SUPREME COURT OF QUEENSLAND

CITATION:	*Silwood v Chandler* [2016] QCA 273
PARTIES:	**CLIVE FRANCIS SILWOOD** (appellant) **v** **KAYLEEN GAYLE CHANDLER** (respondent)
FILE NO/S:	Appeal No 5188 of 2016 SC No 12010 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2016] QSC 90
DELIVERED ON:	28 October 2016
DELIVERED AT:	Brisbane
HEARING DATE:	14 September 2016
JUDGES:	Margaret McMurdo P and Gotterson JA and Atkinson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. Unless the appellant files submissions on costs in accordance with paragraph 52(4) of Practice Direction 3 of 2013 within 14 days, with any response by the respondent to be within seven days of receipt of those submissions, the appellant is to pay the respondent's costs of the appeal on the standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – DANGEROUS PREMISES – INJURIES TO PERSONS ENTERING PREMISES – INVITEES – LIABILITY OF OCCUPIER GENERALLY – where the respondent suffered injury when she slipped on wet tiled steps at the home of the appellant – where the trial judge found the appellant liable in negligence – where the appellant challenged the trial judge's findings of foreseeability of risk and want of reasonable care, submitting that these findings were affected by hindsight bias – where the appellant also challenged the trial judge's findings of causation – where the trial judge's findings of fact were thoroughly explained and well justified – whether there was any reason to depart from the trial judge's findings *Civil Liability Act* 2003 (Qld), s 9

Chandler v Silwood [2016] QSC 90, affirmed
Hutchison Construction Services Pty Ltd v Fogg [2016] NSWCA 135, cited
Robinson Helicopter Company Incorporated v McDermott (2016) 90 ALJR 679; [2016] HCA 22, cited

COUNSEL: G W Diehm QC, with K S Howe, for the appellant
K Fleming QC, with G Hampson, for the respondent

SOLICITORS: Barry Nilsson for the appellant
O'Donnell Legal for the respondent

[1] **MARGARET McMURDO P:** I agree with Atkinson J's reasons for dismissing this appeal and with the proposed orders.

[2] **GOTTERSON JA:** I agree with the orders proposed by Atkinson J and with the reasons given by her Honour.

[3] **ATKINSON J:** Kayleen Chandler suffered a serious injury when she slipped on wet tiled steps and injured her right arm as she fell through a glass door. The learned trial judge found Clive Silwood, the home owner, liable in negligence for Ms Chandler's injury. Mr Silwood appealed that finding. These are the reasons why the appeal should be dismissed.

[4] Ms Chandler was the mother of a two-week-old baby. The baby's father was Mr Silwood with whom Ms Chandler had previously been in a relationship. On 9 September 2008, the day of her accident, Ms Chandler was exhausted from caring for the baby. After many attempts to contact Mr Silwood by telephone she finally contacted him at about a quarter to eight on that night and they agreed that she would bring the baby to Mr Silwood's house to allow her an opportunity to catch up on some sleep.

[5] She arrived at the house at about 8.30 pm with the baby and her older daughter in the car. It was dark when she got out of the car and walked to the front door. The outside light near the front door was not illuminated. The concrete path from the driveway, where the car was parked, to the front door has an s-bend in it. The front door faces away from the street. At the end of the s-bend is a small tiled area and then two tiled steps up to the front door which is made of glass. The area of the tiles and steps is recessed so as to form an alcove at the front of the house. Unbeknown to Ms Chandler, that afternoon Mr Silwood had noticed bat droppings on the front wall of the house and had hosed the wall next to the front door. He did nothing to dry the area afterwards.

[6] The learned trial judge found that Ms Chandler cut across to the steps from her car in a straight line rather than following the s-bend in the path. She had left both children in the car as she went to the door to alert Mr Silwood to her presence. The judge's findings were that she had put her foot (she could not recall which) on the tiled area and then her right foot on the lower of the two steps. She said she went "across" from the path. It appears that it was at an acute rather than a 90 degree angle to the steps. When she 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. When Mr Silwood saw her in hospital in the days after

her injury he acknowledged to her 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.

