SUPREME COURT OF QUEENSLAND

CITATION:	*Manca v Teys Australia Beenleigh Pty Ltd* [2024] QCA 60
PARTIES:	**REINALDO MANCA** (appellant) **v** **TEYS AUSTRALIA BEENLEIGH PTY LTD** ACN 009 672 459 (respondent)
FILE NO/S:	Appeal No 11513 of 2023 DC No 2724 of 2021
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2023] QDC 139 (Barlow DCJ)
DELIVERED ON:	19 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	20 February 2024
JUDGES:	Bowskill CJ and Fraser AJA and Applegarth J
ORDER:	**The appeal be dismissed with costs.**
CATCHWORDS:	TORTS – NEGLIGENCE – GENERALLY – NEGLIGENCE AND OTHER TORTS – where the appellant slipped and fell on steps at his employer's meatworks and was injured – where the appellant alleged that the slip was the result of the steps being covered in blood and other substances, or because the steps were damaged or worn – where the trial judge found that the appellant had not proved the cause of his fall – where the trial judge made findings of fact about the state of the steps at the time of the fall and found that the respondent had not breached its duty to the appellant in the respects that the appellant pleaded – where the appellant challenges several findings of fact made by the trial judge – whether the factual findings made by the trial judge should be set aside because the conclusions are glaringly improbable, or contrary to compelling inferences, or wrong – whether the evidence proved that the pleaded breaches of duty were established and caused the appellant's injuries PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – PLEADINGS – where the appellant's pleaded case alleged that the steps were damaged and worn and covered in blood and other fluids/substances from recently slaughtered carcasses and that these matters gave rise to a breach of duty – where the appellant's

pleadings at trial did not allege that a necessary precaution was to instruct him when he came to undertake new work in a new and very different work location about carrying equipment on the steps – whether the trial judge erred in confining the appellant to his pleaded case

Uniform Civil Procedure Rules 1999 (Qld), r 149, r 157
Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305B, s 305C, s 305D

Banque Commerciale SA (In liq) v Akhil Holdings Ltd (1990) 169 CLR 279; [1990] HCA 11, cited
Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd (2001) 117 FCR 424; [2001] FCA 1833, cited
Browne v Dunn (1893) 6 R 67, cited
Dovuro Pty Ltd v Wilkins (2003) 215 CLR 317; [2003] HCA 51, cited
Erickson v Bagley [2015] VSCA 220, cited
Jones v Dunkel (1959) 101 CLR 298; [1959] HCA 8, cited
Lee v Lee (2019) 266 CLR 129; [2019] HCA 28, cited
Manca v Teys Australia Beenleigh Pty Ltd [2023] QDC 139, cited
Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd [2013] 1 Qd R 319; [2012] QCA 315, cited
Pascoe v Coolum Resort Pty Ltd [2005] QCA 354, cited
Potter v Gympie Regional Council [2022] QSC 9, cited
Poulet Frais Pty Ltd v Silver Fox Company Pty Ltd (2005) 220 ALR 211; [2005] FCAFC 131, cited
Robinson Helicopter Company Incorporated v McDermott (2016) 90 ALJR 679; (2016) 331 ALR 550; [2016] HCA 22, cited
S J Sanders Pty Ltd v Schmidt [2012] QCA 358, cited
Sutton v Hunter & Anor [2022] QCA 208, cited
Vairy v Wyong Shire Council (2005) 223 CLR 422; [2005] HCA 62, cited
Walker v Greenmountain Processing Pty Ltd [2020] QSC 329, cited
Wilkinson v Law Courts Limited [2001] NSWCA 196, cited

COUNSEL: W D P Campbell and T A Nielsen, for the appellant
R M Treston KC, with J Hewson, for the respondent

SOLICITORS: Jonathan C Whiting & Associates for the appellant
BT Lawyers for the respondent

[1] **BOWSKILL CJ:** I agree with Applegarth J.

[2] **FRASER AJA:** I agree with the reasons of Applegarth J.

[3] **APPLEGARTH J:** The appellant, Mr Manca, was injured on 11 February 2020 when he slipped and fell on steps adjacent to the "blooding floor" of the respondent's meatworks where he worked. He fractured a rib and suffered a soft tissue injury to part of his spine. He also grazed his arm. The orthopaedic injuries had long-term consequences and he sued his employer (Teys) for negligence.

[4] The primary judge found that Teys had taken reasonable steps to mitigate any risk that a person would slip on the steps, and that Mr Manca had not proven that he slipped due to any failure by Teys to take reasonable precautions against a risk of slipping.[1] Because the judge found that no failure on Teys' part caused Mr Manca to slip and fall, the claim was dismissed.

[5] Mr Manca's notice of appeal challenges numerous factual findings and the conclusion that Teys was not negligent.

Background

[6] For several months in late 2019 and early 2020, Mr Manca worked on a part of the "kill floor" at Teys' Beenleigh meatworks. His work was slicing meat to remove fat and using a saw to cut briskets.

[7] About a week before being injured on 11 February 2020, Mr Manca was transferred to do different work in a different environment on "the blooding floor". Unlike his previous work, his work on the blooding floor required him to come and go up via stairs. They consisted of six concrete steps.

[8] The blooding floor, the area surrounding it and the system of work, are carefully and clearly explained in the primary judge's comprehensive reasons.[2] The details are confronting but it is necessary to summarise them to understand the evidence and the issues.

[9] Cattle are brought into the meatworks and each animal is rendered unconscious. An animal's throat is then cut in a Halal manner, which kills it. The body is then transported on a conveyor belt at the start of the blooding floor. It is lifted onto an overhead conveyor from which it is hung by its rear legs. Two workers are on the blooding floor. The first slices the carcass with a knife, releasing a large amount of blood onto the floor. It is then conveyed to the second worker who undertakes additional cutting. In one shift these workers would usually deal with between 700 and 800 cattle. Because of this process, a large amount of blood, sometimes up to 20 centimetres deep, accumulates on the blooding floor.

[10] The blooding floor has a large drain in the middle through which blood is pumped and later processed.

[11] Workers on the blooding floor are supplied by Teys with a strong, thick, rubber apron that reaches from the chest to a few centimetres above their gumboots. These boots are also supplied by Teys and have deep-treaded soles.

[12] The workers have their own knives. They are kept in a specially designed plastic pouch that is strapped to the worker's waist. The workers also have sharpening tools that are kept in the pouch. In addition, Mr Manca used a sharpening stone.

[13] The workers are required to sterilise their knives before starting work and also during their shift. Immediately adjacent to the blooding floor are two metal washdown cubicles that open onto the blooding floor. There is a kind of showerhead in each cubicle which is automatically activated when the workers

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1 *Manca v Teys Australia Beenleigh Pty Ltd* [2023] QDC 139 at [62] ("*Manca*").
2 *Manca* at [12]-[18].

come to wash and re-sterilise their tools. While they do that, two "floor boys" might go onto the blooding floor and use squeegees to push the bulk of the blood into the drain and activate a pump to extract the blood. The two workers then return to the blooding floor until a lunch break or the end of their shift.

[14] At the end of the shift, the workers each use a washdown cubicle to wash their tools and rinse off their apron and their boots. Mr Manca denied, but Teys proved, that there was a hose with a trigger-head in each washdown cubicle that could be used to wash aprons and boots, including the soles of the boots, at the end of a shift. It is not a high-pressure hose for multiple reasons. One reason is to prevent excess water entering the blooding floor and contaminating the blood that is to be processed. Another reason is that the washdown in the metal cubicle on the blooding floor is only intended to be a preliminary washdown. After they descend the stairs, the workers proceed to another area with their tools where there are full washing facilities. The workers' aprons and boots are taken from them and washed by other employees, to be ready for a later shift.

[15] After undertaking a preliminary washdown in the cubicle on the blooding floor, the worker has to walk back along the edge of the blooding floor, before entering a passage to the top of the stairs. While walking along the edge of the blooding floor, the worker does not walk in deep blood, but there will be some blood on it, unless it has been squeegeed.

[16] The worker then walks through a gate and back along a concrete path that is four or five metres long and leads to the top of the steps.

[17] This is the path Mr Manca took on the day he was injured. After performing the preliminary washdown, he was carrying his knife pouch, with knives in it and a hook hanging from it, in one hand. His sharpening steels and stone were in his other hand. His rubber apron was draped over an arm. As a result, he was not able to use a hand to hold onto the handrail at the right side of the steps as he descended.[3] When he reached the second or third step, his right foot slipped and he fell backwards, hitting the left side of his back on the edge of a stair.

[18] Mr Manca was able to walk away from the scene, and soon afterwards he reported the incident to a supervisor, Mr Rodrigues. When Mr Rodrigues saw him, Mr Manca was holding his injured arm in a bent position and holding his tools in his other hand.[4] Mr Rodrigues told Mr Manca to go to the first aid room. Mr Rodrigues then went to the steps. His evidence, which the primary judge accepted, was that he did not observe any dirt, fat, blood or water on the steps.[5]

[19] Later that day, a Teys employee took a photograph of the scene of his fall. Other photographs were subsequently taken by Mr Manca and by Teys.

The substantial liability issues raised by the pleadings

[20] Mr Manca's pleading alleged that "the surfaces and edges of some of the concrete steps were damaged and worn and covered in blood and other fluids/substances from recently slaughtered carcasses …"

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3 *Manca* at [20].
4 *Manca* at [57].
5 *Manca* at [26].

[21] The pleading alleged that Mr Manca's injuries were caused by Teys' negligence. The first two particulars were as follows:

> "(a) failing to take adequate precautions for the safety of the Plaintiff while he was engaged in carrying out his assigned work at the workplace;
>
> (b) exposing the Plaintiff while he was at the workplace to a risk of injury, namely the risk of slipping down the steps, of which risk the Defendant was aware or ought to have been aware …"

[22] The third particular was "failing to take reasonable care for the Plaintiff by ensuring that the workplace was safe by …" and there followed 10 subparagraphs. The 10 matters that Teys were alleged to have failed to do were:

> "(i) repairing the damaged and worn edges of the steps;
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> (ii) providing a non-slip surface and metal edge strips to the steps;
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> (iii) otherwise ensuring the steps were kept clean of blood and other fluids/substances from recently slaughtered and bled carcasses by, for example, a system of regular cleaning;
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> (iv) failing to conduct an adequate assessment of the risks posed to its workers at the workplace associated with the tasks carried out thereat and, in particular, the risk of slipping on blood or other fluids/substances from recently slaughtered carcasses which had found its way onto the steps from the adjacent work floor;
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> (v) failing to respond adequately to previous slips and/or falls by other staff members on the steps because of the presence of blood and other fluids/substances thereon, and/or because the surface and edges of the steps were damaged and worn;
>
> (vi) failing to take any or sufficient steps to prevent the hazard created by the damaged and worn and contaminated steps, or to quickly remove the hazard once it had been created;
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> (vii) failing to repair the damaged and worn steps to ensure they ceased to present a risk to persons walking thereon;
>
> (viii) failing to warn the Plaintiff that the steps were damaged, worn and slippery from the presence of blood or other fluids/substances which had found their way onto the steps, and that walking thereon would be likely to cause him to slip and fall;
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> (ix) in breach of s 19(1) of the [*Work Health and Safety Act 2011* (Qld)], failing to ensure the health and safety of the Plaintiff while he was at work in the business or undertaking, by eliminating or minimising the risk of him slipping on the steps of the premises;
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> (x) in breach of s 19(3) of the [*Work Health and Safety Act 2011* (Qld)], failing to properly manage the Plaintiff's exposure to

> risk from the work environment provided to him be eliminating or minimising the risk of him slipping on the steps of the premises."

