SUPREME COURT OF QUEENSLAND

CITATION:	*Dowling v The Met Brisbane Pty Ltd* [2013] QCA 167
PARTIES:	**KAREN ANN DOWLING** (appellant) **v** **THE MET BRISBANE PTY LTD** ABN 46 116 428 114 (respondent)
FILE NO/S:	Appeal No 9765 of 2012 DC No 3398 of 2010
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	24 June 2013
DELIVERED AT:	Brisbane
HEARING DATE:	28 March 2013
JUDGES:	Margaret McMurdo P and Margaret Wilson and Douglas JJ Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appeal is dismissed with costs.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – INTERFERENCE WITH JUDGE'S FINDINGS OF FACT – FUNCTIONS OF APPELLATE COURT – WHERE INFERENCES OF FACTS INVOLVED – where the appellant sought to challenge various findings of fact made by the trial judge – whether the trial judge's findings of fact were inconsistent and glaringly improbable – whether the trial judge's findings of fact impugned by the appellant should be overturned *Evidence Act* 1977 (Qld), s 18, s 101 *Anderson v Connelly* [2011] QCA 37, cited *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 59 ALJR 842; [1985] HCA 61, cited *Devries v Australian National Railways Commission* (1993) 177 CLR 472; [1993] HCA 78, cited *Fox v Percy* (2003) 214 CLR 118; [2003] HCA 22, followed
COUNSEL:	R J Lynch for the appellant R C Morton with M Smith for the respondent

SOLICITORS: Shine Lawyers for the appellant
Barry Nilsson for the respondent

[1] **MARGARET McMURDO P:** I agree with Douglas J's reasons for dismissing this appeal with costs.

[2] **MARGARET WILSON J:** I agree with the order proposed by Douglas J and with his Honour's reasons for judgment.

[3] **DOUGLAS J:** This appeal seeks to challenge the learned trial judge's factual findings about the circumstances leading up to an accident suffered by the appellant, Ms Dowling. Her Honour gave judgment for the defendant at the trial, the respondent to this appeal, a conclusion that depended heavily on her assessment of the appellant's evidence compared to that of the respondent's witnesses. It is my view that the appellant has not shown that her Honour's findings were erroneous.

Background

[4] The appellant was injured when she slipped on a freshly varnished wooden floor in the respondent's nightclub on 10 September 2008. She was inspecting the premises with a view to organising a function for travel agents there. She had made arrangements to visit and arrived with a work colleague, Ms Duck, about 1.30 pm. They were met at the front door by the respondent's then duty manager, Mr Noreiks. He no longer worked for the respondent by the time of the trial, having become a pilot.

[5] He took the visitors towards the potential function area. The nightclub was closed for business so there were no patrons inside, although there were other employees. The function area was described as a dance hall and was set lower than the approach to it. The path to that area from the entry to the club was across a concrete floor, down a corridor past a bar towards an area where the concrete floor changed to timber flooring. There was a concrete strip about one metre wide bordering the timber floored area to the right as shown on the attached copy of ex 1, a plan used at the trial.

[6] The timber flooring was the freshly varnished area. It was still wet and the odour of the varnish was strong. The lighting was dim, with the appellant comparing it to conditions at 5.00 pm in one's own home. Mr Noreiks said he warned her that the floors were being varnished and that he was limited in the area that he could show her. The main factual dispute dealt with by her Honour was as to the extent of the warning he delivered.

[7] Her Honour summarised his evidence as follows:

> "[9] … He said that he told the plaintiff that the floors were being varnished and he could show her around but he was limited in the areas that he could show her. He said: 'As we passed through the doors I mentioned, I was pointing out 'This is the section that has been varnished. You can't go there.' As we approached the far timbered section we stopped. I said, 'This is the section you can't walk on. If you follow me to my right I can take you on the concrete strip behind it and I can show you the main room.' He said

