SUPREME COURT OF QUEENSLAND

CITATION:	*Julia Creek Town and Country Club Inc v Littlejohn* [2012] QCA 16
PARTIES:	**JULIA CREEK TOWN AND COUNTRY CLUB INC** (appellant) **v** **SONIA IVY LITTLEJOHN** (respondent)
FILE NO/S:	Appeal No 6303 of 2011 DC No 237 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Townsville
DELIVERED ON:	21 February 2012
DELIVERED AT:	Brisbane
HEARING DATE:	14 February 2012
JUDGES:	Chief Justice, Muir JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal dismissed.** **2. Written submissions on final form of relief, interest, costs and consequential orders to be exchanged and presented to the court within 14 days.** **3. Further hearing of the matter adjourned to a date to be fixed.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL – GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE FINDINGS BASED ON CREDIBILITY OF WITNESSES – GENERALLY – where the respondent awarded damages for injuries due to the negligence of the appellant at the appellant's premises – where there was a height difference between floorings – where the respondent also mentioned glare as a contributing factor – where there were some inconsistencies in the respondent's allegations – where the trial judge accepted respondent's expert over appellant's – whether trial judge failed to provide sufficient reasons in accepting the respondent's evidence – whether the appeal should be allowed

COUNSEL:	K Fleming QC, with M Drew, for the appellant M Grant-Taylor SC, with A Stobie, for the respondent
SOLICITORS:	Connolly Suthers for the appellant Turner Freeman for the respondent

CHIEF JUSTICE:

Introduction

[1] The respondent was injured in the morning of 21 May 2004 when she fell to the floor in the appellant's premises at Julia Creek. She brought a proceeding in the Supreme Court for damages for negligence. She succeeded in obtaining judgment against the appellant in the amount of $160,705.68. The present appellant appealed. The Court of Appeal rejected the appeal insofar as it related to the assessment of the amount of damages, but it upheld the appeal in relation to the precedent determination of liability, on the ground that the learned Judge had not adequately explained his reasons for his finding that the appellant had been negligent. The Court of Appeal remitted the question of the appellant's liability for determination by the District Court. A learned District Court Judge again found the appellant liable.

The primary judgment

[2] As will emerge, one of the present grounds of appeal again agitates the adequacy of the reasons for judgment. Because of that, it is necessary to recapitulate the primary Judge's expressed reasons in some detail.

[3] That Judge accepted the respondent's evidence that she arrived at the premises at about 11 am on a fine and sunny day. She and her party, which included her husband and a Mrs Hope, who gave evidence consistent with the respondent's evidence, went to the bar for a time.

[4] Then when leaving, the respondent was walking at a modest pace from the lit bar area into an unlit area. She was confronted with glare thrown up from the floor (a reflection of sunlight streaming in from an "undressed" window) and put her hand up to shield her gaze. At that moment she lost her footing, stumbled and fell.

[5] The respondent fell at the interface between a tiled area adjacent to the bar and a lower carpeted area. At that point of juxtaposition, the level of the floor fell by approximately 25 millimetres. The edge between the tiled area and the carpeted area was positioned at about 45 degrees to the respondent's path of travel.

[6] There was debate at the hearing of the appeal as to whether the respondent acknowledged in her evidence having noticed the change in level before she stumbled over it. She did not clearly acknowledge that, and the Judge made no specific finding in that regard, although the tenor of his reasons is that the respondent came upon the hazard unexpectedly. It was not put to the respondent in cross-examination that she noticed the hazard before falling over it. To the contrary, it was expressly put to her that she had not seen the "gap" in level, and she accepted that. This aspect is of no significance, therefore, in the resolution of the appeal.

[7] The learned Judge rejected a submission that he should not accept the respondent's account because of inconsistencies between the evidence she gave before him in June 2011, and the content of a notice of claim prepared by her solicitor and given in September 2004. For example, in the notice of claim she described the premises (wrongly) as Julia Creek Hotel, she referred to a wooden rather than tiled area around the bar, and of the greatest arguable significance, she made no mention of the role of the glare or of shielding her gaze with her hand.

[8] Counsel for the appellant concentrated on the delay in the mention of glare, submitting that was significant. Of course it arguably was, but the present issue is whether the Judge adequately dealt with it.

[9] When pressed under cross-examination about those discrepancies, the respondent said that it was only when she revisited the premises in 2006 with Mr O'Sullivan, an ergonomist who gave evidence, that she recalled that the area was tiled, and also recalled the role of the glare. The visit in May 2004 when she was injured was her first time at the premises, and she was there on that occasion for only 20 to 30 minutes.