[23] Teys' defence denied the allegation that the surfaces and edges of the concrete steps were damaged and worn, and denied that they were covered in blood and other substances from carcasses, as alleged by Mr Manca. Teys also denied that it was negligent, as alleged in paragraph 3 of Mr Manca's pleading. Among the matters relied upon by Teys in its defence were the process of cleaning the floor, the concrete surfaces and steps being coated in a non-slip paint, the absence of previous slips or falls by other employees on the steps, and the provision of good condition, quality leather boots with adequate grip to reduce the risk of falls. Teys also relied upon the requirement to undertake a "full apron wash" prior to exiting the kill floor and using the steps.

[24] As part of its defence to the negligence claim, and as part of its alternate defence of contributory negligence, Teys pleaded that it trained and instructed Mr Manca to use the handrails provided on the steps and erected signs on the premises to remind workers to use handrails.

[25] Teys pleaded that it provided a safe system of work for its employees to exit the kill floor by providing a pouch in which to keep equipment, requiring the worker to undertake a full apron wash, including a boot wash, before accessing the stairs, and training and instructing workers to use the handrail that was provided.

[26] Teys alleged that Mr Manca failed to take reasonable care for his own safety. The incident was alleged to have been caused by Mr Manca's actions in failing to conduct a full apron wash and boot wash, failing to carry equipment in one hand, failing to make use of the handrail and thereby failing to comply with the required procedure.

The evidence at the trial

[27] Unsurprisingly, given the disputed allegations in Mr Manca's pleading about the steps being "damaged and worn" and "covered in blood and other fluids/substances", a substantial part of the evidence related to the state of the steps and whether blood and other substances from recently slaughtered carcasses caused Mr Manca to slip.

[28] The evidence, which I will not recount in detail at this point, did not support a finding that there was blood, or indeed water, in any significant quantity, on the steps where Mr Manca slipped and fell. When it was put to him in cross-examination that there was no blood on the stairs at the time of the incident, Mr Manca responded "[i]n my boots has the blood". I should mention that Mr Manca grew up in Brazil and English is not his first language. He was then asked the following question:

> "MS HEWSON: You didn't see blood on the stairs, did you?---No. I didn't say. You asked me if you have a blood in [sic] the stairs, I say I have a blood in my boots.

> HIS HONOUR: No. But the question was, was there any blood on the stairs?---Yes, sir. I don't remember exactly if it have on the stairs. But in my boots, a hundred per cent sure I have it.
>
> MS HEWSON: Did you look at your boots at the time of the incident?---I don't need to look. I just tried to stand up because I scratched my arm. I tried to stand up and the floor – the floor is so dirt [sic] and I have to stand up with my tools in [sic] the floor."

[29] As noted, Mr Rodrigues did not see blood, water or other substances on the steps when he viewed them from about four metres away, shortly after the incident. The photographs that were taken by either Mr Manca or Teys' employees after the event, either on the day in question or at a later date, do not show steps that are wet or covered in blood. Only the first photograph was taken on the day of the incident. Photographs 2 and 3 were taken by Mr Manca on a later date.

[30] Mr Fry, who worked in the "knocking box" not far from the steps in question, gave evidence of having whinged about the steps "all the time" because they used to get bloodied.[6] His evidence was that blood would "splash up onto the steps" on occasions if drains beneath the blooding floor became blocked, and blood would get on the steps from people walking from the bleeding area. The amount of blood that was on the steps would vary from time to time. If the blood pit was "running fine" it "really wasn't that bad".[7] Mr Fry had never fallen on the steps. On the day of the incident, he did not see Mr Manca fall, but he did see him getting up from the floor. Mr Fry could not say whether there was any blood on the steps or whether they were slippery at the time. His evidence was that "if there was no blood on them, no, they weren't slippery, but with blood on them, yes, they were".[8]

[31] As a result of the passage of Mr Manca's evidence that I have earlier quoted, and in the absence of evidence about blood being on the steps prior to Mr Manca descending them, attention shifted to blood being on the soles of his boots and congealed between the treads of his boots. Another factual issue that emerged in the course of the evidence was whether the blood through which workers like Mr Manca and others walked was "slippery". Mr Manca said it was, while Mr Rodrigues and Mr Platten gave evidence that blood is not slippery. Mr Platten, who has worked for Teys for 43 years, also gave evidence that blood would not congeal in the treads of boots.[9]

The primary judge's finding about the cause of Mr Manca's fall

[32] The primary judge gave detailed consideration to the evidence before reaching the following conclusion about the cause of Mr Manca's fall:[10]

> "The nett effect of all this evidence is that it is not clear what caused Mr Manca to slip and fall. I am not satisfied that there was congealed blood in the tracks of his boots nor, if and to the extent that there was, that any such blood was slippery. There was no expert evidence about the slipperiness or otherwise of blood: what evidence there

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6 *Manca* at [23].
7 *Manca* at [24].
8 *Manca* at [25].
9 *Manca* at [31]–[32].
10 *Manca* at [37]–[39].

> was, was conflicting, with two witnesses saying it is slippery and two saying it is not. I do not find that it was slippery but, even if it was, I consider that the tread on the boots would likely have been adequate to ameliorate its slipperiness. Furthermore, if it was, to Mr Manca's knowledge, slippery, that would have a substantial effect on any finding about contributory negligence.
>
> I am satisfied that the steps at the time were not wet, as there is no evidence that any water or other fluid was present on them when Mr Manca descended them. I am not satisfied that they had any spilt or sprayed blood on them. If there had been, it is likely that someone would have seen it, but no witness gave evidence of having seen it and Mr Rodgrigues said there was none that he saw.
>
> While the edges of the steps were not fully even, there were no defects that, in my view, would of themselves had caused Mr Manca to slip and fall. Rather, it seems that, for some reason (probably his own inattention), he misplaced his foot onto the edge (rather than the floor) of a step, causing it to slip out from under him, which in turn led him to fall back and land on the edge of a higher step on his rear left back and rib area. It was an unfortunate accident but was not caused by any defect in, or uncleanliness of, the steps, nor by any material, such as blood, built up in the tread of his boots."

Submissions at trial about whether there was "a foreseeable and not insignificant risk of injury"

[33] The applicable principles and statutory provisions are set out in the judgment[11] and it is unnecessary to reproduce them in full. Section 305B(1) of the *Workers' Compensation and Rehabilitation Act 2003* (Qld) provides:

> "**305B General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of injury to a worker unless —
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought reasonably to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the position of the person would have taken the precautions."

[34] In his submissions at trial, counsel for Mr Manca submitted that the risk of slipping on the concrete steps and falling back onto them while walking down the steps "carrying in both hands his just rinsed apron, three sharpening steels, a sharpening stone and his plastic pouch of three knives, having just finished work in the bleeding section after which his boots would likely have had jelly-like congealed blood stuck to and built up under their soles, was clearly 'foreseeable' and 'not insignificant'."[12]

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11 *Manca* at [7]–[9].

12 *Manca* at [41].

[35] Counsel submitted that the surfaces and edges of most of the steps were damaged, worn and irregular, and the steps were likely to have blood or fluid on them from previous descents by the workers and from "congealed blood build-up" in the blood basin which on occasions overflowed, or from previously rinsed aprons and boots. He described the preliminary wash as "rudimentary", with boots only being washed from above, with no ability to remove congealed blood. Counsel relied on Mr Fry's evidence of having previously complained about the presence of blood on the floor and steps, as well as the later installation of non-slip capping on the steps.

[36] Against that background, counsel submitted that the risk of a worker slipping ought reasonably to have been anticipated by Teys "which should have taken precautions to ensure that any blood on the floor, the steps or workers' boots was removed, or to ensure that workers were not required to carry so many items in both hands, but could use their right hand to grip the handrail".[13]

[37] Counsel for Teys at the trial submitted that the risk of a worker slipping on the steps, as happened to Mr Manca, was not foreseeable, nor was it "not insignificant". There was no previous report of a worker slipping on the steps. The evidence of the Teys' witnesses was that blood was not slippery and did not congeal in the treads of workers' boots. Also, workers were trained and instructed to use handrails and there were signs in various places around the meatworks that workers should use the handrails that were provided.

Findings about instructions to use handrails

[38] Teys pleaded, and Mr Manca admitted, that Teys erected signs on the premises "to remind workers to use the handrail provided". There was no such sign in the vicinity of the steps.

[39] Mr Manca denied that he was trained or instructed by Teys to use handrails. A copy of a 41-page induction document that he had signed in the course of his induction in June 2019 became an exhibit, and one page of the document contains a reference to ensuring "to use handrails where provided". The primary judge found that Mr Manca did not read and was not informed of this passage in the induction manual. His ability to read English was limited and he would not have been able to read the manual.

[40] The judge found that Mr Manca "was not specifically instructed by Teys to use handrails". However, he was aware that it was prudent to do so, having been instructed to do by a former employer when he worked in Ireland, and he was aware that it was advised by signs in a number of places around the meatworks.[14]

Findings about use of the handrail

[41] Mr Manca's evidence was that he used both hands to carry his equipment because that was the only way to carry his equipment as he went down the steps. The primary judge did not accept that Mr Manca had no choice in the matter. His Honour found that it would have been possible for Mr Manca to wear the apron and the knife pouch, carrying the knives in the pouch, rather than to carry them, and to carry the sharpening tools and stone in one hand.

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13 *Manca* at [42].

14 *Manca* at [48].

