SUPREME COURT OF THE AUSTRALIAN CAPITAL TERRITORY
COURT OF APPEAL

Case Title:	**Coles Supermarket Australia Pty Ltd v Harris**
Citation:	**[2018] ACTCA 25**
Hearing Date:	18 May 2018
Decision Date:	29 June 2018
Before:	Mossop, Loukas-Karlsson and Charlesworth JJ
Decision:	Appeal dismissed with costs
Catchwords:	**TORTS** – NEGLIGENCE – Standard of Care – reasonably foreseeable risk of injury to employee using a device provided by employer – employee not trained in safe use of device – whether probability of injury so low that no reasonable employer in the appellant's position would take any precaution against it – whether risk of injury ought to have been obvious to adult employee – whether employee guilty of contributory negligence
Legislation Cited:	*Civil Law (Wrongs) Act 2002* (ACT) ss 42, 43, 43(1)(a), 43(1)(b), 43(2), 43(2)(a), 43(2)(b), 43(2)(c), 43(2)(d), 44
Cases Cited:	*Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 *Cowie v Gungahlin Veterinary Services Pty Ltd* [2016] ACTSC 311 *Czatyrko v Edith Cowan University* [2005] HCA 14; 214 ALR 349 *Fox v Percy* [2003] HCA 22; 214 CLR 118 *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 *Hamilton v Nuroof WA Pty Ltd* (1956) 96 CLR 18 *Harris v Coles Supermarkets Australia Pty Ltd* [2017] ACTSC 81 *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 90 ALJR 679 *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 *Vincent v Woolworths Ltd* [2016] NSWCA 40 *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; 208 CLR 460 *Wyong Shire Council v Shirt* [1980] HCA 12; 146 CLR 40
Parties:	Coles Supermarket Australia Pty Ltd (Appellant) Nicole Harris (Respondent)
Representation:	**Counsel** K Rewell SC (Appellant)

	M Cranitch SC and S Hausfield (Respondent)	
	Solicitors	
	Moray and Agnew (Appellant)	
	Blumers Personal Injury Lawyers (Respondent)	
File Number:	ACTCA 16 of 2017	
Decision under appeal:	Court/Tribunal:	Supreme Court of the ACT
	Before:	Ashford AJ
	Date of Decision:	6 April 2017
	Case Title:	*Harris v Coles Supermarkets Australia Pty Ltd*
	Citation:	[2017] ACTSC 81

THE COURT

Introduction

1. The appellant operates a national chain of supermarkets. It employed the respondent for a short time late in 2009. The appellant appeals from a judgment and orders of a single judge of this Court: *Harris v Coles Supermarkets Australia Pty Ltd* [2017] ACTSC 81 ("*Harris*"). The trial judge found that the appellant was liable in negligence for injuries suffered by the respondent in the course of her employment.

2. A short time after commencing her employment, the respondent was rearranging stock on the higher shelves at the appellant's Tuggeranong store. To reach the higher shelves, she used a step, provided to her by the appellant, known as a "Safe-T-Step". It is a four-sided plastic object with an upper platform about 370mm from the ground and recessed triangular "halfway" steps, about 180mm from the ground on each of its four sides. It is roughly cube shaped, although slightly wider at the bottom than it is at the top. It appears the same when viewed from any one of its four sides.

3. The respondent fell to the ground when dismounting sideways via the halfway step to her right. The nature and extent of her injuries are not in issue on this appeal.

4. Before the trial judge, the respondent pleaded that the appellant knew or ought to have known that if it did not provide her with "adequate training and a safe work environment", she would be exposed to injury. The statement of claim also included an allegation that the appellant had failed to train her in how to safely climb up and down the step.

5. The respondent's evidence (which was accepted) was that she had worked her way down the supermarket aisle, dismounting the step sideways via the intermediate step to her right with her right leg, before stepping down to the floor with her left. She then kicked the step along the aisle, before stepping up again to reach the next portion of high shelving, repeating these manoeuvres as she made her way down each aisle. She had observed a co-worker using the step in that fashion and so had imitated that method.

6. The appellant denied liability. It alleged that the respondent had been trained in the safe use of the step by the provision of an induction booklet and by way of a training video.

