

SUPREME COURT OF QUEENSLAND

CITATION: *Chandler v Silwood* [2016] QSC 90

PARTIES: **KAYLEEN GAYLE CHANDLER**
(plaintiff)
v
CLIVE FRANCIS SILWOOD
(defendant)

FILE NO/S: SC No 12010 of 2013

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 27 April 2016

DELIVERED AT: Brisbane

HEARING
DATES: 7, 8 December 2015

JUDGE: Holmes CJ

ORDER: **Judgment for the plaintiff against the defendant in the sum of \$650,000**

CATCHWORDS: NEGLIGENCE – DANGEROUS PREMISES – INJURIES TO PERSONS ENTERING PREMISES – INVITEES – LIABILITY OF OCCUPIER GENERALLY – where the plaintiff suffered an injury while ascending external steps at the front entrance of the defendant’s property – whether the area was adequately lit at the relevant time – whether the area was in a wet or slippery state at the relevant time – whether the defendant breached his duty of care to the plaintiff

COUNSEL: K C Fleming QC, with G Hampson, for the plaintiff
K S Howe for the defendant

SOLICITORS: O’Donnell Legal for the plaintiff
Barry Nilsson for the defendant

[1] **HOLMES CJ:** The plaintiff, Ms Chandler, seeks damages for a severe injury to her right arm said to have been sustained when she slipped on a step at the front door of the defendant’s house, with the result that her arm went through a glass panel of the door. There is no dispute as to quantum, but liability is denied. The factual issues between the parties are, in summary, whether the stairs were in darkness at the relevant time; whether they were damp or wet and whether there was any reason for the defendant to suppose that they would be slippery; whether Ms Chandler slipped or tripped; and whether she was affected by alcohol in such a way as to impair her coordination, perception and judgment.

The plaintiff's evidence

- [2] Ms Chandler and the defendant, Mr Silwood, had previously been in a relationship which had ended by the time of her accident on 9 September 2008, but in the course of it Ms Chandler had conceived a child, born about two weeks prior to the incident. On the day in question, worn out by caring for the baby, she had made a number of attempts to contact Mr Silwood by telephone. Eventually there was a long conversation between the two at 7.49 pm, in which they agreed that Ms Chandler would bring the baby to Mr Silwood's house, which was not far from her own, that night. The aim was to give Ms Chandler an opportunity to catch up on her sleep. Ms Chandler's evidence was that from about 4 pm she had drunk three 150 millilitre glasses containing an even mix of red wine and lemonade, with the aim of drying up her breast milk. On her arrival at Mr Silwood's house at about 8.30 pm, with the baby and her older daughter in her car, she pulled up on the driveway, got out of the car and walked to the front door. She saw no lights inside the house. Nor was there any outside light.
- [3] Photographs tendered in evidence show a concrete path leading from the driveway of Mr Silwood's house to a small tiled area and two tiled steps in front of the front door of the residence. The area of the tiles and steps is recessed so as to form a sort of alcove at the front of the house. There is a street light across the road; judging by the scale on the photograph it is about 25 metres from the front door. However, part of the house extends beyond the alcove, between it and the light. A 2015 photograph shows a three-limbed palm tree at the front of that protruding section of the house; according to Ms Chandler, the tree was bushier in 2008.
- [4] On the evening of 9 September 2008, Ms Chandler was wearing sandals with a very small wedge heel; they had synthetic soles, but she could not remember whether they were smooth or corrugated. She had put a foot (she could not recall which) on the tiled area and then her right foot on the lower of the two stairs. She said that she went "across" from the path. (Unfortunately, although she indicated her direction of travel, it was not recorded in submissions. Her counsel's recall was that it was at an acute, rather than a 90°, angle to the stairs. Counsel for the defendant could not recall, but did not dispute that memory.) When Ms Chandler put her right foot on the lower step, she felt herself slide forward. In trying to stop herself from falling, she put her outstretched arms through the bottom panel of the door, injuring her right arm. She bled profusely, having damaged an artery.
- [5] Ms Chandler could not remember Mr Silwood coming to her aid, nor the arrival of a young woman neighbour or the ambulance which took her to Redcliffe Hospital. The Queensland Ambulance Service notes record that she appeared to have lost a litre of blood and that she was administered five grams of morphine. She was transferred in the early hours of the morning to Princess Alexandra Hospital for surgery. In the first day or so that she was there, Mr Silwood spoke to her. He acknowledged that he had washed the house down on the day of her visit and that the steps might have been wet so as to cause her to slip.
- [6] Under cross-examination, Ms Chandler was challenged about what were said to be previous inconsistent statements, as to whether she had in fact tripped rather than slipped and the amount of alcohol she had drunk before the incident. It was put to her that a