Finding that there was no foreseeable risk

[42] The primary judge found that there was not a foreseeable risk of a worker slipping on the steps, given the precautions that Teys had taken to avoid or minimise a risk that might otherwise have existed. The primary judge stated:[15]

> "There had been no prior incident of slipping reported to Teys. Although I accept Mr Fry's evidence that he had previously complained about a substantial amount of blood or water on the floor and the steps, that appears to have been one occasion only and was certainly not the norm, nor expected, even though some droplets of blood might splash or spray on or near the steps from time to time. Furthermore, in the absence of expert evidence about whether blood is slippery, I do not find that it was slippery or contributed to the risk of a person slipping if there was blood on the floor or in the treads of his boots. The boots were also clearly designed to be non-slip. Finally, it is unlikely that blood is slippery or that the tread of the boots did not prevent slipping when, in order to leave a washdown cubicle to go onto the walkway toward the stairs, it was necessary to walk along the sloped edge of the blooding floor basin, on which there would be blood. There was no evidence that that edge was slippery or difficult to walk along."

[43] The judge also found that the steps taken by Teys were reasonable and sufficient to mitigate the risk of anyone slipping on the steps. The steps had a rough, non-slip surface. Employees were instructed to use a handrail and there were facilities for employees to undertake a preliminary rinse of their aprons and boots. The fact that Teys later installed metal capping on the edges of the steps did not prove that it was negligent for it not to have done so earlier. In any event, there was no evidence comparing the non-slip status of steps before and after the installation of the capping.[16]

[44] The primary judge continued:[17]

> "I also consider that it was not foreseeable that a worker might slip on the steps while carrying equipment in both hands and thus not using the handrail. It was unnecessary for a worker to carry so much equipment that he could not do so with one hand and use the other to grip the handrail. Workers were also instructed – and reminded by signs in various places around the meatworks – to use handrails and they were expected to do so. The floor and the steps were of non-slip material and, according to Mr Platten, along with the rest of the plant were the subject of regular safety inspections and maintenance or improvements where considered appropriate. There was no evidence that Teys was aware that any employee, let alone Mr Manca, had a habit of carrying all his equipment in two hands and not using the handrail. In the circumstances, the risk of injury from slipping on the steps was not a risk of which Teys knew or ought reasonably to have

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15 *Manca* at [58].
16 *Manca* at [59].
17 *Manca* at [60].

> known, given the precautions that Teys had taken against any such risk."

Finding that the risk was insignificant

[45] In case he was wrong and the risk of slipping on the steps and being injured was foreseeable, the primary judge additionally found that the risk was not significant. His Honour's reasons included the lack of a previous report of anyone slipping, the existence of a non-slip floor and the provision of a handrail. The judge reasoned that even though there was no sign at the steps to remind workers to use the handrail, "the presence of the handrail was obvious and the sensible thing for anyone to do was to use it and, for that purpose, to carry as little as equipment as possible, in one hand, to enable its use with the other".[18]

[46] The judge added that it was unnecessary for an employee to take off the apron and knife pouch after undertaking the preliminary washdown in the cubicle, before walking down the steps. The washdown was designed to minimise the amount of blood that would be on the person's apron and boots while moving through the plant in the direction of the change room.

Contributory negligence and quantum

[47] Having concluded that the precautions taken by Teys against a risk of slipping were reasonable, that Teys was not negligent, and that the claim should be dismissed, the judge made precautionary findings on issues of contributory negligence and loss and damage.

[48] The judge declined to find any failure by Mr Manca to adequately wash down his apron and boots, as having contributed to his fall. It was, however, "crystal clear" that Mr Manca's failure to use the handrail contributed to his fall.[19]

[49] The judge defined the issue as follows:[20]

> "The real issue that arises here is whether, as Mr Manca claims, it was not realistically possible for him hold all his equipment in one hand while using the handrail and therefore he was not negligent in using two hands to hold his equipment and therefore not using the handrail. If that is the case, then he did not contribute to that fall."

[50] The judge rejected Mr Manca's evidence that he could not carry all of his equipment in one hand.[21] The judge also found that Mr Manca could have worn his apron while leaving the blooding floor, or could have draped it over the same arm in which he carried his tools.

[51] Mr Manca was said not to have been engaged at the time of his injury in work tasks that were "repetitive and may breed familiarity and inadvertence".[22] He was not in a hurry nor distracted. The choice to carry his equipment in both hands was found to be not reasonable or prudent and a significant factor as a cause of the fall,

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18 *Manca* at [61].
19 *Manca* at [73].
20 *Manca* at [74].
21 *Manca* at [75].
22 *Manca* at [77].

particularly in circumstances where he maintained that, from prior experience, there could be blood on the floor or on the tread of his boots. If Mr Manca was aware of the slipperiness of blood, then the risk of slipping, particularly on the steps, was something of which he must have been aware.

[52] In failing to take advantage of the obvious reduction of risk provided by the handrail, Mr Manca was found to have departed from the standard of care for his own safety that a reasonable person in his position would adopt. The judge assessed the level of Mr Manca's contributory negligence at 30 per cent, being the amount sought in the defendant's submissions. Absent such a figure, the judge would have assessed contributory negligence at 50 per cent.

[53] Damages were assessed at $170,394. Had the judge found that Teys was negligent, damages would have been awarded in the amount of $119,276, after a 30 per cent reduction for contributory negligence.

The appeal

[54] The notice of appeal contains 15 grounds, only one of which was not pursued. Ground 1 challenges findings that the steps did not represent a foreseeable and "not insignificant risk of injury" in circumstances, where, among other things, steps are inherently dangerous, particularly when either the steps or the footwear of the person descending them are wet. It also complains that the issue of foreseeability was conflated with the issue of breach of duty, and that the issue of foreseeability was conflated with the issue of contributory negligence (whether Mr Manca could or should have used the handrail).

[55] The notice of appeal and the appellant's outline of argument mostly consist of ambitious challenges to findings of fact. Mr Manca seeks to argue that findings should be set aside because the conclusions are glaringly improbable, or contrary to compelling inferences, or wrong.[23] The outline does not develop a major point raised in counsel's address to this Court to the effect that Teys was negligent in leaving him to devise the system by which he would undertake the preliminary wash and then transport his tools and his apron to the cleaning room.

[56] Teys' outline of argument responds to Mr Manca's contentions that findings of fact about the scene of the accident and the cause of the accident should be overturned. Teys notes that the judge's ultimate conclusions were based on central findings of fact made by him that:

(a) Mr Manca had not proved what caused him to slip and fall, but it was likely that he slipped due to accidentally misplacing one foot incorrectly on a step;

(b) the primary judge was not satisfied that there was congealed blood in the tracks of Mr Manca's boots nor, if and to the extent that there was, that any such blood was slippery;

(c) the steps at the time were not wet and the primary judge was not satisfied that they had any spilt or sprayed blood on them;

(d) there were no defects that would of themselves had caused Mr Manca to slip and fall; and

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23 See generally *Sutton v Hunter & Anor* [2022] QCA 208 at [46]–[52].

(e) Mr Manca's accident was not caused by any defect in, or uncleanliness of, the steps, nor by any material, such as blood, built up in the tread of his boots.

[57] Teys refers to evidence that is submitted to demonstrate that these findings of fact were correct and open on the evidence. They have not been demonstrated to be wrong by "incontrovertible facts or uncontested testimony", and nor are they "glaringly improbable" or "contrary to compelling inferences".[24]

[58] By a notice of contention, Teys seeks to uphold the judgment on the basis that the allegations about the state of the steps were not proved, and that a reasonable person in Teys' position would not have taken the precautions set out in paragraphs 3(a), (b) and (c) of Mr Manca's pleading. It also contends that even if a breach of duty was found, the evidence was not capable of establishing factual causation within the meaning of s 305D(1)(a) of the *WCRA*.

The argument developed by the appellant in oral submissions

[59] In oral submissions on the appeal, counsel for Mr Manca persisted with challenges to findings of fact so as to disturb conclusions about foreseeability, breach and causation that followed from them.

[60] The oral submissions also raised a complaint about the system of work. It was that Teys allowed Mr Manca to devise his own system of work in a new work environment in which he was required to descend steps for the first time, having washed his apron and boots of the blood that he encountered on the "blooding floor". The essential complaint is that, when he came to work on the blooding floor, Mr Manca was not trained or instructed to not hold his tools in both hands and, instead, to hold them only in one hand or to place the apron back on and re-attach his belt and pouch. The failure was to not instruct Mr Manca on his induction into a new work environment, doing different work, about the procedure that he should follow after the preliminary washing. An associated submission was that, Mr Manca, having adopted the practice of carrying his tools in both hands after the preliminary washdown, was not told that he should not do so by any supervisor who observed him doing so. The essential argument is that Teys exposed Mr Manca to the risk of falling on stairs that are inherently dangerous, even in the absence of a large amount of blood or water or congealed blood in the treads of his boots, by not giving him *specific instructions* about handling equipment and the use of the steps after the washdown.

[61] These arguments raise a pleading point that was the subject of submissions to the primary judge and to this Court on the hearing of the appeal. In brief, Mr Manca contends that subparagraphs 3(a), (b) and (c) of his pleading encompass his case that Teys did not provide a safe system of work and exposed him to the risk of injury of slipping down the steps, being a risk of which Teys was aware, by not specifically instructing him to not carry his tools in both hands after the preliminary wash.

[62] Mr Manca relies upon authority that the obligation to establish, maintain and enforce a safe system of work requires the undertaking of "appropriate risk assessments, the devising of a proper method, training and its use, instruction to use

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24 *Robinson Helicopter Company Incorporated v McDermott* (2016) 331 ALR 550 at 558–9 [43]; [2016] HCA 22 at [43]; *Lee v Lee* (2019) 266 CLR 129 at 148–9 [55].

that method, and the taking of reasonable steps to ensure its implementation".[25] In the context of an employer's duty to its employees, "the exercise of reasonable care for the employee's safety in the environment created for, and in the course of, the conduct of the … business operations includes recognition of the possibility of inadvertence or even careless lack of attention by its employees".[26]

[63] Mr Manca contends that he should not have been left to devise his own process for washing down his apron and tools and then transporting them to the cleaning area. His argument that he should have been specifically instructed to not carry this equipment in both hands does not depend upon proof of the amount of blood or water that was on the steps or under his boots, or that blood is slippery, or that the stairs were in a poor state of repair.

