SUPREME COURT OF QUEENSLAND

CITATION:	*Prasad v Ingham's Enterprises Pty Ltd* [2016] QCA 147
PARTIES:	**ROSELYN PRASAD** (appellant) **v** **INGHAM'S ENTERPRISES PTY LTD** ACN 008 447 345 (respondent)
FILE NO/S:	Appeal No 8810 of 2015 DC No 2892 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2015] QDC 200
DELIVERED ON:	7 June 2016
DELIVERED AT:	Brisbane
HEARING DATE:	10 March 2016
JUDGES:	Fraser and Philip McMurdo JJA and Boddice J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The appeal is dismissed.** **2. The appellant pay the respondent's costs of and incidental to the appeal on a standard basis.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DUTY OF CARE – where the appellant was an employee of the respondent – where the appellant developed the condition bilateral plantar fasciitis – where the respondent owed a duty to exercise reasonable care to avoid a foreseeable risk of injury to the appellant – where the appellant alleged several conditions of her working environment constituted a breach of the duty owed to her by the respondent – where the primary Judge found the risk of the development of bilateral plantar fasciitis was reasonably foreseeable – where the primary Judge found the respondent had not breached its duty – whether the primary Judge erred in finding the respondent had not breached its duty TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – where the primary Judge found that the appellant's work conditions were a cause of her plantar fasciitis – where the primary Judge found that the appellant had not established that her condition was

caused by the respondent's breach of duty – where the primary Judge's finding was made on the basis that there was no evidence any measure taken by the respondent would probably have prevented the appellant developing plantar fasciitis – whether the primary Judge erred in failing to find that the respondent's breach of duty caused the appellant's injury

Amaca Pty Ltd v Booth (2011) 246 CLR 36; [2011] HCA 53, applied
Czatyrko v Edith Cowan University (2005) 79 ALJR 839; [2005] HCA 14, cited
Fox v Percy (2003) 214 CLR 118; [2003] HCA 22, applied
Koehler v Cerebos (Australia) Ltd (2005) 222 CLR 44; [2005] HCA 15, cited
Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11, applied
Prasad v Ingham's Enterprises Pty Ltd [2015] QDC 200, not followed
Tame v New South Wales (2011) 211 CLR 317; [2002] HCA 35, cited
Woolworths Ltd v Perrins [2015] QCA 207, applied

COUNSEL: P W Hackett, with A S Katsikalis, for the appellant
M T O'Sullivan for the respondent

SOLICITORS: Carman Lawyers for the appellant
BT Lawyers for the respondent

[1] **FRASER JA:** For the reasons given by Boddice J, and the additional reasons of Philip McMurdo JA, I agree that the appeal should be dismissed with costs.

[2] **PHILIP McMURDO JA:** I have read the judgment of Boddice J and agree that the appeal should be dismissed.

[3] The appellant was employed at the respondent's food processing plant, where she had worked for approximately 10 years when she developed pain in her feet from what was found to be a condition of plantar fasciitis. She claimed that this injury was caused by the respondent's negligence.

[4] The appellant alleged that the respondent had been negligent in many ways. She had been required to push heavy trolleys with defective wheels and which were sometimes made more difficult to push because of chicken pieces which had been dropped on the floor. She had been required to stand for long periods, without adequate breaks, on concrete floors in an environment which was maintained at 13 degrees Celsius. She had been required to carry stacks of cartons in an unsafe manner, which involved carrying some of the weight of the cartons upon her foot. And she had been provided with inadequate footwear. These complaints were together described in the appellant's statement of claim as "the said conditions" and that expression was then employed in the pleading in a way which demonstrated that the appellant's case was that it was the combination of these conditions which had caused her injury.

[5] This explains why the primary judge considered, as a distinct factual question, whether "the conditions under which the plaintiff was working were a cause of the plantar fasciitis from which [the appellant] suffered".[1] His Honour was persuaded that the conditions under which the appellant worked were a cause of her injury. But he was not persuaded that any of those conditions was the result of negligence. Further, his Honour was not persuaded that any one of those conditions, in particular, was causative of the injury. As his Honour wrote:

> "[81] There is the further difficulty for the plaintiff, that the evidence of causation is very vague. It is one thing to say that the plaintiff was doing various things which increased the risk of plantar fasciitis, and those things together produced a cumulative increase in the risk, and that in those circumstances, and bearing in mind the absence of evidence of non-work based predisposing factors, the inference is open that it was a combination of the workplace activities which probably caused the plaintiff's condition. It is another to say that any particular change in those workplace activities would probably have led to the plaintiff's avoiding the development or seriousness of that condition. The medical evidence did not establish that any particular change would probably have produced a different outcome, even if it follows from the finding I have made that if all of the factors identified had changed there would probably have been a different outcome. In these circumstances, where the plaintiff has not proved negligence in relation to the presence of all of those factors, the plaintiff has failed to show any relevant causation."

[6] As to the allegations about the task of pushing trolleys, the primary judge found that the appellant had not been "required to push trolleys with defective wheels in the ordinary course of things at work" and that there had not been a negligent failure to maintain the trolley wheels;[2] nor was his Honour persuaded that there was negligence in failing to provide trolleys with caster wheels.[3] As for the presence of chicken pieces on the floor, which sometimes impeded the movement of a trolley, his Honour was not persuaded that there was a failure to exercise reasonable care in relation to the regular cleaning of the floor and he found that with due care, it was inevitable that there would be some risk of this material being there.[4]

[7] The findings as to the pushing of trolleys were partly based upon the trial judge's expressed reservations about the plaintiff's credibility.[5] The finding that sufficient attention was paid to the regular cleaning of chicken pieces from the floor was from his assessment of the evidence of several witnesses as to the extent of how often and in what quantities these pieces were present. His Honour accepted that this material could impede the movement of a trolley. But there was a question of degree to be assessed here, which depended upon his Honour's opinion of the witnesses who spoke about the problem. There is no discernible error in his Honour's conclusions on this subject.