[7] When cross-examined on where she had slipped, Ms Chandler said she had placed the foot which slipped partly on the nosing and partly on the tread of the first step at a point about a quarter of the way along the step. She marked it on a photograph which was tendered in evidence and was therefore before this Court.

[8] There were various areas of dispute as to liability which are not in issue on the appeal. Quantum was not in dispute at the trial. It was agreed that if liability was found in favour of the plaintiff then the sum awarded should be $650,000.

Grounds of appeal

[9] The grounds of appeal were as follows:

> "2.1 Her Honour erred in the application of the evidence of Mr Kahler in that:
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> (a) Mr Kahler's evidence as to the slipperiness of the steps was premised on the Respondent having approached and stepped onto the steps along the tread.
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> (b) the evidence did not establish that the Plaintiff stepped onto the steps longitudinally but rather tended to show she stepped onto them laterally.
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> 2.2 Her Honour impermissibly used a hindsight bias to reach the conclusion in effect that the Appellant ought to have prospectively apprehended the risk of the Respondent slipping on the steps.
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> 2.3 Her Honour erred in finding that the Respondent slipped as a result of the steps being wet.
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> 2.4 Her Honour erred in finding that the Appellant breached his duty of care owed to the Respondent by failing to have made sure the steps were dry, or warning the Respondent that the steps might be wet and should be taken with care, or have made sure that the light in the vicinity of the steps was on.
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> 2.5 Her Honour ought to have found that the prospect that the harm would occur by the circumstances of the steps being wet was so low that a reasonable person in the position of the Appellant would not have taken the precautions identified by her Honour.
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> 2.6 Her Honour ought to have found that the Appellant neither knew nor ought to have known that the steps posed any material risk of injury by slipping when wet, such that his duty of care as occupier of the premises did not require him to take any particular step concerning the risk of the Respondent slipping.
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> 2.7 Her Honour erred in finding that the circumstances of the said light being off was causative of the injury suffered by the Respondent."

The appellant's submissions

[10] The appellant's submissions divided these grounds of appeal into three areas. The first area was reasonable care and the use of hindsight; the second asked the question, was the cause of the slip the steps being wet; and the third, was the absence of lighting a cause of the accident?

Reasonable care and the use of hindsight

[11] The appellant made submissions under this heading on appeal grounds 2.1, 2.2, 2.4, 2.5 and 2.6. The appellant's submissions were that he had owned the property for some eight years, many people including the appellant and the respondent had used the steps without problems previously, he had not been concerned that hosing the area had made the steps slippery previously and this evidence was a strong foundation for the drawing of an inference that the steps were not in fact slippery when wet at least when used in a way reasonably to be anticipated or at least there was no reason for the appellant to think that they would be.

[12] The appellant's submission was that it was "very difficult to conceive how or why" a person in the position of the appellant would anticipate that a person would walk up and down those steps other than by an approach which was generally square on. It was submitted that the learned trial judge ought to have found that the risk was not one which the appellant knew or ought to have known of and that, in the circumstances, a reasonable person in his position would not have taken the precautions alleged.

The cause of the slip was the steps being wet

[13] The appellant challenged, in ground 2.3, the learned trial judge's finding that the respondent slipped as a result of the steps being wet. The appellant's submissions were that the steps would only be slippery if the respondent stepped longitudinally onto them and not if she stepped square on. It was submitted that the evidence was silent on the topic as to the state of slipperiness in the event that she stepped on the steps at an angle somewhere in between. It was submitted that the respondent must have stepped more at a right angle than longitudinally and that it was not open in those circumstances to conclude that a loss in footing was as a consequence of the dampness. It was submitted that as the respondent said that both her arms went through the glass panel, that suggested she must have been reasonably square on to the door at the time of her fall.

Absence of lighting as a cause of the accident

[14] The appellant submitted that the learned trial judge gave insufficient reasons for finding that the appellant should have made sure the outside light was on and that doing so would have obviated a real prospect of serious harm to the respondent.

