts above in my view satisfy the elements of the tort: there was an overt act by Ms Riechelmann indicating an immediate intention to commit a battery (throwing wine or another liquid over him and saturating and spoiling his clothes, saturating himself and causing him distress, agitation and anxiety) which caused Mr McCabe reasonably to apprehend a threat of force to him of the wine being thrown on him with a capacity in Ms Riechelmann of carrying that intention into effect: *Croucher v Cachia* at [42] and [99]. The tort appears to be one not requiring an intent to actually physically injure to be established (as opposed to an apprehension) by its very nature. To that extent, I reject paragraph 9 of the written submissions of the defendant dated 25 October 2022. If the submission was correct, the tort of assault, which does not require physical contact, would not be established because there was no intent to actually physically injure by Ms Riechelmann. A person would then civilly have no redress on this construction of the CLA which is very unlikely to have been intended by the legislature. Further, I find there was clearly an intention to cause stress, anxiety and agitation in Mr McCabe: see my analysis of the applicable legal principles above and Ibbett, referred to above, at [5]-[11], [125] and [218] in relation to the proper construction of "injure" in s 3B(1) (a) of the CLA.

The 31 March 2018 incident

Intoxication of relevant parties/witnesses on 31 March 2018

1. An issue arises for determination as to the intoxication of the various parties and witnesses on the evening of 31 March 2018. This is relevant to at least the reliability of the various witnesses' accounts.
2. Mr Pusell gave evidence that he was a non-drinker and had not been drinking on 31 March 2018. I accept that evidence. I also accept the evidence of Mrs Pusell that she had not been drinking on that night. There is no suggestion in the evidence that she had been.
3. Mr McCabe conceded in cross-examination that he was intoxicated but said he was not heavily intoxicated. He also agreed that he was slurring his words on the night. In my view, the video evidence strongly supports these concessions and I make that finding. In the video evidence, Mr McCabe appeared slightly red in the face, was slurring his words, was talking loudly and slowly and was acting in an extroverted and assertive or bellicose way. He did not appear, however, to be very heavily intoxicated. He was not unsteady on his feet or incoherent, including in his discussions with Police on the telephone and in his exchanges with Ms Wells and Ms Riechelmann as recorded on the video footage. I accept his evidence that he had drunk 10-12 schooners of beer in the course of the evening. That is a large quantity of alcoholic drink to consume.
4. Ms Wells appeared also to be intoxicated. There was a real issue in the proceedings as to how many alcoholic drinks she had been drinking that evening prior to the events at the block of units. Mr McCabe said he got a glass of champagne for her every time he obtained a glass of beer for himself on the night at the earlier party they had attended (ie 10-12 glasses of champagne). Ms Wells' two statements are substantially inconsistent on this issue, the latter statement suggesting a much lower consumption of alcohol. Ms Wells in her oral evidence said she had 5-6 glasses of champagne at the party. Ms Wells' precise consumption of alcohol is unclear on the evidence. Taking into account all the evidence, Ms Wells appeared to be intoxicated having consumed several glasses of champagne at least (that is at least six glasses and possibly more) but probably was intoxicated to a lesser degree than Mr McCabe.
5. Contrary to the written submissions made on her behalf, Ms Riechelmann also appeared to me from the video footage to be somewhat intoxicated on the evening of 31 March 2018. This was also the view of Mr Pusell who had previously worked at an hotel in Cronulla. Mr Pusell described her as talking slowly and pointed to her behaviour in continuing in her knocking. She was clearly very loud and assertive in her behaviour. She was using frequent obscenities in her exchanges with Mr McCabe. Her loud banging and knocking on Mr Lavers' door over a period of at least several minutes and possibly more, when there was no answer by him, was, in the circumstances, and having regard to the time of the evening, unreasonable and somewhat irrational and not properly explained by her in her evidence. She said she felt "trapped" upstairs in her oral evidence, but this did not stop her calling out insults to Mr McCabe. Her conduct in placing her telephone filming close to the faces of Mr McCabe and

Ms Wells was intrusive and aggressive and, in my view, inconsistent with someone feeling trapped. Her exchanges of words with Mr McCabe and Ms Wells and her use of obscenities on many occasions were seemingly uninhibited. All these matters lead me to the view that Ms Riechelmann was intoxicated to some degree on the evening of 31 March 2018 but to a lesser degree than Mr McCabe and Ms Wells. In her oral evidence she conceded drinking three mixed drinks with spirits. However, in my view her level of intoxication was not very high as she could converse and argue and appeared not to be unsteady on her feet in the video footage. See also Professor Brew's report on this aspect which appears to accord with my finding.

6. The Police records as recorded by Officer Brooks who attended on the night, also provide some support for my conclusion in relation to Mr McCabe, Ms Riechelmann and Ms Wells:

"It should be noted that the Vic [Ms Riechelmann] was very erratic in her behaviour and was aggressive with Police at times. Police could smell alcohol on her breath and she appeared highly intoxicated...All parties including the Wit [Ms Wells] were highly intox. As a result they were deemed to [sic] intoxicated for statements to be reliable": Exhibit B page 56.

This was a contemporaneous and reasoned view by a police officer which must be given considerable weight and supports my own conclusions from the evidence.

Phone Hand Injury Allegation

1. In paragraph 5 of the Further Amended Defence filed on 15 February 2022 and in paragraph 1(iv) of the Further Amended Cross-Claim filed on 5 August 2022, the defendant pleads that Mr McCabe "struck" her on the right hand in which she was holding her mobile phone thereby causing an injury to the defendant's right hand. It is pleaded that this was done intentionally and with the intent to cause injury to the defendant. Alternative claims in assault and trespass are pleaded. All these claims by Ms Riechelmann are denied by Mr McCabe.
2. This allegation is supported by the oral evidence of the defendant, Ms Riechelmann: see T708.34. Her text to Mr Lavers on the night of the incident alleges a punch: Exhibit 3 page 136. Ms Wells, the only other witness (apart from Mr McCabe) in the foyer when the alleged act occurred, gives a somewhat different account in her second statement signed in 2020 and states that the plaintiff "grabbed" Ms Riechelmann's phone out of her hand and threw it into his unit (paragraph 8). This version of Ms Wells was put to Mr McCabe in cross examination by senior counsel for the defendant which he denied: T382.5. In her oral evidence in chief, Ms Wells inconsistently stated that she recalled that Mr McCabe "knocked" the telephone out of Ms Riechelmann's hand after the "sister" discussion. This time sequence as suggested by Ms Wells is not supported by the video evidence: video 8 in Exhibit A. In cross-examination, Ms Wells altered her position again and said that the phone was either "grabbed" by Mr McCabe out of Ms Riechelmann's hand and thrown into the unit or Mr McCabe "knocked" the phone out of Ms Riechelmann's hand: see T768.11-T769.31. Mr McCabe stated that Ms

Riechelmann dropped the phone after she had struck him in the face the first time outside his unit door.