[8] As to carrying cartons, his Honour did not accept the appellant's evidence that she was told to carry them in the way that she described, namely by balancing a stack of

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1 *Prasad v Ingham's Enterprises Pty Ltd* [2015] QDC 200, [56].
2 [2015] QDC 200, [71].
3 [2015] QDC 200, [72].
4 [2015] QDC 200, [73], [74].
5 [2015] QDC 200, [71].

them on her toe. He preferred the evidence of her supervisors, who said that they had discouraged her from doing this.[6] The challenge to his Honour's findings about cartons thereby requires the appellant to establish that his Honour should have preferred the appellant's evidence to that of her fellow employees. His Honour further concluded that the appellant's pleaded case, that she had carried these cartons over a distance of 50 metres at a time, was a gross exaggeration and that although she had at times carried the cartons over a distance of 10 or 15 metres, she did not do so "with any great frequency".[7] The appellant's argument has not revealed any error in the determination of these factual questions.

[9] His Honour rejected the appellant's complaints about her footwear, holding that the boots issued by the respondent were not defective. His Honour did so having considered the opinion evidence of two witnesses, who offered some criticism of the boots in relation to their cushioning effect. But as his Honour explained, this evidence was not sufficient to persuade him to accept this part of her case.

[10] But the appellant's case that her boots were ill fitting and did not provide an adequate shock-absorbing sole is said to have been misunderstood by the trial judge. It is argued that he failed to appreciate the significance of evidence from two fellow employees which was to the effect that it was not unusual for staff at this plant to have old and worn boots. Although that evidence was not specifically discussed by his Honour, its effect was negated by the appellant's evidence. His Honour noted that the appellant conceded that in 2010, the boots she was wearing were comfortable and that she could change her boots if they were uncomfortable.[8]

[11] The appellant's case about footwear relied upon the evidence of a Dr Werner. In his view, the flat cushioning insert which was provided by the respondent was not likely to be effective without an arch support. Dr Werner wrote that the respondent had prohibited the appellant from wearing therapeutic shoe inserts that provided that support. But his Honour observed that there was no evidence of that fact.[9] His Honour said also that the absence of such a support was not pleaded as a particular of negligence.[10] That is challenged in the appellant's written submissions, but I agree with his Honour's analysis of the pleading. In paragraph 7 of the statement of claim, the appellant alleged that the boots "had no or no adequate shock absorbing sole." The appellant argues that this should have been understood as an allegation that the boots lacked support to the arch of the foot. That argument cannot be accepted.

[12] But it is also argued that the trial was conducted on the basis that the absence of an arch support was one of the appellant's complaints. That submission has more force. Such a complaint was evident from the appellant's reliance upon the evidence of Dr Werner, who was also cross-examined on the issue. In my view, the primary judge ought to have considered this complaint of the absence of arch supports in the boots which the respondent provided.

[13] As to the complaint that the appellant had to stand for most of the day on a hard concrete floor, an important element of the appellant's case was the absence of rubber mats upon which employees (such as the appellant) could stand as they worked. These

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6 [2015] QDC 200, [61].
7 [2015] QDC 200, [61].
8 [2015] QDC 200, [58].
9 [2015] QDC 200, [59].
10 [2015] QDC 200, [59] n 39.

mats were used in the plant when the appellant began working there in 2000 until they were removed in 2006. His Honour found that they were removed because of an assessment by the respondent that the mats presented a tripping hazard and a risk of their harbouring bacteria. His Honour said that he held no doubt that the rubber mats formerly provided would have had some insulating effect. But as to the cushioning effect of the mats, his Honour said that "given the thickness of the rubber soles on the boots worn by the plaintiff it is difficult to see that anything much more in the way of cushioning was required".[11] In my view, that comment was not justified by any evidence. It was an opinion which could not be formed by the trial judge in the absence of an informed assessment by an accredited witness of the respective effects of the boots and the mats.

[14] There was evidence which indicated a potential for the mats to provide a benefit by way of cushioning the effect on musculoskeletal structures of the lower limbs from a hard surface, such as concrete.[12] A podiatrist, Mr Lane, gave evidence that standing on rubber matting would have been "of assistance as opposed to standing on concrete floors" and that this would have provided "a greater protection to the plantar fascia". There was evidence, in the form of a paper co-authored by Dr Werner, to the effect that the hardness of the flooring was relevant although, as the trial judge noted, "the evidence of Dr Werner did not establish that, had the mats been left in place, this would probably have made a difference, in that the plaintiff would probably not have developed the condition."[13] His Honour noted that the available research, including that of Dr Werner, did not suggest a causal relationship between the hardness of the surface, as distinct from prolonged standing, and the development of this condition.[14] As to the condition of prolonged standing, his Honour noted that the pleaded case that the respondent had allowed insufficient work breaks or rotation of tasks was not pursued.[15]

[15] The trial judge reasoned that the non-provision of the mats, although they were potentially beneficial, was not negligent given the competing considerations of the mats constituting a tripping hazard and a risk to hygiene in the plant. In this respect his Honour's reasoning is fairly open to criticism. The only evidence which suggested these disadvantages of the mats was that given by Mr Msalem, a supervisor in the plant who, it appeared, had not been involved in the decision to remove the mats. Having said that the mats were removed "at some stage", he was asked "Do you know why they were removed?", to which he answered: "Removed for safety reasons, and hygiene as well. There was a hygiene issue of the plant." He said that the safety issue was a "trip hazard". That evidence corresponded with the respondent's pleading. But the evidence had little or no weight on the question of whether these were good reasons for the removal of the mats. It was evidence of the opinions of others, which were not the subject of evidence. In my view this evidence was an inadequate basis for the trial judge's findings that these risks existed and that their existence made the decision to remove them a reasonable one.

