SUPREME COURT OF QUEENSLAND

CITATION:	*Green v Hanson Construction Materials Pty Ltd* [2007] QCA 260
PARTIES:	**MARGARET GREEN** (plaintiff/respondent) **v** **HANSON CONSTRUCTION MATERIALS PTY LTD** (ACN 009 679 734) (defendant/appellant)
FILE NO/S:	Appeal No 532 of 2007 DC No 2865 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	10 August 2007
DELIVERED AT:	Brisbane
HEARING DATE:	12 June 2007
JUDGES:	Jerrard JA, White and Atkinson JJ Judgment of the Court
ORDER:	**1. Appeal allowed** **2. Reduce damages awarded by 30 per cent to $103,358.22** **3. Respondent to pay two thirds of the appellant's costs of the appeal assessed on the standard basis**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – STANDARD OF CARE – PARTICULAR PERSONS AND SITUATIONS – OTHER CASES – where the plaintiff was a courier – where the plaintiff injured her shoulder when she fell down the defendant's stairs while making a delivery – whether the defendant had breached its duty of care to the plaintiff TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – PARTICULAR CASES – OTHER CASES – where the plaintiff had failed to hold on to the handrail when using the stairs – whether the failure amounted to contributory negligence DAMAGES – PARTICULAR AWARDS OF GENERAL DAMAGES – QUEENSLAND – whether the trial judge's calculation of damages was correct *Civil Liability Act 2003* (Qld), s 9(1)(a), s 9(1)(b)

Law Reform Act 1995 (Qld), s 10(1)

Hoekstra v Residual Assco Industries Pty Ltd [2004] NSWSC 564, applied
McLean v Tedman (1984) 155 CLR 306, applied
New South Wales v Fahy [2007] HCA 20, applied
Wyong Shire Council v Shirt (1980) 146 CLR 40, applied

COUNSEL: R Morgan for the appellant
S Williams QC, with J Kimmins, for the respondent

SOLICITORS: HBM Lawyers for the appellant
Maurice Blackburn Cashman for the respondent

[1] **THE COURT**: This appeal is against a decision in the District Court delivered on 18 January 2007 in which the learned trial judge gave judgment for the plaintiff respondent in the sum of $147,654.61 against the defendant appellant, on the plaintiff's claim for personal injury. The learned judge also ordered that the defendant pay the plaintiff's costs of and incidental to the action assessed on an indemnity basis. The appellant challenged the finding that it had breached a duty of care to the plaintiff, the quantum ordered for damages by way of future economic loss, and the failure to find that the plaintiff should have her damages reduced by reason of her failure to take reasonable care for her own safety in the incident resulting in personal injury.

The slip

[2] The incident causing the plaintiff injury to her right shoulder happened at approximately 6.35 am on 1 May 2003, when the 56 year old plaintiff was delivering mail and other items to the defendant's office at its Coopers Plains concrete batching plant. The plaintiff was a self employed courier, who had been making daily delivery to that office for between a week to 10 days. She had made her way from her vehicle to the external stairs giving access to the office, ascended them, delivered the items, and had collected a satchel to deliver elsewhere. She was wearing shoes, carrying the satchel under her left arm, and began to descend the external stairs. On her account, when her right foot was on the top stair she stepped down to the second stair on her left foot, and slipped off the "rounded edge of the step." That description by her of a "rounded edge" was not challenged in cross-examination. She said she did not have hold of either handrail when she slipped, and grabbed at one unsuccessfully; her hand then slipped on that and she fell, sprawling, down 10 steps.

[3] An incident report dated 1 May 2003, completed by a Mr Fenner, the then batching plant manager at the site, and who relied on the plaintiff's statements to him, described the circumstances as:

> "Slipped on stairs from batch office caused by losing grip on handrail. Handrail was wet due to morning dew. Courier claims that she is always wary about these types of stairways."

The reference to the handrail being wet from dew accords with the plaintiff's description in an application for compensation dated 8 May 2003 (signed by her) which has the description:

> "Slipped on exterior stairs (metal) and wet (dew) handrail."