[64] The part of his case that emerged in the course of oral submissions relies, in part, on the primary judge's finding that Mr Manca was not specifically instructed by Teys to use handrails.[27] There was no evidence that he was instructed when he began to work on the blooding floor about a week before the incident to not carry equipment in both hands. On that basis, it was not sufficient to rely on background knowledge gained years earlier in Ireland about using handrails or on signs in other parts of the meatworks. This is because an employer's duty to provide and enforce a safe system of work includes the giving of instructions, and the supervision of their enforcement, to experienced workers, having regard to the fact that an experienced worker may inadvertently or negligently injure themselves.[28]

[65] In response to these arguments, the respondent contended that such a case was not pleaded. It reiterated a submission made to the primary judge that:

> "[T]he Statement of Claim does not include a pleading of (alleged) negligence on the basis that there was any inadequacy in respect of the system of work in place, or the training provided to the Plaintiff. This is significant not only in respect of the issue of breach of duty, but also causation."

[66] In response, counsel for Mr Manca on the appeal contended that the case advanced in relation to not instructing and supervising Mr Manca fell within the breadth of the particulars in paragraph 3 of his pleading.

The threshold pleading point

[67] Was it part of Mr Manca's pleaded case that Teys had failed to provide a safe system of work, exposed him to a known risk of injury, and failed to take reasonable care to ensure that the workplace was safe, because it failed to specifically instruct him about how to carry his equipment and the apron after a preliminary wash?

[68] If the answer to this question is in the affirmative, then the case takes on a different complexion. If it was part of Mr Manca's case that a reasonable employer should have specifically instructed him to not carry items in both hands when descending the steps after the washdown, then the issue of his failure to hold the handrail does

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25 *S J Sanders Pty Ltd v Schmidt* [2012] QCA 358 at [29] ("*S J Saunders*").
26 *Pascoe v Coolum Resort Pty Ltd* [2005] QCA 354 at [20] ("*Pascoe*").
27 *Manca* at [48].
28 *Pascoe* at [20].

not arise only in connection with allegations of contributory negligence. It arises in connection with liability issues about breach and causation.

[69] If Mr Manca is correct on the pleading point, then the primary judge should have addressed the handrail issue through the lens of Mr Manca's negligence case, rather than exclusively through the lens of contributory negligence for failing to use the handrail.

[70] Mr Manca's concise written submissions at trial began as quoted above at [34]. After addressing the state of the steps and the work environment, Mr Manca's submissions stated:

> "The risk of a worker from the kill floor slipping on the steps ought reasonably to have been anticipated by a reasonable employer, who ought to have had precautions in place which *ensured* that the congealed blood on the soles of workers' boots, and/or on the steps themselves, and/or on the floor leading up to the steps, was properly removed prior to their descent of the steps. Further or alternatively, a reasonable employer ought to have taken precautions **which ensured that workers were not required to carry so many items in both hands, and that their right hand was kept free whilst descending the steps**, and that their right hand gripped the handrail whilst descending the steps. In the Plaintiff's case the Defendant failed in all these respects. The Defendant has failed to provide the Plaintiff with a safe workplace." (emphasis added)

[71] In short, Mr Manca's submissions at trial relied upon a failure to provide a safe system of work and exposing him to risk by not taking precautions, including instructions and supervision that ensured that he did not carry items in both hands while descending the steps.

[72] During oral submissions at trial, counsel for Mr Manca and the judge discussed the proposition that the employer should have taken precautions that ensured that congealed blood was properly removed and to "ensure that workers were not required to carry too many items". The primary judge discussed whether this placed the duty too high and counsel for Mr Manca emphasised the statutory duty to ensure the worker's health and safety by eliminating or minimising the risk of him slipping on the steps. Counsel also relied upon the fact that an employer's duty required it to give instructions and supervise if someone is observed doing something that is contrary to an instruction. Counsel for Mr Manca argued that Teys had failed Mr Manca in a number of respects in relation to the system of work and the safety of the place of work, including by failing to ensure that workers were not permitted to carry items in both hands.

[73] In oral submissions in reply counsel for Teys reiterated that some of the submissions made on Mr Manca's behalf were not open on the pleadings. These included arguments that precautions should have been taken to ensure that congealed blood on the soles of workers' boots was properly removed, prior to their descent of the steps, and also an alleged failure to ensure that workers were not required to carry so many items in both hands, so as to keep their right hand free. Counsel submitted that those matters were not raised on the pleadings.

[74] The primary judge seemingly accepted this submission. The primary judge appears to have accepted the submission that such an alleged failure to instruct Mr Manca when he came to work on the blooding floor to not carry equipment in both hands when he descended the stairs, was not part of Mr Manca's pleaded case.

[75] Earlier, at [21] and [22], I have quoted subparagraphs 3(a), (b) and (c) of the Amended Statement of Claim, which includes subparagraphs 3(c)(i) to (x). The primary judge quoted the allegations of negligence in subparagraphs (i) to (x). He addressed the presence of signs on the premises about using handrails and the 41-page induction document in the context of the foreseeability issue. The failure to use the handrail also featured in the discussion of contributory negligence.

[76] Subparagraphs 3(c)(i) to (viii) of Mr Manca's pleading addressed in one way or another the allegedly damaged and worn state of the steps, and a failure to "ensure the steps were kept clean of blood and other fluids/substances from recently slaughtered and bled carcasses". Subparagraph (viii) alleged a failure to warn Mr Manca that the steps were damaged, worn and slippery. There was no specific allegation of a failure to warn him of the dangers of carrying items in both hands when on the steps, and to instruct him not to do so.

[77] The pleadings point involves two issues:

(a) was a failure, during induction into working on the blooding floor, to specifically instruct Mr Manca to not carry his tools in both hands after the washdown and, instead, to use the handrail, part of Mr Manca's pleaded case on negligence; and

(b) was that issue nevertheless raised by the pleadings as part of his case?

[78] Mr Manca submits that the particulars of paragraphs 3(a), (b) and (c)(ix) and (x) were broad enough to include the issue of instructions and that the matter also arose in paragraphs 6(e) and (f) and 9(e) of his Reply to Teys' pleading about the system of work, foreseeability and breach.

[79] Teys' counsel on the appeal were correct to contend that Mr Manca's case at trial was presented in two parts. The first was the structural integrity or state of repair of the stairs. The second was whether the stairs were covered in blood and other fluids from recently slaughtered carcasses. The only particular of negligence about a failure to warn or instruct was paragraph 3(c)(viii). It alleged a failure to warn that the steps were worn and slippery from the presence of blood and other substances. According to Teys, if Mr Manca wished to rely on a failure to give an instruction about not holding his tools in both hands on the stairs, this should have been specifically pleaded.

[80] In my view, this submission should be accepted. The function of pleadings in defining the issues for trial and the requirements of the rules to plead and particularise matters that, if not alleged, will take a party by surprise,[29] are fundamental to a fair trial. Pleadings "ensure the basic requirement of procedural fairness that a party should have the opportunity of meeting the case against him or

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29 *Uniform Civil Procedure Rules 1999* (Qld), rr 149(1)(c), 157(b).

her".[30] It did not fall to Teys to guess what Mr Manca's pleaded case was. The specific reliance on a failure to warn or instruct in paragraph 3(c)(viii) would reasonably induce a defendant to conclude that this was the only aspect of the plaintiff's case that relied on a failure to instruct. Also, the particulars in (i) to (x) beneath subparagraph 3(c) might have been read as particulars of 3(a) and (b). The primary judge perceived Mr Manca's negligence pleading to be based on those ten matters.

[81] In its defence, Teys pleaded that it implemented and enforced a requirement for all workers to undertake a "full apron wash" prior to exiting the kill floor using the steps; and that it trained Mr Manca to use handrails and had signs to remind workers to use handrails. It relied on these matters in responding to the allegation that it did not provide a safe system of work. It pleaded that it provided Mr Manca with "adequate training and instruction". The instruction to which it pointed was the induction booklet which it gave Mr Manca in June 2019, but which the judge found he did not read. It did not rely on any instruction when he was being trained about work and safety on the blooding floor in February 2020.

[82] Teys pleaded that it was not foreseeable that Mr Manca would remove his apron prior to using the stairs and be required to hold equipment in both hands because:

(a) he was not required nor trained to remove his apron prior to using the stairs;

(b) it had trained him to use one hand to carry his equipment and the other hand to use the handrail.

Again, the alleged training was the induction booklet.

[83] Mr Manca replied to these pleas about foreseeability and alleged breach of the duties. He pleaded:

(a) in response to the requirement to perform a "full apron wash", that on occasions he would take his apron off to wash it and carry it by draping it over his arm when descending the stairs, and that it was up to the individual worker whether they would do this; and

(b) in response to allegations of training to use handrails, that there were signs, but no "formal training" to use handrails and that instructions were given to him in English to read, but English was not his first language.

He also pleaded in paragraph 9(3) of his Reply that Teys knew its employees descended the stairs while carrying items of equipment in their hands that made it impossible to use the handrail.

[84] The pleas in the defence and in paragraphs 6 and 9 of the Reply raised in a general way the sufficiency of the written instructions given to Mr Manca and Teys' failure to enforce the written and signed instruction about using handrails. The Reply did not squarely raise the need for a specific, further instruction about carrying equipment and use of the handrail when Mr Manca was being trained about the system of work on the blooding floor.

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30 *Banque Commerciale SA (In liq) v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286 ("*Banque Commerciale*").

[85] Teys' allegation about the "full apron wash" requirement (which was admitted) related to a process that avoided excess blood being carried to other parts of the floor, including the steps. The Reply to Teys' allegations about training and instructions was to answer its case that these instructions (and other matters) made the risk of injury not foreseeable and that it took reasonable precautions.

[86] I am not persuaded that paragraphs 6 and 9 of the Reply raise as a particular of Teys' negligence the failure, during induction into the blooding floor, to instruct Mr Manca to not carry his tools in both hands after the washdown. Mr Manca's statement of claim was the place to make this allegation, if it were to be made. In any case, it was not particularised in either of his pleadings.

[87] Teys' pleading and case about the training and instruction it gave Mr Manca upon his induction in June 2019 as a worker at its meatworks, about the signs at the premises about handrail use, and that he was required to undertake a "full apron wash", and Mr Manca's reply to these pleaded allegations did not raise, or at least clearly raise, as part of his case on negligence that he should have been specifically instructed during his induction onto the blooding floor to not carry tools in both hands after the washdown. The place to do so was in his statement of claim. It was unfair to Teys for it to face a basis of liability that was not pleaded or particularised.