3. The alleged incident is not shown on the relevant video footage: Exhibit A. A thudding noise can be heard on video 8 (part of Exhibit A) and the relevant phone is seen on the floor soon after and eventually picked up by Mrs Pusell who uses it to ring the Police as she was filming with her own telephone. Ms Riechelmann can be heard on video 8 claiming twice that Mr McCabe "slapped" the phone out of her hand. He is not heard denying this claim. This must be taken into account as it is a claim made soon after the event but in the context of a volatile altercation where various insults, allegations and claims were being made by the parties.
4. Also, as stated, in her 31 March 2018 text to Mr Lavers, Ms Riechelmann asserts that Mr McCabe "punched my phone out of my hand". See also T708.34; T931.45.
5. The video evidence shows Ms Riechelmann filming with her phone in her hand unnecessarily and unreasonably very close to the faces of Mr McCabe and Ms Wells shortly beforehand.
6. Therefore, there are allegations of a striking action (the pleadings), a slapping action (the video assertion), a punching action (the text and the Riechelmann oral evidence), a grabbing action (Ms Wells' second statement), a knocking action (Ms Wells' oral evidence in chief) and Ms Riechelmann dropping the phone (Mr McCabe). These inconsistencies raise some real doubt about what actually occurred.
7. Having considered the various evidence and the submissions, and taking into account the serious nature of the allegation made against Mr McCabe in the light of the differing evidence, I am not satisfied or persuaded to the requisite standard that Mr McCabe struck or punched Ms Riechelmann's hand, that there was any intention by Mr McCabe to injure her hand or arm or that her hand was injured as alleged. This is for the following reasons:
 1. The serious nature of the allegation made by the defendant;
 2. The differing accounts of what occurred by the various witnesses (Mr McCabe, Ms Riechelmann and Ms Wells), all of whom were in the foyer when the incident occurred and all of whom I have found to be unreliable or unsatisfactory in various ways and to various degrees;
 3. The fact that Mr McCabe, Ms Riechelmann and Ms Wells were intoxicated to various degrees making each more likely to be clumsy or not showing the usual degree of attention to what was occurring;
 4. There being no direct film footage evidence on the video to support the defendant's version other than an assertion twice made by the defendant herself as to a "slapping" action;

5. The close filming by Ms Riechelmann near the faces of Mr McCabe and Ms Wells making it equally feasible and possible that Mr McCabe pushed or diverted the telephone out of his face (or Ms Wells' face) and it then dropped as the other versions. Ms Riechelmann gave evidence in cross-examination that she did not actually see her telephone being punched out of her right hand by Mr McCabe as she was looking at Ms Wells: T931.35-.48. This is significant;
6. Ms Wells 2020 statement (supporting the "grabbing" version) being prepared by her well before her oral evidence was given and closer to the events in question. She adopted it in her evidence: T769.23. This version is inconsistent with a punching or striking action;
7. The lack of any photographs of bruises on Ms Riechelmann's hand or other areas of her body: see Exhibit 4;
8. Even if I am in error as to what Mr McCabe did as to the phone, I am not satisfied that he took any action with the aim of intentionally injuring Ms Riechelmann including her hand. The notes of Dr Begum (Exhibit B) do not specifically refer to bruising or an injury to the hand as opposed to the forearm or arm. The latter injury could have occurred in the vigorous and repeated banging or knocking on the door of Mr Lavers by Ms Riechelmann or during the physical altercation later near the stair balustrade or in Ms Riechelmann hitting the car of Mr McCabe;
9. A battery is primarily relied upon by Ms Riechelmann as to this alleged incident which I have found has not been established. A tortious assault is a separate claim but is part of the alleged battery in the present case. In any case, there is no reliable evidence of Ms Riechelmann being apprehensive of being struck when she had chosen to stop to exchange robust insults and views with Mr McCabe and to film Ms Wells and him closely and before the phone dropping occurred. She could have left the block of units at any time as she was asked to do. Her behaviour was inconsistent with having the necessary apprehension for an assault. She did not actually see her right hand being struck or slapped or knocked but claimed that she felt it. The tort of assault is therefore rejected in relation to the phone incident.
1. The claims relating to the strike or punch or slap or knock on the phone hand are not made out by the defendant/cross-claimant to the requisite standard to my satisfaction.

How did Ms Riechelmann's telephone get into the McCabe unit?

1. It is clear from video 8 which is part of Exhibit A that Ms Riechelmann's phone ended up in Mr McCabe's unit. The defendant claims Mr McCabe used his foot to kick the phone into the unit. Ms Wells claims Mr McCabe threw the phone into the unit (or in her oral evidence threw or knocked the phone into the unit). Mr McCabe gave evidence that he does not know how the phone got into his unit, but he did not kick it there or throw it into the unit.

2. In deciding this issue, I take into account the various versions and the video evidence in Exhibit A. I do not consider that the video evidence directly shows what happened. However, what can be seen allows me to be satisfied that it is more likely than not that Mr McCabe kicked the phone into his unit using his foot after it fell to the ground. It seems very unlikely that the phone bounced on the carpeted foyer floor and landed where it is shown on the video. It is also unlikely that Ms Riechelmann threw the phone into the unit.
3. Why Mr McCabe did this is not entirely clear. One possibility is that he did not want Police to see the video taken by Ms Riechelmann despite his video protestations to the contrary: "Show them the video." This was the submission of the defendant. Another possibility is his desire to preserve the video evidence for Police who had been called. He says words to the effect: "The Police are going to get that [the phone] as a record." A third possibility is that he did not want Ms Riechelmann filming close to his face as this had irritated him and showed him as intoxicated. In my view, it is likely that the last two possibilities were both reasons for him kicking the phone into the unit. His action meant that Ms Riechelmann was deprived of her phone for a short period until the Police arrived. However, the phone was held on the evidence by Ms Farrugia and Mrs Pusell for most of the time not Mr McCabe.