7. The appellant's plea that it had provided adequate training was not made good on the evidence. Whilst it had prepared training materials in respect of the step for provision to its new employees, the trial judge held that the materials had not been brought to the respondent's attention, nor had she otherwise been instructed as to the safe use of the step. There is no challenge to those findings.

8. It is the appellant's alternative plea that now forms the subject of this appeal. The alternative plea was that the safe manner of using the step was obvious, such that no amount of training or supervision was necessary in any event. In the alternative, it was alleged that the respondent was guilty of contributory negligence because she had made a deliberate choice to use the step in a way that she knew or ought to have known would expose her to a risk of harm.

9. The two issues on this appeal are, first, whether the primary judge erred in concluding that the appellant had breached the duty of care it owed to the respondent by failing to take precautions against the risk of harm (particularly the precautions of training and supervision) and, second, whether the primary judge erred in concluding that the respondent was not guilty of contributory negligence.

10. It is convenient to deal first with the grounds of appeal impugning the conclusion that the appellant breached its duty of care.

Negligence

Issues arising on the appeal

11. It is not disputed that the appellant, as employer, owed the respondent, as employee, a duty of care at common law. As explained by the High Court in *Czatyrko v Edith Cowan University* [2005] HCA 14; 214 ALR 349 ("*Czatyrko*") at [12]:

> … An employer owes a non-delegable duty of care to its employees to take reasonable care to avoid exposing them to unnecessary risks of injury. If there is a real risk of an injury to an employee in the performance of a task in a workplace, the employer must take reasonable care to avoid the risk by devising a method of operation for the performance of the task that eliminates the risk, or by the provision of adequate safeguards. The employer must take into account the possibility of thoughtlessness, or inadvertence, or carelessness, particularly in a case of repetitive work.
>
> (footnotes omitted)

12. See also *Hamilton v Nuroof WA Pty Ltd* (1956) 96 CLR 18; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301.

13. On this appeal, it is the standard of care that is in issue, more precisely whether the appellant provided adequate safeguards against the risk of harm to which the respondent was exposed. It is not possible to answer that question without first identifying and articulating that risk: *Roads and Traffic Authority (NSW) v Dederer* [2007] HCA 42; 234 CLR 330 ("*Dederer*") at [59] (Gummow J). In our view, the risk may be described as the risk of an injury should an employee lose balance and fall when dismounting sideways from the step. Whilst the risk might be articulated in a more general fashion, doing so in the present case would not affect the ultimate result.

14. The relevant pleaded precaution was the provision of training, particularly a warning against the sideways use of the step. It appears that the discrete question of appropriate supervision was also the subject matter of evidence and submissions at trial, although it was not pleaded. There is no challenge to the findings of the trial judge in respect of

supervision merely on the basis that that particular precaution was not pleaded in the statement of claim.

15. Whether or not the appellant was negligent turned on the proper application of the *Civil Law (Wrongs) Act 2002* (ACT) ("the Act") to the facts. Sections 42 to 44 of the Act provide:

> **42 Standard of care**
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> For deciding whether a person (the ***defendant***) was negligent, the standard of care required of the defendant is that of a reasonable person in the defendant's position who was in possession of all the information that the defendant either had, or ought reasonably to have had, at the time of the incident out of which the harm arose.
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> **43 Precautions against risk—general principles**
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> (1) A person is not negligent in failing to take precautions against a risk of harm unless—
>
> (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
>
> (b) the risk was not insignificant; and
>
> (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
>
> (2) In deciding whether a reasonable person would have taken precautions against a risk of harm, the court must consider the following (among other relevant things):
>
> (a) the probability that the harm would happen if precautions were not taken;
>
> (b) the likely seriousness of the harm;
>
> (c) the burden of taking precautions to avoid the risk of harm;
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> (d) the social utility of the activity creating the risk of harm.
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> **44 Precautions against risk—other principles**
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> In a proceeding in relation to liability for negligence—
>
> (a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible; and
>
> (b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which it was done; and
>
> (c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in relation to the risk and is not of itself an admission of liability in relation to the risk.

