SUPREME COURT OF QUEENSLAND

CITATION:	*Littlejohn v Julia Creek Town and Country Club Inc* [2010] QCA 361
PARTIES:	**SONIA IVY LITTLEJOHN** (plaintiff/respondent) **v** **JULIA CREEK TOWN AND COUNTRY CLUB INC** (defendant/appellant)
FILE NO/S:	Appeal No 7807 of 2010 SC No 488 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Townsville
DELIVERED ON:	17 December 2010
DELIVERED AT:	Brisbane
HEARING DATE:	24 November 2010
JUDGES:	Muir and Chesterman JJA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. The question of the appellant's liability to pay the respondent the damages assessed be remitted for determination by the District Court at Townsville.** **3. The respondent pay the appellant's costs of and incidental to the appeal.** **4. The respondent, should she apply, be granted an Indemnity Certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.**
CATCHWORDS:	PROCEDURE – JUDGMENTS AND ORDERS – IN GENERAL – STATEMENT OF REASONS FOR DECISION – where respondent plaintiff fell and injured herself at the appellant's premises – where the respondent's Notice of Claim alleged her fall was partly caused by inadequate lighting – where four years later the Statement of Claim instead alleged the respondent was blinded by glare – where the trial judge accepted the respondent's case as pleaded but did not explain why he preferred her second version of events to the first – whether the judgment was supported by reasons – whether a retrial should be ordered

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – EXCESSIVE OR INADEQUATE DAMAGES – GENERAL PRINCIPLES – PERSONAL INJURY OR DEATH CASES – where respondent suffered significant permanent injury and had some residual incapacities but exaggerated her claim for damages – where there was no expert testimony from an occupational therapist about the amount of care the respondent required – where trial judge considered the amount of damages claimed by respondent excessive and estimated the appropriate amount – whether the assessment of damages made by the trial judge was wrong

Appeal Costs Fund Act 1973 (Qld), s 15
Civil Liability Act 2003 (Qld), s 59(1)(c)
Supreme Court of Queensland Act 1991 (Qld), s 68(3)

Beale v Government Insurance Office of NSW (1997) 48 NSWLR 430, cited
Camden v McKenzie [2008] 1 Qd R 39; [2007] QCA 136, applied
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, applied
Soulemezis v Dudley (Holdings) Pty Ltd (1987) 10 NSWLR 247, cited

COUNSEL: M Drew for the appellant
M Grant-Taylor SC, with A Stobie, for the respondent

SOLICITORS: Connolly Suthers for the appellant
Turner Freeman Lawyers for the respondent

[1] **MUIR JA**: I agree with the reasons of Chesterman JA and with the orders he proposes.

[2] **CHESTERMAN JA**: The respondent successfully prosecuted a claim for damages for negligence against the appellant who was the occupier of licensed premises in Julia Creek. On 29 June 2010 the Supreme Court at Townsville gave judgment for the respondent plaintiff against the appellant defendant in the sum of $160,705.68.

[3] The respondent was one of a party of lapidaries who in May 2004 travelled through Northwest Queensland in pursuit of their interest. Late in the morning of 21 May 2004 the group were driving east along the road from Cloncurry to Richmond. They stopped at Julia Creek and entered the appellant's premises hoping to enjoy an early lunch. They were disappointed: the kitchen was closed. Instead members of the group, the respondent and her husband among them, consumed light liquid refreshment and left the premises. On her way out the appellant fell heavily and broke her left arm quite badly. She is left handed.

[4] The bar area in the appellant's premises ("the club") was at the rear of the building as one enters from the street. To get to the bar, having entered the front door, the respondent walked across a polished wooden dance floor onto carpet and then onto a tiled surface which extended to the bar area.

[5] There was a slight change of level between the carpeted floor and the tiled floor. The carpet was 25 mm lower. The join between the two surfaces ran obliquely at an angle of about 45 degrees to the path followed by anyone walking from the front door directly to the bar. The respondent as she walked from the tiles to the carpet stepped down about 25 mm.