The alleged deletion of videos from Ms Riechelmann's phone

1. An issue arose in relation to the alleged deletion of video evidence from Ms Riechelmann's telephone. Mr McCabe denied deleting material from Ms Riechelmann's phone when this was put to him by Senior Counsel for the defendant. He said he had been told by Mrs Pusell that Ms Farrugia had deleted two photographs and a film from Ms Riechelmann's telephone. It was submitted by the defendant that the court should find that Mr McCabe did delete some videos in order to prevent his conduct being established.
2. Mrs Pusell gave differing evidence on this issue as referred to above. At first she gave evidence that Ms Farrugia had deleted video footage from Ms Riechelmann's phone: T170.12-28. Then she gave evidence that only photographs were deleted: T181.20. Then she changed that evidence and stated that she believed video footage was deleted by Ms Farrugia and later said she was "sure" of this: T181.29; T182.1; T182.19; T183.4; T183.13; and T187.7.
3. Mrs Pusell's evidence was that Mr McCabe did not have access to Ms Riechelmann's telephone after she or Ms Farrugia placed it on the kitchen bench: T156.24; T157.1-9; T158.11; T175.9-45; T203.11.
4. Having regard to Mrs Pusell's evidence referred to in the previous paragraph, which I accept, I find that Mr McCabe did not delete any video footage from Ms Riechelmann's telephone as he had no real opportunity to do so. I found Mrs Pusell to be an impressive witness in her evidence as to the placement of the phone after it came into her possession. She had no reason to give incorrect evidence on this point. She did not appear to me to give evidence with the aim of assisting Mr McCabe. I have found that it is likely that at least one video was deleted by Ms Farrugia on the night in question from Ms Riechelmann's telephone.

5. The plaintiff also submitted that it is very unlikely Mr McCabe deleted any video footage from the telephone as there was no reason to do so. According to Ms Riechermann, from the moment the telephone of Ms Riechermann struck the floor, she had no access to it. The alleged first strangling incident occurred after the telephone left her hand according to Ms Riechermann. Thus, the telephone could not have recorded the first alleged strangling incident.

The alleged torts of battery said to have been committed by Mr McCabe and Ms Riechermann near the McCabe unit doorway on 31 March 2018

1. I find that there were three people in the foyer of the block of units at xx Ozone Street at the time of the alleged batteries on 31 March 2018: Mr McCabe, Ms Riechermann and Ms Wells. Each gave a quite different account of what occurred in the foyer in their written and oral evidence. Some assistance is provided also by the video evidence which is part of Exhibit A. Mr Pusell also gave relevant evidence as to what he saw from his door peep hole.
2. The plaintiff, Mr McCabe, alleges he was punched by Ms Riechermann at least five times on or near his face when they were standing near the doorway to his unit around the time Ms Riechermann's telephone was said to have dropped or was thrown/knocked on the floor: T293-4. The first time he was allegedly struck by Ms Riechermann, Mr McCabe thought Ms Riechermann may have been holding her phone but he was not sure. Her hand was said by him to be clenched at the time of the striking action. Mr McCabe denies strangling, choking or otherwise grabbing Ms Riechermann or throwing her to the ground or against a wall as she alleges. It should be noted that the Amended Statement of Claim in paragraph 2 refers to Mr McCabe being struck three times not at least five times as he set out in his oral evidence. This was emphasised by the defendant in the written and oral submissions made on her behalf.
3. Ms Wells claimed in her oral evidence that Ms Riechermann was "strangled" by Mr McCabe and that Mr McCabe had put his hands around Ms Riechermann's neck whilst facing her, until she could not breathe, and her face went red: T574.10-.18; T748.40. Ms Wells gave no clear evidence relating to Ms Riechermann being thrown against a wall or to the ground. Her account of the incident did not mention that happening, even though she was in the foyer until she left for Cronulla Police Station: T771-T772. Ms Wells stated that the "strangling" incident occurred only once to her observation, when Mr McCabe and Ms Riechermann were face to face, with Mr McCabe's arms being outstretched and both his hands being placed around her neck. At this time, Ms Wells said she was standing near the unit block entrance, away from the entrance to Mr McCabe's unit. She gave clear evidence that this "strangling" incident occurred after the end of the events as shown in video 8, part of Exhibit A. There are significant differences between Ms Wells' statements on this issue and other aspects of the evidence relating to the events of 31 March 2018. That is despite the fact that she was standing in the foyer and apparently watching what was occurring or was at least present.

4. In her 20 May 2018 signed statement, Ms Wells is recorded as telling a police officer : "Both of them were at each other's throats" (paragraph 23). It is unclear whether this was intended to be a literal or figurative description. The latter is more likely as counsel for the plaintiff submitted. She is also recorded as saying to Mr McCabe: "You had your hand around her throat" (paragraph 26 cf paragraph 32). Significantly, only the singular word "hand" is used by Ms Wells. She said parts of her 20 May 2018 statement were inaccurate even though it was signed by her. Her second statement gives a different version: Exhibit 2. Ms Wells' evidence, given orally and in her first statement concerning the "strangling" incident, is inconsistent with Ms Riechelmann's initial pleaded case and her oral evidence as to the incident near the McCabe doorway.
5. Ms Riechelmann in her pleadings claims that Mr McCabe "came over the top of her right shoulder with his right arm [when she tried to retrieve her dropped mobile phone from the floor], grabbing her upper torso and chest and wrapping his arm around her throat and reaching across to her left shoulder as a consequence of which the cross-claimant was in a strangle hold...when pulling his arm away from [the defendant's] throat...pulled her backwards with her head tilted backwards so that she could see his face above her": Further Amended Cross-claim paragraph 1(v) and (vii). She claims Mr McCabe then (or sometime after) threw her to the floor. This was generally consistent with her oral evidence and statement evidence. Ms Riechelmann denies hitting Mr McCabe except perhaps unintentionally in the course of Mr McCabe's battery of her. That appears to be inconsistent with the evidence of Mr Pusell (and of course Mr McCabe).
6. Ms Riechelmann claimed that Ms Wells called out loudly and urgently to Mr McCabe to "stop" when he was strangling her: T950.9; T950.24. Ms Wells inconsistently claims she did not try to intervene during her version of the "strangling" incident: T650.29. That is a significant difference. Senior Counsel for the defendant asserted that Ms Riechelmann must have been referring to the earlier incidents shown on the video footage.
7. Mr Pusell claims that he saw through his door peephole, Ms Riechelmann strike out with a mostly clenched hand towards the face of Mr McCabe. He did not see whether the strike connected to Mr McCabe. He also did not see any of the conduct alleged by Ms Riechelmann to be the battery said to have been committed by Mr McCabe.
8. Mrs Pusell also did not see any of the claimed conduct. She said she did see Mr McCabe with his arm outstretched towards Ms Riechelmann when she was later close to the unit stair balustrade. The video footage in video 8 (Exhibit A) establishes this was after the batteries alleged by each of the parties but prior to the Wells' alleged version.
9. The Court therefore has fundamentally different factual accounts before it as to the events of 31 March 2018 in the foyer near the McCabe doorway and thereafter.