16. It should first be observed that s 43 and s 44 are concerned with the "precautions against risk". They do not expressly provide for the circumstance in which the risk resulting in injury is one that is positively created by a defendant. At trial and on this appeal, the respondent's submissions proceeded from the assumption that the provisions were applicable in that the appellant failed to take certain precautions against a risk created by its provision to the respondent of the step for her use in the performance of a task. In the absence of a submission to the contrary, this Court should proceed on the same

assumption. The circumstance that the step was one provided by the appellant and formed a part of the workplace will be considered in the course of ascertaining the standard of care.

17. The appellant did not contend at trial (or on appeal) that the possibility of an employee dismounting the step in a sideways fashion was not reasonably foreseeable. Indeed, the appellant conceded that "the risk of harm was reasonably foreseeable" and that the risk was "not insignificant". Those concessions were sufficient to fulfil the requirements of s 43(1)(a) and (b) of the Act.

18. Grounds [1(b)] to [1(e)] of the Notice of Appeal ("NOA") allege that the trial judge erred by:

> …
>
> b) finding the Appellant's duty of care as employer extended to the provision of training and supervision to the Respondent in the use of a 'Safe-T-Step', being a step or stool in common use in supermarkets and similar retail outlets throughout Australia, when the safe use of that step was straightforward.
>
> c) failing to apply, or misapplying, s.42, s.43 and s.44 of the *Civil Law (Wrongs) Act* 2002 (ACT).
>
> d) finding that the provisions of that Act required the Appellant to take the precaution of explicitly instructing its employees in the use of the Safe-T-Step, when the proper method of using the step was obvious to any adult employee; supervision to ensure that the step was being used in the manner for which it was obviously intended was not required.
>
> e) giving undue weight to a spreadsheet analysis of incidents involving the use of the Safe-T-Step at the Appellant's stores across Australia for the years 2004 to 2009; properly understood, the frequency of incidents involving employees stepping down from such units, compared to the number of uses each day and year in stores Australia-wide, was infinitesimally low, and insufficient to require any precautions to be taken by the Appellant.

19. It is not in dispute that the step was in common use in supermarkets throughout Australia as asserted in ground [(1(b)].

20. Submissions on the appeal focussed, among other things, on two factual issues:

    (a) whether the use of the step was "straightforward" or "obvious" as asserted in grounds [1(b)] and [1(d)] (the "obviousness issue"); and

    (b) whether the probability that the harm would happen if precautions were not taken ought to have been assessed by the trial judge as "infinitesimally low" as asserted in ground [1(e)] (the "probability issue").

21. The appellant submitted that these questions interrelate in the sense that the "infinitesimally low" occurrence of incidents involving the step was a reflection of, and explained by, the obviousness of its safe manner of use. From there, the appellant submitted that the conclusion that it was negligent revealed a misapplication of s 43(2) of the Act. For the purposes of s 43(2)(a), it was submitted, the trial judge ought to have concluded that the probability of the harm was infinitesimally low and thus, it was submitted, wholly determinative of the question of breach. The trial judge, it was submitted, ought to have decided the question of breach by reference to s 43(2)(a) such that it was unnecessary to consider the matters referred to in ss 43(2)(b), (c) or (d). It was in this respect that the trial judge was said to have erred in principle.

The obviousness issue

22. The obviousness issue was expressed in different ways in the course of submissions. The essence of the argument is that the dangers associated with dismounting sideways from the step are so obvious that no reasonable adult employee would resort to using it in that way. It is to be borne in mind that the appellant conceded at trial that the risk of harm was reasonably foreseeable and "not insignificant". The obviousness issue is to be considered for the different purpose of establishing how a reasonable person in a defendant's position would have responded to the risk.

23. The issue of obviousness was fairly raised by the appellant at trial. Its resolution bore on the standard of care and thus the question of breach: *Woods v Multi-Sport Holdings Pty Ltd* [2002] HCA 9; 208 CLR 460. It also bore on the question of contributory negligence (as to which see [59] – [64] below). It was a topic that ought to have been the subject of a specific finding and cogent reasons based on the evidence.

24. Two ergonomists gave expert evidence at trial. Each of them expressed the opinion that dismounting the step sideways, as the respondent had done, was unsafe. That method of dismounting the step would, the ergonomists said, place the body in a destabilised position because the right foot must enter the recessed halfway step at an awkward inward angle. A stable posture could be achieved by dismounting directly backward, inserting the foot, toes first, into the recessed halfway step. It is apparent that the step could be dismounted to the right in that way by first turning the body 90 degrees left, before stepping directly backward to the floor. As a lesson in ergonomics, none of that is contentious.

