SUPREME COURT OF QUEENSLAND

CITATION:	*Heeman v Metalcorp Recyclers Pty Ltd* [2005] QSC 350
PARTIES:	**CHARLES ANTHONY HEEMAN** (plaintiff) **v** **METALCORP RECYCLERS PTY LTD** **(ACN 002 707 262)** (defendant)
FILE NO/S:	SC 7423 of 2005
DIVISION:	Trial
PROCEEDING:	Claim for damages for negligence and/or breach of contract of employment and/or breach of statutory duty
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	6 December 2005
DELIVERED AT:	Brisbane
HEARING DATE:	10 – 11 November 2005
JUDGE:	Chesterman J
ORDER:	**Judgment for the defendant.**
CATCHWORDS:	EMPLOYMENT LAW – THE CONTRACT OF SERVICE AND RIGHTS, DUTIES AND LIABILITIES AS BETWEEN EMPLOYER AND EMPLOYEE – LIABILITY OF EMPLOYER FOR INJURY TO EMPLOEE AT COMMON LAW – SAFE ACCESS TO PLACE OF WORK – where plaintiff sued defendant after injuring ankle at place of work – whether defendant has breached contractual or statutory duty to plaintiff in not providing safe access to place of work TORTS – NEGLIGENCE – DUTY OF CARE – SPECIAL RELATIONSHIPS AND DUTIES – EMPLOYER AND EMPLOYEE – whether plaintiff can succeed in claim for damages in negligence against defendant. *Workplace Health and Safety Act* 1995 (Qld)
COUNSEL:	Mr W Campbell for the plaintiff Mr R Myers for the defendant
SOLICITORS:	Shannon Donaldson for the plaintiff Messrs Hede Byrne & Hall for the defendant

[1] The plaintiff claims damages against the defendant, his employer, for an injury he sustained at work on 17 March 1999. The plaintiff was a labourer. The defendant carries on business as a dealer in scrap metal.

[2] The plaintiff's mishap was described in the pleadings in these terms:

> ‘ **AMENDED STATEMENT OF CLAIM**
>
> …
>
> 5. On or about 17 March 1999 the Plaintiff in the course of his employment was walking between the … lunch room and his work area when he stepped from the weighbridge to the ground...
>
> 6. As a result … the Plaintiff suffered … a fracture of the talus of his right limb leading to degenerative changes in the joint.
>
> …
>
> 9. The … injury … was caused by the breach of contract and/or negligence and/or breach of statutory duty by the Defendant …
>
> PARTICULARS
>
> (a) Failing to provide the Plaintiff with a safe means of travelling to and from the work … lunch room and his work area;
>
> (b) Allowing or permitting the Plaintiff to travel … by a route which involved walking across the weighbridge approach and then stepping off the weighbridge approach onto a concrete step...;
>
> (c) Failing to provide the Plaintiff with any instruction as to the means of safely travelling to and from the … lunch room and his work area;
>
> (g) Failing to maintain the concrete step in a safe condition;
>
> …’
>
> ‘ **DEFENCE OF THE DEFENDANT**
>
> …
>
> 1. The Defendant admits the allegations contained in paragraphs … 5 (and) 6 … of the Statement of Claim.
>
> …

8. As to … paragraph 9 … the Defendant denies that the … injury … suffered by the Plaintiff was caused by … breach of Contract and/or negligence and/or breach of statutory duty …'

REPLY

…

4. As to paragraph 8 of the Defence the Plaintiff … says…:

   (a) The Defendant failed to provide the Plaintiff with a safe means of travel … because … it was common practice for employees to walk along the path and over the weighbridge and a block of concrete had been placed on the ground by the employer … for the purpose of and to facilitate use of this route … (which) was not maintained in a safe condition;

   …

   (g) The Plaintiff … says that the concrete step was not maintained in a safe condition and that his fall and consequent injuries were directly related to the state of the concrete step;

   …'

[3] The uninformative paragraph 5 contains the only pleaded description of the circumstances in which the plaintiff was injured.