> he could not remember if they acknowledged what he said, but he turned right and walked along the concrete strip and they were behind him. He said Alex Foster was present at this time and after the plaintiff fell they both helped her to get off the floor. He thought that Ms Foster came along when they were transiting into the main Met room.
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> [10] Mr Noreicks agreed that there was a high potential of slipping on the varnished floors. He insisted that he pointed out where the varnish was and told them where to walk. He agreed in cross-examination that he had not told a loss assessor about him pointing out the section where the varnish was, however he says that that was covered by the part of his statement which stated that he was quite sure that he mentioned to them on at least one other occasion as they were walking across the concrete that they would not be able to walk on the timbered floor. He said he mentioned this to them either while they were walking towards the one metre wide strip of concrete floor or when he was standing on it. He maintained that there was no difference between what he told the loss adjustor and what he said in court. he said he was very clear about where they could and could not walk."

[8] Two other former employees of the respondent, Alexandra Forster and Candice Cowden, gave evidence that Mr Noreiks had warned the appellant that the floors were being varnished and not to walk on them. Alexandra Forster said she also told the appellant:[1]

> "Please be careful because the cleaner will get angry … if someone stepped on them."

[9] She also said that Mr Noreiks showed the appellant where the varnished floor was. Ms Cowden also said that the wooden floor was obviously shiny and sticky.

[10] In contrast the appellant and her colleague Ms Duck acknowledged that there was a strong smell which the appellant likened to varnish and Ms Duck to paint. The appellant said that Mr Noreiks said that they had recently polished the floors and that they would only be able to view the proposed function area from a distance.

[11] The appellant said she believed that the floor that had been varnished was the one in the function room rather than the approach to it where she fell. She said that she was given no warning not to walk on the floor and could not remember looking at the floor before she stepped on it. She also said it was difficult to see inside the building.

[12] Ms Duck did not hear any conversation about the state of the floors, did not notice any change in the floors and also said it was quite dark in the club. She said Mr Noreiks did not indicate that they should not walk on the floors and did not point them out.

[13] In considering this evidence, her Honour said:

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1 See AR58 at l.59 - AR59 l.3.

"[13] It can be seen from the summary of the evidence that there were inconsistencies between all the witnesses. That is hardly surprising given that their evidence was given some three years after the incident occurred. The defence witnesses were all to a large extent independent. They no longer had an interest in the Met Nightclub and there was nothing in their demeanour which would suggest that they were tailoring their evidence to assist the defendant nor was there any reason for them to do so. Mr Noreiks came across in particular as a very believable witness. His statement to the loss adjuster was not, in my view, significantly inconsistent with the evidence he gave in court as he said in the statement that he mentioned on a number of occasions that the floor should not be walked on. He indicated that he told the two ladies that they would not be able to see all the areas as they could not walk on the recently varnished timber floors and he was quite sure he mentioned it again on at least one other occasion as we (sic) were walking across the concrete floor. It was not busy in the nightclub as it was closed at the time and the lighting was sufficient to see where the flooring was polished.

[14] The evidence of Miss Foster was also credible. It may not be that the others heard her because she was behind them at the time but I accept that she did make a comment about getting into trouble if someone walked on the newly varnished floors (as no doubt would have been the case if they had let people walk on varnished floors when they were wet). The fact that they were not yet dry was made obvious by the fact that the plaintiff ended up with varnish on her when she slipped. Although Ms Cowden did not hear all the conversation, she clearly remembers the warning not to step on the floors and although I would not be prepared to act on her evidence alone she does corroborate the evidence of the other two defence witnesses.

[15] Ms Dowling was also a believable witness. However her evidence must logically be coloured to some extent by the fact that she did inadvertently walk on to the timber floor and slip. She said that she was interested in using the Met because it had been an old Chinese theatre and she had not been in it before that day so it is logical to assume that she was looking around with interest as she was walking towards the function area. She cannot remember if she looked down at the floor but it is unlikely that she did because she walked on the timber flooring having been told that the floors were recently being varnished and she had noted herself the strong smell of varnish that was emanating from the club. It may well be that in her embarrassment at having fallen over she has unconsciously reconstructed events.