[10] The Judge expressed the reasons for his conclusion that the respondent should nevertheless be regarded as a witness whose evidence should be accepted at paragraphs 17 to 19:

> "I had the opportunity of watching the plaintiff give her evidence over an extended period and I formed the view that she was a straight forward witness doing her best to give an honest account of herself. The notice of claim for damages, which was tendered as exhibit 2, is apparently prepared by a solicitor and provides an account of what happened in the third person. I note that the plaintiff was not challenged as to the fact that the 20 minutes or half an hour that she spent in the club was the only time that she had ever spent there prior to the notice of claim for damages being prepared and I do not think that the first two inconsistencies are surprising, having regard to that matter.
>
> Further, the essential [cause] of the plaintiff's fall was the difference in the floor levels between the tiled surface and the carpeted area and the fact that another contributing matter which, whilst significant, was not essential in the causation was not remembered by her until she revisited the premises does not surprise me.
>
> I accept her evidence that she noticed glare from the dance floor and put her hand up to shield her eyes from that glare. I am satisfied that at that moment stepped onto the edge of the tiles, lost her footing and fell."

[11] His Honour then referred to the expert evidence, relying on Mr O'Sullivan's conclusion that a 25 millimetre fall in height would be sufficient to explain a loss of balance and stumbling, if encountered unexpectedly, particularly if at an angle (here approximately 45 degrees) where the foot can tip sideways. The risk increases with age.

[12] Both Mr O'Sullivan and the appellant's expert Mr Forbes acknowledged that the lighting in the premises substantially exceeded the Australian Standard for lighting

in publicly accessible parts of buildings (20 lux). The Judge referred however to the higher standard expected in restaurants (160 lux) which was substantially more than the level at the premises. His Honour also referred to a warning in the Standard about the potential for "disability glare" to produce a "gloomy" interior.

[13] Aware of attempts to measure the glare on an occasion said to be comparable with the situation in the morning of 21 May 2004 (evidence from Mr Forbes), His Honour concluded that reliable measuring was not possible, and he approached that issue by reference to the respondent's subjective experience. At paragraph 31 he said:

> "It is not possible on the evidence to determine the nature and extent of the glare but only to say that it was, subjectively, from the plaintiff's point of view, sufficient to cause her to attempt to shield her eyes from it. I note that the glare was also described by Mr O'Sullivan as significant. Mr Forbes' contrary view was formed after an inspection of the club when significant alterations had been undertaken which alterations in my view left him less able to assess the situation than Mr O'Sullivan had been two years earlier."

[14] The appellant's own expert Mr Forbes said that "measurement of glare is a subjective issue, and it is difficult to record meaningful and repeatable values".

[15] Having referred to *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479, 488, the learned Judge concluded that the change in floor level constituted "a real risk of injury", and listed these circumstances relevant to the existence of a duty of care in paragraph 40:

> "(a) [T]he premises are commercial premises;
>
> (b) Alcohol is served to patrons on the premises;
>
> (c) Visitors are welcomed at the premises;
>
> (d) The area where the change in height occurs is an area frequently traversed by patrons and probably by staff;
>
> (e) The area is a workplace;
>
> (f) The height change presents at an angle to what might be the usual or expected path taken by persons crossing the area;
>
> (g) It would be expected that persons unfamiliar with the premises would traverse the area from time to time."

[16] The Judge held that the hazard reasonably required attention, and referred to the evidence of Mr O'Sullivan that the problem could have been addressed by providing better lighting, or eliminating or at least highlighting the height difference. The Judge rejected the appellant's contention that a colour change between the light coloured tiled area and the darker coloured carpet sufficiently alerted a user to a possible change in height, saying at paragraph 42:

> "It does not seem to me that a reasonable person on observing the change in the floor surface would expect that that would be

> accompanied by a change in height. I think that a reasonable person, absent any warning, can expect a continuity of the floor surface where there is nothing to indicate the contrary and a change in colour does not bring with it an anticipation of a change in the height of the floor."

[17] His Honour then found the appellant liable on the following basis:

> "(a) It failed to eliminate the height difference between the tiles and the carpeted floor.
>
> (b) It failed to adequately light the area having regard to the danger that existed.
>
> (c) It failed to use curtains or similar means to reduce the glare coming from the window.
>
> (d) It failed to highlight the edge of the tiles by way of a provision of coloured nosing tiles or otherwise."

[18] He rejected, as follows, a contention that the respondent had been contributorily negligent:

> "The plaintiff was not moving at an excessive speed or failing to keep a proper lookout but was distracted by the glare as I have said. There was, in my opinion, no other measure which she could reasonably have been expected to take to reduce the risk to her."

[19] His Honour was no doubt energized to express his reasons for judgment with particular care because of the previous decision of the Court of Appeal. My feeling immediately leaving a reading of those reasons was of a comprehensive, coherent and compelling account. I turn now to the challenge.