[6] There was a marked difference in colouration between the carpet and the tiles. The former was, as far as one can judge from the photographic exhibits, crimson or, perhaps, burgundy. The tiles were predominantly off white with smaller darker diamond shaped inserts at each corner of the larger square tiles. The line of the join between tile and carpet was masked by a heavy black tape providing a bevelled edge.

[7] The respondent's case, as pleaded and given in evidence, was that the floor of the club adjacent to the join between the two surfaces was poorly lit and a visitor's capacity to notice the variation in level was restricted by the glare of bright sunlight into the club from a window adjacent to the front door. She said she could not see the comparatively dark floor because of the glare towards which she was walking.

[8] Her case as pleaded was:

> "7. The Plaintiff's fall was caused or contributed to by the following circumstances:-
>
> (a) The floor of the premises at the time of the fall had extremely low levels of lighting;
>
> (b) There was an excessive degree of glare from the sun coming through a window facing the Plaintiff, and/or reflected from the dance floor facing the Plaintiff, and impairing her vision;
>
> (c) There was a difference in height between the tiled and carpeted areas of the floor of approximately 25 mm;
>
> (d) The edge between the tiled and carpeted sections of the floor ran at approximately 45° to the normal direction of travel of persons entering or leaving the premises.
>
> 8. The (plaintiff's) injuries … were caused by the negligence of the Defendant … particulars whereof are as follows:-
>
> (a) ….
>
> (b) ….
>
> (c) failing to remedy the difference in height between the tiled and carpeted floor surfaces, so as to provide a surface safe for persons crossing the floor of the premises;
>
> (d) failing to highlight the transition from the tiled to the carpeted area, by means of colour contrast or otherwise;

(e) failing to control the amount of glare confronting the Plaintiff, by lowering a blind on the window … or otherwise;

(f) failing to provide sufficient lighting in the premises at the time of the fall, by turning on the available electric lights;

(g) failing to ensure that the level of lighting in the premises met or exceeded the level of 160 lux recommended in AS1680.2.0:1990: *Interior Lighting: Recommendations for Particular Tasks and Interiors*;

(h) failing to ensure that the premises were uniformly illuminated as recommended in AS/NZS 1680.1:2001: *Interior Lighting: General Principles and Recommendations*;

(i) failing to adhere generally to the recommendations in AS/NZS1680.0:1998: *Interior Lighting: Safe Movement*; AS/NZS 1680.1:2001: *Interior Lighting: General Principles* … and AS1680.2.0:1990: *Interior Lighting: Recommendations* … ."

[9] The appellant's evidence-in-chief was:

> "I left the area where we were having the drink and … proceeded to go through the area that was unlit. … I couldn't see any difference in the flooring there because … there was no light. … And there was a brightness from the end window.
>
> …
>
> what … resulted from there being nothing covering … this window? -- Made it quite dark.
>
> What … was your state of forward vision as you made your way back towards that door? -- Very poor.
>
> …
>
> I attempted to walk out and as I was leaving there was no lights in the second area and there was a bright light, which was quite blinding … in my eyes. … That was coming from the end window at the entrance. … as I went out … my foot just … 'cause I didn't know of any difference in the flooring and I just went and couldn't save myself … . … I was just walking as you normally walk. … there was one floor and then there was nothing."

[10] The respondent led evidence from an ergonomist, Mr O'Sullivan, who provided her with a report dated 21 June 2006 which dealt with the risk to pedestrians of discrepancies in the levels of walking surfaces, and the effect of light on the detectability of variations in height.

[11] The first topic addressed by Mr O'Sullivan was not, in the end, controversial. The appellant did not pursue an argument that the discrepancy in height between the two

floor surfaces was not capable of constituting a hazard which might cause a visitor to the club to stumble and fall. The issue between the parties, at trial and on appeal, was whether the lighting in the club at the time the respondent fell was adequate.

[12] Mr O'Sullivan quoted from AS/NZS 1680.1:1998 Interior Lighting: Safe Movement:

> "Electric lighting alone cannot provide conditions that will ensure safe movement. Other factors, such as … the avoidance of excessive contrasts in brightness of surfaces in the field of view eg. windows … can significantly enhance the visual environment for safe movement."