The respondent's submissions

[15] The respondent argued that all of the grounds of appeal were based on an argument that the learned trial judge erred in relation to findings of fact. Paragraphs 2.1, 2.3, 2.4 and 2.7 asserted that her Honour erred in making certain findings of fact; paragraphs 2.5 and 2.6 asserted that her Honour ought to have made alternative factual findings; and paragraph 2.2 asserted that the trial judge impermissibly used hindsight bias to reach a finding of fact in relation to the appellant's breach of duty of care. The respondent submitted, relying on *Robinson Helicopter Company*

Incorporated v McDermott[1] that the appellant must satisfy the appellate court that the findings of the trial judge were demonstrably wrong because they are contrary to "incontrovertible facts or uncontested testimony", they are "glaringly improbable" or "contrary to compelling inferences."

[16] The respondent submitted that Mr Kahler's opinion as to the slipperiness of the first step did not depend upon whether or not the respondent's foot was on the tiled area prior to stepping with her right foot on the first step, but instead depended on her angle of approach to the first step, which, to achieve hysteresis or mechanical interlocking (and make Mr Kahler's measurements and consequent views of slipperiness concerning the first step redundant), would need to be square on. Accordingly, the respondent submitted that unless she approached the step where she subsequently slipped square on, Mr Kahler's opinion as to the slipperiness of the first step when wet was entirely relevant.

[17] The respondent submitted with regard to her angle of approach to the first step that there was no evidence that led to the only reasonable inference being that the respondent would have approached the step square on. It was not put to her that she approached the step square on. She approached the steps from an angle and, despite her evidence that both arms went through the glass panel, it was only her right arm that was injured consistent with that arm and that side of her body having been closer to the glass panel of the door at the time of her fall and less consistent with a square on forward fall through the door.

[18] It was therefore submitted that Mr Kahler's assumptions, which were based on the respondent approaching the first step at an angle and not square on, were valid. It was submitted that the judge's findings about the angled approach and her reliance on Mr Kahler's evidence were not findings of fact that were contrary to an incontrovertible fact or glaringly improbable. Mr Kahler's evidence was about the slipperiness of the step in the event that someone approached the step at an angle rather than square on and that the steps would be slippery when wet when so approached.

[19] With regard to the question of whether or not that angle of approach was foreseeable, it would appear, it was submitted, from the photographs that the most direct and convenient path to the front door was by taking an angled approach. There was, it was submitted, no evidence to support the appellant's submission that it is very difficult to conceive why a person would walk up the steps at an angle. It was submitted that it is far less probable (indeed most unlikely) that a person would walk towards the house along the concrete path towards the wall of the alcove, before taking what the respondent submitted might be described as a "military" style of right-angled turn towards the front door, in order to approach the steps square on, in the absence of any barriers such as a handrail directing an entrant to take that path. Accordingly, it was submitted, it is neither glaringly improbable nor contradictory to incontrovertible facts that the respondent ought to have anticipated someone approaching the front steps on an angled approach, rather than square on.

[20] It was submitted that the learned trial judge did not apply hindsight bias but rather the totality of the evidence pointed to the steps having been wet as a result of the appellant's activities, the likelihood of them having been slippery when wet and the respondent's failing to have considered that likelihood.

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1 (2016) 90 ALJR 679; [2016] HCA 22 at [43] and *Hutchison Construction Services Pty Ltd v Fogg* [2016] NSWCA 135.

[21] So far as the absence of lighting is concerned, the respondent submitted that turning on the light was one of the responses that the appellant could have made but was not the only response. In circumstances where, because of darkness, the respondent was denied the opportunity to observe the surface condition of the steps, it was submitted that it is reasonable to conclude that this contributed to her fall in that, as the learned trial judge said, the respondent was denied the possibility of perceiving the danger presented by the unexpectedly wet steps.