That accorded with the plaintiff's evidence that, while she had seen water on the pathway along which she had walked that morning, and while there was water at the bottom of the stairs, the stairs were not in any way obviously wet, and she could not recall them being wet. On reflection, she thought that the bottom of her shoes must have been wet, but she did not think about that at the time.[1]

The pleadings

[4] The plaintiff's pleadings went further than her evidence did, and contended that the stairs were damp and slippery at the relevant time, and that so too were the handrails. She also pleaded the edges of the stairs did not have nosings, were rounded, and were slippery. Paragraph 9A of the pleading was a description of the stairs, comparing the condition described in that pleading of various stair components with the Australian Standard (AS 1657-1992) for "stairways and ladders". The plaintiff pleaded in that paragraph 9A that the checker plate tread of the stairs was worn, the surfaces were not slip resistant, and also pleaded in that paragraph various matters about the risers and goings of the stairs; she also pleaded in paragraph 9A(i) that the second tread down of the stairs had a forward and downward incline of 2.5°. She did not plead any relevant Australian Standard for the degree of forward and downwards incline, if any. The defendant's pleading as to paragraph 9A(i) denied the pleaded allegations about the downward incline, on the ground that:

> "(i) The measurement of the incline depends upon the measurement technique used, which is the subject of contentious evidence;
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> (ii) It is not pleaded how the said incline caused or contributed to the plaintiff's fall."

[5] Her particulars of negligence in paragraph 15 contended that the defendant had provided stairs that were damp and slippery, and other defects were pleaded; the final particular (in paragraph 15(r)) alleged negligence in:

> "Providing a stair being the second tread down from the top of the stairs with a forward and downward incline of 2.5°".

The plaintiff then asserted in her pleadings that the risk of her injury occurring was one of which the defendant knew or ought reasonably to have known, and was not insignificant. Particulars of that pleading (paragraph 15A(b)) included (in 15A(b)(iv)):

> "Providing a tread being the second tread down on the stairs which had a forward and downward incline to 0.5°." (*sic*) (Presumably, a misprint for 2.5 °).

The plaintiff then pleaded (in 15B) particulars of the precautions that a reasonable person in the defendant's position would have taken, including:

> "...provide (*sic*) steps which did not have a forward and downward incline of 2.5°." (Paragraph 15B(d)).

[6] The defendant pleaded in response to paragraph 15A of the plaintiff's pleading that the risk of the plaintiff's falling was insignificant and there had been no previous occurrences of slipping on those stairs; and that the precautions pleaded in paragraph 15B need not have been taken and were not a reasonable response to the

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1 This evidence is at AR 18.

risk of the plaintiff's falling. The pleadings certainly raised the asserted forward and downward incline of the step on which the plaintiff actually slipped, and put in issue whether that incline had caused or contributed to the fall, although the latter point was raised by the defendant and not pleaded by the plaintiff.

The evidence

[7] The plaintiff led evidence from a Mr Justin O'Sullivan, in the form of a report dated 13 May 2005, supplemented by evidence-in-chief. Mr O'Sullivan described himself as an ergonomist and safety consultant, with a Bachelor's Degree in Physiotherapy (with honours) and a Masters Degree in Occupational Health and Safety. His report, Exhibit 15, included the following observations at page 10:

> "The slip-resistance testing conducted on the checker plate material of the landing indicates a risk of slipping in wet conditions, that is, in accordance with the terminology given in AS/NZS 4663 the surface makes a 'moderate contribution to the risk the of slipping' without taking into account the downward and forward slope of the treads. The second tread down has a forward and downward incline of 2.5^{o} and the risk of slipping must be modified to take account of the downward slope which would tend to increase the risk of slipping. Guidance in this regard is given in Handbook 197:1999:An Introductory Guide to the Slip-Resistance of Pedestrian Surface Materials where, in accordance with Appendix A, a slope of 2.5^{o} would require a British pendulum score of 3.6 in order to be equivalent to a British pendulum number of 35 on a flat level surface, that is, a 2.5^{o} slope reduces traction by nearly 12 per cent."

[8] The quoted statement is not self-explanatory as to how or why a downward slope of 2.5^{o} reduces traction by the asserted 12 per cent, although the general proposition seems obvious enough, namely that a downwards sloping step increases a risk of slipping on it. The appellant complains that the Handbook 197 Guide was not appended to that report, and made a number of criticisms on the appeal about that evidence, particularly referring to *Makita Australia Pty Ltd v Sprowles* [2001] 52 NSWLR 705 and the judgment of Heydon JA therein at [87].

[9] The passage reads:[2]

> "But, given that the court is not obliged to take the opinion of an expert as conclusive even though no other expert is called to contradict it, can it be said that Professor Morton's report goes beyond a series of oracular pronouncements? Does it usurp the function of the trier of fact? More vitally, did it furnish the trial judge with the necessary scientific criteria for testing the accuracy of its conclusions? Did it enable him to form his own independent judgment by applying the criteria furnished to the facts proved? Was it intelligible, convincing and tested? Did it go beyond a bare *ipse dixit*? Did it contain within itself materials which could have convinced the trial judge of its fundamental soundness?"