[13] He quoted also from AS/NZS 1680.1:2001: Interior Lighting: General Principles:

> "Windows can be a source of direct disability glare and can sometimes cause a gloomy interior unless due regard is taken of the recommendations in this standard."

[14] Mr O'Sullivan concluded:

> - "The average illuminance along the tiled edge varies depending on lighting arrangements: if as described by Ms Littlejohn (blind open, downlight only) the average is 77.6 lux … with a minimum of 36 lux at the left hand end (when facing outwards); 77.6 lux falls short of the 160 lux recommendation for restaurants but exceeds the minimum requirement of 20 lux in AS/NZS 1680.0;
>
> - The illuminance uniformity is adequate over the area but falls short if the patch of sunlight is taken into account (sunlight levels are around 5000 – 10,000 lux or more);
>
> - There is likely to have been a degree of disability glare, based on measurements at inspection and Ms Littlejohn's description of light levels and the effect of glare on her visual capacity due to sunlight reflected on the dance floor …
>
> This latter aspect is likely to be the critical factor in causing Ms Littlejohn to fail to detect the tiled edge or it's (sic) height difference … ."

[15] The appellant's defence of the suit contended that the respondent was not prevented from seeing what it described as an obvious change in floor surface, in height, colour and texture, by the glare of sunlight. The appellant called evidence in support of the first proposition, that the area was well lit, and relied upon discrepancies in the respondent's accounts of the reason for her fall to discredit the second proposition, that she was blinded by glare.

[16] The appellant's expert evidence was given by Mr Forbes, a lighting engineer. He inspected the club on 27 September 2006, and reported:

> "The following general observations about the premises and possible contributing factors were made:
>
> - Dark brown edge tiles with a rounded leading edge, highlight the transition from the cream coloured tiled floor onto the maroon carpeted floor. This band of tiles contrasts well with both the tiles and carpet.

- The blinds covering the front window were in poor repair and did not completely occlude the window, when in the closed position. …
- Due to seasonal changes, the angle of the sun … varies significantly between 21 May and 27 September. The sunlight contribution through the front window at the time my measurements were taken can not be considered indicative of the conditions experienced by the (respondent) because of the different sun-angles.
- The exterior gabled entry awning above the front door and covering the footpath will shield the front window from direct sunlight at certain times of the day and year. … ."

[17] Mr Forbes measured light levels. He said:

"The values of horizontal illuminance along the edge tiles, were measured … for the following conditions:

- blinds open and all lights switched on
- blinds closed and all lights switched on
- blinds closed and all light switched off

Time of measurement was between 1115 and 1215.

…

All values of horizontal illuminance … in the vicinity of the site of the … incident … exceed the minimum value of 20 lux required by AS/NZS 1680.0:1998 … under all measured conditions.

The AS1680 series of Standards *recommends* minimum average values of illuminance for lighting based on specific tasks being performed in a given area. Mr O'Sullivan is correct in stating that 160 lux is *recommended* for restaurants, cafeterias etc., however this value is based upon the level considered appropriate for the performance of tasks (i.e. serving, reading menus, preparation/presentation of food). The only part of AS1680 that is relevant to this matter is AS/NZS 1680.0:1998 … .

Mr O'Sullivan's attempt to quantify the extent of disability glare experienced by the (respondent) … does not establish the degree of disability caused by the glare. Measurement of glare is a subjective issue, and it is difficult to record meaningful and repeatable values.

It is likely that any sunlight coming through the front window and being reflected from the floor (in the direction of a person walking towards the exit door) from the bar would increase the perception of the transition, as the difference in texture of the tiles (shiny) and carpet (ragged) is exaggerated. …"

[18] The respondent's counsel elicited from the appellant's husband in cross-examination that when they entered the club and approached the bar the bar attendant turned on the lights which lit the bar area. Slightly different evidence was given by the bar attendant, Mrs Grace, called in the appellant's case. She said that when she arrived for work at about 10.00 am "The lights were on" having been

turned on and left on by the "guy … in charge of the club (who came) in early (to) do the tills … ." There were, said Mrs Grace fluorescent lights which lit the area in front of the bar where the tiles adjoined the carpeted surface.