[16] His Honour referred to the evidence of Mr McDougall, an industrial safety expert, that he had seen such matting used at other food processing plants but said that this meant only that "different employers take different views as to where the balance

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11 [2015] QDC 200, [64].
12 The evidence of Dr McDougall Exhibit 21 p 14.
13 [2015] QDC 200, [66].
14 Ibid.
15 [2015] QDC 200, [67].

lies". But absent the proof of the risks from keeping the mats, there was no occasion to balance competing risks. The use of mats did not have a demonstrated beneficial effect according to the research discussed by the trial judge. But they had at least a potential benefit such that absent some demonstrated detriment from their use, it was necessary that they be used in the exercise of reasonable care to avoid a foreseeable risk of an injury of the type the appellant suffered.

[17] Much of the argument at the trial and some of the argument in this court focused upon whether the respondent should have undertaken a risk assessment when removing the mats. The primary judge found that such an assessment was not made.[16] His Honour held, correctly in my view, that if the absence of such a risk assessment was to be a basis of liability, the appellant had to prove that such an assessment would have concluded that the mats should not be removed and that this would have made a difference to the appellant's condition. All of that is to say that the absence of a risk assessment itself was not causative of the injury. If there was actionable negligence on the part of the respondent, it was by not providing the mats rather than by not undertaking an assessment as to whether they should be provided.

[18] In my view, the appellant thereby demonstrated two errors in the trial judge's consideration of the allegations of negligence. His Honour ought to have concluded that the removal of the mats was negligent and ought to have considered whether the non-provision of arch supports was negligent. But in all other respects, the appellant has not demonstrated that his Honour's findings on the issue of negligence should be disturbed.

[19] Because not all of "the said conditions" of which the appellant complained were the result of negligence by the respondent, the finding that her injury was caused by "the conditions" of her workplace did not have the consequence that the respondent was liable. The appellant had to prove that her injury was caused by the respondent's negligence and could not succeed without proof that the absence of mats or arch supports at least materially contributed to her injury. As Boddice J has explained, the evidence did not support a finding that the absence of mats probably contributed to the development of the condition. And as to arch supports, Dr Werner said that the use of a shoe orthosis may assist but that "we do not have a study proving that". There was no opinion evidence to the effect that either of these measures, more probably than not, would have prevented or minimised the appellant's condition.

[20] I substantially agree with the reasons of Boddice J. I would order that the appeal be dismissed and that the appellant pay the respondent's costs of the appeal.

[21] **BODDICE J:** On 7 August 2015, the primary Judge dismissed the appellant's claim for damages for personal injuries alleged to have been sustained in the course of her employment as a consequence of the respondent's breach of duty.

[22] The appellant appeals that decision. At issue is whether the primary Judge erred in finding that: the respondent had not breached its duty; and that the medical evidence did not establish any relevant causation.

Background

[23] The appellant was born on 2 December 1971. She had previously worked for the respondent between 1994 and 1997. She commenced employment with the respondent

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16 [2015] QDC 200, [65].

again in March 2000. She was employed as a process worker at the respondent's chicken processing plant at Murarrie in the State of Queensland.

[24] The appellant worked five days a week. A working day consisted of a 6 am start with four working sessions of eighty four minutes, interspersed with breaks of ten minutes, fifteen minutes and thirty five minutes. Halfway through each work session, the appellant stretched for a couple of minutes. Her duties required her to stand for lengthy periods.

[25] The appellant mainly worked in a room where she packed chicken pieces into plastic trays. The appellant would take chicken pieces from a conveyor belt, place them in in plastic trays and then put the packed trays onto a higher conveyor belt. At times, the higher belt stopped. When this occurred, the appellant loaded wrapped chicken pieces onto trolleys and pushed them into the cold room.

[26] The area in which the appellant worked had a concrete floor and was cooled to thirteen degrees Celsius. The appellant dressed warmly under a food hygiene uniform supplied by the respondent. The uniform included a set of boots. The appellant wore two pairs of socks to keep her feet warm and wore larger sized boots. When the appellant recommenced employment in 2000 the workers stood on rubber mats placed on the concrete floors. Those rubber mats were removed in 2006 for health and safety reasons. After their removal, the appellant would stand on cardboard sheets, but she was subsequently told by supervisors she was not allowed to do so. The appellant also had access to a metal stand.

[27] In March 2010, the appellant reported suffering from pain in her feet. Her heels were swollen and red, the right heel being worse. The appellant saw a podiatrist and later a general practitioner, who referred her to an orthopaedic surgeon. When the appellant found it too painful to perform her normal working duties she was transferred to lighter duties. Her employment was terminated on 26 June 2010.

[28] The appellant subsequently had treatments to her heels in hospital, four treatments on each side. The treatments produced some improvement. She also used creams to treat her pain. Her pain lessened when she was no longer required to stand for lengthy periods of time. The appellant later resumed employment on a part time basis with another employer.

[29] The appellant commenced the proceeding against the respondent in 2011.

The proceeding

[30] The appellant alleged that her duties as a process worker involved repetitive activities of standing in rubber boots on concrete floors for long periods in areas which were maintained at cold temperatures of 13 degrees Celsius. The appellant was required to pick chicken pieces from conveyor belts and pack them into trays, crates or boxes and to work on the breast line and downstream wrapper/packer line.

[31] The appellant alleged that part of her duties of employment required her to stack and push crates loaded on trolleys. The appellant would move five to six trolley loads each day, a distance of 80 metres each way. The trolleys were heavy and had fixed wheels, making them difficult to manoeuvre across the concrete floors. On occasions, the wheels of the trolley would stick and not rotate properly. One reason for the wheels sticking was contamination with chicken pieces.

[32] The appellant alleged her duties of employment required her to stand for long periods without adequate breaks or rotation. Ninety per cent of her work time was spent working on concrete floors with 10 per cent of her work time spent working on steel stands. On occasions, she would be required to carry stacks of cardboard cartons 12 to 13 high over a distance of 50 metres using the toe of her shoe as support. The Wellington boots she was required to wear were ill-fitting and had no or no adequate shock-absorbing role.