[4] The evidence revealed that the defendant conducted its business from premises off Watson Court in Toowoomba. It bought scrap metal of two types: ferrous and non-ferrous and paid by weight. Trucks carrying loads of scrap metal would enter the defendant's premises through a gate, which opened onto a road leading to a concrete ramp, at the end of which was a weighbridge where the trucks would stop to be weighed. They would then proceed to an appropriate part of the premises, dump their load, and return to the weighbridge where they were, again, weighed. The difference between the two measurements represented the weight, and therefore price, of the scrap metal which had been dumped. To the south of the weighbridge was a building which contained an office, reception area, storeroom, lunch room, toilet and a large area in which non ferrous metals could be cleaned and processed. To the rear of the building, at its eastern end, there was a concrete paved yard enclosed by a fence onto which non-ferrous metal was dumped prior to its being taken into the building for processing.

[5] The plaintiff worked in a part of the yard to the north of the weighbridge where he operated mechanical shears, a machine rather like a large guillotine, which were used to cut lengths of metal into sizes easier to handle and package.

[6] Should the plaintiff wish to walk to or from his particular workplace to or from the lunch room (or toilet or storeroom) he would have to cross the ramp.

[7] The height of the ramp above the surrounding ground was not proved in evidence. The best indication is given by exhibit 2F from which it appears that the height was about equivalent to the combined height of three concrete blocks, about two to three feet. These blocks formed the sides of the ramp.

[8] Liability for the plaintiff's injury turns upon the fact that the means of access between the facilities building and the shears involved the plaintiff stepping up onto the surface of the ramp, walking across the ramp and stepping down on the other side. The dimension of the step down was substantial, at least two feet and maybe three. To facilitate this traverse, the defendant had placed a concrete slab on the ground adjacent to the ramp where it met the end of the weighbridge. The slab formed a rudimentary step between the surface of the yard and the surface of the ramp. There were two slabs: one on each side of the ramp. The one in question is that which was on the northern side of the ramp, the side farthest from the building.

[9] One might have thought from the description contained in the pleadings that the plaintiff was injured because of some defect in the concrete slab on which he stood when stepping down from the ramp. The plaintiff certainly complained that the slab, which was provided by the defendant as a makeshift step, was defective, but his case is not that he slipped on or off the defective step. His evidence was that the step was defective and he knew it to be so. He sought to avoid the danger posed by the defect by stepping directly from the ramp to the ground, over the slab. It was this act which caused him to stumble and twist his ankle.

[10] Exhibit 2F shows the ramp and the ground adjacent to it where the plaintiff fell. It also shows a concrete slab lying on the ground adjacent to the base of the side wall of the ramp but separated from it. The ground at the base is not flat but slopes and the slab appears to lie on the ground so that its top surface slopes at the same degree as the ground on which it rests. There was no evidence as to the dimensions of the slab but it appears substantial. The thickness of the slab, that is the height of the step above the ground, is less than the height from the top of the slab to the top of the ramp. The step from the top of the ramp to the ground beyond the slab would appear to require something in the nature of a leap.

[11] The plaintiff's evidence was this (T 26.42 – 29.50):

> '… [W]hat did you do? – Stepped down off the concrete down to the ground.
>
> … [L]ook at photograph 1F (sic) … Do you see there is a concrete block down below? – Yes.
>
> Is that the concrete block that was there the day you fell? – No, that's a new block. … [T]hey replaced that step.

Does that block appear any different from the one that was there on the day you fell? – Yeah, that's wider.

…

About how wide was the tread on the block that was there before? – Probably about a foot.

And what about the height down? – That's a bit easier going down because the block's out of the ground more. The other block … was a bit closer to the wall and was down a bit more.

…

What about the condition of the block that's shown in the photograph? – Yes, a lot better condition than the block that was there.

In what respect? – The edges aren't chipped off it … it's not round like the other one was.

…

Does anyone else use that block? – No.

…

As you … approach(ed) … to take the step down, what did you do? – I normally just step down.

…

Did you use the step or did you not use the step? – No I did not use the step.

Why didn't you use the step? – Because it was already rounded so I thought I would have slipped off the step if I have of used the step.

… So you stepped straight down over the step to the earth on the other side of the step? – Yes … it's not an easy step, but it was the easiest way to go … I stepped onto uneven ground as I stepped down … I fell to the ground … (my ankle) twisted outwards.'