[10] Mr R Morgan of counsel for the appellant contended that Mr O'Sullivan's evidence should receive an answer unfavourable to the respondent, to each question. His

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2 At (2001) 52 NSWLR 705 at 745.

report did not explain how the 2.5° slope resulted in a 12 per cent increase in the risk of a slip, and was written on an assumption not supported by the trial judge. We agree that the conclusion of proof of a breach of duty causing injury cannot be drawn from relying on Mr O'Sullivan's views about the degree of increased risk of slipping from a 2.5° slope. The judge did rely on that, it seems, for the conclusion of breach of duty of care, but Mr S Williams QC for the respondent on the appeal defended the same conclusion on broader grounds.

[11] Mr O'Sullivan also referred to the increased liability to slipping resulting from a downward slope on a step, in his evidence-in-chief. He said:

> "The effect of the slope of the tread is to turn it into a ramp, a mild ramp, which requires greater levels of friction than a horizontal surface to prevent slipping. The effects can be significant, so in this case for example, 2.5° equates to about a 12 per cent difference in slip resistance in reality stepping onto that tread compared to if it was horizontal. So if that forward slope – it is called a wash – W-A-S-H it is designed to help water drain off but it is normally around 1° or up to 1° rather than 2.5°. So this is quite a significant slope and increases the risk of slipping."

[12] He was not cross-examined about that evidence, or about the quoted observation in his report, to the effect that a slope of 2.5° reduces traction by nearly 12 per cent. Despite the defendant's pleading, it called no evidence to challenge the assertion that the second step had a forward and downward incline of 2.5 degrees, and did not dispute that description in cross-examination. Mr O'Sullivan's report had included (at page 6) the observation that:

> "The forward slope as individual treads was measured on the top 5 treads, not including the landing giving the result as follows (from the top down): 3°, 2.5°, 2°,3°."[3]

Although the appellant made a substantial challenge on this appeal to that evidence by Mr O'Sullivan about the increased risk of slip from the 2.5° slope on the step, the report went in without any objection. There was no challenge to the reference "Handbook 197" figures, or what could be deduced from them, and no clarification was sought.

[13] That evidence became significant in the judgment, because the learned judge rejected, or did not find for the plaintiff, on each of the other particulars of negligence. The judge did not find that the railing and steps were wet at the time of the plaintiff's descent, or that moisture or dampness on her shoe soles (resulting from any moisture on the ground put there by the defendant) played any causative role in the slip. The judge considered the history of those particular stairs as established by the evidence, and appears to have concluded that they came from a concrete plant at Maroochydore established by the appellant in the 1970's, which was closed down in or about 1997. The stairs were put in storage, and then installed at the Coopers Plains Plant in 1999 in an upgrade at that plant, to give access to an elevated demountable site office. There was no documentary record of any form of inspection prior to the installation of the stairs at Coopers Plains. The judge accepted that after the incident in March 2003 yellow slip resistant nosing strips were placed on the edge of each tread of the stairs, and that such strips were not

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[3] At AR 454.

uncommon, and that their purpose was to increase the likelihood of a person using the stairs not slipping. Those adhesive strips were installed in late 2003, but the defendant's evidence was that they were not a direct response to the plaintiff's fall.

[14] The learned judge recorded that in March 2001 a Mr Murphy, then employed by the defendant as its risk manager for Queensland and the Northern Territory, had circulated a memorandum to the Coopers Plains site (and to all other sites) requiring that April 2001 be spent focusing "on slip and trip hazards including inspection of all ladders, steps, pavements and work practices"; and recommending "Vigil" anti-slip material, apparently on areas considered likely to cause slips and trips. There was no response in writing from the manger of the Coopers Plains site; the appellant contended that Mr Murphy's evidence-in-chief had made it clear that that memorandum was primarily focused on the defendant's mobile equipment and concrete trucks.[4]

[15] Mr Murphy's evidence emphasised that it was the durable quality of the Vigil anti-slip material which persuaded the company at "some time in 2003" to make the decision[5] to install that same material on its fixed plant. That was done at its 55 concrete plants, and completed in 2005. It was a relatively inexpensive process per step, but relatively expensive for a company with thousands of steps, and was applied at the Coopers Plains location in or about November or December 2003. He agreed in cross-examination that his March 2001 memorandum had wanted an inspection of fixed plant as well as of mobile, and that the reference to "pavements" could not possibly refer to mobile equipment. Accordingly, he agreed that the memorandum, sent to the Coopers Plains site in March of 2001, was an instruction to the then present manager to inspect, inter alia, all steps, whether they were on mobile equipment, fixed plant, or wherever. He also agreed that any worn step treads were to be identified and located, because those were an obvious source of danger, and would require either the installation of the non-slip material or some other action.[6] He further conceded that the company would not have placed the adhesive material on the stairs at the Coopers Plains plant site in late 2003, which was placed there, unless it was required.