[19] The material which was said to discredit the respondent's account of being prevented by glare from seeing the step down to the carpet consisted of accounts of her fall given by the respondent which did not mention that cause. The first account appears in the respondent's Notice of Claim given to the appellant in October 2004 pursuant to the *Personal Injuries Proceedings Act* 2002. The Notice was detailed and prepared in typescript. It identifies the respondent's solicitors as the lawyers she had consulted "about the possibility of making a claim". Her "Brief description of the incident" was that:

> "The claimant walked through the front entrance of the … Club. She walked to the end of the bar area where a female bar attendant was seated. Everyone had a refreshment at the bar. The claimant had 1 light beer. Staff at the hotel advised that there were no meals being served … so the group decided to … continue the journey to Richmond.
>
> The claimant walked from the bar area through a lit area of the hotel into a non-lit area which was dark. The area was subsequently discovered to have lighting however it had not been switched on at the time of the incident.
>
> The claimant walked across wooden floor boards towards the exit of the hotel. The claimant had to traverse across the carpeted entertainment area which was recessed from the wooden floor area. The claimant lost her footing on the step from the wooden flooring to the recessed carpeted area. The claimant tried to save herself from the fall by grabbing a nearby chair however this did not stop the fall.
>
> …
>
> Following the incident, the female bar attendant … then lit up the area which improved the visibility significantly."

[20] Later in the notice the respondent addressed "The reasons why (she) believes that (the appellant) caused the incident." The respondent wrote:

> "5. At or about 11.00am on (21 May 2004) and while the plaintiff was walking from the bar area and across a wooden planked floor section, she was required to walk across a recessed carpeted entertainment area and while the plaintiff was stepping from the wooden planked floor area to the recessed carpeted entertainment area:-
>
> (a) the plaintiff was unable to observe or properly observe the difference in floor height between the wooden plank floor area and the recessed carpeted entertainment area;
>
> …
>
> 6. Immediately proceeding (sic) the events referred to in paragraph 5 hereof:

(a) the plaintiff had not seen the gap in floor height between the wooden planked area and the recessed carpeted entertainment area as she was walking towards the street entrance of the premises;

(b) the recessed carpeted entertainment area had lighting, however, it had not been switched on by the defendant … prior to or during the period the plaintiff was at the premises;

(c) the difference in floor height between the wooden planked area and the recessed carpeted entertainment area was concealed and/or obscured from the plaintiff's view as a result of the lighting within the recessed carpeted entertainment area not having been illuminated by the defendant … ."

[21] The appellant also relies to a lesser extent upon the report of Mr Peter Stoker, psychologist, whom the respondent consulted. According to his report the respondent's account of her fall was that:

> "As she stepped from the wooden planked floor area to the recessed carpeted entertainment area, she could not observe the difference in floor height … and … tripped and fell… ."

[22] The respondent signed the Notice of Claim on 6 October 2004. Mr O'Sullivan's report was dated, as I mentioned, 21 June 2006. He had inspected the club's premises with the respondent on 22 May 2006. The Statement of Claim was filed 23 July 2008.

[23] The appellant's point is that there are substantial discrepancies between the respondent's account of her fall given five months later in her Notice of Claim and the case pleaded four years later and two years after Mr O'Sullivan had been retained and had provided his report describing the propensity of sunlight to impair vision. There was no mention of glare in the Notice of Claim. The account given in that document gave a wholly different explanation for the fall. It was that the club was in darkness because the lights had not been turned on.

[24] The respondent was cross-examined about the discrepancy. Her explanation for failing to mention that it was glare which prevented her seeing the difference in floor level in the Notice of Claim was that "it probably slipped (her) mind." This may be thought an implausible explanation for what, the appellant at least contended, was a critical omission.

[25] The trial judge accepted the respondent's case as pleaded and given in evidence at trial. The appellant complains that he did not do its case justice by explaining why that account should be preferred to the initial account, and he did not notice the appellant's evidence that the floor was adequately lit by fluorescent lighting.