[12] The plaintiff has not given an altogether consistent account of how he sustained his injury. He told Dr Ivers, an orthopaedic surgeon who examined him at the request of WorkCover Queensland on 25 May 1999, that 'he had stepped off a piece of concrete at work falling about one metre.' This, as far as it goes, is consistent with the account the plaintiff gave in evidence. Dr Saxby, who has treated the patient for a number of years, and examined him frequently, reported on 12 July 1999 that the plaintiff 'suffered an injury at work about three months ago when he stepped on a piece of concrete and suffered a dorsiflexion injury to his ankle.' The plaintiff's

evidence is not that he was hurt when he stepped onto a piece of concrete but that he stepped over the concrete onto uneven ground. Of more significance is the fact that on 14 January 2002 Miss Stephenson, an occupational therapist, examined the plaintiff who told her that '[o]n the 17 March 1999 (he) sustained injuries … in a workplace incident. His right ankle gave way when he stepped down off a weighbridge onto a rounded step.' The plaintiff was examined on 16 March 2001 by Dr Meibusch, orthopaedic surgeon, at the request of WorkCover. The description of the accident given to the doctor was that the plaintiff 'stepped off a 4' high concrete step. The concrete was worn away and he slipped and fell.' This account, though succinct, suggests that the plaintiff was injured when he slipped from the top of the concrete ramp. This is not an account which the plaintiff gave in evidence or to any other doctor.

[13] The plaintiff gave some other explanations for his injury in his claims for compensation and in his notice for claim for damages. The earliest in point of time was the application for compensation which was made on 24 March 1999, only a week after the injury. The plaintiff said that he was 'stepping off weighbridge approach to walk towards shears and landed on uneven ground.' This is consistent with the plaintiff's evidence but he does not mention that he was stepping over a concrete block to avoid the danger of stepping onto it. The notice of claim for damages was made on 4 March 2003, about a year after the action was commenced on 18 February 2002. The description of the accident was that 'the claimant was stepping off the weighbridge. The weighbridge was approximately one metre high and the step was broken. The worker had to step down from the weighbridge on the ground and he landed on his right foot.' This version is, I think, the same as that given in evidence.

[14] Though the plaintiff is a man of limited education and intelligence, this cannot explain the varying descriptions of the mechanism of his injury which the plaintiff has given. The task of describing an uncomplicated event which caused his injury was well within the plaintiff's intellectual capacity. It is, I think, significant that the first account which contains a description of the plaintiff stepping down to avoid placing his foot on the broken step came a year after the commencement of the proceedings. One does not gain that understanding of the accident from the statement of claim.

[15] Both parties complain about the pleadings. The defendant's complaint is that the plaintiff's case as described in evidence is radically different to the case he pleaded and, questions of credit apart, the plaintiff should not be permitted to present a case he did not plead. There is some justification for the defendant's stance. An ordinary reading of the statement of claim suggests that the plaintiff was hurt because of some defective feature of a concrete step on which he trod. Nevertheless the pleading is widely, perhaps badly, drafted with the result that the depiction of the accident given in evidence is not inconsistent with the allegations in the statement of claim. If one looks at them carefully the plaintiff's evidence can be seen to fit.

[16] A second answer to the complaint is that if it were good, the plaintiff's evidence was irrelevant and should have been objected to. That did not happen.

[17] The result of the variations in the plaintiff's account of his fall is that I am left in doubt as to precisely what the plaintiff was doing which led him to twist his ankle. There is no doubt the injury occurred at the time and place alleged by the plaintiff and that it occurred when he stepped down from the ramp. What is not clear is whether he twisted his ankle when he stepped from the ramp onto a concrete block, or from a concrete block to the ground, or by stepping directly from the ramp to the ground.

[18] This difficulty can be ignored because another more serious obstacle confronts the plaintiff on the question of liability. It takes the shape of evidence given by witnesses called in the plaintiff's own case from the defendant's manager and supervisor. They are both adamant that the concrete step which is shown in exhibit 2F is the very one which served as a step when the plaintiff was injured on 17 March 1999. Mr Wilkins, who was the supervisor at the time of the plaintiff's injury and is now the defendant's manager at the Toowoomba yard, said in his statement on 19 December 2001, tendered in the plaintiff's case (exhibit 12):

> '… [I]t was common to get to … the yard (where the shears were located) from the building in which the lunchroom is located, to walk through a garden at the front of the building. There is a well-worn path through the garden. Where that path meets the weighbridge there is a step up, and an additional block of concrete has been placed on the ground beside the weighbridge to reduce the height of that step. There is a similar block of concrete on the ground on the opposite side of the weighbridge. Those blocks of concrete are still in place and have not been moved or altered since (the plaintiff's) injury. Nor have any alterations been made to the concrete adjacent to the weighbridge.'