> "That – that's correct. And that's still the case now. There is no mandatory requirement to have it on every single step. If the stairs are a good non-slip surface now there would be no requirement to have that material placed on there."[7]

[16] The learned judge concluded that the treads on the stairs were up to 30 years old or thereabouts, and accepted Mr O'Sullivan's description of the checker plate surface as "somewhat worn". The judge referred to the evidence of the downward slope on the first five treads, and incorrectly recorded that:

> "The significance of the down slope of the step emerged in Dr Low's evidence: a downward incline of 2.5^{o} equates to a 12 per cent difference in slip resistance."[8]

The learned judge was inaccurate in ascribing that evidence to a Dr Low, who had given evidence; that particular evidence was given by Mr O'Sullivan. The incorrect

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4 In accordance with the evidence at AR 155 and 156.
5 At AR 163.
6 At AR 181.
7 At AR 187.
8 In [18] of the reasons, at AR 826.

identification of the author does not affect the relevance of the evidence, but there were other problems in relying on the asserted 12 per cent difference. The judge had continued:

> "There was no explanation from the defendant accounting for the presence of such slopes – variable as they are – other than, in my view, want of proper tradesmanship in the construction of stairs with downward slopes of the treads. The treads should have been level (zero degrees)."[9]

[17] Mr Morgan submitted that there was no evidence from any source that the treads ought to have been level, and also that Mr O'Sullivan's evidence was to the contrary, in that he described a slight slope for the purposes of having water run off the stairs. Nor was there any evidence of a lack of proper "tradesmanship" (for which the appellant was in any way responsible) in building the stairs. Both those criticisms are valid. An even stronger ground for not relying on Mr O'Sullivan's opinion that a 2.5^{o} slope increased the risk of slipping by some 12 per cent was, as Mr Morgan argued, that his report made it clear he had assumed the stair surfaces were wet. All his tests and opinions were based on that assumption, which was not supported by the finding of the learned trial judge. On the appeal, Mr S Williams QC for the respondent readily conceded that the only point to be gained from the evidence of the slope of the step was whatever commonsense conclusion might be drawn, and no more. His submissions in support of the judgment focussed simply on the somewhat worn state of the stairs, their height and relative steepness, the complaint of rounded edges, and the conclusion the appellant company had itself reached later in 2003 as to what was required for safety.

[18] The learned judge had gone on:

> "To ask any person to take a series of steps down with each foot landing on a tread which itself slopes downwards is to fail to take precautions against a foreseeable risk of which the defendant should have been aware – the risk that the foot may slide or slip downwards when contact is made with the surface of the tread. In the circumstances, a reasonable person would have considered that the risk of a slip or fall was not insignificant and that the probability of harm being suffered in the event of a fall by a person descending the stairs could result from the likelihood that the person's body would strike the stairs or treads causing bruising at least, and skeletal damage or displacement at the worst. In the event, I consider that a reasonable person in the position of the defendant would have considered the question of what precaution could have been taken to avoid the risk of such harm occurring."[10]

[19] Those observations reflected the terms of paragraph 15A of the pleading, and the provisions of s 9(1)(a) and (b) of the *Civil Liability Act 2003* (Qld), which provides:

> "**9 General principles**
>
> (1) A person does not breach a duty to take precautions against a risk of harm unless—

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9 In [18], at AR 827.

10 In [18], at AR 827.

(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."

[20] The remarks by the learned judge did not go so far as to reflect the pleading in paragraph 15B or s 9(1)(c), and the learned judge did not make an actual finding that a reasonable person in the position of the defendant would have taken any precautions. The judge did find that the use of slip resistant nosing to minimise the risk of slipping was likely to meet the required level of slip resistance indicated by Handbook 197:1999, that being Mr O'Sullivan's opinion evidence,[11] but that opinion evidence referred to tests conducted on the landing when wet, not on the stair treads when dry. The judge also referred to evidence by Dr Low describing the adhesive strip actually placed on the treads (after the accident) "as relatively cheap" and "not uncommon". The judge found that had such strips been installed at a time between April 2001 and April 2003, being relatively long lasting, it was more than likely that the respondent would not have slipped.[12] The judge then concluded that what the judge called the inherent defect identified by Mr O'Sullivan (apparently the downwards slope of the first five stairs) had the result that an incident such as the one suffered by the plaintiff was bound to happen to someone some time,[13] and the judge accordingly found that the defendant was in breach of its duty of care to the plaintiff.[14] The learned judge did not expressly find at that part of the judgment how or why the plaintiff had slipped. However, later in the reasons, when finding that the plaintiff had not shown any contributory negligence, the learned judge wrote:

"She slipped because of the tread."