10. There appeared to me to be established on the evidence an extensive degree of animosity between Ms Wells and Ms Riechelmann on the one hand, and Mr McCabe on the other hand. The serious animosity between Mr McCabe and Ms Riechelmann had existed since at least 2014. This is a significant matter to be taken into account in determining whether I am comfortably satisfied on the balance of probabilities that a particular version has been established.
11. Mr and Mrs Pusell are in my view independent witnesses and their evidence is therefore potentially significant. It is true that Mr Pusell admitted that he did not like Ms Riechelmann and thought she was not "nice", but I did not consider, having seen him giving his oral evidence and being tested on it, that that influenced him in giving his evidence. Overall, he was a fairly impressive witness. I take into account his memory and other problems of which he gave frank evidence. I do not accept his estimate of the time Ms Riechelmann was knocking/banging on Mr Lavers' door. Mrs Pusell also appeared to be a genuine and honest witness but saw little of relevance to the complained of conduct. She did however see Mr McCabe's facial injury which was noted in the submissions of both parties: see defendant's written submissions paragraphs 28. That is inconsistent in my opinion with the Riechelmann version.
12. I have carefully reviewed the competing submissions in the light of the evidence on what should be held to have occurred.
13. In my view, the following matters are relevant to a consideration of Ms Wells' evidence of what occurred outside the doorway and thereafter in the foyer on 31 March 2018:
 1. On the evidence, there is clearly a substantial degree of animosity held by Ms Wells towards Mr McCabe;
 2. Their relationship was also to some extent volatile – Ms Wells was found to have "keyed" Mr McCabe's car during their relationship causing substantial damage to the vehicle even though (on the evidence) a conviction was apparently not recorded against her. She admitted this conduct in her evidence. This evinces a substantial degree of anger by Ms Wells towards Mr McCabe at the time. Ms Wells herself described the relationship as "volatile" in her oral evidence;
 3. Their prior relationship ended with some ill-feeling between them;
 4. The text messages sent by Mr McCabe to Ms Wells' new partner caused her both trauma and real embarrassment (Mr McCabe accepted the texts were inappropriate). The texts were clearly inappropriate and offensive;
 5. Ms Wells was intoxicated on the evening in question which is relevant to the reliability of her perceptions and recollections – see my analysis above. See also paragraph 5 of her first statement dated 20 May 2018 and the differing evidence in her second statement;

6. There is no video evidence to support directly her account of Mr McCabe's alleged actions, including the alleged "strangling" occurring with two hands after the events shown in video 8 (part of Exhibit A);
7. There is a substantial difference in the accounts given by Ms Wells in her two statements. Even though Mr McCabe prepared the first statement in draft, Ms Wells expressly approved it and signed it and accepted that she must have spoken to him to provide him with details relating to it prior to its preparation. The first statement was also not entirely favourable to Mr McCabe. The second statement was prepared well after the events of 31 March 2018. Although Ms Wells gave evidence that part of the first statement was inaccurate and she had "no choice" but to give it, the differences in the two statements raise real concerns about the accuracy of her accounts, despite her explanation as given for the differences;
8. There are also differences between the Wells' version (a grab or a knock) and the Riechelmann version (a slap or punch to the hand) in relation to how the Riechelmann phone hit the ground. Mr McCabe's version is again very different;
9. There are very substantial and significant differences between Ms Riechelmann's version of the battery/choking incident and Ms Wells' version of the "strangling". Ms Riechelmann gave evidence that Ms Wells was in the foyer when the alleged battery occurred. Ms Wells stated that the "strangling" incident occurred after the events in video 8, not earlier. She stated that the strangling occurred face to face with Mr McCabe's hands outstretched: T771-T772. Ms Riechelmann gave evidence that it occurred from behind and involved pulling Ms Riechelmann's head back forcefully. Ms Wells said it occurred after the discussion about Mr McCabe's sister in the foyer whereas Ms Riechelmann said it occurred much earlier. The inconsistencies were significant and several in number and are concerning. I take into account the evidence of Drs McClure, Roberts and Professor Brew in relation to a possible explanation for the gaps in Ms Riechelmann's memory;
10. There is some uncertainty in my view as to whether Ms Wells' "out of line" comments to Mr McCabe referred to the events immediately outside Mr McCabe's unit or the events which later occurred near the stair balustrade when Mr McCabe appeared to be attempting to prevent Ms Riechelmann coming back into the block of units. On Ms Wells' evidence, the comments were made before the "strangling" had occurred;
11. I could not discern on the video footage the part asserted by Ms Riechelmann of "you just stra..." I therefore cannot be satisfied that it was a claim by Ms Riechelmann that Mr McCabe had just "strangled" her. On Ms Wells' evidence, no strangling had occurred to her observation by this time;
12. Ms Riechelmann attended her general practitioner Dr Begum on 5 April 2018: Exhibit B page 91. The account recorded has Ms Riechelmann stating "punched phone out of R hand while recording verbal conversation" not that Mr McCabe struck Ms Riechelmann's hand (although she may have intended the same action). There is also a reference to "hold to choke the throat." However, the examination by Dr Begum does not refer to marks or bruises on the

throat or neck areas but rather "R chest – fading bruise 2.5 x 3 cm". The notes may, of course, not be complete, but Ms Riechelmann did attend to record her injuries and this was noted. Thus, Dr Begum would likely have been careful in recording his findings. I take into account the comments in *Mason v Demasi* [2009] NSWCA 227 per Basten JA at [2]. Mr McCabe does not dispute that he had his hand out in front of him contacting Ms Riechelmann's upper chest as she advanced towards him but denies any form of strangling or choking of her. See also Exhibits G and H and the difference between Ms Riechelmann's marked bruising and Ms Hart-Waters marked redness. I have accepted the former as likely being more accurate;