[88] There was a brief passage in the evidence-in-chief of Mr Manca in which he said that he was never told to not carry his tools in both hands or to make a second trip back up the stairs to collect a second handful of tools. This evidence was relevant to one of Teys' pleas about foreseeability and its contributory negligence plea. Mr Manca did not argue that this or anything else in the conduct of the trial meant that the parties had "deliberately chosen"[31] a basis different from that disclosed by the pleadings for the determination of their respective rights and liabilities. Therefore, Teys was entitled to submit to the primary judge that Mr Manca was confined to his pleaded case.

[89] The pleading point was taken at trial by Teys in its written and oral submissions. No application was made by Mr Manca to amend at that point. Such an application might have raised issues about the conduct of the parties' cases, the state of the evidence on the new allegation, and whether any further evidence needed to be called. Even now, no application to amend the pleading is made.

[90] Also, the pleading point was not raised as a ground of appeal. The major issue that arose in Mr Manca's oral submissions on the appeal was not raised in any ground. Counsel for Mr Manca submitted that it was raised in ground 7. However, this is not apparent. Ground 7 concerns a finding of fact about whether Mr Manca could have carried all of his equipment in one hand.

[91] In my view, Mr Manca's pleadings at trial did not allege that a necessary precaution was to instruct him when he came to undertake new work in a new and very different work location in February 2020 about carrying equipment on the steps.

[92] The notice of appeal does not allege that the primary judge erred in acceding to Teys' pleading point. In any case, in my view, he has not been shown to have done so.

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31 *Banque Commerciale* at 287.

Alleged errors in fact-finding

[93] Mr Manca's notice of appeal raises a number of alleged errors in factual findings and also alleged errors on legal issues concerning foreseeability, whether there was a "not insignificant" risk of injury, breach of duty, and causation. I will deal first with alleged errors in fact-finding.

[94] Mr Manca's pleaded case was that the steps were "covered in blood and other fluid/substances from recently slaughtered carcasses" and that Teys failed to ensure that the steps were kept clean of those substances by, for example, a system of regular cleaning. He did not plead that the steps were covered in water or were wet. He did not plead that his fall was caused by congealed blood in the treads of his work boots, or that the boots were unsuitable to use on floors like the blooding floor where blood would accumulate. These other issues emerged at the trial when the evidence did not support a finding about the presence of blood in any significant quantity on the steps on the day of Mr Manca's fall. The trial judge engaged with them in his reasons. I will return to issues concerning blood on the soles of the boots in addressing grounds 4, 5 and 6 which address this issue, and grounds 10 and 11 in relation to the cause of the fall. Despite not being pleaded, it is convenient to deal with the allegation that the steps were wet in conjunction with the ground of appeal that relates to the presence of blood on the steps.

Did the trial judge err in failing to find that the steps were bloody or wet?

[95] As for the presence of blood, it is important to distinguish between:

(a) bloodstains, like one left on the tread of a step that appears in one photograph that was taken sometime after the incident, or the "little bit" of apparently dried blood on the edge of one tread; and

(b) blood that was slippery and a potential cause of Mr Manca's fall.

His complaint in the proceeding and in this appeal is not about the presence of dried bloodstains or dried sprays of blood. It is about the presence of blood on the step upon which he slipped.

[96] The fact-finding exercise required of the primary judge was not a choice between Mr Manca or other witnesses who said that there was blood on the steps shortly before or shortly after he fell, and those who did not see any blood or other fluid on the steps at about the time of his accident. This was because Mr Manca did not say that he saw any blood on the steps before or after he fell. Mr Rodrigues did not see any blood when he visited the scene shortly after the incident. Mr Fry did not see any blood on the steps that day, but did not inspect the steps after seeing that Mr Manca had fallen on them.

[97] A photograph taken of the steps on the day of the incident does not show the presence of blood on any of the steps.

[98] The primary judge considered the evidence and, in my view, it was open to him to conclude that Mr Manca had not proven that there was blood on the step or steps and that the blood caused him to slip.

[99] Mr Manca's appeal submissions point to a minor error made by the primary judge where the judge says that Mr Manca took photographs 1 and 2 in exhibit 2 later on

the day of his fall. A Teys employee took photograph 1 that day and Mr Manca took photographs 2 and 3 on a later, unknown date. Nothing turns on who took photograph 1. It does not show blood on the steps.

[100] The photograph does not show that the steps were wet with water or any other fluid. It does not clearly show the presence of any fluid on the steps. At best, there is a small area at the bottom of the steps which might be light reflecting off some water.

[101] Mr Manca challenges the finding that the steps at the time were not wet. He places reliance upon the fact that his uncontested evidence was that he was wearing wet boots, having rinsed his boots and equipment with water. However, that cannot account for the presence of water in any significant quantity on the step before Mr Manca arrived at it. Also, there were only two workers on the blooding floor who rinsed off their boots at the end of a shift. Therefore, the alleged presence of water on the steps cannot be attributed to it being a high-traffic area for workers with wet boots. Only the two workers on the blooding floor used the steps to come and go.

[102] Mr Manca gave evidence under cross-examination that "always that stair is wet" and that it is "always wet there". However, the primary judge was not required to accept that evidence where:

(a) in recounting his fall, Mr Manca did not say that he walked in water on the steps, or that he noticed that the steps were wet after he fell on them;

(b) no other witness gave evidence that the steps were wet on the day in question or in general;

(c) his boots were not so wet from water (or anything else) that he slipped while walking about four or five metres down a path to the top of the steps; and

(d) a photograph taken on the day of the incident does not show the steps to be wet.

[103] The evidence of Mr Fry about occasions when "the blood trays underneath would overflow from being blocked up" and splash, and the blood would get on the steps from people walking through the area and up the steps, is relevant. However, there was no evidence from Mr Fry or anyone else that such an episode involving blocked drains from the blood pit occurred on the day in question.

[104] Mr Manca's own evidence about what he saw or did not see on the day in question is important. His evidence was that he was looking ahead and then, as he walked down the steps, he looked down. He did not give evidence of seeing any blood or water on the steps before he slipped on one of them or after he fell.

[105] Overall, the evidence left open the possibility that remnants of blood from the soles of work boots, despite the washing process, may have been transferred onto the steps and marked them.

[106] Mr Manca's submissions on appeal point to one factual error in the judge's reasons. It concerns the date of an incident report that Mr Rodrigues wrote. The report gave an account of the incident and of having checked the stairway and found it to be clear of any obstructions and of having stated to the safety officer that the edges of some steps were "wasted away and painted over". The report was accompanied by

a drawing of the area that confirmed that the stairway was clear of obstructions or rubbish. The primary judge noted that the incident report signed by Mr Rodrigues was dated 17 March 2021. Counsel for Mr Manca at the trial suggested this was an error and the report was made on 17 March 2020. Mr Rodrigues did not accept that that was the case, but the trial judge concluded that it had been and therefore was made at a time "sufficiently proximate to the date of the incident" for Mr Rodrigues to have a reasonable memory at the time the report was written. It appears, however, that the report was in fact signed on 17 March 2021, since the form it used was not adopted until September 2020.

[107] The incident report that was completed by Mr Rodrigues was tendered by Mr Manca as part of his trial bundle and given a date of 17 March 2020 in the index. Mr Manca's legal representatives sought to rely upon it as a near-contemporaneous document. However, nothing really turns on the erroneous conclusion that it was more likely than not written and signed on 17 March 2020. The only consequence was that the true date of the report may have led the trial judge to place more reliance upon the report than he should have. If the judge had concluded Mr Rodrigues' report was dated 17 March 2021, then he still would have been left with Mr Rodrigues' recollection that there was no blood on the step and the absence of any evidence from Mr Manca about the presence of blood on the step at the time he fell. Mr Fry's evidence about what might happen if the drain became blocked does not assist Mr Manca because there is no evidence that such an episode occurred that day.

[108] In my view, the trial judge's findings about the presence or absence of blood and water on the steps on the day in question and prior to Mr Manca's fall have not been shown to be in error. They were open on the evidence and in the absence of any evidence from Mr Manca of having seen blood on the steps at about the time of the fall. The primary judge's finding has not been demonstrated to be wrong by incontrovertible facts or uncontested testimony. The finding is not glaringly improbable or contrary to compelling inferences. Ground 3 and associated points made in connection with the cause of the fall in grounds 10 and 11 are not established.

Mr Manca's boots and congealed blood

[109] Mr Manca's pleading did not allege a breach of duty in respect of the state of the sole of his boots. He did not plead that congealed blood between the treads of his boots caused him to slip and fall. His pleading raised two general matters in relation to alleged negligence. The first was the issue just discussed about the presence of blood and other fluids from recently slaughtered carcasses covering the steps. The second was the physical state of the steps and allegations that they had damaged and worn edges, and did not provide a non-slip surface.

[110] The topic of congealed blood only emerged at the end of Mr Manca's cross-examination when the judge sought clarification of his evidence-in-chief that there was blood "in" his boots. The following exchange occurred between the judge and Mr Manca:

> "When you say blood in your boots, I assume you don't mean inside your boots where you - - -?---No.
>
> No?---Underneath.

Underneath?---Yes.

And was that congealed blood?---Yes.

Like jelly type?---Jelly, yes.

Jelly, and was it slippery - - -?---Yes.

- - - on your boots?---Yes."

[111] In further cross-examination, Mr Manca acknowledged that when he walked four to five metres along the path that led to the top of the stairs, he did not notice any slipperiness with his boots.

[112] During Mr Rodrigues' evidence, the primary judge asked whether a worker would have congealed blood on the soles of their boots. He replied, "[W]ell, I suppose you can, but that's because you're not doing a proper job". This refers to evidence he had given a few minutes earlier about a hose that is used to wash as much as possible underneath the sole of the boots, so that when the worker goes to the washroom, there is less to clean. Mr Rodrigues explained, "you're taking the majority out with the pressure – pressurised water, with the – with the nozzle". This refers to the hose with a trigger nozzle that was in the metal cubicle to be used to hose blood from aprons and boots. Mr Rodrigues' evidence was that the worker washes the treads of the boots with the hose and this "protects your boots from getting a lot of blood".

[113] In answer to a further question from the judge about whether "blood congealed in your boots" would be slippery to walk on, Mr Rodrigues responded that he did not believe so, saying that he had worked on the kill floor where there is "blood everywhere" and one might step on fat. But he had never slipped on "blood itself because, basically, blood is not slippery".