In context, that was a conclusion about the combination of the wear on the tread, its downward slope, and what the plaintiff called the rounded edge.

[21] It is implicit in the conclusions reached by the judge that the judge found that the forward slope of the second stair had an inherent defect in it, making a slip inevitable, and also that a reasonable person would have installed slip resistant nosing before March 2003. Neither conclusion is explicitly stated, and the second one is not necessarily dependant on the first, although the learned judge obviously linked them together. Those conclusions assume that the defendant either knew or should have known of the downward slope on those particular steps, or else that the slip resistant strips placed on the steps in late 2003 ought to have been installed earlier in any event, in accordance with a duty of care.

[22] Mr Morgan did not challenge the learned judge's conclusion that had slip resistant adhesive strips, of the variety installed in late 2003, been installed at the time between April 2001 and April 2003, it was more than likely that the plaintiff would not have slipped. That conclusion was open on the evidence. Mr Morgan contended that to have regard to that (unchallenged) finding was to ignore the

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11 Quoted in [19] of the reasons; Mr O'Sullivan's evidence on this is at AR 455 and 460.
12 At [20] of the reasons, at AR 828.
13 At [22].
14 At [23], at AR 829.

statement by Gummow and Hayne JJ in their joint judgment in *New South Wales v Fahy* [2007] HCA 20, where their Honours wrote (of the decision by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40) that:

> "57. ...*Shirt* requires a more elaborate inquiry that does not focus only upon how the particular injury happened. It requires looking forward to identify what a reasonable person *would* have done, not backward to identify what would have avoided the injury.
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> 58. In *Vairy v Wyong Shire Council*[15] it was explained why it is wrong to focus exclusively upon the way in the particular injury of which a plaintiff complains came about. In *Vairy*, it was said[16] that:
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> > 'The apparent precision of investigations into what happened to the particular plaintiff cannot be permitted to obscure the nature of the questions that are presented in connection with the inquiry into breach of duty. In particular, the examination of the causes of an incident that *has* happened cannot be equated with the examination that is to be undertaken when asking whether there was a breach of a duty of care which was a cause of the plaintiff's injuries. The inquiry into the causes of an incident is wholly retrospective. It seeks to identify what happened and why. The inquiry into breach, although made after the accident, must attempt to answer what response a reasonable person, confronted with a foreseeable risk of injury, would have made to that risk. And one of the possible answers to that inquiry must be 'nothing'.'"

[23] Mr Morgan also emphasised as relevant the observations by Mason P in *Francis & Ors v Lewis* [2003] NSW CA 152 where that learned judge wrote:

> "[40] Foreseeability of risk of injury is determinative of breach of duty of care. If, which I doubt, the learned trial judge overlooked this he would have been in error. The duty is one of reasonable care, not whether safety could have been improved by some modification. The duty is not confined to one owed to those who are careful for their own safety, but it is relevant to take into account that plaintiffs are themselves expected to act reasonably and take care for their own safety when determining what is reasonable. (*Citations omitted*).
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> [41] In recent years, this Court has emphasised that no stairs are perfectly safe and that it is wrong to suggest that a plaintiff who is injured by falling on stairs has *prima facie* some cause of action. (*Citations omitted*). In *Wilkinson v Law*

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15 [2005] 223 CLR 422.

16 At (2005) 223 CLR 422 at [124] per Hayne J and [60] – [61] per Gummow J.

> *Courts Ltd* [2001] NSW CA 196, Heydon JA, with whom Meagher JA and Rolfe AJA agreed, said at [32]:
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> *'Stairs are inherently, but obviously dangerous. Many measures might have been taken to make the stairs as safe as human skill could possibly make them; but the duty is only to take care which is reasonable under the circumstances. Among the essential circumstances is the following fact:'*
> *'Persons using steps may misjudge their footing and slip or trip but this is an everyday risk which members of the public avoid by taking care for their own safety.'*
> *Stannus v Graham (1994) Aust Torts Rpts 81-297 at 61, 566 per Handley JA."*

[24] Mr Morgan also referred to the decision in *Ghantous v Hawkesbury City Council* (2001) 206 CLR 512, and in particular to the observations in the joint judgment of Gaudron, McHugh and Gummow JJ,[17] agreeing with Callinan J, that:

> "Persons ordinarily will be expected to exercise sufficient care by looking where they are going and perceiving and avoiding obvious hazards, such as uneven paving stones, tree roots or holes."

Those remarks accord with what Callinan J wrote[18] in that judgment, that:

> "The world is not a level playing field. It is not unreasonable to expect that people will see in broad daylight what lies ahead of them in the ordinary course as they walk along. No special vigilance is required for this."