neighbour who had heard her scream and come to help, Ms Giammichele, had asked her whether she had been drinking and she had responded that she had been. Ms Chandler said she had no recall of that. A Queensland Ambulance Service report, admitted by consent, gave a case description with these details:

“Called to a 36 yr old female pt who had tripped up her front stairs and fell with an outstretched arm through a glass panel door...pt stated she had consumed ‘a lot’ of alcohol this pm”.

The emergency department record from Redcliffe Hospital, similarly admitted by consent, contained these notes:

“36 yo presents following trip on stairs and falls through glass door at top of stairs...had been drinking all evening three glasses wine total”.

Ms Chandler said she did not recall any discussion with anyone after the accident; in particular she did not recall saying that she had tripped, that she had drunk a lot of alcohol or that she had drunk three glasses of wine. Asked why she had made no mention of a lemonade mix to hospital staff, she said that at the relevant time she was moving in and out of consciousness and thought she was going to die.

- [7] It was put to Ms Chandler that in a notice given under the *Personal Injuries Proceedings Act* in February 2009, in answer to a question as to whether she had consumed any alcohol in the 12 hours before the incident, she had responded

“One glass of wine and lemonade. One glass approximately one hour before the incident”.

Ms Chandler said that was an error. It was also pointed out to her that in a Reply filed on 4 April 2014, it was specified that it was on the tiled area, not the steps, that she had slipped. Again she said that it was wrong. (An amended Statement of Claim filed 27 March 2015 alleged that Ms Chandler had slipped as she stepped on to the first of the two tiled steps with her right foot, consistently with her evidence.)

- [8] Cross-examined on the point, Ms Chandler said that she placed the foot which slipped partly on the nosing and partly on the tread of the first step. She indicated that it was at a point about a quarter of the way along the step, marking it on a photograph. She agreed that she had been to Mr Silwood’s house many times over the last two years. Although she usually used the back door, on numerous occasions and in varying weather conditions, she had entered by the front steps and door. Ms Chandler rejected the proposition that on this occasion, having had “a few drinks”, she had lost her footing or misjudged her step.

The defendant’s evidence

- [9] Mr Silwood’s house was built in 1968; he had purchased it in 2000. He had not made any alterations to the stairs and tiled area outside the front door. On arriving home from work on 9 September 2008, he had noticed some bat droppings on the front wall of the house, so at about 3 pm he had hosed next to the front door. He put a cross on a photograph to mark the area hosed; it is immediately adjacent to the steps and looks to be about a metre above the ground. He did nothing to dry the area afterwards. Mr

Silwood said he had had no concerns about the stairs being slippery, either generally, or on previous occasions when he had hosed the wall.

- [10] Having spoken earlier with Ms Chandler about bringing the baby around to his house, Mr Silwood was in the kitchen around 8.30 pm, cooking dinner. Responding to a noise, he discovered that Ms Chandler had fallen and cut her arm at the front door. His first actions were to find a towel, wrap her arm in it and ring the emergency number. The emergency call was played. Mr Silwood can be heard saying that Ms Chandler is about to black out. She can be heard in a state of agitation telling him to get the baby and saying that she is about to be sick and thinks she is dying. With the operator still on the line, Mr Silwood took Ms Chandler inside, put her on the couch and retrieved the baby and Ms Chandler's young daughter from her car. When he went to fetch the children, he did not notice that the steps or tiled area were wet or damp, and he did not detect any slipperiness. The outside light was not on, but there was a streetlight across the road and the kitchen light would have been on; he was able to see where he was going.
- [11] Under cross-examination, Mr Silwood said that when he went to Ms Chandler's assistance she was half on the steps and half in the house, bleeding heavily. He conceded that he was not taking any notice of whether there was any water on the steps or tiles and that when he returned with the two children, he had to tread carefully, making his way through a substantial amount of blood near the door. The streetlight was across the road from his house; there was a palm tree between it and the front porch. Mr Silwood agreed that any light thrown from the kitchen, which was at the back of the house, would not have made its way to the alcove area.
- [12] Mr Silwood acknowledged that when he was washing the bat droppings off the house, he had been unconcerned about the amount of water deposited on the stairs and tiles. The stairs might well have been wet when Ms Chandler fell, he conceded, but he did not know. He had not heard any conversation between her and Ms Giammichele, the neighbour who came to assist, as to whether she had been drinking alcohol, and he would not have thought that she was in any condition to engage in conversation.