[33] The appellant alleged the respondent knew or ought to have known that the Wellington boots offered poor protection for a worker standing on hard surfaces such as concrete and that walking, standing, lifting and pushing trolleys with defective wheels whilst wearing those boots on concrete floors caused stress on the plantar fascia, a factor in causing plantar fasciitis.

[34] The appellant further alleged that the respondent knew or ought to have known that standing on rubber mats reduced the risk of workers suffering plantar fasciitis. Notwithstanding that knowledge, the respondent removed the rubber mats without undertaking any assessment of the risk factors to its workers whilst working in cold temperatures; wearing ill-fitting Wellington boots; standing for long periods without adequate breaks and/or rotation; pushing heavy trolleys; standing on concrete floors and/or steel frames; and carrying stacks of made-up cardboard cartons over a distance of 50 metres using the toe of a shoe as support.

[35] The appellant alleged that subsequent to the removal of the rubber mats the respondent knew or ought to have known that its workers were experiencing difficulty working in those conditions. A number of its workers used cardboard in their boots to cushion their feet until they were instructed not to do so. The appellant alleged that as a consequence of performing her duties in the pleaded conditions, without rubber matting, she suffered bilateral plantar fasciitis and bilateral heel spurs. That personal injury, loss and damage was caused by the respondent's negligence and/or breach of contract. Multiple particulars were relied upon by the appellant.

[36] The respondent admitted that the appellant, in the course of her duties of employment as a process worker, worked in areas maintained at a cool temperature of approximately 13 degrees Celsius. The appellant was also required to wear rubber boots. However, the respondent alleged it provided boots with adequate shock absorption and further, provided sole inserts to improve comfort, support and shock absorption. The respondent denied it knew or ought to have known that its workers used cardboard in or under their boots to cushion their feet.

[37] The respondent admitted that prior to 2006 it supplied rubber mats to the floor adjacent to work stations. It discontinued the use of such rubber mats in 2006 because they constituted a safety hazard and created a food safety and hygiene hazard. The respondent denied their removal increased the risk of the plaintiff developing bilateral plantar fasciitis and bilateral heel spurs.

[38] The respondent admitted the appellant was required to pack the chicken product in crates which were loaded onto trolleys but denied the appellant was required to do so on a regular basis. The respondent also denied the trolleys were difficult to push, that the wheels were not adequately maintained and that the floors were contaminated with chicken pieces. The respondent alleged the appellant was rotated to different tasks whilst working on the production line.

[39] The respondent denied it was negligent and in breach of contract and that any negligence or breach of contract caused the appellant's bilateral plantar fasciitis and bilateral heel spurs. If the appellant suffered such conditions they were as a result of pre-existing congenital developmental or degenerative abnormalities or a pre-existing disposition to the development of those conditions. The respondent also contended the appellant had failed to mitigate her loss and that her injuries were caused or contributed to by the appellant's contributory negligence.

Decision below

[40] The primary Judge accepted that the appellant's duties of employment required her to work in 13 degrees Celsius, whilst standing in rubber boots on concrete floors. The primary Judge also accepted that the appellant in March 2010, had developed swollen and red heels which caused her significant pain. However, the primary Judge found aspects of the appellant's evidence unsatisfactory. Her explanations were found unconvincing on occasions. There were also inconsistencies in her evidence. The primary Judge concluded that whilst it had not been shown the appellant was deliberately exaggerating her symptoms or inventing them, he was cautious about her reliability.

[41] In respect of the appellant's pleaded injuries, the primary Judge found that the appellant's bilateral heel spurs were a constitutional condition which had nothing to do with her working environment. The primary Judge found that the other condition, plantar fasciitis, is a fairly common condition which can arise as a consequence of a wide range of matters placing unusual stress on the ligaments in the foot. Whilst it appeared that most of the factors identified as being associated with the condition were not present in the appellant's case, the primary Judge concluded that more likely than not the conditions under which the appellant was working were a cause of the plantar fasciitis.

[42] The primary Judge accepted the appellant wore rubber boots but did not accept the boots were defective in that they provided no adequate shock absorbing sole. The primary Judge also did not accept the appellant was required to carry boxes by balancing a stack of them on her toe. If the appellant did so it was by choice in circumstances where she was discouraged by the respondent to do so. The primary Judge found an assertion that the appellant was required to carry these boxes 50 metres a gross exaggeration. The primary Judge also did not accept the appellant undertook such a task with any great frequency.

[43] The primary Judge accepted the appellant was required to work standing on concrete floors but found that metal stands were provided if workers requested them. The primary Judge also accepted the respondent had at some point removed the rubber mats because they presented a tripping hazard and a risk to hygiene. The primary Judge accepted anti-fatigue matting was available and used at other food processing plants but was not persuaded there was any negligence in the removal of the rubber mats by the respondent.

[44] In coming to this conclusion the primary Judge accepted the rubber mats would have had some insulating effect and thereby reduce the tendency for the cold concrete floor to make feet cold. However, the primary Judge did not accept anything in the way of cushioning was required, over and above that provided by the rubber soles on the boots worn by the appellant.

[45] The primary Judge accepted the rubber mats were removed without the respondent undertaking any risk assessment. However, the primary Judge did not accept that any negligence in failing to undertake that risk assessment rendered the respondent liable for the appellant's subsequent injury. The primary Judge considered the appellant had to establish two points: that any risk assessment undertaken would have led to the conclusion that the mats ought not to be removed; and that had the mats been left in place this probably would have made a difference in that the appellant would probably not have developed the condition. The primary Judge was not satisfied the appellant's evidence established either point. The primary Judge found the evidence did not show that the hardness of the surface, as distinct from the mere fact of standing, was crucial so that the condition would probably have been averted by the provision of matting.

[46] The primary Judge found that the system of work provided adequate breaks and rotation. The primary Judge did not accept the appellant's evidence she was always required to work at the breast line and not rotated from it. The primary Judge also did not accept the appellant was required to stand throughout her entire shift with no breaks.