25. The trial judge found that "calling a step a safety step does not make it so" and that the step was "not a dangerous step, per se": *Harris* at [60] and [61]. It is otherwise implicit that the evidence of the ergonomists was accepted insofar as it explained the risk associated with using the step in a sideways fashion. These findings go to the question of whether there was a reasonably foreseeable and not insignificant risk of harm associated with the step, but they do not directly engage with the different question of whether the risk was, or ought to have been, obvious to the appellant's adult employees. Whether or not the safe or unsafe manner of using the step was "obvious" was not the subject of an express factual finding. In our view, it cannot be said that the trial judge implicitly decided that discrete issue against the appellant. An implication of that kind ought not to be drawn in circumstances where it might also be surmised that the trial judge failed to recognise the significance of the factual question to the task to be performed under s 43(2) of the Act and to the task of determining the claim of contributory negligence, and so erroneously left the question undetermined.

26. A court on appeal should not lightly interfere with findings of fact made at first instance: *Fox v Percy* [2003] HCA 22; 214 CLR 118 at [22] – [31]; *Robinson Helicopter Company Inc v McDermott* [2016] HCA 22; 90 ALJR 679 at [43]). However, the need for appellate restraint does not arise where a material question clearly arose for determination at first instance but has been left unanswered. In such cases, the Court on appeal must determine whether the failure to answer the question might materially have affected the outcome and, in so doing, may determine the factual question on the evidence before the judge at first instance.

27. For the reasons that follow, it has not been shown that the risks of injury inherent in dismounting the step sideways was so obvious that no reasonable person in the

appellant's position ought to be expected to warn against it (whether by training, supervision or otherwise).

28. The appellant relies on the evidence of an ergonomist, Mr Dohrmann. His evidence is relevantly summarised by the trial judge as follows (*Harris* at [34]):

> He said the obvious way of stepping onto this step was by 'approaching it straight-on and using the intermediate step, and then going to the top step on the same side'. In getting down he said to 'use a single side one foot at a time, coming backwards'.

29. Whether or not the safe or unsafe manner of using the step ought to be obvious to an adult employee in the appellant's supermarkets is not properly the subject of expert evidence. The risk of harm is either obvious to such a lay person or it is not. Obviousness is to be assessed objectively, having regard to all of the circumstances in which the step was provided and used. The context is one in which a device was provided by an employer to an adult employee who was instructed to use it to rearrange stock on higher shelves. No alternative device was provided. An employee of ordinary height could not efficiently perform the allocated task except by the use of the step. The step formed a part of the workplace. An adult employee in the respondent's position would not have the benefit of an ergonomist's opinion or figurative diagrams demonstrating how various stable or unstable postures might be adopted or avoided when using the device in different ways. It was not suggested by the appellant that the step could and should be subject to detailed inspection and consideration by its employees before being put to use. Nor was it suggested that a closer inspection would reveal an obvious danger that a cursory inspection would not.

30. The respondent's evidence was that she was not aware of the danger presented by using the step sideways until some time after her accident. She said that the step had four sides and so she assumed it would be "fine" to use any one of them. In light of the outward appearance of the step, that assumption is neither unreasonable nor startling. The step neither obviously encourages nor obviously discourages the user to mount or dismount from any one of its four sides, nor to mount or dismount in a backward or sideways direction relative to the front of the body. Unlike a regular ladder, the step is square-shaped and wide at its base. It is obviously designed to provide a stable platform upon which to stand. There is nothing to suggest that it would topple if weight were placed on any one of its sides, and the accident that in fact occurred did not involve the toppling of the device itself. It is not a high structure. More specifically, it is not so high so as to invite extreme caution by virtue only of the likely distance of a fall.

31. At the very least, whilst there is a foreseeable and not insignificant risk of harm arising from a particular method of using the step, the risk is not so obvious so as to provide a complete answer to the questions of standard of care and breach or, for that matter, the question of contributory negligence (as to which see [59] – [64] below). To the extent that the grounds of appeal contend that the issue of obviousness was determinative of those questions, the contention is rejected.