The Good Samaritan's evidence

- [13] Ms Giammichele lived nearby. She had not been to Mr Silwood's house before, but hearing a scream, rather bravely came to the aid of the person in trouble. She said that when she arrived, she was able to see where she was going. There was a light coming from just inside the house and there were streetlights on. The steps were not wet nor damp to her recall. She had no difficulty in walking up them, although she was hurrying to assist, not walking casually. When she entered the house Ms Chandler and Mr Silwood were in the living room. Mr Silwood, while holding the baby, was using a towel to try and stop the bleeding from Ms Chandler's arm. Ms Giammichele could see all that was going on, but she did not know the source of the light: whether the living room light was on or not.
- [14] Ms Giammichele took the baby from Mr Silwood. Smelling alcohol on Ms Chandler, she asked her if she had been drinking, because of the concern that it might affect blood loss. Ms Chandler replied "yes". Ms Giammichele spoke to the emergency operator. On the recording she can be heard advising the operator that Ms Chandler was "throwing up", and her bleeding was uncontrolled; she received instructions about stanching it. Under cross-examination, Ms Giammichele said that she did not know whether she had

asked Ms Chandler about drinking before or after she vomited. She left the house after Ms Chandler was taken away by the ambulance. Walking down the stairs, she did not notice that they were slippery or wet, and she had no difficulty seeing her way. Ms Giammichele agreed, under cross-examination, that there was a lot of blood on the stairs and inside the house. She had not specifically looked for water on the stairs, and she had walked around the blood.

The expert evidence as to intoxication

- [15] Ms Chandler had identified the wine she mixed with lemonade as a Wolf Blass label, the alcohol content of which was established to be between 13 and 14 per cent. She had drunk it from a 150 millilitre glass. Expert evidence was adduced in her case from Dr Donal Buchanan, a forensic medical officer. On the premise that she had begun drinking at 4 pm and stopped at 7 pm, consuming 225 millilitres of wine, he estimated that by 8.30 pm her blood alcohol concentration would have been between 0 and .03 per cent, with minimal effect on her judgment and perception. Dr Buchanan had also made calculations on the basis of, inter alia, Ms Chandler's having drunk three glasses each containing 150 millilitres of wine over a four and a half hour period. That would have produced a blood alcohol concentration in Ms Chandler of .057 per cent at 8.30 pm, which would result in some degree of disinhibition, with mild impairment of perception and judgment. It would not normally produce any visible sign of intoxication such as unsteadiness on the feet.
- [16] In giving evidence, Dr Buchanan said that Ms Chandler's blood pressure readings as recorded in the medical records showed that she had suffered marked blood loss, which would cause her to be anxious and confused. It would be very difficult to discern from her behaviour whether Ms Chandler were intoxicated or simply suffering shock from loss of blood. In cross-examination, Dr Buchanan said that a smell of alcohol on a person's breath could be expected to dissipate in 15 to 20 minutes. If, on the other hand, Ms Chandler's last drink had been an hour or so before and diluted with lemonade, it would be surprising that alcohol could still be smelled on her breath.
- [17] The defendant called Dr Robert Hoskins, a physician with expertise in forensic medicine. He did not disagree with any of Dr Buchanan's calculations. However, he considered that if Ms Chandler had a blood alcohol concentration of .057 per cent, the resulting impairment of her perception and judgment would affect her capacity to exercise proper care and skill. That would not be the case if her blood alcohol concentration were as low as .03 per cent. The smell of alcohol in the mouth could be expected to dissipate after five minutes, but there were two other possible sources of the smell of alcohol: spillage on a person's clothes or a persisting chemical from the alcohol, excreted in the breath. There was no necessary relationship between the smell of alcohol and the state of a person's sobriety.