[19] Mr Wilkins confirmed in cross-examination that the concrete block depicted in exhibit 2F was the one in existence when the plaintiff was injured. It had been used as a step for about eight years from 1997 until recently when the premises were renovated. Mr Wilkins was also called by the defendant to reaffirm his evidence on this point, which he did.

[20] Mr Bartley, the defendant's manager, also gave evidence that exhibit 2F depicted the ramp and step as it was when the plaintiff was injured. He denied that the plaintiff ever complained to him about the dangerous state of the step or that he replaced it by the one shown in the photograph. This was evidence given in chief, in the plaintiff's case (T 98.25-.40). He reaffirmed his evidence in cross-examination (T 99.35).

[21] The plaintiff had given evidence that he was the only one to utilise the route from the lunch room to the shears traversing the ramp and using the concrete blocks as steps. Mr Bartley gave evidence that he 'and many others' used the same route several times a day. It is clear from Mr Bartley's evidence that he regarded the route, and the steps provided to ascend and descend the ramp, as adequate for safety.

[22] The plaintiff agreed. He made it clear that he had no complaint about the safety of the route depicted in exhibit 2F. The following exchange occurred in cross-examination (T 63.40 – 64.27):

> 'Well, Mr Heeman, you understand what I say, that block was precisely the same … on the day of the accident as is illustrated in (exhibit) 2F? - No, it was not the same, no.
>
> … [I]f it was the same block, you would simply have stepped from the … weighbridge on to that block and thereafter on to the ground? – It wasn't the same block.
>
> … I understand you are saying that, but had it been precisely what we see there, there was nothing to prevent you from stepping from the approach to the weighbridge on to that block and then on to the ground? – There would have been nothing stopping me, no, but the block was a rounded (presumably, "a round one").
>
> Have you seen the block that's illustrated in 2F …? - Yes.
>
> You've seen it … since you went back to work? - Yes, I have, yes.
>
> …
>
> That would provide a perfectly safe access say from the smoko room … across the approach and down the block (on) the other side? - Yes, it would, yes.
>
> You had no complaint about that system? - No, I didn't.'

[23] The plaintiff's case is thus that the workplace provided for him by the defendant was unsafe in that to go between the lunch room and the shears the plaintiff had to step from the ramp onto an object that was inadequate for the purpose by reason of its size and shape. The plaintiff had therefore to use an inadequate step, or get down from the ramp by stepping a considerable distance onto uneven ground. Critical to this case in both its alternatives, is the existence of a step which was dangerous. Had the plaintiff stepped and slipped because of its defective quality, the defendant would have failed to provide a safe workplace. Likewise, had the plaintiff avoided the danger by stepping directly onto the ground and suffered hurt because of the magnitude of the descent and the nature of the ground on which he stepped the defendant would have failed to provide a safe workplace.

[24] Both theses will fail if the step provided by the defendant, as a means of descending the ramp, was adequate, or reasonably safe for the purpose.

[25] On this point the only evidence is that of Mr Bartley and the plaintiff who both accepted that the step depicted in exhibit 2F met that description.

[26] The question on which the defendant's liability turns is whether the plaintiff is correct in asserting that the block which is shown in exhibit 2F, which is accepted was satisfactory, was the one in position when he was injured. Messrs Bartley and Wilkins have testified that it was. The plaintiff says it was not.

[27] The plaintiff was recalled to supplement his evidence about the replacement of the concrete step with the one which appears in the exhibit. He said that between May and July 1999, a period when he returned to work at the defendant's premises, some concreting work was done in the yard. In particular a pad was made adjacent to the non ferrous yard to allow an excavator to have access to the yard without bogging in wet weather. The plaintiff asserts that the opportunity was taken to pour a concrete step adjacent to the ramp to make the passage from the ramp to the ground safer. The boxing, or form work, for the step was built by Mr Bartley and Mr Wilkins. The block shown in exhibit 2F is the result.

[28] Both Mr Bartley and Mr Wilkins deny that they had built the boxing for a new step. They both denied that the block in existence when the plaintiff was injured was changed or moved until very recently.