[47] The primary Judge accepted that from time to time the appellant was required to push crates of chickens stacked on a trolley but found this was something the appellant did on only a relatively small number of times each day. The primary Judge did not accept there was any particular difficulty in manoeuvring the trolley.

[48] The primary Judge found the appellant was not required to push trolleys with defective wheels in the ordinary course of her working duties and that there was not any negligent failure on the part of the respondent to properly maintain the trolley wheels. The primary Judge was not satisfied there was any negligence in failing to provide trolleys with castor wheels or that any failure to do so would have resulted in the appellant probably not developing her injuries. The primary Judge also was not persuaded there was any failure to exercise reasonable care in relation to the cleaning of the floor in the processing area.

[49] The primary Judge accepted there was a risk of developing plantar fasciitis if an employee was required to stand at one place at a work station on a hard concrete floor for most of the working day, particularly in a temperature of 13 degrees Celsius. However, the primary Judge was not satisfied the evidence established there were practical courses of action the respondent could have taken to eliminate or at least reduce that risk. The appellant had not established a reasonable employer would have concluded that anti-fatigue matting would be provided or that there was negligence in failing to provide anti-fatigue matting. The evidence also did not support a finding that if it had been provided it would probably have made a difference.

[50] The primary Judge reached a similar conclusion in relation to the provision of footrests. The primary Judge was not persuaded on the evidence that an employee exercising reasonable care to avoid the risk of musculoskeletal disorders would have probably arranged the workplace in a way which did not require workers such as the appellant to stand while performing their processing work or to work in a workplace at a higher temperatures.

[51] Finally, the primary Judge found that even if negligence had been shown, the appellant had not established that any particular change in the workplace conditions

would probably have led to the appellant avoiding the development or seriousness of her personal injury. Accordingly, the appellant also failed to show any relevant causation.

Appellant's submissions

[52] The appellant submitted the primary Judge erred in finding that the respondent removed the rubber matting because of an assessment they presented a tripping and hygiene hazard. There was no evidence capable of supporting that finding. Further, that finding was inconsistent with a subsequent finding that no risk assessment had been undertaken by the respondent before removing the rubber mats.

[53] The primary Judge also erred in finding that in order to show negligence it was necessary for the appellant to show that if there had been a risk assessment undertaken it would probably have produced a result different from the result that in fact occurred, namely removal of the mats. This finding misstated the test in *Kuhl v Zurich Financial Services Australia Ltd*.[17] That test was not confined to demonstrating that the rubber mats would not have been removed by the respondent. Regard also had to be had to the possibility of their replacement.

[54] The appellant submitted the uncontradicted expert evidence was that a risk assessment would have identified risk factors associated with the appellant's working conditions and identified a range of measures that could have been used to reduce the risk of prolonged standing on cold concrete floors, including the usage of anti-fatigue mats which had been used in meat processing plants in Queensland and New South Wales. The primary Judge ought to have found the respondent breached its duty of care by removing the mats, failing to conduct a risk assessment or failing to replace the rubber mats with different mats.

[55] The appellant submitted the primary Judge erred in finding there was no relevant causal link between the appellant's personal injuries and that breach of the respondent's duty of care. There was evidence that anti-fatigue mats had a cushioning effect for someone standing on a hard floor and may lower the risk for plantar fasciitis, which risk was significantly increased by continuous standing on a hard surface. A causal link was consistent with the primary Judge's finding that it was more likely than not the conditions under which the appellant was working were a cause of her plantar fasciitis.

[56] The appellant submitted the primary Judge erred in finding the appellant was not required to push trolleys with defective wheels in the ordinary course of her work or that there was any negligent failure properly to maintain the trolley wheels. The evidence established the respondent did not have a documented system of regular inspection and maintenance and only fixed problems of which they were aware. This evidence supported a conclusion workers were required to work with trolleys that were not properly maintained. There was also evidence that chicken regularly was on the floor and would get caught in the wheels of the trolleys.

[57] Further, the respondent failed to lead any evidence of a risk assessment in relation to the risk to workers of pushing such trolleys, despite having alleged it did undertake such an assessment. As the primary Judge accepted the pushing of trolleys subject to high resistance would place additional pressure on the plantar fasciitis, the primary Judge ought to have determined it was incumbent upon the respondent to undertake

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17 (2011) 243 CLR 361 at 397 – 8 [104].

a risk assessment in order to take reasonable care to avoid the risk of injury to the appellant. There was evidence that pushing the trolleys, or failing to conduct a risk assessment, was causally related to the appellant's personal injuries.

[58] The appellant submitted the primary Judge erred in failing to find the appellant's carrying duties caused her injuries. There was evidence the respondent was aware that its employees were undertaking such carrying duties and the respondent did not lead evidence to contradict the conclusion it had breached its duty of care by allowing and/or permitting the appellant to undertake such carrying duties. This failure was causally related to the appellant's personal injuries.

[59] The appellant submitted the primary Judge erred in failing to find that the respondent breached its duty of care in the provision of footwear that was old, worn, ill-fitting and had no adequate shock absorbing soles. There was evidence the respondent provided old and worn boots. The primary Judge failed to appreciate the significance of this evidence, namely that the poor condition of the boots, including the lack of cushioning or support, evidenced a breach of duty. The primary Judge erred in concluding the appellant's case did not include allegations regarding a lack of arch support. The appellant proved that the provision of inadequate footwear was causally related to her personal injuries as the boots that were supplied to her did not support her arch, which is a standard and typically effective treatment option. The relevant lack of shock absorbing sole was also relevant to the plantar fascia. Similarly, the primary Judge erred in not finding the respondent was negligent for not conducting a risk assessment with respect to workers standing for long periods without adequate breaks and/or rotation.