The expert evidence as to the state of the stairs

- [18] The third expert called in the case was Mr Roger Kahler, an engineer who provided a report and gave evidence in Ms Chandler's case as to the slip resistance of the stairs. The tread on the first stair sloped from rear to front. Its nosing was slightly raised above the tread's surface, which caused pooling when water was poured onto the stair. Mr Kahler observed some algae growth at the stair's edge, indicating, he said, that water did not freely drain from the stair, instead partially draining through the grout lines of the nosing strips and leaving a residue of pooled water.

- [19] Mr Kahler had been able to establish that the maximum temperature on the day of the accident was 20.5° C. He was not able to obtain a figure for humidity but did establish that on 9 September 2014, a day when the temperature was comparable, the humidity level was 65 per cent. He had carried out a test to establish the evaporation rate of water in an environment in which the temperature was maintained at 24° C and humidity at 50 per cent, those being conservative estimates on the basis of the figures he had obtained. He conducted the test in an enclosed air conditioned room with air circulating from an evaporator unit. The water reduced at a rate of .05 mm per hour; at that rate, five hours after the step was cleaned, the pooled water could be expected to have dropped by .25 mm. That suggested to him that it was probable the stair was still wet when Ms Chandler arrived. The precise quantity of water which remained on it was irrelevant; the point was that any water would alter the friction properties of the stair.
- [20] Mr Kahler conducted friction tests on the steps in a wet state, using a “Wet Pendulum” test to arrive at a friction measurement used in Australian Standards which identified appropriate surface materials. The Pendulum test gave a reading which was higher the greater the friction. Mr Kahler arrived at a range of 33-36 for the step treads and 33-38 for the nosings. There was no Australian Standard which prescribed slip resistance for external stairs, but for external colonnades and walkways and for internal stair nosings, the recommendation was for surfaces which gave results between 45-54, in order to produce a low prospect of the floor surface contributing to a risk of slipping when wet. Readings of 35-44 produced a moderate risk of slipping and 25-34 a high risk. The readings in the present case were at the margin between the last two categories.
- [21] In his report, Mr Kahler proceeded on instructions that Ms Chandler had stepped directly from the concrete path at an angle onto the first stair, using her right foot, rather than first walking onto the tiled area below the stairs. He made the point that a pedestrian walking on a surface with a higher degree of friction, such as a concrete path, tended to develop an expectation of its continuance, so that a slip was more likely on moving to a slipperier surface such as a wet stair tread. Mr Kahler said that if Ms Chandler had stepped on the stairs at an angle, it was not of great significance whether her foot was partly on the nosing; if her direction of approach was not square on, a friction effect known as hysteresis (to achieve which was the purpose of the grooves in the nosing) would be lost. To a question about the significance of a situation in which Ms Chandler placed one foot on the tiled area and the other on the lower stair, Mr Kahler said that since the tiles were as slippery as the step, it would be expected that the left foot would slip first. However, that might depend on whether the left foot was contacting the nosings of the tiled area rather than a tile.
- [22] Mr Kahler suggested various safety measures, including drying the stairs after cleaning and installing an external sensor light. He made the point, though, that lighting was a contributory, rather than an essential, factor because it depended on whether the light revealed that there was a change in the surface to which the person using it would respond.

The pleadings as to negligence and contributory negligence

- [23] There was no dispute that Mr Silwood as occupier of the property owed a duty to Ms Chandler as a lawful entrant to take reasonable care to prevent injury to her, while being entitled to assume that she would take reasonable care for her own safety. The amended statement of claim pleaded negligence in Mr Silwood’s failures to: switch on the outdoor

light or otherwise illuminate the alcove area so that any water was apparent; warn Ms Chandler that the area could be wet, damp or slippery as a result of his having washed the area down; ensure that the area was dry; and somewhat more cryptically, identify the risk posed by the area being damp or slippery as a result of the washing of the house. Those allegations were of course denied, and Mr Silwood pleaded also that the incident was the result of Ms Chandler's inebriation and carelessness, or alternatively that those matters amounted to contributory negligence which should result in a reduction of her damages by at least 50 per cent.