13. While Ms Wells appears to have told police on the night that Mr McCabe had his hands around Ms Riechelmann's throat, she was intoxicated and this was not repeated in her first statement, which was not entirely favourable to Mr McCabe and was confirmed and signed by her. The police account at Exhibit B page 56 seems to be different to both the McCabe and Riechelmann versions. It records in relation to Ms Wells (it appears): "A witness states she walked in after the incident had started and saw both parties grabbing each other around the throat." Mr McCabe says he did not respond to Ms Wells' version stated in front of the police officer as he was shocked by it. Ms Wells' account is not reflected in the bruising indicated by Ms Riechelmann in Exhibit G or by Dr Begum's record. The police recorded that Ms Riechelmann "had no visible injuries": Exhibit B page 56. Having considered the differing versions, it is likely, in my view, that Ms Wells in her dealings with the police officer was referring to the interaction between Mr McCabe and Ms Riechelmann shown in Exhibit A when Ms Riechelmann was attempting to gain access to the upstairs of the unit block past Mr McCabe and discussing his sister. It appears only one hand was used by Mr McCabe at this time (video evidence). See also Ms Wells' first statement paragraph 26, Exhibit F, where there is a reference to one hand. If Mr McCabe had really controlled the finalisation of this statement of Ms Wells, one would not expect adverse material to him to have remained in the statement. I accept the submissions of the plaintiff on this issue.
1. These matters raise very considerable doubts in my mind as to the accuracy of Ms Wells' account of the actions of Mr McCabe and Ms Riechelmann outside Mr McCabe's unit and in the foyer area. However, Ms Wells was there and her account is very different to Ms Riechelmann's account and Mr McCabe's account. Overall, in my view Ms Wells's evidence should be treated with real caution on the central issues.
2. There are also a large number of matters relevant to considering Ms Riechelmann's account of what occurred. See:
 1. The matters referred to in the penultimate paragraph relating to Ms Wells in (i) and (j). In relation to the visit to Dr Begum (see (l)), this occurred only 5 days after the alleged incident and the doctor's notes are generally consistent with Ms Riechelmann's account. However, importantly there is no reference in the notes to bruising or marks on the defendant's neck or throat. See also Exhibit G (marked by Ms Riechelmann herself) and Professor Brew's comment on this matter. There is always the possibility that Dr Begum's notes are not fully detailed but he was aware Ms Riechelmann was present so he could "document" her injuries

and thus must have been aware of the importance of his notes being accurate as to the bruising/injuries: see his consultation notes in Exhibit B;

2. Ms Riechelmann's longstanding psychological issues at the time of the incident. Some of these related to Mr McCabe and her strong feelings relating to him;
3. There was a substantial and consistent degree of dislike and animosity between Ms Riechelmann and Mr McCabe over several years. This is clearly established on the evidence including emails between them. There was no evidence of any prior violence by Mr McCabe on Ms Riechelmann. Mr McCabe's complaints about Ms Riechelmann had led to an apprehended violence order being sought and obtained by Police in 2014. Ms Riechelmann thought Mr McCabe was offensive, insulting and belittling and attempting to control her relationship with Mr Lavers. She expressed significant anger to Mr Lavers in relation to Mr McCabe: see the texts in Exhibit 5. She gave evidence that by 2017 she "hated" Mr McCabe;
4. Even on her evidence, Ms Riechelmann had previously slapped Mr McCabe's face in 2014. She had thrown wine over him in 2017. There was thus a strong history of dislike between them. She informed Mr Lavers that she had "anger issues";
5. Ms Riechelmann appeared to be intoxicated to some degree on the night of the incident – see my analysis above;
6. Ms Riechelmann's conduct on the night prior to the alleged assaults was in my view unreasonable and aggressive. She knocked loudly and regularly on Mr Lavers' door and made many obscene comments to Mr McCabe in the context of his loud insults to her. Her knocking fairly late at night seemed to be unjustified;
7. In the video footage, Mr McCabe is heard saying: "You hit me in the face". Significantly, this is not denied by Ms Riechelmann at the time. Ms Riechelmann responds: "You slapped my phone out of my hand";
8. There is no video footage directly and clearly supporting Ms Riechelmann's account of Mr McCabe's alleged actions. At one point, Mr McCabe very briefly has his back inside the doorway to his unit which appears to be inconsistent with the suggestion that he had moved behind Ms Riechelmann to choke/strangle her when she went to pick up her telephone: see the plaintiff's written submissions in chief, paragraph 43 and the Exhibit A video. The defendant is shown soon after attempting to get back into the unit block and calling out to Mr Lavers which is arguably inconsistent with having just been choked/strangled where she was unable to speak or breathe (see T709.29);
9. Ms Wells version is inconsistent in many significant ways with Ms Riechelmann's version. On Ms Riechelmann's evidence, Ms Wells was in the foyer when the battery involving strangling/choking from behind allegedly occurred;

10. Mr Pusell's evidence of Ms Riechelmann's hand being directed towards Mr McCabe when Mr Pusell looked in the peep hole in the door of his unit. This evidence supports Mr McCabe's account that Ms Riechelmann punched him (at least one time);
 11. Ms Riechelmann appeared from the footage to be agitated by Ms Wells' comment a short time before the alleged battery that Mr Lavers has "got another girlfriend." Both Mr McCabe and Ms Wells appeared to be goading Ms Riechelmann. I agree with the defendant's submissions on this matter;
 12. The bruising evidence from Ms Riechelmann: Exhibit G. The defendant's submissions about the bruising on the defendant's back allegedly connected with Mr McCabe's sunglasses appeared to me to be somewhat speculative and requiring a tenuous inference to be drawn;
 13. Ms Riechelmann's largely contemporaneous complaints to the police, Mr Lavers and her friend soon after the incident are relevant: see the defendant's written submissions paragraph 41 (25 October 2022);
 14. The video footage shows Mr McCabe and Ms Riechelmann in conversation after Ms Riechelmann was allegedly choked or strangled in the first alleged incident and after she attempted to pass by him apparently to reclimb the stairs. It would seem very surprising indeed that Ms Riechelmann would do this and engage in a conversation with Mr McCabe about his sister if she had been strangled or choked only a short time before by him. It would seem much more likely that she would leave the units and seek to report the matter immediately to Police. Further, I could not detect any limitation or restriction in her voice or her confidence at the time;
 15. Her stated lack of recollection after she was allegedly assaulted by Mr McCabe near his unit doorway: T711-T712.
1. Many of these various matters raise doubts in my mind about the reliability of Ms Riechelmann's allegations in her evidence that Mr McCabe grabbed her, put his arm around her from behind, choked or strangled her and at some time threw her against a wall and to the ground. Ms Wells did not see the actions alleged by Ms Riechelmann despite being in the foyer and gave an inconsistent version but said they could possibly have occurred. Ms Riechelmann tried to come back into the units and pass by Mr McCabe referring to his sister after the alleged strangling/choking which appears inconsistent with such a significant physical event. In the end, taking into account all of the evidence and the factors I have referred to, I am not satisfied that Ms Riechelmann's account has been established to the requisite standard.
 2. In relation to Mr McCabe, the following matters are relevant:
 1. He was clearly well intoxicated on the night – see my analysis above;
 2. He clearly disliked Ms Riechelmann prior to the incident for a number of years and regarded her as violent and aggressive;