Grounds of appeal

[20] Although the notice of appeal raised numerous challenges to the judgment, those which were developed at the hearing of the appeal, and in the written outline, may be distilled into the following propositions:

1. The Judge "palpably misused" his opportunity to assess the creditworthiness of the evidence of the respondent, in that he did not properly deal with discrepancies between her evidence before him, and the notice of claim and evidence given at the previous trial, and inconsistencies between her claims and a video recording (to which I will come).
2. The Judge apparently "completely ignored" the evidence of the appellant's lighting expert Mr Forbes.
3. The difference in height, "readily identifiable and observed, is an ordinary incident of life and a reasonable person would not consider it to be a real risk of causing injury".
4. "It would be extraordinary for anybody to consider it to be reasonably foreseeable that the unique combination of glare at a particular time of day at a particular time of year and the difference in height could be a foreseeable risk."

[21] In the context of the preceding analysis of the primary judgment, one may address these grounds of appeal reasonably briefly.

Ground 1: respondent's credibility

[22] The Judge dealt with this comprehensively and in an unexceptionable way. He explained why he accepted the respondent's evidence notwithstanding the inconsistencies. It was not necessary for him to list each and every one of those inconsistencies: he mentioned those of more arguable significance. He passed upon the level of significance of the inconsistencies. Then he assessed the respondent's explanation for why the inconsistencies existed. That was all appropriate and sufficient.

[23] The covert video recording showed the respondent acting inconsistently with her claimed level of disability. That led the Trial Judge in the Supreme Court to pare back her claim in respect of past and future support substantially. The District Court Judge referred to the video recording in his reasons. In paragraph 14, responding to a submission made to him, he referred to the finding in the Supreme Court, pointing out that the Judge did not, on the basis of the video, reject the respondent as having been untruthful, concluding only that "the need for care at the level claimed could (not) sit comfortably with the video evidence". The findings on liability by the Supreme Court Judge, and observations on the facts made in the Court of Appeal, did not constrain the primary Judge's approach to his task, as he correctly observed.

[24] The primary Judge was plainly aware of the video recording and its potential significance in the assessment of the respondent's creditworthiness. That he did not expressly say, "I accept the plaintiff's evidence notwithstanding the video recording, for the same reason as was expressed in the Supreme Court", does not invalidate his reasons: it is implicitly plain that the primary Judge also took that approach. He was obviously strongly influenced in his assessment by his experience in seeing and listening to the respondent giving evidence. The inconsistencies did not necessarily exclude an acceptance of her credibility.

Ground 2: evidence of Mr Forbes

[25] The Judge did not ignore the evidence of Mr Forbes, as claimed in the applicant's written outline. His Honour referred expressly to that evidence when expressing his preference for the conclusion of Mr O'Sullivan, and he said why he rejected Mr Forbes' contrary view. See paras [12] to [14] above. That course was open.

Ground 3: no "real risk of injury" because of change in levels

[26] His Honour's reasons for his finding as to risk were, again, unexceptionable, and amply supported by evidence he was entitled to accept.

Ground 4: the presence of glare as the respondent negotiated the step down

[27] The appellant's duty arose because of the unsafe nature of the floor. It was that hazard which reasonably required attention. Ordinary experience of life would suggest that sunlight might stream into the premises through an "undressed" window. That is not an extraordinary possibility, as the appellant appeared to suggest.

[28] The foreseeable risk was of a user stumbling over the step down in floor height. Addressing the glare, by closing curtains for example, was just one of four measures which His Honour found should have been adopted to deal with the risk constituted by that step down in the flooring.

Conclusion

[29] There is no substance to any of the grounds of challenge to the primary judgment.

[30] The appeal should be dismissed.

[31] It follows that this court should "accept" the determination of the District Court (s 68(4) *Supreme Court of Queensland Act* 1991). Counsel for the respondent raised issues as to the form of final relief, bearing on the award of interest, and costs. Also, further consequential orders may be necessary. It may be, for example, that orders extant following the first appeal (as to costs etc) should now be vacated or varied.

[32] Written submissions on those matters should be exchanged and presented to the court within 14 days. There should be no need for any further oral hearing. That is especially important in the interests of economy, in light of the protracted and no doubt expensive history of this comparatively uncomplicated claim.

[33] In the meantime, the further hearing of the matter should be adjourned to a date to be fixed.

[34] **MUIR JA:** I agree that the appeal should be dismissed for the reasons given by the Chief Justice. I agree also that the primary judge's determination of liability should be accepted.

[35] **ATKINSON J:** I agree with the orders proposed by and the reasons of the Chief Justice.