> [16] The evidence of Ms Duck cannot be seen as reliable in light of the fact that she does not remember any conversations even the ones that the plaintiff acknowledges occurred. It is clear that she was not paying particular attention to any conversation.
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> [17] It follows from this discussion that I accept the evidence of the defence witnesses that the plaintiff was given a warning not to walk on the floors on more than one occasion by both Mr Noreiks and Ms Foster. I also accept that the warning was reiterated just before she fell over in the area where the timber floor was and that Noreiks pointed towards the flooring.
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> [18] It was conceded by the plaintiff that if the warning was given as Noreiks claims then the plaintiff's case must fail.
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> [19] Even if Noreiks did not physically point out where the timber flooring was it is clear that he did say from the beginning that the floors were not to be walked on. The timber floor area was apparent to the naked eye even though the light was dim. The plaintiff herself gave evidence that the lighting was such that it was 'like 5 o'clock in a domestic household.' That in my view was sufficient lighting to notice the timber floor particularly in circumstances where the plaintiff had been asked not to walk on the timber floors and she had noticed that the strong smell of varnish."

[14] Her findings based on that analysis were:

> "[23] I accept that the plaintiff was given a warning by Noreiks not to walk on the floors and that although the lighting in the club was dim she was asked to follow Noreiks and he did not walk on any polished floors. I accept that he told her where the floors were and pointed to them and I find that the plaintiff was likely distracted by her observation of the club for future use and did not watch where she was walking. The evidence of Noreiks is corroborated by Cowden and Foster. In the circumstances, in my view there is no evidence that the defendant breached its duty of care to the plaintiff because the plaintiff was warned not to walk on the floors. Even if it was not pointed out to her exactly where the polished floors were, had she followed Noreicks as requested she would not have walked on the floor and slipped."

[15] Faced with that careful analysis of the facts the appellant had difficulties in seeking to persuade this court that her Honour's factual findings should be overturned on the basis that they were glaringly improbable or because the primary judge failed to use or clearly misused her advantage in observing the witnesses give their evidence.[2]

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[2] See *Fox v Percy* (2003) 214 CLR 118, 128; *Anderson v Connelly* [2011] QCA 37 at [39] citing *Brunskill v Sovereign Marine & General Insurance Co Pty Ltd* (1985) 59 ALJR 842; *Devries v Australian National Railways Commission* (1993) 177 CLR 472.

The parties' submissions

Improbability of the appellant acting inadvertently in the face of the warning

[16] In submitting that the factual findings were wrong, Mr Lynch for the appellant focussed first on what he described as the improbability of the conclusion that the appellant inadvertently walked on the floor in the face of the explicit warning Mr Noreiks said he gave. His argument was that those factual findings were mutually inconsistent because one would not expect such inadvertence by Ms Dowling in the face of the type of warning described by Mr Noreiks.

[17] Inadvertence in the face of explicit warnings is, however, not an uncommon feature of human behaviour and, as Mr Morton for the respondent pointed out, the appellant's evidence was that she may not have looked at the floor before she stepped on it.[3] That factual finding arrived at by her Honour is neither glaringly improbable nor contrary to compelling inferences.

Mr Noreiks' statement to a loss adjustor

[18] Mr Noreiks' evidence was, it was also submitted, inconsistent with a signed statement he gave a loss adjustor on 31 May 2011. Mr Lynch submitted that, when analysed, that statement contained no warning as to the actual areas the appellant and Ms Duck were not to walk on. It was, he argued, inconsistent with Mr Noreiks' evidence that he stopped and pointed out the area of the floor on which they should not walk.

[19] The statement does not say that he stopped, but it is otherwise consistent with his evidence at the trial and not necessarily inconsistent with the possibility that he did stop. The main relevant paragraph reads:[4]

> "10. We walked across the concrete floor towards the timber floor. Alexandra Forster, another staff person at The Met, was with us for some of the time. I pointed out to Karen Dowling and her friend that they would be able to view the large main room by walking along a section of concrete floor which runs adjacent to the timber floor. At that point the concrete floor is approximately 1 metre in width. I was walking in front of the two women and I made that comment either while walking towards the 1 metre wide strip of concrete floor or when I was standing on it. I am quite sure that I mentioned to them on at least one other occasion as we were walking across the concrete floor that we would not be able to walk on the timber floor."