32. It remains to consider two authorities upon which the appellant relied: *Vincent v Woolworths Ltd* [2016] NSWCA 40 ("*Vincent*") and *Cowie v Gungahlin Veterinary Services Pty Ltd* [2016] ACTSC 311 ("*Cowie*").

33. In *Vincent* the plaintiff was injured when she dismounted a step not relevantly different to that under consideration in this case. The plaintiff stepped directly backwards from the step into the path of a shopping trolley passing behind her. Her hip hit the trolley and she fell heavily. The plaintiff's claim in negligence was dismissed at first instance and her

appeal from that judgment was also dismissed. The trial judge found (and the New South Wales Court of Appeal affirmed) that the simple nature of the task was such that the safe use of the step could be left to an adult employee.

34. The plaintiff in *Cowie* was injured as a result of falling from a stepladder. The ladder tipped and fell when the plaintiff leaned to one side to place items on a shelf. Mossop AsJ (as his Honour then was) held that a stepladder was an ordinary piece of equipment and that the task in question (that of using a common stepladder) was simple and domestic in nature such that the standard of care did not require the provision of training.

35. As has already been observed, the task of ascertaining the standard of care involves, as a critical step, the proper articulation of the risk of harm against which it is alleged a defendant ought to have taken precautions. The risk in *Vincent* was the risk of a collision and fall should the plaintiff step backwards into a moving obstacle. The risk in *Cowie* was the risk of a two footed ladder toppling over should the user lean sideways. The task of articulating the risk, and thus the standard of care, is highly fact specific. As a consequence, there cannot be, for the purposes of the law of negligence, a fixed category of case (such as a "ladder case") according to which the outcome may be predicted. Attempts to use factual precedents and parallels are likely to detract from the legal principles and so lead to error: *Vairy v Wyong Shire Council* [2005] HCA 62*;* 223 CLR 422 ("*Vairy*") at [21], [28] – [32] (McHugh J); *Dederer* at [56] – [58] (Gummow J). The cases do not support the allegation of obviousness on the facts in the present case. Nor do the cases establish any proposition that there is, or is not, a duty to "warn" of the risks of injury when using a device in the nature of a step or ladder.

36. In *Vairy*, McHugh J was concerned with the standard of care owed by a public authority to a person injured in a diving accident in an area within the authority's responsibility. His Honour said: at [29], [31]:

> 29 As I have already indicated, at times during the present appeal and the appeal of *Mulligan v Coffs Harbour City Council* heard at the same time, the argument for various parties did not keep the issues of duty and breach distinct. The arguments were often clouded by reference to phrases such as 'the scope and content of duty' and 'duty to warn'. Judges and lawyers often use such phrases. When they are understood as commensurate with the standard of care required to discharge the defendant's duty of reasonable care, they cause no harm. But often enough they are used as if they themselves define or were the duty, or part of it. Using them creates the risk that they will be treated as stating legal propositions and convert what is a question of fact into a question of law. Hence, their use invites error in analysis, particularly the analysis of judicial precedents.
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> …
>
> 31 The common law has no need to – and does not – categorise the cases in which the defendant was held to have breached a standard of care. It is unlikely that 'diving cases' will ever constitute such a category. The common law categorises cases – for the purposes of ascertaining the circumstances in which a defendant owes the plaintiff a duty of care – according to the *relationship* between plaintiff and defendant and not the *activity* that caused the plaintiff harm. In cases where the defendant is a public authority, the act of diving is not apt to place the diver in a relationship with the defendant. It is not the act of diving, but the act of entering on to the land that the respondent had a statutory power to control and manage, that made the appellant a member of a class to whom, in accordance with precedent, the Council owed a duty to take reasonable care. Thus, in determining whether the Council breached the standard of care that it owed to the appellant, references to other diving cases – like this Court's decision in *Nagle* – are not decisive. Their reasoning is 'entitled to

respect' and may be useful. But that is all. The appellant's reliance on *Nagle* was misplaced.