[114] Neither Mr Rodrigues nor Mr Platten, who was a shift manager and who had worked for Teys for about 43 years, had ever witnessed someone slipping on the steps. Mr Platten also said that blood would not congeal in the treads of boots and that it was not slippery.[32]

[115] The primary judge addressed the evidence about congealed blood and boots in considering what caused Mr Manca to fall[33] and in considering the issue of foreseeability.[34]

[116] The judge was not satisfied that there was congealed blood in the tread of Mr Manca's boots. He also declined to find that blood was slippery, but went on to find that, even if it was, the tread on the boots would likely have been adequate to ameliorate its slipperiness.[35] He later added that it was unlikely that the tread of the boots did not prevent slipping because it was necessary for a worker to walk along areas on the sloped edge of the blooding floor basin on which there would be blood.[36]

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32 *Manca* at [32].
33 *Manca* at [37].
34 *Manca* at [58].
35 *Manca* at [37].
36 *Manca* at [58].

[117] In grounds 4, 5 and 6 of his notice of appeal, Mr Manca challenges these findings. Subparagraph 4(a) says that the primary judge erred in finding that congealed blood was not slippery when it "was never an issue pleaded in the Defence". It is true that the slipperiness of congealed blood was not pleaded in the defence. Equally, the matter of congealed blood in the treads of boots, and its slipperiness, were not pleaded in the Statement of Claim.

[118] Ground 4 complains that this issue was first raised in the course of Mr Rodrigues' evidence-in-chief on the third day of the trial, after Mr Manca's case had closed, and that the evidence should not have been accepted because of the principles in *Browne v Dunn*.[37] Mr Manca submits that neither he nor Mr Fry was challenged as to their evidence that congealed blood was slippery. During closing submissions at the trial, counsel for Mr Manca identified the conflicting evidence about whether blood was slippery. No application was made to reopen Mr Manca's case. Also, it is not accurate to say that Mr Manca was not challenged since, after he told the primary judge that congealed blood was slippery, counsel for Teys put to him that he had not noticed any slipperiness with his boots during the walk prior to the fall. Given the course of evidence, I am not persuaded that there was a breach of the principles in *Browne v Dunn*, or that the primary judge was not entitled to act upon the evidence of witnesses called in Teys' case about congealed blood and whether blood is slippery or not.

[119] Insofar as Mr Manca relies upon Mr Fry's evidence, Mr Fry's evidence was not about the slipperiness of congealed blood stuck in the treads of boots or the efficacy of the boots to prevent slipping. His uncontested evidence was that if the blood trays underneath became blocked, then it would splash up onto the steps or people walking up the steps would transport blood on their boots. If the "blood pit" where the conveyor belt was running was running fine, it "really wasn't that bad". He mentioned that if blood got on the steps it congealed. As for the stairs, he said that if there was "no blood on them, no, they weren't slippery, but with blood on them, yes, they were".

[120] The issue of whether blood, congealed or otherwise, is "slippery" is itself slippery. What is meant by "slippery"? Any fluid, whether water or oil, on a surface might be said to be slippery.

[121] Teys' case was that the steps were not covered in blood or other fluid at the time of Mr Manca's accident so as to cause him to slip.

[122] The evidence of Mr Rodridgues and Mr Platten about slipperiness was to the effect that if workers wore boots and had to walk through blood in an area like the blooding floor, then the blood was not slippery. This brings one to the use of boots and the adequacy of their treads in preventing slips. Teys pleaded that it provided quality boots "with adequate grip to reduce the risk of falls". Mr Manca's Reply did not engage with that allegation. There was no evidence from any lay or expert witness that the boots, which are shown in the evidence to have a deep tread, were inadequate for use on the blooding floor.

[123] Grounds 5 and 6 of the notice of appeal contend that the primary judge erred in finding that the boots were clearly designed to be non-slip and were likely to have ameliorated the slipperiness of blood on the boots, when that proposition was not

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37 (1893) 6 R 67.

put to Mr Manca and there is no expert or other evidence to that effect. There was no occasion for Teys' counsel at trial to ask Mr Manca about the boots' design and whether the treads would reduce slipperiness. The design and adequacy of the boots was not a real issue. Issues of congealed blood and the slipperiness of blood emerged in the course of the evidence in the way I have described. The primary judge's finding that the boots were designed to be non-slip and would likely ameliorate the slipperiness of any blood on the boots was unremarkable. Grounds 5 and 6 lack merit.

[124] Finally, there is the primary judge's conclusion that the evidence did not satisfy him that there was congealed blood in the tracks of Mr Manca's boots. The primary judge was entitled to be not satisfied on that point. The only evidence that Mr Manca gave about congealed blood being underneath his boots was in response to a leading question from the primary judge. The further cross-examination called into question whether that was the case and whether any congealed blood rendered the boots ineffective. The primary judge was not obliged to accept Mr Manca's evidence about the presence of congealed blood. Other aspects of Mr Manca's evidence were found to be unreliable. For example, he denied that there was a hose with a nozzle in the washdown cubicle that was able to be used to wash down the apron and his boots. The evidence persuaded the judge that there was such a hose in each washdown cubicle in February 2020, and it was available to be used to wash the apron and boots, including the underside of the boots.[38]

[125] The judge found that he used the hose to wash his apron and boots.[39] If Mr Manca did so, then the hose with its trigger nozzle would have been effective in removing congealed blood to some extent.

[126] Overall, the state of the evidence did not require the primary judge to be satisfied that there was congealed blood in the tracks of Mr Manca's boots at the time he fell, or that any congealed blood that remained in the deep tracks prevented the tread on the soles of his boots from functioning. The finding that the tread on the boots would likely have been adequate to ameliorate the slipperiness of blood (assuming blood to be slippery), was one that was open to the primary judge to reach.

[127] Mr Manca has not established that the primary judge erred in his findings about congealed blood and boots.

The physical state of the steps

[128] Three issues arise for consideration under this heading. The first is the physical state of the steps. The second relates to issues of foreseeability and breach. The essential issue is whether a duty arose in the circumstances that required Teys to repair the edges of the steps, provide a non-slip surface, or install metal-edged strips to the steps. The third issue concerns causation. Did the physical state of the steps and any proven breach of duty in that regard cause the fall on 11 February 2020? A related issue is whether the suggested precautions probably would have made a difference. The third issue is about "factual causation" in terms of s 305D(1) of the *WCRA*.

[129] There was limited evidence about the physical state of the steps. Mr Manca's submissions do not place any particular reliance upon Mr Rodrigues' incident

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38 *Manca* at [55].
39 *Manca* at [72].

statement form dated 17 March 2021 (more than a year after the incident), which reported that he had stated to a safety officer that "the edges of some stairs were wasted away and painted over". Photographs 1, 2 and 3 in exhibit 2, being a photo taken by a Teys employee on 11 February 2020 and two photos taken some time later by Mr Manca, seem to show that the edges of the steps were slightly rounded, rather than sharp. Photograph 3 appears to show that the very top step had a small part of its edge missing. There was no detailed evidence given by lay or expert witnesses about the state of the steps and, in particular, the state of the edges of the second or third step down (where Mr Manca slipped).

[130] Mr Manca did not give evidence that he sensed that he missed the edge of one of those steps, slipped off the edge, or misjudged where the edge was.

[131] Photographs 5 and 6 depict yellow metal edging that was installed. There was no evidence as to why the metal edges were installed, for instance, to provide greater traction or simply to better identify where the edge of each step was.

[132] The primary judge addressed the state of the steps in the context of findings about foreseeability. He found as follows:[40]

> "Furthermore, I find that the steps that had been taken by Teys to mitigate the risk of anyone slipping on the steps were reasonable and sufficient to mitigate any such risk. Those steps were having a rough non-slip floor apparently designed to be non-slip, having and instructing the use of a handrail and providing facilities for employees to undertake a preliminary rinse of their apron and boots before proceeding along the walkway and down the steps, as well as having regular safety inspections of the entire plant. The fact that, in December 2020, Teys installed metal capping on the edges of the steps does not prove that it was negligent for it not to have done so earlier. To the contrary, it serves to demonstrate that Teys did undertake safety inspections and make ongoing improvements to the plant when it considered it appropriate. As provided in s 305C(b) and (c), the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done; and the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of injury does not of itself give rise to or affect liability in relation to the risk and does not of itself constitute an admission of liability in connection with the risk. In any event, there was no evidence comparing the non-slip status of the steps before and after the installation of the capping."

[133] In later concluding his liability findings, the primary judge accepted the submission that "there was no evidence demonstrating whether any particular alternative stair applications, treads, system of inspection or any other precaution not taken by Teys at the time would or would not have avoided Mr Manca's fall".[41]

[134] Ground 12 contends that the judge erred in finding that the installation of metal capping after Mr Manca's fall was not evidence as to what Teys should previously

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40 *Manca* at [59].

41 *Manca* at [62].

have done to improve safety. Mr Manca submits that this topic is not a matter for expert evidence and that there was sufficient evidence for the judge to conclude that the capping reduced the risk of slipping. Mr Manca's appeal submissions contend that photograph 5 leads to the conclusion that the indentations on rubber-soled boots would "obviously interlock" with the metal capping and provide an "obvious improvement" to the traction presented by the steps for someone descending them.

[135] Two issues warrant separate consideration. The first relates to foreseeability, reasonable precautions, and what is to be made of the fact that metal caps were placed on the edge of the steps in December 2020. Mr Manca does not contest what the primary judge wrote about s 305C(b), namely the fact that a risk of injury could have been avoided by doing something in a different way does not of itself give rise to or affect liability in relation to the risk, and does not in itself constitute an admission of liability in connection with the risk.

[136] The second issue relates to the fact that installation of metal capping may have reduced to some extent the risk of slipping. This does not necessarily mean that this was a reasonable precaution that was required in all the circumstances. As Teys submits, a breach inquiry is not satisfied by positing, with the benefit of hindsight, that something more could have been done.[42] Also, in determining what were reasonable precautions, a court must avoid hindsight bias.

[137] The primary judge did not find that the installation of metal capping was not an improvement. In fact, he referred to it as an improvement. The relevant point being made was that the extent of improvement was not clear, there being no evidence comparing the non-slip status of the steps before and after the installation of the metal capping. The primary judge inferred that capping reduced the risk of slipping to some uncertain extent.

[138] Mr Manca's challenge to [62] of the reasons relates to a finding on a related, but different issue about causation. The uncertain extent of the improvement posed a problem in establishing that the earlier installation of metal caps would or would not have avoided Mr Manca's fall. This aspect is part of a broader issue of causation. It concerns the state of the evidence about what caused Mr Manca to fall. For example, he did not give evidence that he fell because of the state of the edge of the steps.

[139] It is appropriate to return to that point when discussing issues of foreseeability, breach and causation. Presently, it is sufficient to observe that the primary judge found that there were a number of possible causes for Mr Manca to slip. The primary judge did not find that he slipped because of the state of the edge of the second or third step. The state of the evidence did not require the judge to find that the physical state of the steps caused him to fall.