Credit findings

- [24] My impression of the three lay witnesses was that all were honest and generally reliable, but that time and the dramatic nature of the events were likely to have affected their memory for some details. Nothing in the evidence of the three expert witnesses suggested to me that their opinions could not be relied on.

Whether the steps were wet and slippery

- [25] The steps were almost certainly still damp when Ms Chandler arrived. The proximity of the wall which Mr Silwood was hosing to the steps made it inevitable that water would have been deposited on them in that process; and as Mr Kahler demonstrated, the formation of the lower step meant that the water could not drain away in its entirety. His testing provided some illustration of the slowness of the evaporation process, but common sense would indicate, in any event, that the steps were unlikely to dry quickly. It was a cool spring day, no doubt growing colder as the evening set in. The photographs of the alcove show it to be rather a dark, damp place, something which is confirmed by the algae growth on the stair. I am satisfied that there was residual moisture on the stairs and, having regard to the Wet Pendulum test results, that its effect was to produce a significant risk of slipping.
- [26] It would have been apparent to Mr Silwood, too, had he turned his mind to it, that the steps would remain wet for some time and could be hazardous in that state. In conversations with Ms Chandler, both around the time of her accident and more recently, in a statement made in 2008, and in evidence here, he has consistently conceded the possibility, without actual knowledge, that they were damp or wet when Ms Chandler arrived at the house. His volunteering to Ms Chandler, very shortly post-accident, of the possibility that wet steps were the cause of her fall, while not an admission of the fact, certainly suggests a consciousness on his part that they were likely to have remained in that condition and to have caused her fall. He might not on previous occasions have had any concern about the steps after he had hosed them, but he did not seem to me likely to have given the matter any thought; when he did (after her accident) the likelihood was apparent to him. The lack of any previous accident may well have been a matter of luck.
- [27] The fact that neither Mr Silwood nor Ms Giammichele observed any dampness or water on the steps as they used them that night does not compel a different conclusion. It was not something of which they were likely to take heed in the drama of events; and both of them were likely to have been concerned with the need to avoid the blood on the steps, the need to take that care possibly accounting for why they did not slip. And of course, while there may have been sufficient light for them at that stage to see where they were going, the porch light was not turned on. In that state of illumination, it is questionable how able they would have been to discern water, which would not have been as visible

as blood. Notwithstanding their evidence, I am satisfied at a level beyond probability that the steps were wet to some degree and in that condition unsafe.

The lighting

- [28] Mr Silwood frankly conceded that he had not turned the outside light on and that the only light on in the house when Ms Chandler arrived was that in the kitchen, which did not cast any light into the alcove. There is no evidence as to how effective the street lighting was, but it is apparent that the part of the house which extended towards the road was presented some barrier between the light and the alcove. The palm tree was also likely to cast some shadow in that area. Mr Silwood and Ms Giammichele both said that they could see adequately when they used the stairs; but it seems to me that the probable explanation is that Mr Silwood had actually turned the living room light on by that stage. It seems extremely improbable that he attempted to attend to Ms Chandler's arm or ring emergency services in a darkened room or that he brought the children back into the house without having turned the living room light on. His having done so would certainly explain Ms Giammichele's recollection of a light "from just inside" and her ability to see what was going on with the occupants in the living room. I accept Ms Chandler's evidence that the alcove area was dark when she arrived.