(original emphasis, footnotes omitted)

37. In *Dederer* Gummow J issued a similar caution. His Honour said at [58]:

> The utility of factual parallels lies not in determining the correctness of decisions of fact, but rather in determining whether the correct legal tests were applied. Apothegms relating to factual matters are unlikely to focus the mind on the resolution of the legal questions that were presented.

The probability issue

38. The trial judge found that there was a "likelihood of accidents" involving the step and that there had been "many incidents involving its use, such that a risk assessment was thought necessary and was done": *Harris* at [54], [56].

39. Her Honour's findings about the "risk assessment" were based on a spreadsheet prepared by the appellant in the course of its business prior to the respondent's accident. It was tendered by the respondent as part of her case and forms the subject of [1(e)] of the NOA. Her Honour said this of the spreadsheet (*Harris* at [36] – [39]):

> 36 An analysis of incidents involving use of the safety step at Coles stores across Australia was tendered. This was set out in a spreadsheet and covers the years 2004 to 2009, 385 incidents are noted. On perusal of the spreadsheet, a wide variety of incidents are set out with a description of the incident and any injuries sustained. All of these are very brief and very imprecise.
>
> 37 There is a section headed 'Severity' which notes if incidents were classified as minor, moderate, major, or not specified. It is not known who made the decision as to how the classification was made in respect of either the incident or the injuries sustained. Some of the incidents relate to injuries stepping off the safety step, however it is all so imprecise as to be of little utility, other than to demonstrate that this step does cause problems for some of the workers and injury has resulted from its use.
>
> 38 Ms Whitby perused the spreadsheet. She analysed that some 47 per cent of the incidents involved persons getting down from the step. Mr Dohrmann [an ergonomist] agreed that this was a significant percentage and he opined that on those statistics a risk analysis was warranted. Such an analysis apparently identified use of the safety step as a medium risk in ascending or descending the step. The risk assessment was apparently done in respect of Coles stores as well as other merchandisers.
>
> 39 One of the recommendations from the risk assessment was that there should be training and supervision, to always use the halfway step, a consideration to be given to use a different step design, including steps or handrails. SWP016 of course advises line managers are responsible for ensuring team members are trained in safe work practices and in respect of the safety step, to use the halfway step when available to ascend or descend.

40. SWP016, to which her Honour referred, is a safe procedures worksheet. It formed a part of a bundle of induction materials that the appellant alleged (unsuccessfully) had been brought to the respondent's attention during a training day at the commencement of her employment. Among other things, SWP016 stated:

> Always use the safety step to access items above shoulder height. Always use a ladder if you cannot safely reach items from the safety step.
>
> Always position the safety step close to the working area allowing enough room to carry the item in front of you. Use the halfway step (where available) to ascend / descend the safety step.
>
> …

Always step down backwards from the safety step never step forwards or sideways.

41. Against the background of that evidence, Counsel for the appellant commenced submissions on the appeal with what he fairly acknowledged was a rough and ready mathematical calculation. Counsel's starting point was the undisputed fact that the appellant operated 750 stores throughout Australia. The safety step was in use in every one of them on a daily basis. On the assumption that the step was used 11 times each day in each supermarket, the rate of incidents occurring whilst dismounting the step (expressed as a percentage of all uses) was .001% and thus, Counsel submitted, properly characterised as "infinitesimally low". The percentage would, it was submitted, be even more miniscule if the incidents were confined to those involving injuries caused by dismounting the step sideways and if the true (and much larger) number of actual uses was inserted into the equation. Counsel submitted that the trial judge ought to have assessed the probability of harm under s 43(2)(a) in that mathematical fashion and then proceeded no further to consider the matters referred to in ss 43(2)(b), (c) and (d).

42. Relatedly, it was submitted that the trial judge erred by placing too much weight on the spreadsheet so as to support a finding that there had been "many incidents" involving the use of the step. Before the trial judge, submissions concerning the quality of the evidence, and the use to which it might be put, proceeded as follows:

> HER HONOUR: …You classified minor injuries, major injuries. That's a very broad brush approach.
>
> MR CAVANAGH: It is. It is but it's the same approach – we're just trying to deal with the statistical analysis of the plaintiff, if I can put it that way, your Honour. People could hurt themselves in many ways stepping down from the safety step. They could hurt themselves in many ways stepping down from anything, a foot higher or six …
>
> HER HONOUR: If I could just take that a little further, it doesn't take it very far. I'm just reading one at random here on the first page:
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> > *Stepped off the safety step, slipped off the step, landed on the floor on his back and has a small laceration to the right wrist.*
>
> I don't know what that means. It could mean that he had a disc injury. It could mean that he – it could mean anything.
>
> MR CAVANAGH: That's really the point we're trying to make as well, your Honour, but the plaintiff seems to be saying that Coles was on notice that this was a dangerous piece of equipment and the plaintiff says, 'We can prove that through relying in this spreadsheet.' That must be the effect of the plaintiff's argument. We say hold on – and really why I called that other witness is this. There's 750 Coles stores. There's nearly 100,000 employees of Coles. You've got – I can't remember, I call it 300 for the sake of – 350 incidents happening in a five-year period, incidents. Your Honour says, 'Well, I don't know whether they're major or minor, whatever they are."
>
> HER HONOUR: Somebody has classified them in severity but I don't know what that means either. I mean, it's some lay observation which doesn't take me very far at all.
>
> MR CAVANAGH: I understand that. The point being, your Honour, if a step like this is used 100 times a day in any given store, one only has to do the maths to figure out that the actual number of incidents recorded is actually not very high, because if it's used 100 times a day in one store and there's 750 stores, that means it's being used 75,000 times a day.
>
> HER HONOUR: I take what you say.
>
> MR CAVANAGH: The fact that there's 350 incidents over five years, that's 50 incidents a year ... It adds up to about 3.5million uses a year and we have 50 incidents a year, mostly, we would submit on analysis, minor.
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> HER HONOUR: You can take statistics to do anything.

MR CAVANAGH: Exactly.

HER HONOUR: What you've really got to look at is what happened to this lady and how she was instructed to use it and what she did.

MR CAVANAGH: I accept that completely, your Honour, but I have to deal with what seems to be an important part of the plaintiff's case. We've got this spreadsheet and Ms Whitby, therefore, somehow uses it to prove that in some way we're on notice it was unsafe and all that sort of thing. I'm just [adducing] all that evidence to say that it is Coles and the idea of 350 incidents in Coles is not high compared to the number of times it's being used. That's really as far as I wanted to take that evidence, your Honour, that it doesn't establish anything at all.

43. The submission now advanced on the appeal (namely that the low probability of harm was wholly determinative of the question of breach) does not appear to have been advanced before the trial judge, or at least not with the same clarity of expression. As now expressed, the submission should be rejected.

44. On appeal, Counsel did not explain how the appellant's adoption of the phrase "infinitesimally low" might be reconciled with its concessions at trial that there was a foreseeable risk of harm and the risk was "not insignificant" within the meaning of s 43(1)(b) of the Act. Counsel urged upon this Court an interpretation of the Act that suggested that the enactment of s 43(2) had as its underlying purpose the confinement of cases in which a party in the appellant's position may be found liable for failing to take precautions against infinitesimally low risks. Whilst we accept that to be an objective of the Act, in our view it is an objective that is achieved by the enactment of s 43(1)(b) and not by s 43(2)(a), (b) or (c). Section 43(1)(b) modifies the common law so as to require not only that a risk is foreseeable (in the sense that it is not far-fetched and fanciful) but to require, *in addition*, that the risk is "not insignificant". The appellant's submission that the probability of harm was "infinitesimally low" in our view cannot be comfortably reconciled with its concession at trial that the risk was not insignificant. The tension might be explained by the use of phrases such as "infinitesimal" in common law cases to describe the chance of a risk occurring for the purposes of determining the antecedent question of reasonable foreseeability: *Wyong Shire Council v Shirt* [1980] HCA 12; 146 CLR 40 ("*Shirt*") at 45 – 46 (Mason J). The existence of a duty of care is not in issue in the present case. The case concerns not the foreseeability of harm, but what (if any) precautions the appellant ought reasonably to have taken in response to it. So far as it can be done, the editorial descriptor "infinitesimally low" ought to be put aside so that the essence of the appellant's case may be understood in a way that does not detract from the concession at trial.