Allied to that submission about judicial recognition of the obligation on pedestrians to take care for their own safety, and the expectation that pedestrians will do so on stairs (those being self evidently an appropriate place for self care by pedestrians), were references by Mr Morgan to the extent of past usage of that very set of stairs by many other people without mishap. The defendant led evidence from Mr Fenner that up to 12 or more concrete trucks would come to the plant each day, and up to 20 tippers delivering sand and gravel, and the drivers would all need to come to the office (up and down the stairs), and that:

> "There is no problem of having 30 trips up the stairs and 30 trips down, quite regularly."[19]

Mr Fenner calculated that there were literally thousands of such occasions without incident. His evidence included:

> "Well, over a period of two years, if you had somewhere between about 15 to 20,000 transactions and no incidents, you know, it is like Murphy's Law. Why fix it if it works?"

[25] All of those matters were relevant to the ultimate conclusion whether the defendant had been in breach of a duty of care to the plaintiff, causing her injury by reason of the breach. The appropriate test was described by Mason J in *Wyong Shire Council*

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17 At [163].
18 At [355].
19 At AR 134.

v Shirt,[20] and in *New South Wales v Fahy* the High Court recently decided it did not need restating. Mason J wrote:

> "A risk of injury which is quite unlikely to occur, such as that which happened in *Bolton v Stone*[21] may nevertheless be plainly foreseeable. Consequently, when we speak of a risk of injury as being 'foreseeable' we are not making any statement as to the probability or improbability of its occurrence, save that we are implicitly asserting that the risk is not one that is far fetched or fanciful. Although it is true to say that in many cases the greater the degree of probability of the occurrence of the risk the more readily it will be perceived to be a risk, it certainly does not follow that a risk which is unlikely to occur is not foreseeable.
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> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable (person) in the defendant's position would have foreseen that (his) conduct involved a risk of injury to the plaintiff or to a class of persons including the person. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable (person) would do by way of response to the risk. The perception of the reasonable (person's) response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibility which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable (person) placed in the defendant's position. The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

[26] In this matter we did not understand Mr Morgan challenged the conclusions relevant to s 9(1) of the *Civil Liability Act 2003* (Qld), that a risk of injury to people descending the defendant's stairs was foreseeable, and the risk was not insignificant. Mr Morgan's challenge was to the conclusion that a reasonable person in the defendant's position would have taken any further precautions as at mid-2003 than the defendant had already taken, namely by supplying handrails which complied with the applicable Australian Standard and were quite suitable for use when ascending or descending the stairs. The plaintiff had simply failed to avail herself of that means of taking the level of care for her own safety reasonably expected of her. Putting the matter as Mason J required, the defendant's argument was that in mid-2003 a reasonable person would have foreseen that those rather steep, somewhat worn, stairs involved a risk of injury to persons descending them,

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20 (1980) 146 CLR 40 at 47-48.

21 [1951] AC 850.

but that a reasonable response consisted in supplying railings. The risk of slipping if using them was small, and nobody else had by the beginning of 2003. The expense, difficulty, and inconvenience of taking any other alleviating action resulted in the defendants not being in breach of any duty of care in relying on the handrailings supplied, and on the obligation of pedestrians to take some care for themselves.

[27] The appellant's case was ably and amply put by Mr Morgan, but we consider the conclusion was open that the memorandum sent to the manager of the Coopers Plains site and the defendant's other sites and plant managers in March 2001, was an instruction to inspect the fixed plant and identify worn steps or treads and to take preventative action. The concession in cross-examination that the non-slip adhesive material placed on those stairs in late 2003 was put there because it was required, was significant. The defendants did not suggest in evidence that the condition of the stairs in mid-2003 was any different from the condition in 2001, or in 2003 when the non-slip material was put on. The finding was open that a reasonable person would have responded to the risk presented by those stairs by the use of the non-slip surface before May 2003, and that the defendant was in breach of a duty of care in not having done so. The learned trial judge's conclusions included that in all probability that would have saved the plaintiff from slipping. Accordingly, the relevant nexus between a breach of duty and injury was established, and the plaintiff should hold the judgment for liability in her favour.

Contributory negligence

[28] Where we respectfully disagree with the learned judge is in the conclusion that the plaintiff had not shown a want of care for her own safety.

[29] Contributory negligence is defined by Professor Fleming[22] as the plaintiff's failure to meet the standard of care to which he or she is required to conform for his or her own protection and which is a legally contributing cause, together with the defendant's default, in bringing about the plaintiff's injury.