[20] I do not agree with the submission that the statement is entirely inconsistent with Mr Noreiks either stopping or carefully pointing out the area of the flooring that the appellant was not to walk on. Even if it were, however, that would not preclude her Honour from reaching the view that she did about the reliability of his evidence overall. Her conclusion that the statement was not significantly inconsistent with his evidence in court is, in any event, a view with which I agree.

[21] It was said to be admissible as a prior inconsistent statement, making its contents admissible as evidence of the facts contained in the statement pursuant to s 101 of

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3 See AR22 l.35.

4 See AR83.

the *Evidence Act* 1977 (Qld). It was not treated as such a document at the trial as it was admitted without objection and without clarifying the basis of its reception into evidence.[5] In any event, Mr Noreiks admitted making it for the purposes of s 18 of the *Evidence Act* so that the precondition for the applicability of s 101 did not arise.

[22] In any event the document was consistent with his oral evidence and not one whose content led to compelling inferences that what he said in Court was wrong. The oral evidence provided more detail, which is not surprising, but it was detail that supplemented rather than contradicted the statement. Trials normally examine evidence in finer detail than statements which may be given to a loss adjustor.

The reliability of other witnesses' evidence

[23] Her Honour's findings on the lack of reliability of Ms Duck were also attacked on the basis that that witness recalled more facts than her Honour credited to her. Her denial that Mr Noreiks gave a specific direction or warning about the floors was said to provide powerful corroboration for the appellant. Her limited recollection of some of the events still justified her Honour's findings about her reliability, however.

[24] Ms Forster's evidence was criticised as dogmatic about the warning she gave where no such statement was included in a statement she had provided to a loss adjustor prepared on 28 April 2011. It was not suggested to her, however, that she had invented the story. Other inconsistencies between her evidence and that of Mr Noreiks and others about where individuals were positioned during the events were also criticised. She also said in her evidence that she had made an incident report at the time which was neither disclosed nor produced at the trial.

[25] Mr Morton pointed, however, to important areas where her evidence was consistent with that of Mr Noreiks, especially in relation to the warnings given and the indication where the varnished floor was.

[26] The evidence of Ms Cowden was said to be more consistent with the appellant's case in Mr Lynch's submission. He also pointed out that it did not support Mr Noreiks' evidence that he stopped and indicated which floors not to walk on. She did not accompany Ms Dowling and Mr Noreiks on their journey through the club, however, and had begun to lose interest in the conversation. She did remember Mr Noreiks saying that the floors had just been varnished and not to walk on them.

The effect of the dim lighting

[27] Her Honour's finding that there was sufficient lighting to notice the change in floor surface was criticised as being against the weight of the evidence. The appellant and Ms Duck said that the light was dim and they did not notice the change in the type of surface. The defendant's photographs, however, support her Honour's finding that the timber floor area was apparent to the naked eye even though the light was dim. There was no pleading that the lighting was inadequate, the issue having been raised initially by a question by her Honour.[6] There was no suggestion that the photographs showed a scene quite different from that perceived by the appellant.[7] This finding should not be disturbed.

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5 See AR53-54.

6 AR6 ll8-12.

7 See her examination in chief at AR6-7.

Absence of a barricade

[28] Mr Morton also submitted for the respondent that the defendant's duty did not extend to the need to erect a barricade to prevent entry to the area, a submission accepted by her Honour and not the subject of any argument in this appeal.

Discussion

[29] This consideration of the submissions merely reinforces her Honour's conclusion that there were inconsistencies in the evidence. Her analysis took those inconsistencies into account rationally. It cannot be said at all persuasively that she did so in circumstances where she failed to use or clearly misused her advantage in observing the witnesses give their evidence. Nor were her conclusions glaringly improbable or contrary to compelling inferences.

[30] In the circumstances, the appeal must fail.

Order

[31] I would order that the appeal be dismissed with costs.