[60] The appellant submits the primary Judge also erred in finding that there was no medical evidence to support the conclusion that the appellant's work conditions may have put stress on her plantar fascia and aggravated the development of plantar fasciitis. There was evidence that plantar fasciitis was an overuse injury and that the appellant's work conditions were causative of strain to the plantar fascia.

[61] Finally, the appellant submitted the primary Judge erred in finding the medical evidence did not establish that any particular change in workplace conditions would probably have produced a different outcome. The primary Judge found it was more likely than not the work conditions were a cause of the appellant's plantar fasciitis. Against that background, it was irreconcilable to find the appellant had failed to show any relevant causation. The evidence supported the proposition that particular changes in the workplace activities would probably have reduced the risk of the appellant developing plantar fasciitis. There was also no evidence of contributory negligence on the appellant's part.

Respondent's submissions

[62] The respondent submits that the primary Judge's findings on there being no breach of duty and no causation were open and supported by the evidence. The medical evidence did not establish that any particular change in work practices would probably have produced a different outcome. Further, where the appellant had not proved negligence the primary Judge correctly found that the appellant had failed to show any relevant causation. In order to succeed the appellant had to establish that the measures it was said the respondent failed to adopt would, not 'could' or 'might' protect the appellant from injury.[18]

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18 *Woolworths Ltd v Perrins* [2015] QCA 207 at [173].

[63] The primary Judge's findings that the appellant had access to a metal stand were open and relevant to the question of the removal of the rubber matting. Whilst the rubber matting would have provided some insulating effect, the primary Judge appropriately concluded that the appellant failed to establish her case as there was no evidence that any risk assessment undertaken by the respondent would have led to a different outcome or that leaving the rubber matting in place would probably have made a difference in that the appellant would probably not have developed the condition. It was also open on the evidence for the primary Judge to conclude that even if there had been negligence, the appellant had not shown that that negligence was probably a cause of the development of her condition of plantar fasciitis. The appellant's evidence only established that any negligence may have caused her condition.

[64] The primary Judge's conclusions in respect of standing were also in accordance with the evidence as found by the primary Judge. The expert evidence did not support a finding that standing in one place at a workstation on 13 degree Celsius hard concrete floors placed the appellant at risk of developing plantar fasciitis.

[65] The respondent submits it was appropriate for the primary Judge to conclude the respondent had not breached its duty of care by removing or not replacing the mats, or failing to conduct a risk assessment.

[66] The respondent submits the primary Judge's conclusion in relation to the pushing of trolleys were also supported by the evidence. The primary Judge expressly did not accept aspects of the appellant's evidence in relation to the pushing of trolleys and expressly did not accept that the appellant was required to push trolleys with defective wheels or that there was any negligent failure to properly maintain those wheels.

[67] The primary Judge's findings in relation to the carrying of cartons were also open on the evidence. Again, the primary Judge did not accept the appellant's evidence on this aspect. Such findings were a matter for the primary Judge. The primary Judge's findings in relation to footwear were also supported by the evidence. An absence of arch support was not part of the appellant's case at trial.

[68] Similarly, the primary Judge's findings as to breaks and rotation were also supported by the evidence. The primary Judge rejected aspects of the appellant's evidence. Such findings were open and supported by the evidence as a whole.

[69] Finally, the respondent submitted that the primary Judge's findings in respect of causation were open on the evidence. The medical evidence was deficient in establishing a causal link between the appellant's work conditions and the conditions developed by the appellant. The medical evidence also did not establish that any particular change in work conditions would probably have produced a different outcome.

Discussion

[70] The respondent accepted at trial that as the appellant's employer, it owed the appellant a duty to exercise reasonable care to avoid a foreseeable risk of injury. The primary Judge found the risk of the development of bilateral plantar fasciitis was reasonably foreseeable.[19] The evidence supported a general assertion that there was industry guidance available to the effect "that workers who stand at one place at a workstation

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19 [2015] QDC 200 at [75].

in 13 degree Celsius on hard concrete floors for most of their working day are at risk of developing a range of musculoskeletal disorders", including plantar fasciitis.[20]

[71] The primary Judge expressly found that the conditions under which the appellant worked were a cause of her plantar fasciitis.[21] The primary Judge also found that the evidence supported a conclusion that the development of that condition was a foreseeable risk in all of the circumstances.[22]

[72] Reasonable foreseeability of the kind of injury suffered impacts on both the scope of duty and on breach of duty.[23] These central issues require a consideration of whether the risk of injury was reasonably foreseeable.[24] The risk must be not only foreseeable but reasonably foreseeable.[25]

Breach

Matting

[73] The primary Judge expressly found that no risk assessment had been undertaken by the respondent prior to the removal of the rubber matting in 2006. That finding is not the subject of challenge. Contrary to the appellant's submissions, that finding was not inconsistent with the earlier finding that the rubber matting had been removed after an assessment as to a risk of tripping and hygiene considerations. The earlier finding provided a reason why the rubber matting was removed by the respondent; it did not suggest the respondent carried out a formal risk assessment at that time.

[74] The primary Judge accepted that in failing to undertake that risk assessment the respondent may have been negligent. Although the primary Judge did not ultimately determine whether the failure to undertake that risk assessment did constitute negligence, a consideration of the content of the respondent's duty as the appellant's employer supports a conclusion that in failing to undertake that risk assessment the respondent had breached its duty to the appellant.

[75] Rubber matting had been a feature of the respondent's workplace for some years. There was evidence before the primary Judge that it was used in similar workplaces. There was also evidence that the rubber matting provided a cushioning effect, which was relevant, having regard to the cold hard concrete surfaces the appellant was required to undertake her duties of employment on while standing for a considerable period of time.