3. He thought Ms Riechelmann was not a good partner for Mr Lavers, his long standing friend;
 4. He had, at the least, been rude to Ms Riechelmann both directly to her face and in emails prior to 31 March 2018;
 5. Ms Riechelmann's obscenities and loud knocking, and her close filming of him, are likely to have annoyed him or at least irritated him. He denied anger in his oral evidence;
 6. The video footage does not directly and clearly support Mr McCabe's account other than Ms Riechelmann's failure to deny his assertion made to her that she had "hit [him] in the face". This is relevant and must be taken into account as it was made soon after the events in question;
 7. Mr McCabe was clearly a person of interest with Police from 31 March 2018. In my view, this was clear to him. As a solicitor, he clearly had an interest in blaming aggression on Ms Riechelmann rather than himself;
 8. Ms Wells' second account in her later statement in some ways supports Ms Riechelmann's account of a strangling but a factually different and later strangling;
 9. However, Mr Pusell's account provides some support for Mr McCabe's account of being punched by Ms Riechelmann due to him claiming that he saw Mr Riechelmann's partly closed hand being directed towards Mr McCabe;
 10. The alleged striking by Ms Riechelmann occurred soon after Ms Wells claimed that Mr Lavers had another girlfriend and Mr McCabe said this was a good development. This is likely to have affected and possibly provoked Ms Riechelmann although she denied this in her oral evidence;
 11. Ms Riechelmann's complaints soon after the incident to Mr Lavers and Ms Hart-Waters are inconsistent with Mr McCabe's account;
 12. The photographic evidence supports an injury to Mr McCabe's face. This was seen by Mrs Pusell;
 13. The various factors referred to by me above in these reasons in assessing Mr McCabe's credibility.
1. The above matters impact, in my view, on the reliability of Mr McCabe's account. I do not accept all of his account. Similarly, I cannot find that he is a reliable witness as to all aspects of the battery allegations.
 2. Taking the above matters into account, and having considered the detailed submissions made on behalf of the parties, I find as follows:
 1. All the relevant witnesses apart from Mr and Mrs Pusell were intoxicated to some degree (although Ms Riechelmann to a lesser degree) on the night of 31 March 2018;

2. All the relevant witnesses apart from Mr and Mrs Pusell and Mr Lavers have significant personal reasons in putting forward their respective versions of events. There has been considerable animosity between Mr McCabe on the one hand and Ms Wells and Ms Riechelmann on the other hand;
3. I am not comfortably satisfied on the balance of probabilities that Mr McCabe punched or struck Ms Riechelmann's hand and particularly, that he did so with an intent to cause injury to her hand. See my analysis above;
4. I am not comfortably satisfied on the balance of probabilities that Mr McCabe choked or strangled Ms Riechelmann or threw Ms Riechelmann to the floor or grabbed her as alleged by Ms Riechelmann. It is likely Ms Riechelmann would have alleged this against Mr McCabe very soon after it occurred if it had occurred. It is not heard as an assertion by Ms Riechelmann on the video footage. It is unlikely Ms Riechelmann would have stayed near the block of units and attempted to pass Mr McCabe after the incident alleged by Ms Riechelmann if it had occurred. She would have been wishing to avoid him as he would have seemed to her to be very violent. Her voice and confidence did not appear to be affected when she attempted to pass him towards the end of video 8 in Exhibit A. There were no reported or recorded bruises or marks on her neck or throat when she visited Dr Begum. Ms Riechelmann confirmed this in her oral evidence and in Exhibit G. Ms Riechelmann did not mention the redness on the neck reported by Ms Hart-Waters. Mr and Mrs Pusell saw no conduct from Mr McCabe consistent with Ms Riechelmann's allegations. Whilst Ms Riechelmann had bruises and marks, these could potentially have occurred in knocking loudly on Mr Lavers' door (she complained of sore knuckles), in striking Mr McCabe or in her attempts to come back into the units and pass by Mr McCabe. I did not find Ms Wells to be a persuasive or reliable witness having regard to the factors I have referred to in relation to her. Her account was very different to Ms Riechelmann's account. I also did not find Ms Riechelmann to be a persuasive witness for the reasons outlined despite her making relevant complaints at the time. These complaints obviously emanated from her. Her account is also inconsistent with the apparent injury to Mr McCabe's face confirmed by Mrs Pusell;
5. I am not comfortably satisfied on the balance of probabilities that Ms Riechelmann struck Mr McCabe five or more times as claimed by him. Only Mr McCabe's evidence supports this, and he is not in my view an independent or reliable witness on this issue. There was no other independent evidence supporting this version of at least five punches. I did not regard the video evidence as providing any real significant support for this allegation;
6. I am comfortably satisfied on the balance of probabilities that it has been established by the plaintiff that Ms Riechelmann intentionally struck Mr McCabe once on the face with her hand with the intention of injuring him whilst they were standing outside Mr McCabe's unit doorway. This finding is supported by Mr McCabe's near contemporaneous oral assertion on the video footage of being struck on the face which was not denied at the time by Ms Riechelmann. It is also supported by the photograph of Mr McCabe's face taken a few days

after the incident which shows redness/swelling. This was confirmed by Mr McCabe in his oral evidence. I acknowledge the limitations of photographic evidence and the caution that must be exercised in its use: see *Goode v Angland* [2017] NSWCA 311 at [89]-[96], [105], [224]. It was supported by Mrs Pusell's evidence as to her observations of Mr McCabe's upper cheek and his assertions to her soon after of being struck: see at T192.25-46;