[29] I prefer the evidence of Mr Bartley and Mr Wilkins. They were witnesses who had no interest in the outcome of the trial. Both were called in the plaintiff's case to support his contention that he was an industrious worker. They showed no animosity towards the plaintiff: on the contrary they were supportive of him. The plaintiff has an obvious financial interest in the outcome of the action. That apart, I think it most unlikely that Mr Bartley, the manager, would himself be involved in the manual task of boxing up the step. There is the further point that the plaintiff was clearly confused about the concreting work done in the vicinity of the non-ferrous yard. His recollection of that, which is tied to the replacing of the step, was clearly faulty. It is in this regard that the plaintiff's discrepant accounts of his accident given to the doctors have importance. They show that he is not a reliable historian.

[30] There is a further point. I cannot accept that the block shown in exhibit 2F is a step poured *in situ*. Such a step would have been poured on ground which would have been levelled for the purpose. It would have adjoined the vertical wall of the ramp. The photograph shows a concrete block lying on sloping ground and physically separated from the wall. It appears to have been placed on the existing sloping ground to form a makeshift step.

[31] For these reasons I do not accept the plaintiff's evidence about the replacement step nor about the character of the step which he testified was in place when he fell. I find that the block shown in exhibit 2F is the step that existed when the plaintiff fell. It is the step about which he makes no complaint and about which Mr Bartley says was used by the defendant's employees daily with no suggestion of mishap. The plaintiff does not allege that some feature of that step caused his injury.

[32] The plaintiff's complaint about the pleadings is that the defendant did not, in his defence, contest the plaintiff's point that the concrete step had changed. I do not see

this as fatal to the defendant's success in the action. The defendant can be forgiven for not answering a point which the statement of claim did not identify. More significantly the plaintiff's case fails because the evidence he gave in support of his claim is unacceptable.

[33] I conclude that the plaintiff was not hurt in the manner described. It is not possible to find what, if any, feature of the ramp, step or ground caused him to twist and break his ankle. It is clear that the acceptable evidence does not permit a finding that the plaintiff was injured in the only manner which was said to constitute negligence or a failure to comply with the statutory obligation to provide a safe workplace.

[34] The plaintiff's claim must fail.

[35] I will say something very brief about damages. Only two components of an award were controversial. These were the assessment for general damages and the amount to be allowed for future economic loss.

[36] As to the former, the plaintiff's counsel submitted that the appropriate figure was $60,000 while counsel for the defendant thought $40,000 appropriate. The plaintiff's injury, its treatment and its effect on his mobility and amenity of life are well documented. I prefer the defendant's figure because the plaintiff is not as badly affected as he has suggested. I think he is capable of doing more than he has admitted and, in fact, does more than he has admitted. I have no doubt he experiences pain, discomfort and some disability but I do not accept that he is immobilised to the extent he has described nor that he is incapable of driving a motor vehicle as he claimed.

[37] The plaintiff asks for an assessment of damages for future economic loss on the basis that he is, to all intents and purposes, unemployable. The defendant submits that the plaintiff is capable of performing a variety of tasks and that his damages should be assessed on the basis that he could go back to work at the defendant's and satisfactorily perform his employment. Damages should be allowed for his undoubted disadvantage on the open labour market should he, in the future, have to compete for work.

[38] The plaintiff is a labourer. He has no formal training and no real education. He is not, I think, an intelligent man. The evidence shows that in each of many years before the accident he spent long periods unemployed and received unemployment benefits. Paradoxically, when he worked, he appears to have been industrious and conscientious. The defendant, as I mentioned, and another former employer, both spoke highly of the plaintiff as an employee.

[39] Since the plaintiff has been out of work in recent times he has not claimed unemployment benefits. He ascribes this to a moral compunction: it is somehow improper to claim that benefit. I cannot accept this is the reason why he has not asked Centrelink for payment. He had no such compunctions in the past. It is more

likely, as counsel for the defendant suggests, that the reason he has not sought those payments is that he is working. There is some evidence that he has an interest in establishing his own small scrap metal dealership consisting of the purchase of metal objects from farms in and around Dalby, where he lives, and selling it to the defendant. He has already made some such sales. The plaintiff claims that he has traded not on his behalf but on behalf of family members. This is unlikely given that he has no means of supporting himself or his family except by that business activity.

[40] There is also the point that the plaintiff did return to work with the defendant and only stopped when he twisted his ankle during weekend activity. Until then he had coped satisfactorily with his work; he could do all the tasks the defendant asked of him.