The ability to carry the sharpening tools and stone in one hand

[140] The primary judge found that it would have been possible for Mr Manca to wear the apron and the knife pouch, carrying the knives in the pouch rather than to carry them, and to carry the sharpening tools and stone in one hand.[43] This finding is relevant to his ability to use the handrail. It has a particular relevance to the

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42 *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at 461–2 [124]–[128]; [2005] HCA 62 at [124]–[128].

43 *Manca* at [57].

foreseeability that a worker would not be able to use the handrail. It also has a relevance to causation. For example, in considering issues about contributory negligence, the judge did not accept that it was not possible for Mr Manca to carry his equipment in one hand and to hold the handrail with the other. His choice not to use the handrail was found to be "a significant factor as a cause of his fall".[44]

[141] Grounds 7 and 8 challenge the judge's finding[45] that Mr Manca was able to carry his equipment in one hand, thereby enabling him to use the handrail.

[142] One aspect of the challenge relates to evidence given by Mr Rodrigues that, when he saw Mr Manca after the fall, Mr Manca was holding one arm bent at the elbow (his sore arm) and holding his tools in the other hand, with his apron or tunic draped over his arm. The judge acknowledged that this episode was not put to Mr Manca in cross-examination, but found that Mr Rodrigues appeared to have a clear memory of seeing Mr Manca carrying his gear in one hand and holding up his injured arm. While the judge accepted Mr Rodrigues' evidence, he noted that it was consistent with Mr Manca having hurt one arm so he did not use it and having gathered his equipment with the other hand, before proceeding to the change area. Therefore, the judge did not rely upon that evidence as itself proving that Mr Manca should have carried his equipment before the incident in only one hand. It simply proved that it was possible for Mr Manca to hold his equipment in one hand. The judge had regard to other evidence, including Mr Manca's demonstration in court of how he was carrying his equipment. That demonstration did not include holding a sharpening stone or his apron and gloves. The judge was not convinced by the demonstration that Mr Manca could not have held the equipment he had with him in court with one hand, or by strapping the knife pouch around his waist.[46] This was a conclusion that was open to the judge. It certainly is not glaringly improbable or contrary to compelling inferences.

[143] Grounds 7 and 8 contend that the scenario by which Mr Manca was able to carry his equipment in one hand was never put to him at the trial. I disagree. Counsel for Teys cross-examined Mr Manca about the pouch that was carried on his belt. She pointed out that there were holes in it and that the "steels" normally go inside certain holes in the pouch. Mr Manca agreed. However, he said that he had three steels and there were only two spaces, and that he also carried a stone that he used every day on the blooding floor.

[144] Mr Manca was also cross-examined about his ability to hold onto the handrail as he was descending the stairs. It was specifically put to him that he could have done so, to which he responded that he was carrying his tools in both hands. He was also cross-examined about instructions to use handrails. Different aspects of the cross-examination fairly put to Mr Manca that he could have carried his equipment in one hand and used the handrail.

[145] The judge did not specifically find that Mr Manca might have placed two of the sharpening steels, along with the knives, in the pouch, leaving him to carry a third steel and the stone in one hand. He found, however, that it would have been possible for him to wear the apron and the knife pouch, carrying the knives in the pouch, rather than to carry them, the sharpening tools and stone in one hand. This finding did not depend upon Mr Rodrigues' evidence of what he saw after the event.

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44 *Manca* at [78].
45 *Manca* at [57], [60], [76] and [77].
46 *Manca* at [76].

It was a conclusion based upon the evidence, including the cross-examination of Mr Manca and Mr Manca's demonstration in court. The evidence did not convince the judge that Mr Manca could not have strapped the knife pouch around his waist and held the remaining equipment in one hand. Appropriate consideration should be given to the advantage which the primary judge had in assessing the evidence, including Mr Manca's evidence and his demonstration. Mr Manca has not surmounted the high threshold required to overturn a finding of fact that was open to the judge to reach on this issue.

[146] Finally, subparagraphs 7(d) and 8(d) of the notice of appeal relate to Mr Manca's evidence that during the week in which he had been working on the blooding floor and had been carrying items of equipment after the preliminary wash, by using both hands, he had not been instructed to not do so, or to put his apron and knife pouch/belt back on after he had rinsed them and before descending the steps. Those matters relate to the issue of instruction and supervision which has been addressed in the context of the pleading point. They do not disturb or undermine the challenged finding that it would have been possible for Mr Manca to wear the apron and knife pouch and to carry the remaining tools in one hand. The evidence did not prove that any supervisor had seen Mr Manca carrying his tools in both hands as he descended the stairs on one of the few days that he worked in that area before his fall.

Foreseeability and "not insignificant" risk of injury

[147] Mr Manca's submissions cite, and Teys does not contest the correctness of, two decisions that discuss ss 305B and 305C of the *WCRA*: *Potter v Gympie Regional Council*[47] and *Walker v Greenmountain Processing Pty Ltd*.[48] Section 305B(1) is set out at [33] above. To prove that there was a breach of duty, a claimant must prove the relevant risk of injury was: (a) foreseeable (in the sense of being a risk that the defendant knew or ought reasonably have known); (b) "not insignificant"; and (c) in the circumstances, a reasonable person in the defendant's position would have taken the pleaded precautions. Each of these three elements are to be judged from the viewpoint of the defendant, in the circumstances that were known, or ought to have been known at the time of the alleged injury.[49]

[148] Fraser JA in *Meandarra Aerial Spraying Pty Ltd v GEJ & MA Geldard Pty Ltd*[50] stated that the introduction of "not insignificant" for the common law formulation of "not far fetched or fanciful" was designed to produce "some slight increase" in the necessary degree of probability.

[149] The risk must be defined by taking into account the particular harm that materialised and the circumstances in which that harm occurred.[51]

[150] The authorities discussed in *Walker*[52] explain that it is possible to formulate the "risk of injury" in different ways. The state of affairs to which the legal rule applies may be described more or less generally or specifically without undue artificiality. Both unduly narrow and unduly broad formulations should be avoided.[53]

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47 [2022] QSC 9 at [461]–[468] ("*Potter*").
48 [2020] QSC 329 at [77]–[79], [111] ("*Walker*").
49 *Potter* at [463].
50 [2013] 1 Qd R 319 at 333 [26]; [2012] QCA 315 at [26] ("*Meandarra*").
51 *Potter* at [459]; *Walker* at [78].
52 *Walker* at [77]–[79].
53 *Walker* at [79].

[151] The formulation of risk of harm should identify the "true source of potential injury" and the "general causal mechanism of the injury sustained".[54] What must be foreseeable and not insignificant is the nature of the particular harm that ensued and the nature and the circumstances in which that harm was incurred.[55]

[152] Ground 1 of the notice of appeal challenges the primary judge's findings about foreseeability and "not insignificant" risk of injury. The point is made that steps are "inherently dangerous".[56] So much may be accepted, but the risk of injury from slipping is not suitably defined for the purpose of s 305B by reference to the risk of falling on stairs. If it was, then the inquiry into foreseeability might be answered by saying that the risk is foreseeable, or that the risk of injury is not foreseeable and not a significant risk where the risk of injury is reduced by a handrail and a non-slip surface. The risk of injury that Mr Manca's submissions at trial formulated is stated at [34] above. In his appeal submissions, he seeks to formulate it as the risk of slipping on the concrete steps and falling and injuring himself while walking down wet steps at the end of his shift, while carrying just-rinsed equipment in both hands, at which time his wet boots "would likely have had jelly-like congealed blood stuck to and built up under their soles".

[153] Ground 1(b) contends that the uncontroverted evidence was that he was wearing wet boots, having stood in a pool of congealed blood for the duration of his shift, after which he had quickly rinsed his boots (while they remained on) and his equipment with water. As to that point:

(a) congealed blood under the soles of his boots was not part of his pleaded case as a matter in respect of which Teys was required to take additional, reasonable precautions, and it was not pleaded as part of the causal mechanism by which the injury was sustained;

(b) the system of work addressed the risk of congealed blood being stuck in the deep tracks of the soles of his boots by the requirement to wash the tops and soles of the boots at the end of the shift with the hose with the trigger nozzle;

(c) in the circumstances, congealed blood in the treads of boots was not known to be a risk of injury; and

(d) the judge's findings do not establish that Teys "ought to have known"[57] that congealed blood in the treads of boots created a risk of injury.

[154] The next point relied on in ground 1 is that Teys, in recognition that there was a risk of traversing the steps, had installed signs in parts of the premises warning workers to use handrails. This, like the installation of a handrail, concerns a precaution taken to reduce or avoid the risk of injury. Expressed differently, it is evidence that steps without a handrail or failing to use a handrail presents a risk of a fall and injury. An instruction to use a handrail recognises that risk and is apt to reduce the risk to one that is not significant.

[155] Next, Mr Manca points to the finding that Mr Fry had previously complained about how the steps would get bloodied if the blood trays beneath the floor became blocked. However, Mr Manca did not establish that there was a problem with the

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54 *Walker* at [78] and the authorities cited therein.
55 *Walker* at [77] and *Potter* at [459] citing *Erickson v Bagley* [2015] VSCA 220 at [33].
56 Ground 1(a), *Wilkinson v Law Courts Limited* [2001] NSWCA 196 at [32].
57 *WCRA*, s 305B(1)(a).

blood pit on 20 February 2020, and Mr Fry made clear that he was not suggesting that to be the case. Therefore, such an episode with blood splashing onto the floor below the steps and being transferred up the steps on workers' boots, does not reflect the mechanism of injury. Further, the risk identified by Mr Fry's evidence would be addressed by precautions to ensure that the blood trays and drains did not become blocked. Such a precaution would not have made a difference to the mechanism of injury on the day in question.

[156] Ground 1(b) asserts that the judge placed "undue reliance" on Teys' evidence that there had been no prior incident of slipping on the subject steps reported to it, given that the steps were used by only two workers on the blooding floor to go to and from their breaks and to leave at the end of their shift. The judge had regard to the evidence of no prior incident of slipping on the steps. He understood by whom the steps were used. He cannot be said to have placed undue reliance on the absence of prior incidents.