[30] In this statement there are three matters which require particular attention. Firstly, a person may be guilty of contributory negligence notwithstanding that he or she owed no duty to the defendant or any third person. In *Astley v Austrust Ltd*[23] the High Court quoted with approval from the opinion of the Judicial Committee of the Privy Council in *Nance v British Columbia Electric Railway Co Ltd*[24] where their Lordships said:

> "When contributory negligence is set up as a defence, its existence does not depend on any duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in (the party's) own interest take reasonable care of himself (or herself) and contributed, by this want of care, to his (or her) own injury."

[31] Secondly, a person may be guilty of contributory negligence if the person contributed to his or her *injury*. It does not matter whether the plaintiff's failure to

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22 *The Law of Torts* 9th Edition, LBC Information Services, 1998, at pp 302-303.

23 (1999) 197 CLR 1 at 11.

24 [1951] AC 601 at 611.

protect himself or herself contributed to the accident itself. What is important is if the plaintiff's want of care contributed to the injury.

[32] The third matter of significance is that the burden of proof of contributory negligence lies on the defendant.[25] The plaintiff is not required to prove that she did not contribute to her injury or the damage suffered.

[33] Contributory negligence finds its statutory form in Queensland in the *Law Reform Act 1995* (Qld) Part 3 Division 3. Section 10(1) provides for the apportionment of liability in the case of contributory negligence as follows:

> "(1) If a person (the **claimant**) suffers damage partly because of the claimant's failure to take reasonable care (**contributory negligence**) and partly because of the wrong of someone else –
>
> (a) a claim in relation to the damage is not defeated because of the claimant's contributory negligence; and
>
> (b) the damages recoverable for the wrong are to be reduced to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage."

[34] In this case the plaintiff knew that the steps were steep and had narrow treads but she did not know, nor did she have reason to suspect, that the condition of the steps would cause her to slip and so injure herself. Accordingly, apportionment may be applied only to the extent of which the injury could have been avoided.[26]

[35] The plaintiff was attending to her work duties which required her to ascend and descend the stairway to the defendant's office while carrying a bag of mail. Whether or not the person who is working is an employee or an independent contractor is not relevant in such a case. Any failure to exercise care by an employee in such circumstances may be regarded as the result of mere inattention, inadvertence or misjudgement or as the result of negligence to use the distinguishing terms referred to by the High Court in *McLean v Tedman*:[27]

> "As Windeyer J. observed in *Sungravure Pty Ltd v Meani* (12), when an employee in a factory sustains injury, the jury in considering contributory negligence may have regard to 'inattention bred of familiarity and repetition, the urgency of the task, the man's preoccupation with the matter in hand, and other prevailing conditions'. It is then for the tribunal of fact to determine whether any of these things caused some temporary inadvertence, some inattention or some taking of a risk, 'excusable in the circumstances because not incompatible with the conduct of a prudent and reasonable man'."

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25 *Nicholson v Nicholson* (1994) 35 NSWLR 308 at 315; *Hercules Textile Mills Pty Ltd v K & R Textile Engineers Pty Ltd* [1955] VLR 310 at 315-316.

26 *Coe v Kernovske* (1990) 10 MVR 563.

27 (1984) 155 CLR 306 at 315.

[36] As Dunford J held in *Hoekstra v Residual Assco Industries Pty Ltd*[28] the courts will not readily attribute contributory negligence to a worker engaged in, concentrating on the task he or she is required to perform and pre-occupied with the task in hand.[29]

[37] In this case, the plaintiff, a self-employed courier, was making the daily delivery and receipt of mail and other items to the office at the defendant's concrete batching plant at Coopers Plains as she had been doing for the previous week to ten days. To do so she was required to carry a satchel. The only access to the defendant's office was via external metal steps and a ramp which was at the top of those steps and at a ninety degree angle to them. She slipped as she was descending the steps. At the moment she slipped she was not holding the handrail, but grabbed it as she slipped. Her hand slipped on the handrail and she was not able to stop herself falling.

[38] The negligence which is said to have contributed to her injury was her failure to hold the handrail at all times while she descended the steps. Her evidence at trial was that she had noticed that the steps were steep with narrow treads but that she did not use the handrail, rather she centred herself on the steps. When she commented on the condition of the steps to an employee of the respondent, he laughed and told her that "we just bound up them." This apparently involved holding both handrails and bounding up the stairs. This would not have been a safe way for a person holding a satchel to ascend the stairs, let alone descend them.

[39] She did not grab the handrail until she started to fall from the second step. Her evidence was that she grabbed the handrail with her right hand but her hand slipped. She was not able to take a firm grip on the handrail until her body had stopped moving on the bottom stairs. In doing so, her right shoulder was ripped backwards.