Intoxication and trip vs slip

- [29] Reliance was placed for the defence on the apparent previous inconsistent statements made by Ms Chandler, particularly as recorded in the Queensland Ambulance Service notes and the Redcliffe Hospital emergency department's clinical record. She denied them, but the records nonetheless have some evidentiary status, having been admitted by consent. However, I do not consider them to be of any real weight in this context. The references in both sets of records to a "trip" is more likely to have been the product of inference by the Ambulance Service members, carried through to the hospital records, than anything Ms Chandler said. In neither case is the relevant statement attributed to her.
- [30] Ms Chandler is recorded as saying to the ambulance officers that she had consumed "a lot" of alcohol and at the hospital that she had been "drinking all evening three glasses wine". What amounts to "a lot" might depend on one's practices; Ms Chandler was not a regular drinker. Nor was there likely to have been much opportunity for her to elaborate in the circumstances on the precise content of her glasses of wine. More importantly, given the effects of shock, her panicked state (which can be heard on the emergency call), and the fact that she was administered morphine, I do not think one could safely place any reliance on what she said at those times. Her evidence here is to be preferred.
- [31] There seems to have been a later inconsistency in the answer in the *Personal Injuries Proceedings Act* notice which suggested that Ms Chandler had drunk only one glass of wine and lemonade in the 12 hours preceding the accident. The possibility exists that that was an attempt to minimise her alcohol intake, but it may equally be the product of poor taking of instructions. I am not prepared to base any adverse finding about her alcohol consumption on it. Ms Giammichele's recollection of a smell of alcohol, for the reasons Dr Hoskins gave, is not conclusive of anything. It seems more likely that if Ms Chandler had been intoxicated, Mr Silwood, who knew her well, would have been alive to that fact, notwithstanding the complications of shock and blood loss. He made no such suggestion. I accept Ms Chandler's account that she had drunk only the half quantities

of wine in three glasses as to which she gave evidence, so that any blood alcohol concentration was unlikely to have any effect on her capacities.

The mechanism of the fall

- [32] I would regard the reference in the Reply to Ms Chandler having slipped on the tiled area, not the steps, as likely to be an unwarranted extrapolation by the drafter from the pleading in the original Statement of Claim, which referred generally to a “tiled surface area near the front door”, without distinguishing the steps. Ms Chandler had as an inpatient at Princess Alexandra Hospital described her accident as occurring on the steps, consistently with the position understood by the ambulance officers and personnel at the Redcliffe Hospital emergency department. It seems unlikely that she resiled from that account for the purposes of the early pleading only to resume it again later. And it was not suggested that her *Personal Injuries Proceedings Act* notice contained a different version from her evidence on this point. In all the circumstances, I regard the pleadings aberration as a red herring.
- [33] Mr Kahler was given to understand that Ms Chandler had stepped straight from the path onto the first step, whereas her evidence was that she had placed a foot on the tiles in front of the stairs. The point she identified as where she placed her right foot on the first step was closer to its street side than its middle, so it is unlikely that she had advanced much onto the tiled area before stepping up; which is consistent with her stepping up at an angle to the stairs rather than square on to them. I think it is not surprising that she is not precise about the position of her feet up to the point where she stepped up with her right foot and felt it slip, that being the significant event. I accept, however, her account of that sensation: of putting her foot onto the first stair and feeling herself slide forward. Her description of that movement was consistent with her having put her foot on the stair at an angle to the nosing so as to produce the physical effect which Mr Kahler described. I am satisfied that Ms Chandler did indeed slip on the step which remained wet or damp from Mr Silwood’s afternoon hosing episode and which was, consequently, slippery.

Reasonable care

- [34] The risk of injury to Ms Chandler through the steps being in a wet and slippery state was foreseeable. Mr Silwood knew that she was coming to the house that night. The risk of her falling on the stairs and hurting herself was not insignificant. It was compounded by the fact that the stairs were in darkness, which removed any possibility that Ms Chandler would perceive the danger. A reasonable person in his position, in my view, would have made sure the stairs were dry or at least warned Ms Chandler in their telephone conversation that they might be wet and should be taken with care, and would certainly have made sure that the light was on. None of that would have created any difficulty for Mr Silwood, and doing so would have obviated a real prospect of serious harm to Ms Chandler. The failure to take those steps was a breach of his duty to her. It unnecessarily exposed her to the risk of the fall and injury which in fact occurred. I find the case on liability made out against him.

Judgment

- [35] Quantum was agreed at \$650,000. Accordingly, I give judgment for the plaintiff, Ms Chandler, against the defendant, Mr Silwood, in the sum of \$650,000. I will hear the parties as to costs.