[157] Grounds 1(f) and (g) allege that the judge conflated the issue of foreseeability with the issue of breach of duty, such that breach of duty was not independently considered, and conflated the issue of foreseeability with the issue of contributory negligence. The relevant point appears to be the finding that it was unnecessary for an employee to carry the apron, knife pouch and equipment in both hands, while descending the steps after undertaking the preliminary washdown, but that Mr Manca did so. That action is said to have created a significant risk of injury and to have required Teys to take reasonable precautions against it. However, the fact that it was unnecessary for Mr Manca to carry his apron, knife pouch and equipment in both hands is relevant to foreseeability in assessing whether the risk of injury is significant, in circumstances in which there were general instructions to use handrails, and Mr Manca knew from his training that using a handrail was sensible. Also, there was no evidence that any supervisor or other employee was aware of Mr Manca's use of two hands to carry his equipment on the steps on the few days that he worked in the blooding area prior to the incident, or that it was a practice adopted by other workers on the blooding floor. This was a circumstance relevant to foreseeability and to whether a reasonable person in Teys' position would have taken the pleaded precautions.

[158] The primary judge found that if the risk of a person slipping on the steps and being injured was foreseeable, it was "not significant". This conclusion was based on a number of matters, including the absence of a report of anyone slipping. There was a non-slip floor. Teys provided a handrail at the steps and had erected signs in the premises reminding them to use handrails where provided. Although there was no sign at these particular steps, the handrail was obvious and a sensible thing for anyone to do was to use it and, for that purpose, to carry as little equipment as possible so as to have one hand free to use the handrail. It was unnecessary to carry the knife pouch, knives and other equipment in both hands because the apron and the belt with the pouch could be worn when walking down the steps. Finally, the judge pointed to the washdown procedure that was designed to minimise the amount of blood that would be transported on a worker's apron and boots. In the light of these precautions, the risk of a person being injured by slipping on the steps was found to be not significant.

[159] This was a conclusion that was open to the primary judge. It is not sufficient for the purpose of an appeal that a different judge, including members of this Court, might

have taken a different view to the view reached by the trial judge. The task of this Court on an appeal by way of rehearing is the correction of error. The views and conclusions of the trial judge ultimately must be shown to be wrong.[58] A conclusion about whether a risk was "not insignificant" entails an evaluation or judgment on a statutory element that involves an element of degree. A simple preference in an appellate court for a view different from that taken by the trial judge may not carry with it the conclusion of error. An appeal court might conclude that there "could not be said to be only one possible correct determination" on the issue.[59] In my view, the primary judge was correct to conclude in the light of his findings of fact that the precautions noted by him meant the risk of a person being injured by slipping on the steps was insignificant. It is sufficient to conclude, however, that the judge's conclusion that the risk was "not significant" has not been shown to be in error.

Reasonable precautions

[160] Ground 2 of the appeal contends that the judge failed to consider the effect of s 305B(2). In the light of my conclusion, that error has not been shown about whether the risk was "not insignificant". It is strictly unnecessary to address this ground.

[161] Section 305B(2) provides:

> "**305B General principles**
>
> …
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of injury, the court is to consider the following (among other relevant things) —
>
> (a) the probability that the injury would occur if care were not taken;
>
> (b) the likely seriousness of the injury;
>
> (c) the burden of taking precautions to avoid the risk of injury."

[162] The primary judge found that Teys had taken reasonable steps to mitigate any risk that a person would slip on the steps. I do not understand why it is said that the primary judge failed to consider matters that were relevant to the issue of whether a reasonable person would have taken the pleaded precautions against the risk of injury. The judge had regard to the probability or improbability that an injury would occur and recognised that a fall might result in a serious injury. He accepted that there was no evidence demonstrating whether any particular alternative stair applications, treads, system of inspection or other precaution not taken by Teys at the time would or would not have avoided the fall. The pleaded precautions that were relied upon by Mr Manca have been discussed earlier in determining the pleadings point.

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58 *Branir Pty Ltd v Owston Nominees (No 2) Pty Ltd* (2001) 117 FCR 424 at 435–7 [21]–[28].

59 *Poulet Frais Pty Ltd v Silver Fox Company Pty Ltd* (2005) 220 ALR 211 at 220 [46]; [2005] FCAFC 131 at [46].

[163] The steps had a non-slip tread and a handrail. As discussed, it is arguable that metal caps on edges might have made the steps safer, but the extent to which they guarded against slipping was not the subject of evidence. The possibility that metal capping may have reduced the risk of slipping does not prove that their installation was a reasonable precaution in all the circumstances. The edges of the steps were not found to be unsafe. Proof that metal capping would have improved safety to some uncertain extent does not prove that, in the circumstances, a reasonable person in Teys' position would have installed them. The following observations by McHugh J in *Dovuro Pty Ltd v Wilkins*[60] had been cited in the context of ss 305B and 305C:

> "A defendant is not negligent merely because it fails to take an alternative course of conduct that would have eliminated the risk of damage. The plaintiff must show that the defendant was not acting reasonably in failing to take that course. If inaction is a course reasonably open to the defendant, the plaintiff fails to prove negligence even if there were alternatives open to the defendant that would have eliminated the risk."

[164] Courts have repeatedly emphasised that what is required is the exercise of reasonable care and one must avoid hindsight. A court must consider the issue by looking forward to identify what a reasonable employer would have done, not backward to identify what would have avoided the injury.[61]

[165] The primary judge has not been shown to have erred in his assessment of whether, in the circumstances, a reasonable person in Teys' position would have taken the pleaded precautions.

Causation

[166] Ground 10 contends the primary judge erred in finding that Mr Manca had not proved what caused him to slip and fall on the steps. It relies upon the matters canvassed in grounds 2 to 8 (ground 9 having been abandoned). These grounds have been addressed.

[167] In addition, the judge is said to have failed to give any, or any significant, weight to a number of matters. The first is Mr Manca's evidence that he had blood on his boots at the time of his slip and fall. The judge took account of that matter. The second was the plaintiff's evidence, when shown the first photograph, that the steps had blood on their edges and were always wet. Again, account was taken to that evidence along with other evidence that did not support that conclusion. The judge is said to have not given any significant weight to Mr Manca's report to Mr Rodrigues that he had "slipped on the steps". However, there was no issue that Mr Manca had slipped on the steps. That issue was what caused him to slip.

[168] Ground 10(b)(iv) relates to Mr Manca's evidence about congealed blood. Again, the judge considered that evidence. Ground 10(b)(v) relates to Mr Fry's evidence. I have discussed this matter and the judge had regard to his evidence about occasions when blood in a drain would clot, overflow, and people walking up the steps would carry blood on their boots. Finally, the judge is said to have paid insufficient regard

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60 (2003) 215 CLR 317 at 330 [38].

61 *Potter* at [468] and the authorities cited therein.

to Mr Rodrigues' evidence about using the hose as much as possible to remove congealed blood. Again, the judge had regard to this evidence, found that (contrary to Mr Manca's denials) the hose and nozzle about which Mr Rodrigues gave evidence existed, and that Mr Manca had not failed to use it on the day in question.

[169] In summary, the matters relied upon in ground 10 do not show that the judge erred in concluding that it was not clear what caused Mr Manca to slip and fall and that, therefore, Mr Manca had not proved that he slipped due to any failure by Teys to take reasonable precautions against the risk of slipping.[62]

Was it likely that Mr Manca slipped and fell for some other reason such as accidentally or inadvertently misplacing his foot on a step?

[170] Having addressed the causes contended for by Mr Manca, the judge observed that it seemed that "for some reason (probably his own inattention), he misplaced his foot onto the edge (rather than the floor) of a step, causing it to slip out from under him".[63] In the summary of his reasons the judge stated that Mr Manca had not proved what caused him to slip and fall, but "it is likely that he slipped due to accidentally misplacing one foot incorrectly on a step".[64] Ground 11 contends that the primary judge erred in making those findings. This, however, is of little consequence once the position is reached that Mr Manca did not prove that his slip and fall were caused by the matters contended for by him in his pleading, or by congealed blood in the tread of his boots.

[171] Mr Manca makes the point that elsewhere the judge said he could not be satisfied that any particular matter caused the fall because at most the evidence gave rise to "inferences of equal degree of probability such that the choice between them is a matter of conjecture … [as to which] the law does not authorise a court to choose between guesses".[65] Mr Manca's argument is that a scenario that he slipped due to inattention, inadvertence, or misplacing his foot on the step, was also a matter of conjecture.

[172] The relevant part of the reasons involved a process of elimination. The evidence did not support a finding that the presence of blood or water caused the slip. Likewise, congealed blood was not proven to be a cause. The physical state of the steps was not proven to be a cause.

[173] There may be some validity in Mr Manca's point that, notwithstanding the exclusion of these potential causes, misjudgment or inadvertence was simply another inference that fell short of being a likely cause. The inference of inattention was a reasonable one, given what was contended by Mr Manca in connection with contributory negligence concerning tiredness, a mistake and inattention at the end of a nine-hour shift during which Mr Manca and his co-worker dealt with several hundred carcasses.

[174] It would have been sufficient for the primary judge to find that misjudgment or inattention was an alternative explanation, without finding that either of them was likely. However, if a finding that an alternative cause was "likely" was an error,

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62 *Manca* at [37], [62].
63 *Manca* at [39].
64 *Manca* at [6(a)].
65 *Manca* at [36] citing *Jones v Dunkel* (1959) 101 CLR 298 at 304–5.

that would not be sufficient for the purpose of Mr Manca's appeal in circumstances in which the causes alleged by him were not proven. Relevantly, the judge's process of reasoning was to consider the pleaded causes and then consider other possible causes that were reasonable inferences in the circumstances. The judge did not reason that Mr Manca's fall was due to misjudgment or inadvertence and rely upon that finding as a basis to exclude the causes for which he contended.

[175] If accidentally misplacing one foot was not "likely" (in the sense of something that was more probable than not), but only one of many possibilities that were open on the evidence, then the cause of the slip was still not proven.

[176] Mr Manca failed to prove that any one of the causes that he alleged was the cause of his fall. He therefore failed to prove causation.

[177] In addition, in circumstances in which the mechanism of his slip and fall was uncertain, he could not prove that one of the additional precautions pleaded by him probably would have prevented the fall. For example, having not proven that he slipped because the edge of a step was defective, and having not proven that metal capping would have significantly altered the risk of him slipping in the way that he did, he encountered a problem with the second aspect of factual causation. However, his main problem on causation was that neither his evidence nor any other evidence proved what caused him to slip and fall.

Conclusion on the appeal

[178] Mr Manca has failed to overturn the findings of fact about which he contends the judge erred. Those findings of fact were sufficient to allow the judge to reach the conclusions that he did on foreseeability, significant risk, reasonable precautions, and causation.

[179] The judge's ultimate finding that Mr Manca had not proved that he slipped due to a failure by Teys to take reasonable precautions, namely the reasonable precautions pleaded by Mr Manca, was not in error. I would dismiss the appeal with costs.