[40] The expert evidence was, as one might expect, that the provision of handrails are a recognised step to reduce the risk of falls. Every stairway should be provided with at least one handrail with a smooth continuous top surface under AS 1657-1992. However the use of a handrail is not necessarily a significant factor in preventing a fall as the following extract from the cross-examination of Justin O'Sullivan, the ergonomist called by the plaintiff as an expert witness, in response to a question asked about whether or not a person decides to use a handrail can affect whether a person slows down as the person approaches a set of stairs, demonstrated:

> "We would normally slow down when we commence descent of a set of steps because it is such a different movement to walking on the flat. So to use a handrail or not use a handrail is not a highly significant issue in preventing a fall. It is an issue – it is a thing that can help you stop the fall from continuing. Once you lose balance you could grab the handrail and you could help yourself to stop yourself from falling all the way. But the research indicates that the absence of a handrail or the presence of a handrail is not a key issue in prevent – in whether a fall commences or not."

[41] As that evidence showed, holding on to the railing would not have stopped the fall from commencing. It however may have been likely to have prevented the fall from continuing and so lessened the injury from which she suffered.

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28 [2004] NSWSC 564 at [72].

29 See also *Polycarpou v Australian Wire Industries Pty Ltd* (1995) 36 NSWLR 49 at 68-69.

[42] The conclusion is open that it is probable that had she used the handrail prior to her foot slipping, she would not have suffered the injury she did. The handrails were easily available; the photographs show the stairway is quite narrow, so that two people could only pass with some difficulty. Had the plaintiff held on to the railing, it is likely that if she slipped, she would not have fallen anywhere near as far as she did, if at all. Her statements to Mr Fenner show she was very aware of the risk the stairs posed, but did not take advantage of the obvious reduction in risk given by the handrails. Not holding on to the railing in those circumstances was more than mere inadvertence.

[43] In those circumstances the defendant should have succeeded at the trial in showing that the plaintiff contributed to her injury through want of care for her own safety. However, since holding on to the handrail would not have prevented her from falling but merely lessened the likelihood of the fall continuing and so reduced to some extent the risk of serious injury, in our view her contributory negligence should be assessed at 30 per cent.

[44] **Quantum**

[45] We disagree that the learned judge erred in concluding the quantum of the future economic loss. The trial proceedings were conducted in late July and early August 2006, and the decision was reserved. The plaintiff's evidence, accepted by the learned trial judge, included a statement by her that:

> "Everything I do everyday causes me pain.",
>
> aggravated by her work obligations and her domestic obligations. She had returned to work as a courier, and still did that as at the date of the trial. She had been employed for most of her working life, and had intended before the incident to work for another 10 years. She now hoped to be able one day to afford surgery on her shoulder. However, the daily pain she now experienced had convinced her that she would be struggling to continue working after Christmas 2006.[30]

[46] The learned judge awarded an amount of $31,400 by way of general damages under the provisions of the *Civil Liability Act 2003* and the *Civil Liability Regulation 2003* (Qld), past special damages of $2,448.21, and future special damages of $12,000 (for the anticipated surgery), and $1,500.75 for past economic loss. Interest as appropriate was also awarded. The judge also allowed $100,000 for future economic loss, representing an amount of about $30,000 net for about six years, as explained by the judge. The figure of $30,000 reflected the net income shown in the plaintiff's taxation returns. The appellant challenged that $100,000, comparing it to the very small sum awarded for past economic loss suffered over three and a half years, and submitted an award in the order of $50,000 would have better reflected the contingencies, including whether the plaintiff would really have worked until about aged 70, and whether the injury experienced in 2003 would have prevented her from doing so. But the decision on quantum was reached after hearing the plaintiff, whose evidence the judge clearly accepted, and the award, although generous, accords with the thrust of that evidence.

[47] The appellant's amended grounds of appeal contained a variety of other specific complaints about the learned judge's findings. Those included that the judge had erred in finding that having the second "going" of the stairs with a 2.5^{o} gradient

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[30] This evidence is at AR 27 and 32.

constituted a breach of duty of care by the appellant. The reference to "going" in that and in other grounds of appeal seems inaccurate, in that the gradient was on the tread, not the going. What constitutes a "going" is illustrated at AR 398, that being the horizontal distance between the outward or external end of any one tread, and the external or outward end of the next tread above or below. In any event, the learned judge did not conclude that a stair or tread with a slop of 2.5^{o} downwards itself constituted a breach of duty of care, but, in context, that having such somewhat worn, relatively steep, stairs without the apparently inexpensive non-skid material constituted a breach of duty.

[48] We would allow the appeal to the extent of reducing the damages awarded by 30 per cent to $103,358.22, and order the respondent to pay two thirds of the appellant's costs of the appeal assessed on the standard basis.