7. The first punch by Ms Riechelmann to Mr McCabe's face is also supported by the independent evidence of Mr Pusell. I take into account that Mr Pusell only viewed the incident through the peep hole on his door, that he did not see the strike connect on Mr McCabe's face, that he suffered some recent memory and anxiety problems and he had a negative view of Ms Riechelmann. I found Mr Pusell overall to be a careful, reliable and persuasive witness. I accept the accuracy of what he saw having regard to his asserted reaction having viewed Ms Riechelmann's act. He said he was shocked by it. My finding is also supported by Ms Riechelmann's long standing hatred of Mr McCabe, her belief that he had interfered in her relationship with Mr Lavers and his goading of Ms Riechelmann shortly before the incident which likely aggravated Ms Riechelmann into action;
8. I also make this finding despite Ms Wells' evidence and Ms Riechelmann's denials and assertions that she was assaulted (including her texts to Mr Lavers and her conversations with Ms Hart-Waters which I reject as being self-serving and inaccurate on this issue); and
9. The nature of the striking action and blow of Ms Riechelmann in the circumstances clearly allows the inference to be comfortably drawn that it was made with an intent to injure and was not accidental. In any case, I expressly make the finding that having regard to the nature of the blow, made directly to Mr McCabe's face in the course of a direct verbal confrontation, it was made with the intent to injure. I acknowledge the seriousness of this finding and expressly take into account the matters in section 140 of the Evidence Act 2005 (NSW) in making the finding.

Assault

1. In her Cross-Claim, Ms Riechelmann also seeks damages for the tort of assault. A battery is not required to establish this tort.
2. In my view, this tort is not established to my satisfaction. The video evidence shows interaction between Mr McCabe and Ms Riechelmann which does not establish or suggest any reasonable apprehension by Ms Riechelmann of force being used against her by Mr McCabe. The video evidence shows Ms Riechelmann descending the stairs, approaching Mr McCabe closely, and filming him and Ms Wells in close proximity to them. She talks to him apparently confidently. Later, the video evidence shows Ms Riechelmann trying to advance towards the stairs and continuing to attempt to do so despite Mr McCabe preventing her by placing his right arm in front of him. She does not appear to be initially dissuaded despite his actions. The film does not, in my view, show any apprehension on her part of the immediate use of force. Instead, she appears to be assertive and confident in her actions. She uses swear words readily in Mr McCabe's presence. I reject her evidence of an

apprehension of force being used by Mr McCabe against her. At all times there was nothing to prevent Ms Riechelmann quietly leaving the premises and contacting Mr Lavers through other means or the next morning.

Damages

Mr McCabe

2017 incident

1. In relation to the wine throwing incident in 2017 which I have found established, it seems that damages must reflect the nature of the battery, the injury and damage suffered including the wine being thrown on Mr McCabe's clothes, back, shoulders and head and the degree of force involved and the distress, anxiety and agitation caused to him on the evidence.
2. Taking these matters into account, I would assess damages at \$500.

Second 2018 incident involving an assault

1. In relation to the second incident in 2018 involving a gestured throwing of the contents of a half glass of liquid, in my view this is relatively minor although I accept that it was concerning to Mr McCabe and caused some anxiety, distress and agitation at the time having regard to the 2017 incident.
2. I would assess damages as being nominal at \$100.

31 March 2018 incident

1. In relation to the 31 March 2018 incident, I have rejected above Mr McCabe having any psychiatric condition as a result of the incident.
2. However, in my view attending a psychologist was reasonable in the circumstances having regard to his symptoms which I accept.
3. I would allow the cost of the two psychological consultations in the sum of \$170. See Exhibit F page 1.
4. I would allow for the general practitioner consultation before the referral. I allow \$70.
5. In relation to the battery, I have only accepted that Mr McCabe was struck once by Ms Riechelmann on the side of the face albeit that it caused redness and was done without permission and not in self-defence. The full circumstances of the night to that stage are taken into account. Striking someone in the face is a serious act and is to be deplored.

6. I would assess damages at \$1,750 for this incident. The injuries did not appear to be long lasting or particularly serious. The amount sought by the plaintiff of \$60,000 is in my view excessive. However, I find a degree of distress, agitation and anxiety to Mr McCabe resulting from the battery was established – he also obtained a referral to a psychologist from his general practitioner.
7. An amount of \$50,000 was sought by the plaintiff for exemplary damages. The relevant principles are set out below. In my view, no amount should be allowed for exemplary damages. First, I do not see the battery found to be of a nature necessary to allow damages as a form of punishment. Secondly, I do not see such an award as required to deter similar conduct in the future. Both parties seem to have moved on and Ms Riechelmann is no longer in a relationship with Mr Lavers, Mr McCabe's long-term friend. Further, in my view the conduct was not such as requiring an award to reflect any "detestation" by the Court.
8. The claim relating to damage to the car was not pressed.

Ms Riechelmann

1. I have rejected Ms Riechelmann's claims.
2. I assess damages for the alleged battery and the alleged assault in the event I am in error in rejecting her claims.
3. Damages must be assessed at common law having regard to the alleged conduct.

General damages

1. I have determined that if Ms Riechelmann's account is accepted, Mr McCabe's battery caused an aggravation of her depression and PTSD.
2. However, it did not cause her to lose her job at Qantas. She was able to keep working in her usual job until she was made redundant. The aggravation of her depression and the PTSD thus appear to be reasonably moderate.
3. The matters referred to in the defendant's submissions are taken into account.
4. I take into account these matters and the following matters if Ms Riechelmann's account is accepted:
 1. On Ms Riechelmann's account it was unprovoked but must be seen in the context of mutually exchanged insults;
 2. Ms Riechelmann is of slight build;
 3. On Ms Riechelmann's account, she was bruised and choked from behind. This would have been frightening;
 4. On Ms Wells' account if that is preferred, Ms Riechelmann was strangled in a face to face incident;

5. Her face went red and she had difficulty breathing;
6. She was thrown to the ground and her back and knee were bruised;
7. It was highly upsetting to her;
8. Her demeanour had changed significantly according to Ms Hart-Waters;
9. She continues to seek professional medical help on a regular basis and has ongoing symptoms although these seem to have improved.
1. On the other hand, the ending of her 8 year relationship with Mr Lavers appears to have caused her some real distress as would be expected.
2. In my view, the appropriate figure to allow is \$100,000 for general damages. The amount claimed by the defendant of \$250,000 seems excessive and does not take into account that the defendant was able to continue working albeit at a reduced level of performance. Ms Riechelmann's existing mental health issues must also be taken into account as must her natural distress in her long term relationship with Mr Lavers ending through his choice. The figure of \$100,000 is arrived at particularly taking into account the medical evidence and Ms Riechelmann's evidence as to the effect of the incident on her.