Consideration

[22] Only one expert was called as to the state of the steps. That was an engineer, Mr Kahler, who gave evidence in Ms Chandler's case as to the slip resistance of the steps. His tests on the pooling of water on each step and the ambient temperature on the day demonstrated that it was probable that the steps were still wet when Ms Chandler arrived. Applying standardised tests, he was able to show that when the steps were wet, they produced a moderate to high risk of slipping.

[23] In his report, Mr Kahler proceeded on instructions that Ms Chandler had stepped from the concrete path at an angle on to the first step using her right foot rather than first walking on to the tiled area below the steps and walking directly up the steps. In fact what the trial judge found happened was something between the two. Ms Chandler had stepped on the steps at an angle and had put one foot on the tiles at the bottom of the steps as well as her right foot on the first step.

[24] Mr Kahler, as the learned trial judge recorded, suggested various safety measures, including drying the steps after cleaning and installing an external sensor light, although the failure to have lighting was a contributory rather than an essential factor because it would depend on whether or not the light revealed there was a change in the surface to which the person using it would respond.

[25] The trial judge concluded that the steps were almost certainly still damp when Ms Chandler arrived. Her Honour was satisfied "at a level beyond probability" that the steps were wet to some degree and in that condition unsafe. She set out her detailed reasons for coming to that conclusion. This conclusion was well justified on the evidence.

[26] With regard to the mechanism of the fall, the learned trial judge dealt with the effect of the difference in Mr Kahler's instructions from the evidence given by the plaintiff. Her Honour's findings as to the mechanism of the fall were as follows:[2]

> "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 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

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2 *Chandler v Silwood* [2016] QSC 90 at [33].

> 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."

[27] Turning to the question of Mr Silwood's liability her Honour said:

> "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. … 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."[3]

[28] With regard to reasonable care the learned trial judge found:[4]

> "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."

[29] Accordingly, the trial judge found the case on liability made out against the appellant.

[30] The judge's findings of fact were thoroughly explained and well justified. There is no occasion for this court to substitute different findings. Those facts are: the steps were wet; the appellant had made them wet by hosing the wall above them; the steps were slippery when wet if approached at an angle; the appellant knew the respondent would be using the steps that night; it was entirely predictable that she would approach the steps by a direct route and therefore at an angle; the respondent had not turned on a light that would illuminate the steps; the steps were wet,

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3 At [26].
4 At [34].

slippery and in darkness; the appellant knew, and the respondent did not know nor had any reason to think given that the weather was fine, that the steps were wet. Unsurprisingly, the respondent slipped on the steps. Had the appellant thought about it he would have realised that the steps were wet and slippery. A reasonable response to that situation was to dry the steps, to warn the respondent of the risk, or at least to have illuminated the steps so the appellant would have some prospect of seeing that they were wet and therefore potentially slippery.

[31] Section 9 of the *Civil Liability Act* 2003 (Qld) provides:

> "**9 General principles**
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> (1) A person does not breach a duty to take precautions against a risk of harm unless—
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> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
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> (b) the risk was not insignificant; and
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> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions.
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> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (among other relevant things)—
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> (a) the probability that the harm would occur if care were not taken;
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> (b) the likely seriousness of the harm;
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> (c) the burden of taking precautions to avoid the risk of harm;
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> (d) the social utility of the activity that creates the risk of harm."

[32] Applying the law to the facts as found, one would conclude that the risk of a person slipping on the wet steps and being injured was foreseeable and not insignificant and so a reasonable person would have taken the precautions suggested by the trial judge given the probability of the harm of slipping, the seriousness of the harm that could result from slipping and how easy it would have been to obviate the risk of harm.

[33] The findings made by the learned trial judge were in accordance with the evidence. The law was correctly applied to the findings of fact.

[34] The appeal should be dismissed.

[35] Unless the appellant files submissions on costs in accordance with paragraph 52(4) of Practice Direction 3 of 2013 within 14 days, with any response by the respondent to be within seven days of receipt of those submissions, the appellant is to pay the respondent's costs of the appeal on the standard basis.