[76] In determining whether there had been a breach of the duty of care, the question for the primary Judge was not merely whether retention of the matting that had been in place prior to 2006 would have prevented or minimised the injury. The question included whether the replacement of the rubber matting removed in 2006, or other measures, more probably than not would have prevented or minimised the injury which was in fact sustained by the appellant.[26]

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20 [2015] QDC 200 at [36].
21 [2015] QDC 200 at [56].
22 [2015] QDC 200 at [75].
23 *Tame v New South Wales* (2011) 211 CLR 317 at 331 [12].
24 *Koehler v Cerebos (Australia) Ltd* (2005) 222 CLR 44 at 57 [33].
25 *Woolworths Ltd v Perrins* [2015] QCA 207 at [67].
26 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 397 – 8 [104].

[77] The primary judge, in considering this aspect, found that the appellant, to succeed, had to establish that any risk assessment would probably have produced a result which did not involve removal of the rubbing matting. In so finding, the primary Judge unduly narrowed the test in *Kuhl*. The primary Judge had found there were a range of measures which could have been used to reduce the risk of prolonged standing, including anti-fatigue mats. Regard had to be had to the possibility of other measures being taken, including the replacement of that matting.

[78] Once the primary Judge correctly found that no risk assessment had been undertaken by the respondent in relation to the significant step of removing the rubber matting, it ought to have followed that the respondent had breached its duty of care to the appellant in failing to undertake that risk assessment.

[79] The primary Judge expressly found that an employee like the appellant, who stood in one place at a work station on 13 degree Celsius hard concrete floors for most of the working day was at risk of developing a range of musculoskeletal disorders, including plantar fasciitis.[27] There was evidence other measures, including the use of anti-fatigue matting, which would have minimised the risk of injury. Had the respondent undertaken a risk assessment, the exercise of reasonable care would have favoured the implementation of other measures like anti-fatigue matting into the workplace. Rubber matting had previously been provided by the respondent. Its usefulness in the industry was well-known and there was no evidence lead to suggest cost or other factors favoured a different approach to recognised industry practice.

Duties

[80] The appellant also contended that the primary judge erred in relation to the findings as to the duties undertaken by the appellant and their methods. Each of these findings was, to a large extent, based on an unfavourable view of the reliability of the appellant as a witness. The primary Judge was in a good position to make that assessment. Each was a finding of fact as to what were the appellant's actual duties of employment. Those findings were supported by a consideration of the other evidence accepted at trial. There is no basis to conclude those findings were glaringly improbable or contrary to compelling inferences.[28]

[81] The primary Judge expressly did not accept that the appellant was instructed to carry the boxes by balancing a stack of them on her toe and expressly accepted that the respondent's employees had discouraged the plaintiff from undertaking this manoeuvre. The primary Judge also expressly rejected the appellant's evidence as to the distance over which these trays were carried by her. In short, the primary Judge rejected the appellant's evidence in respect of the "carrying duties". That being so, there was no proper basis upon which the primary Judge could correctly conclude that the appellant had established a failure to exercise care in respect of this aspect of her claim. The respondent had not established a system as contended by the appellant and the primary Judge rejected an allegation the respondent had failed to enforce its system.[29]

[82] Similarly, the primary Judge, after considering the evidence in relation to the use and maintenance of trolleys, did not accept the appellant's evidence that she was required to push trolleys with defective wheels in the ordinary course of work or that there was any negligent failure to properly maintain the trolley wheels. Such findings were

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27 [2015] QDC 200 at [40].

28 *Fox v Percy* (2003) 214 CLR 118.

29 *Czatyrko v Edith Cowan University* [2005] HCA 14.

open on the evidence. The first involved a rejection of the appellant's evidence. The second involved an acceptance of evidence that any faulty wheels were attended to by the respondent. The fact there was no documented system as to maintenance did not mean the primary Judge must find negligence in the circumstances.

[83] The primary Judge, in considering the trolleys used by the respondent, expressly considered the effect of the presence of chicken pieces on the floor. The primary Judge found the respondent had a system of cleaning the floors. This finding was supported by the evidence. There is no basis to conclude that the primary Judge's finding that there was no failure to exercise reasonable care in relation to cleaning the floors was not open.

[84] Against that background, there is no basis to find that a failure to undertake a risk assessment as to the use of heavy trolleys in an area on which there would be pieces of chicken was a breach of the respondent's duty of care to the appellant. The respondent had a system for cleaning floors. The respondent had a system to address faulty wheels.

[85] Mr Brendan McDougall, the expert engineer, gave evidence as to the adequacy of the types of wheels and as to the forces, which was not accepted by the primary Judge. That conclusion was open to the primary Judge, having considered all of the available evidence. No error has been established which would justify overturning the primary Judge's ultimate conclusion that he was not persuaded there was evidence on the part of the respondent in failing to provide trolleys with castor wheels.

[86] Finally, the primary Judge's findings as to the adequacy of breaks and rotation in the workplace between standing and walking were supported by a consideration of the evidence ultimately accepted at trial. The primary Judge found that the evidence as to the significance of breaks and rotation was insufficient to sustain a finding of negligence in all of the circumstances. That conclusion was open on that evidence.

Boots

[87] The primary Judge's conclusion that he was not persuaded that the boots issued by the respondent were defective in that they provided no adequate shock absorbing sole was also open on the evidence. That conclusion was reached having regard to the fact that Dr Werner did not speak of an absence of cushioning, and where the failure to provide arch support at work was not a particular of negligence.

[88] There was evidence the respondent provided new boots if asked by an employee. It was the practice of the appellant to change her footwear annually. Against that background, there was ample basis for the primary Judge to conclude there was insufficient evidence to establish that the boots worn by the appellant did not provide an adequate shock absorbing role. Once that conclusion was reached there was no basis for the primary Judge to properly conclude that the respondent was negligent in failing to provide adequate footwear.

Causation

[89] The primary Judge erred in failing to find that the appellant had established that the respondent had breached its duty of care to her in failing to undertake a risk assessment in relation to the removal of the rubber matting. It is therefore necessary to consider

whether the primary Judge also erred in finding that the appellant had not established her condition of bilateral plantar fasciitis was causally related to the breach of duty.