[26] The trial judge dealt with the evidence in this way:

> "[9] The plaintiff says that after having a drink and intending to leave the premises she walked away from the bar and across the area where the tiles and the carpeted surfaces are. This area was unlit and she says her visibility was poor. She says

her visibility was impaired by the strong glare of the sun coming through the window which appears in the various photographs. This glare was reflected from the surface where the sunlight struck the floor.

…

[13] She fell in an area where there were tables and chairs. She says that she fell in a forward direction, finishing up face down on the floor and apparently striking a chair or chairs as she fell.

…

[16] The plaintiff and her husband both speak of the lack of light in the area where she fell. Whilst I am satisfied there was no artificial lighting on at the time in this area I am inclined to think the evidence Mr Littlejohn gave somewhat overstated the effect of the lack of artificial lighting.

[17] I am satisfied that the plaintiff had not seen the small drop down from the tiles to the carpet prior to falling.

…

[20] It is common ground that IS/NZS 1680.0.1998 provides for a minimum level of lighting in publicly accessible parts of buildings. This is 20 lux which is well below the measured illuminance at the junction of the carpet and tiles.

[22] Mr O'Sullivan was of the view that there was likely to have been a degree of disability glare affecting the plaintiff's vision which was likely to have prevented her seeing the slight difference in the surfaces.

[23] Mr O'Sullivan carried out a measurement of the illuminance measured on the plane of the eye and compared this to the illuminance at the level where she fell.

[24] Mr Forbes is critical of this and says it is not a recognised test, something which Mr O'Sullivan accepts.

[25] Mr Forbes says that glare is subjective and cannot be adequately tested. He emphasised the Australian standard level referred to above and the fact that the illuminance level at the join of the surfaces significantly exceeded this.

[26] It is obvious that the question of the glare is something which could only be established if the inspection occurred at precisely the same time and in precisely the same circumstances as faced the plaintiff. Mr Forbes says this and it is implicit in Mr O'Sullivan's evidence.

[27] Mr Forbes' examination took place on 27 September between 11.15 a.m. and 12.15 p.m. whilst Mr O'Sullivan's was in May at about 2.30 p.m. He said there was a strong glare at that time but the sun would have been at a different angle, having passed the zenith.

…

> [29] Whilst the Australian standards are not irrelevant, they cannot be determinative of the issues in this case.
>
> [30] I accept what the plaintiff has said in her evidence and am satisfied that her vision was affected by a strong glare as she described. In these circumstances her capacity to see the edge would have been impaired and I am satisfied that she did not see it. The existence of the edge posed a risk of injury to her which was in the result, realised."

[27] The trial judge then rejected a defence of contributory negligence for reasons which cannot be criticised though the appellant faintly attempted to do so. His Honour also found that:

> "… there were a number of ways in which the risk could have been avoided. These are referred to … (in) … (Mr O'Sullivan's report) and are relatively simple and cheap. These steps directed both at the avoidance of the glare and the risk associated with the slightly sunken floor would have avoided the incident."

[28] The appellant did not challenge this finding. Its criticism centred upon the trial judge's omission of reference to its challenge to the respondent's case and, in particular, its substantial attack upon the plausibility of that account given the very different initial description of the reason for her fall.

[29] The appellant complains also that the trial judge did not address the disputed question of fact, critical to the initial version, whether or not the lights in the club were on when the respondent fell.

[30] The failure of a court from which an appeal lies to give sufficient reasons for its decision constitutes an error of law. The authorities to that effect are both numerous and well known. Muir JA with whom Holmes JA and Daubney J agreed said in *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at 237:

> "[58] The rationale for the requirement that courts give reasons for their decisions provides some guidance as to the extent of the reasons required. The requirement has been explained, variously, as necessary: to avoid leaving the losing party with 'a justifiable sense of grievance' through not knowing or understanding why that party lost; to facilitate or not frustrate a right of appeal; as an attribute or incident of the judicial process; to afford natural justice or procedural fairness; to provide 'the foundation for the acceptability of the decision by the parties and the public' and to further 'judicial accountability'." (footnotes omitted)

[31] His Honour pointed out, citing *Soulemezis v Dudley (Holdings) Pty Ltd* (1987) 10 NSWLR 247 at 280, that reasons need not be lengthy or elaborate but "… the essential ground or grounds upon which the decision rests should be articulated."