Aggravated and exemplary damages

1. In *State of New South Wales v Abed* [2014] NSWCA 419, Gleeson JA (with whom Bathurst CJ and Macfarlan JA agreed) stated the following at paragraphs [230]-[234]:
 - [230] The principles upon which aggravated and exemplary damages are awarded are well established and were not in issue on the appeal. The principles were summarised by Sackville AJA (Macfarlan and Whealy JJA agreeing) in *New South Wales v Zreika* [2012] NSWCA 37 at [60]–[64]. It is necessary to keep in mind the conceptual distinction between the compensatory nature of aggravated damages and the punitive and deterrent nature of exemplary damages. The assessment of aggravated damages is made from the point of view of the plaintiff, whereas in the case of exemplary damages the focus is on the conduct of the defendant.
 - [231] Aggravated damages are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like: *Lamb v Cotogno* [1987] HCA 47 ; 164 CLR 1 at 8. Aggravated damages are given to compensate the plaintiff when the harm done to him or her by a wrongful act was aggravated by the manner in which the act was done: *Uren v John Fairfax* [1966] HCA 40 ; 117 CLR 118 at [] (Windeyer J).

- [232] Exemplary damages go beyond compensation and are awarded as a punishment to the guilty, to deter similar conduct in the future, and to reflect "detestation" for the action: *Lamb v Cotogno* at 8. Generally speaking, what is required for an award is "conscious wrongdoing in contumelious disregard of another's rights": *Gray v Motor Accidents Commission* [1998] HC 70 ; 196 CLR 1 at [14] (*Gray v MAC*).
- [233] In *New South v Riley* [2003] NSWCA 208 ; 57 NSWLR 496 Hodgson JA (Sheller JA and Nicholas J agreeing) expressed the view (at [138]) that the description in *Gray v MAC* does not fully cover the field. His Honour said that "Conduct may be high handed, outrageous, and show contempt for the rights of others, even if it is not malicious or even conscious wrongdoing". However, Hodgson JA also observed that, ordinarily, conduct attracting exemplary damages will be of this general nature, and the conduct must be such that an award of compensatory damages does not sufficiently express the Court's disapproval or, in cases where the defendant stood to gain more than the plaintiff lost, demonstrate that the wrongful conduct should not be to the advantage of the wrongdoer.
- [234] In *New South Wales v Radford* [2010] NSWCA 276 ; 79 NSWLR 327, Sackville AJA (Beazley and Macfarlan JJA agreeing) summarised the effect of the authorities as follows:
- [97] These authorities demonstrate that the various categories of damages that may be awarded for trespass to the person, including assault and false imprisonment, are not self-contained. There is a close relationship between an award of ordinary compensatory damages or injury to the plaintiff's feelings and an award of aggravated damages. It is necessary to assess compensatory damages, including aggravated damages, before determining whether exemplary damages should be awarded and, if so, the quantum of any such award."
1. I note that the batteries alleged occurred (if found) in an open area in front of Ms Wells. Ms Riechelmann was, on her case, treated in a fashion which was humiliating, forceful and undignified. The Riechelmann battery was a significant battery if her evidence is accepted. It was committed by an apparently strong and well-built male person. It involved choking or strangling. It must have been traumatic if it occurred as she stated. The Wells' battery was also violent and forceful if accepted. I would allow \$20,000 in aggravated damages for both batteries and \$10,000 if only one battery is accepted. The amount claimed by the defendant of \$70,000-\$100,000 is in my view excessive.
 2. I do not consider an award of exemplary damages to be warranted. I do not see there being any similar conduct likely in the future. All parties appear to have moved on in their lives. The conduct occurred in a heated and emotionally charged situation. An award is not necessary in my view to reflect detestation in the actions of Mr McCabe if accepted. He was not in a position of authority in relation to Ms Riechelmann.

Interest on general and aggravated damages

1. Interest should be awarded on general damages, aggravated damages and exemplary damages. It should be assessed assuming 50% of the damages are in the past and 50% are in the future. A 3% discount rate should be used.

Past treatment expenses

1. An amount of \$4,000 should be allowed for past treatment expenses.

Future treatment expenses

1. An amount should be awarded taking into account the defendant's regular visits to a psychiatrist and psychologist following the incident. I accept the opinion of Dr Keller in his 28 February 2020 report. I allow \$6,000 in total for psychiatric review and medication. In relation to a psychologist, I would allow \$1,000: see Dr Keller's 6 May 2020 report.

Future economic loss/loss of future earning capacity

1. The defendant seeks a buffer of \$200,000. Ms Riechelmann was able to perform her job at Qantas after the 31 March 2018 incident and was retrenched in the middle of the Covid-19 pandemic. She had been a career Qantas steward. There was no evidence of her seeking work or planning to work in the future. Her PTSD affects her capacity to undertake work: see Dr Keller's second report page 4. Having regard to her age and career, any work is likely to be part-time. I would allow only \$15,000 as a buffer for reduction of future earning capacity having regard to the treatment contemplated, her appearance in the witness box, her work from 2018-2020, her concentrated career and her existing depressive symptoms: see also Dr McClure report, page 8, under the heading "prognosis."

Assault

1. If I am in error as to the alleged assault, I would allow \$500 in damages. This is calculated on the basis that the battery did not occur and Ms Riechelmann had a reasonable apprehension of the use of force on her by Mr McCabe.

Determination

1. The Court acknowledges the assistance provided to the Court in submissions by counsel.
2. For the above reasons, the Court makes the following orders:
 1. Judgment for the plaintiff against the defendant in the Statement of Claim proceedings.
 2. Judgment for the plaintiff/cross-defendant against the defendant/cross-claimant in the Cross-Claim proceedings.
3. The Cross-claim proceedings are dismissed against the plaintiff.

4. The parties are to bring in agreed short minutes of orders reflecting these reasons within 14 days.
5. The question of costs of the Statement of Claim proceedings and the Cross-claim proceedings are reserved.
1. As requested by the parties, the fifth order reserving costs is made pending further submissions as to costs.

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 03 March 2023

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/186a6059d3cc52e2dff9d2d2>

CASE PAGE <https://chat.esheria.ai/case-law/australia/mccabe-v-riechemann-2023-nswdc-44-2023>

Prepared on 26 October 2026 · Esheria