[90] To succeed, the appellant had to establish more than the mere existence of an association between the respondent's breach of duty and the occurrence of her condition. As French CJ observed, in *Amaca Pty Ltd v Booth*:[30]

> "The existence of an association or a positive statistical correlation between the occurrence of one event and the subsequent occurrence of another may be expressed as a possibility, which may be no greater than a 'real chance' that, if the first event occurs, the second event will also occur. The mere existence of such an association or correlation does not justify a statement, relevant to factual causation in law, that the first event 'creates' or 'gives rise to' or 'increases' the probability that the second event will occur. Such a statement contains an assumption that if the second event occurs it will have some causal connection to the first. However, if the association between two events is shown to have a causal explanation, then the conclusion may be open, if the second event should occur, that the first event has been at least a contributing cause of that occurrence. An after-the-event inference of causal connection may be reached on the civil standard of proof, namely, balance of probabilities, notwithstanding that the statistical correlation between the first event and the second event indicated, prospectively, no more than a 'mere possibility' or 'real chance' that the second event would occur given the first event."

What must be established is a causal connection between the conduct and the injury, even if it be that other causative factors may be in play.[31] In that event, the question is not what was the most probable cause but whether the respondent's negligence was a cause of the appellant's condition.[32]

[91] The primary Judge's ultimate conclusion was that "the appropriate conclusion in the light of all of the evidence is that, more likely than not, the conditions under which the plaintiff was working were a cause of the plantar fasciitis from which she suffered". In reaching this conclusion the primary Judge noted that there was an absence of any significant explanation for the condition other than the appellant's work.[33]

[92] That the appellant developed the very condition which was foreseeable as a consequence of her duties of employment, in circumstances where the respondent had breached its duty of care to the respondent, is strongly suggestive that the appellant's personal injuries were caused by the respondent's breach of duty in failing to undertake the risk assessment, which would have supported the use of anti-fatigue matting in the workplace.

[93] However, to succeed, the applicant had to establish, on the balance of probabilities, that the measures the respondent failed to adopt would have prevented or minimised her injuries. The necessary satisfaction of this element of causation was described in *Kuhl*:[34]

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30 (2011) 246 CLR 36 at 53 – 4 [43].

31 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at 57 [49] per French CJ.

32 *Amaca Pty Ltd v Booth* (2011) 246 CLR 36 at 62 – 3 per Gummow, Hayne & Crennan JJ, citing with approval the joint reasons in *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at 136 [67].

33 [2015] QDC 200 at [56].

34 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 379 [45] per French CJ and Gummow J.

> "To satisfy the element of causation … it would be necessary to identify the action which, on the available evidence, the trial judge could conclude ought to have been taken; that action, if failure to take it is to be accounted negligent, must be such that the foreseeable risk of injury would require it to be taken, having regard to the nature of that risk and the extent of injury should the risk mature into actuality; and it would be necessary that the trial judge could conclude as a matter of evidence and inference that, more probably than not, the taking of that action … would have prevented or minimised the injuries the plaintiff sustained."

[94] That requirement was also considered by McMeekin J in *Woolworths Ltd v Perrins*:[35]

> "In order to establish the necessary causal link between any arguable negligence on the part of the employer and the injury suffered by the employee, it is necessary to show that the measures that it is said the employer failed to adopt would protect the employee from injury, not 'could' or 'might': *Queensland Corrective Services Commission v Gallagher*; *Turner v South Australia*. In that latter case Gibbs CJ said:
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> > 'When the employer does unreasonably fail to take a precaution against danger, the plaintiff cannot succeed unless he satisfies the court that if that precaution had been taken the injury would probably have been averted, or, in other words, that the safety measures would have been effective and that he would have made use of them if available: *Duyvelshaff v Cathcart & Ritchie Ltd*."
>
> (Citations omitted)

[95] The primary Judge's finding that there was no evidence that rubber matting would have added to the cushioning effect already provided by the boots worn by the appellant, was not supported by the evidence, including the expert evidence. There was evidence that whilst wearing gumboots provided some protection, wearing gumboots and using anti-fatigue matting provided a greater protection to the plantar fascia[36].

[96] However, the primary Judge's finding that the appellant had not established that her condition was caused by the respondent's breach of duty, as there was no evidence any measure taken by the respondent would *probably* have made a difference (in that the appellant would not have developed that condition), was supported by the evidence.

[97] The evidence did not support a finding that the hardness of the surface, as distinct from the mere fact of standing, was the crucial matter.[37] Mr Locke's evidence was that his studies to date were inconclusive as to whether hard floors had anything to do with the cause of plantar fasciitis.[38] Dr Werner gave evidence that the provision of cushioning mats for concrete surfaces *may* lower the risk of the development of the condition.[39]

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35 [2015] QCA 207 at [173].
36 AB 79/5.
37 [2015] QDC 200 at [66].
38 AB 116/30.
39 AB 261/15; AB 866.

[98] The expert engineer, Mr McDougall, gave evidence that the potential risks associated with prolonged standing, cold temperatures and potential risk controls had been identified in poultry processing industry guides from as early as 1993, with risk control strategies including the provision of anti-fatigue matting to reduce the effects of standing on a cold, hard floor. He also gave evidence that guidelines in the Australian Meat Industry also recognised that rubber matting can reduce significantly the discomfort of working on cold concrete floors. [40] However, Mr McDougall could not say those control measures would have guaranteed an injury *would* not occur in the workplace. The measures suggested by him were the recommended measures in all of the guidance documents to manage risk and manual musculoskeletal injuries in the workplace.[41]

Conclusions

[99] Whilst the appellant has established that the primary Judge erred in not finding that the respondent had breached its duty of care to the appellant, the appellant has not established that the primary Judge erred in finding that the appellant had not established a causal link between any such negligence and the appellant's injuries.

[100] I would order:

1. the appeal be dismissed;
2. the appellant pay the respondent's costs of and incidental to the appeal on a standard basis.

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[40] AB 535.
[41] AB 184/10; 185/30.