[32] His Honour referred also to *Beale v Government Insurance Office of NSW* (1997) 48 NSWLR 430 in which Meagher JA set out:

> "… three fundamental elements of a statement of reasons … . First, a judge should refer to relevant evidence. There is no need to refer to

> the … evidence in detail … . However, where certain evidence is important or critical to the proper determination of the matter and it is not referred to by the trial judge, an appellate court may infer that the trial judge overlooked the evidence or failed to give consideration to it … ."

[33] In *Camden v McKenzie* [2008] 1 Qd R 39 Keane JA (with whom McMurdo and Douglas JJ agreed) said at [30]-[31]:

> "The appellants contend, with the support of the decisions of the Court of Appeal of New South Wales in *Beale v Government Insurance Office of New South Wales* and the Victorian Court of Appeal in *Fletcher Construction Australia Ltd v Lions MacFarlane & Marshall Pty Ltd (No 2)*, that adequate reasons for judgment will refer to the evidence which was important to the determination of the matter, and will set out material findings of fact, given the judge's reasons for his … findings of fact, and stating the basis on which the judge has come to prefer one body of evidence over a competing body of evidence.
>
> As a general rule, observance of these requirements is necessary to demonstrate that litigation has been determined fairly and rationally. Adherence to these requirements ensures that rights of appeal are not rendered meaningless, and that a party affected by a decision adverse to his or her interests is not left with the justified sense of grievance that the case has not been properly considered. In short, these standards promote the conscientious public discharge of the responsibilities of a judge to litigants, as well as to the community, which has a vital interest in the integrity of the judicial process." (footnotes omitted)

[34] The critical question in this litigation for the determination of liability was whether the 25 mm height differential between the tiled surface and the carpeted surface of the club was sufficiently lit so that whatever risk it posed to an entrant was obvious. The respondent gave two reasons to explain why she did not notice that the different textured and different coloured floor coverings differed in level. One was that the club interior was dark because the lights had not been turned on. The second was that whether or not the lights were on the glare from sunlight effectively blinded her to the height differential in what, by contrast to the glare, was dark. The trial judge was entitled to accept the respondent's evidence that the second explanation was the true one. His Honour heard and saw the witnesses. However, in not explaining why he preferred the second version to the first, and in not adverting to the fact that there were different explanations, the trial judge did not do justice to the appellant's case.

[35] The respondent's two accounts of why she fell are significantly different. They involve inconsistency. The first account, given in the Notice of Claim, is that she fell because the club premises were dark because the fluorescent lights had not been turned on and she could not see the drop in floor level. This account called for a resolution of disputed facts whether the lights were on as Mr Littlejohn and Mrs Grace said or whether they were off as the respondent testified. The second version avoids that dispute by attributing the respondent's inability to see the change in floor level to bright glare at eye level which put the floor in comparative gloom. On this account whether the lights in the club were on or off is irrelevant. If

the lights were on and the respondent's vision was not affected by glare the appellant had a persuasive case on liability.

[36] The appellant had a serious point which had to be addressed, both out of fairness to its case, to satisfy it as a litigant that the trial had been fair, and to demonstrate that the judicial process had functioned properly and that relevant evidence had been considered and analysed. The trial judge's failure to deal with the point at all means that the judgment is not supported by reasons. The judgment is affected by error of law.

[37] This is not a case in which this Court can or should try the question of fact which the trial judge did not. The question of fact which will determine liability is not established by documents but by *viva voce* testimony. The assessment of witnesses is fundamental. The consequence of the error of law is that the issues of fact will have to be re-tried.

[38] The appellant's argument came to this point very late, indeed only in the latter stages of its oral argument.

[39] Senior Counsel who appeared for the respondent pointed out, with justifiable irritation, that the appellant's Notice of Appeal did not seek a re-trial nor raise inadequacy of reasons as a ground of appeal. It is true that that ground is not precisely articulated but ground 2.4 and its particulars are a sufficient identification of the point in the end agitated by the appellant. Surprisingly, counsel for the appellant did not seek to amend the Notice of Appeal to ask for a new trial. However, the appellant should not be penalised by the refusal of relief to which it has demonstrated an entitlement by reason of a defect in its process. The appellant's counsel did, in the end, ask for a new trial.