[41] The reason the plaintiff gave for stopping work was that he could not drive the distance from Dalby to Toowoomba because of soreness in his right ankle. There is, however, evidence that he is driving in connection with the scrap metal business. There is also evidence that, for a relatively modest sum, the plaintiff could have his car modified so that he could operate the accelerator with his left foot.

[42] Accordingly I accept the defendant's submissions.

[43] If the plaintiff were now employed by the defendant at his old job he would earn $521.10 net per week. He will be 65 in twenty-eight years time. The multiplier for that period is 796.7 (discounting at five per cent). The plaintiff's potential maximum loss on this basis is $415,160. I would allow a fifth of this sum, namely $83,000.

[44] As I have indicated there will be judgment for the defendant.

POSTSCRIPT

[45] Some days after the trial of this action concluded and, indeed, after I had prepared a draft of the preceding reasons for judgment, I received a written submission from the plaintiff's counsel. No leave had been sought to deliver such a document and there had been no prior indication that it would come. It was, no doubt, prompted by the course of the debate during addresses. It must then have been apparent that had I found, as I have done, that the concrete block depicted in exhibit 2 was the one which formed the step when the plaintiff was injured his claim would fail for the reasons I expressed.

[46] The plaintiff's further submissions complain that he was taken by surprise by the course of the defendant's evidence and argument that 'it was not liable for the Plaintiff's injury because the Plaintiff should have used the concrete step.' The submission continues that this 'was not pleaded but, on the contrary, the Defendant by its pleading admitted that the Plaintiff was injured when he stepped from the

weighbridge onto the ground without using the concrete step'. I have set out the relevant parts of the pleadings and will not repeat them. For the reasons I earlier expressed I do not accept that the plaintiff pleaded the case he advanced at trial though, as I pointed out, there was sufficient ambiguity in the pleading to accommodate that case.

[47] The submissions assert that had the defendant 'pleaded an affirmative case based on the Plaintiff's failure to use the concrete step, the Plaintiff would have pleaded by way of Reply that the … provision of … the concrete step as a means of access … did not comply with AS (Australian Standard) 1657 of 1992: 'Fixed platforms, walkways, stairways and ladders …'. Further it is said that the plaintiff would have obtained an expert's report to show that the concrete step, that shown in exhibit 2, was not a safe walkway or stairway.

[48] The submission continues that by paragraph 4(f)(iv) of the Amended Statement of Claim showed the plaintiff relied on the obligation imposed on the defendant by section 28(1) and 30(1)(a) of the *Workplace Health and Safety Act* 1995 (Qld). The concrete step, that depicted in exhibit 2, is said not to comply with the relevant provisions of AS 1657 with the result that the statutory obligations to provide safe access to and from the plaintiff's workplace were not performed.

[49] The submission treats these assertions as self-evident but they assert a case that was not advanced against the defendant at the trial and which was not litigated.

[50] The submission does not seek the court's leave to reopen the plaintiff's case to call further evidence, whether lay or expert. The complaint of surprise comes too late to be effective. The defendant's evidence has been led without objection and the case concluded on the basis described in my earlier reasons. The critical evidence emerged in the plaintiff's case.

[51] The submission cannot alter the conclusion to which I have come. It is not to the point that the plaintiff might have adduced evidence that the concrete block was inadequate as a step, and did not comply with legislation or the Australian Standard. The plaintiff's case was not that he was injured because of some defect in that step. His case was that he was injured because the defendant had provided another step which was dangerous and he was injured in an attempt to avoid the danger.

[52] The plaintiff's case failed at a number of points. Firstly it is not right that he was injured when he stepped off the ramp to avoid a dangerous step. The step provided by the defendant was the one he described as adequate. Secondly the plaintiff failed to prove how he was injured and, therefore, failed to prove the injury was the result of any breach of duty by the defendant. I did not accept his description of the circumstances of his accident. Thirdly the plaintiff failed because his evidence established that the step which was (as I have found) provided for his access did not cause him to fall. Whether or not that block complied with the Australian Standard is irrelevant. Any inadequacy or non-compliance was not causative of the plaintiff's injury.

[53] In essence the plaintiff failed to prove the case he advanced. He cannot now be permitted to advance a different case that the block, onto which he said he did not step, and which, on his evidence, he had no reason to avoid, was defective.