[40] The appellant also complains about one component in the assessment of damages. The trial judge allowed $120,000 for gratuitous care, being $60,000 for past care and $60,000 for the future. The appellant complains the amount is excessive.

[41] The amount actually claimed by the respondent was very much larger. She sought $561,414 of which $232,400 was attributed to costs for future care. As well she sought interest on the amount to be awarded for past care in the sum which I calculate to be (about) $96,841. This brought the total claim for this head of damage to $658,255.

[42] The trial judge thought the amount excessive and that the respondent had grossly exaggerated the level of her disability and consequent need for assistance. His Honour said:

> "[42] The plaintiff sustained injuries to the left shoulder, left elbow and left wrist. She also sustained some fractured ribs which were apparently the result of striking a chair or table as she fell. I am satisfied the fall was a heavy one.
>
> [43] X-rays revealed a fracture of the neck of the left radius which was un-united. She also had an injury to the rotator cuff as well as suffering soft tissue injury to the left wrist.
>
> [44] She has undergone two surgical procedures.
>
> [45] The first was on 16 August 2004 when she had an open reduction internal fixation of the left radial head fracture.

[46] Subsequently in October 2006 she underwent an arthroscopic acromiaplasty and open rotator cuff repair to the left shoulder.

[47] She has been left with a significant disability of the left arm which Dr Robinson, an orthopaedic surgeon, assesses as constituting a 14 percent impairment of whole person function. The various components of this are set out in his report (Exhibit 18B) and can be compared with his earlier assessment of 27 July 2005 (Exhibit 18A).

…

[52] The plaintiff's claim for past and future care and assistance is a substantial one. No evidence was lead from an occupational therapist or a similarly qualified person making an assessment of the needs of the plaintiff in respect of the past and the future. There was evidence from Dr Robinson, who expressed the view that a claim for six hours per day for care and assistance would be excessive. He was not prepared to express a view as to what the plaintiff's needs might be saying that this was a matter for an occupational therapist.

[53] Whilst it is clear that the plaintiff has had a need for care and assistance in respect of some matters and also that she continues to have such a need, the absence of any evidence from an occupational therapist in the form of an assessment of the extent of those needs and what appears in the videos mentioned below justify a conservative approach to the claim.

[54] The defendant tendered two videos. One of these was taken in July 2008 and the second in January 2010.

[55] In these videos the plaintiff appears to move her arm without pain freely away from the body and up to about shoulder level. There is nothing in the video showing her using the arm above shoulder level. She stands with her hand on her hip, something which suggests that the abduction of her shoulder is at least reasonable. She signed some document with her left hand. She is left handed. In none of the activities which the videos capture does the plaintiff appear to be in any pain.

[56] Dr Toft thought that the plaintiff was capable of doing all tasks except those which involved the use of the arm above the shoulder. Dr Robinson was inclined to be a little less dogmatic saying that whilst the movement of her arm away from her body seems to be pain free there was nothing on the video which gave any idea of whether she could use her arm repetitively as would be required in some tasks and exert pressure or exert any force with the arm. He accepted she might have some difficulty with some of these tasks.

> [57] The various specialists each spoke of the possibility that the plaintiff could modify the way in which activities which might cause her some pain or discomfort could be performed.
>
> [58] Whilst it can be accepted that there would have been a substantial need for assistance in the period following the accident and probably for some period following each surgery, I cannot accept that the plaintiff's need for care and assistance is anything like that claimed having seen the videos.
>
> [59] The appropriate allowance in respect of the present and the future must be based on identification as best the court can do so from the various tasks which are listed in Exhibit 1 and Exhibit 2 which the plaintiff would require assistance with. This on my assessment of it could only be a fraction of the time on which the claim is based.
>
> …
>
> [61] I think it more than probable that the plaintiff has had the need for care and assistance with exceeded six hours per week for more than six months in the past and that even discounting heavily the claims made it would not now be below one hour per day.
>
> [62] The assessment of the plaintiff's damages under this head given the paucity of evidence approaches something in the nature of an educated guess. I propose to make an assessment which it seems to me must represent an amount which is the least the plaintiff requires and has required in the way of care and assistance."

[43] The respondent's evidence that her injuries had left her unable to cope with most household activities was falsified by video recordings of her doing a number of things she said she could not do: moving her left arm without any apparent difficulty or pain. Having observed the videos the two medical specialists retained by the appellant concluded that she is able to perform most activities of daily living although perhaps with some restrictions for those requiring the use of the left hand above shoulder level. The specialist retained by the respondent accepted that her claim of six hours' assistance per day was excessive.

[44] The appellant submitted that these features of the respondent's evidence made it impossible for any assessment to be made as to the extent to which the respondent's residual disability sounded in financial loss with respect to this head of damage. In particular it was argued that the evidence did not allow a finding that the respondent had a need for services arising solely out of her injury requiring six hours' assistance per week for at least six months so as to satisfy s 59(1)(c) of the *Civil Liability Act* 2003.

[45] The appellant pointed to the absence of expert testimony from an occupational therapist remarked upon by the trial judge, and that in a broadly similar case the trial judge had allowed only $45,000 for gratuitous care.

[46] The second point can be dismissed at once. Each case turns on its own facts and little, if any, assistance is to be gained from an examination of the facts of another case.

[47] The trial judge was faced, as his Honour recognised, with a difficult task. The claim advanced by the respondent was exaggerated and the evidence in support of it unreliable. Nevertheless the evidence established that the plaintiff had suffered a significant permanent injury to her dominant arm and the expert medical testimony was that she had some residual incapacity for performing personal and household tasks.

[48] Given imprecise and unreliable materials the trial judge had to do the best with what was available. His Honour described the process as making "an educated guess". That is a process with which trial judges are familiar and is not infrequently undertaken where the evidence in support of a particular head of damage is insufficient for precise assessment.

[49] The appellant complains that his Honour guessed too high, but to make good its appeal on this point the appellant must point to a mistake of fact or of law made by the trial judge, or an assessment plainly unreasonable.

[50] The appellant points to no particular error. Nor is the amount of the award self evidently inflated. This Court is in no better a position than the trial judge to determine a reasonable sum for the respondent's accepted lack of capacity. It cannot therefore be said that the assessment made by the trial judge was wrong.

[51] The trial judge was faced with the perplexity of a plaintiff who had some established need for services but very little helpful evidence of the precise extent of that need. There was agreement as to the cost of providing whatever care was needed. The trial judge was therefore obliged to be the best he could with the materials at hand to make an assessment of the damages.

[52] Notwithstanding the shortcomings in the evidentiary basis for the assessment, I would not disturb it.

[53] Despite the appellant not having sought a re-trial in its Notice of Appeal, nor to amend the Notice when the point became acute during the hearing, that is, I think, the appropriate order. It is impossible to be satisfied that the appellant's case was considered by the trial judge and determined on the merits of its and the respondent's evidence and arguments. Justice will not have been done if the judgment should stand supported only by inadequate reasons. It certainly will not have been seen to have been done.

[54] It is a matter of considerable regret that such a small claim will now be the subject of two trials and an appeal though that consequence is unavoidable. The cost of a re-trial should, however, be kept to a minimum. The appropriate forum for that further hearing is the District Court. Section 68(3) of the *Supreme Court of Queensland Act* 1991 permits this Court to remit a proceeding or part thereof pending before it:

> "to another court for the determination … of … any question of fact … arising in the proceeding."

[55] I would therefore order that the question of the appellant's liability to pay the respondent the damages assessed be remitted for determination by the District Court

at Townsville. The appellant is entitled to its costs of the appeal but the respondent should not have to pay them personally. She bears no responsibility for the mistake which has led to the order for a re-trial. I would accordingly order that the respondent pay the appellant's costs of and incidental to the appeal but further order that the respondent, should she apply, be granted an Indemnity Certificate pursuant to s 15 of the *Appeal Costs Fund Act* 1973.

[56] **PHILIPPIDES J**: I also agree with Chesterman JA.