45. It is true that the Act contemplates that a risk of harm may be "not insignificant" and yet a reasonable person in the defendant's position may, having regard to the low probability of harm *and other things*, properly respond to the risk by taking no precautions against it at all. The same result might ensue at common law in respect of a reasonably foreseeable risk that is unlikely to transpire: *Shirt* at 47 – 48 (Mason J):

46. However, it is quite a different thing to claim that the probability of harm is so low that all other factors ordinarily taken into account to ascertain the standard of care *must* be ignored. The task to be performed pursuant to s 43(2) (just as at common law) involves the balancing of countervailing considerations, such that a reasonable person in a defendant's position may, in all of the circumstances, be found to have a duty to take precautions against even a very low probability of harm. Whether or not that is the case will depend on the application of the test set down by Mason J in *Shirt* and explained by

Hayne J in *Vairy*. The test, known as the "negligence calculus" is expressed in *Shirt* (at 47 – 48) as follows:

> In deciding whether there has been a breach of the duty of care the tribunal of fact must first ask itself whether a reasonable man 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 plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man'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 responsibilities 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 man placed in the defendant's position.
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> 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 nonetheless 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.

47. Despite its name, the task of performing the "negligence calculus" is not an exercise in mathematics. It is concerned with standards of behaviour and so involves a normative judgment: *Graham Barclay Oysters Pty Ltd v Ryan* [2002] HCA 54; 211 CLR 540 at [48] – [52] (Gleeson CJ). On such an evaluation, the mathematical laws of probability may well be relevant and useful, but they can never be determinative. Similarly, in cases where the Act applies, the task involves the application of a statute, properly construed, to the facts as properly found. The facts may, of course, include numerical realities such as those that are contained in, or may be inferred from, the respondent's "very brief and very imprecise" spreadsheet. But such facts must in all cases be weighed in the balance, together with other relevant factors.

48. It may be assumed, for the sake of what follows, that the appellant is correct to say that the rate of mishap (whether or not resulting in injury) when dismounting the step, expressed as a percentage of the total occasions of its use, is .001%. The assumption will be made notwithstanding the reliability of the evidence upon which it is based and no matter how dubious the underlying statistics.

Application of s 43(2) of the Act to the facts

49. Having summarised the evidence and determined the issue of foreseeability, the trial judge turned to consider the standard of care. Her Honour reasoned:

> 56 It seems trite to say that this is an ordinary piece of equipment, and in use in very many supermarkets. In the ordinary, everyday observation of this step, it would appear its use is commonplace, yet there have clearly been many incidents involving its use, such that a risk assessment was thought necessary and was done, although it does not seem that the recommendations were followed through.
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> 57 In determining the question of whether there were reasonable steps the defendant could have taken to prevent the accident, the main thrust of the plaintiff's submissions is that the plaintiff was not trained, or not properly trained, in the use of that step. And in any event, there was no supervision of her use of the step, to ensure its safe use by her.
>
> 58 The plaintiff submits that both experts agree the manner of use of the safety step by the plaintiff was dangerous and it was the plaintiff's evidence she had followed the practice of the fellow employees. She had performed the presentation on three or

four shifts only. It is submitted that there was a failure by the defendant to observe and supervise the plaintiff and to ensure she had been properly trained in the appropriate use of the step.

59 It seems to me from the evidence there was a large volume of material given to new employees at induction. Some was relevant to the job to be performed and some was probably peripheral or even irrelevant. Neither the plaintiff nor Mr Alonso had much recollection of what happened at the induction. Various items were initialled, although it seems clear the plaintiff had little comprehension of what many of the tasks involved. She and Mr Alonso both attended on the same day, yet the countersigning of their documentation was done on different days, which may indicate a slipshod method of completion of the form.

60 Calling a step a safety step does not make it so. At first blush, this seems a straightforward item in common use, yet the defendant's spreadsheet indicates 47 per cent of accidents using the step occurred in getting down from the step. The method of classification of injuries is cursory. However, it was thought necessary to do a risk assessment, as I have previously noted. As I have also previously noted, recommendations were made, including supervision and training in the use of the step. There is nothing in the evidence which would suggest to me that there was ever any supervision of the plaintiff and her use of the step, such as telling her not to step off sideways or to always step off backwards, and there is no clarification of the contradictory information shown in the short video and in SWPO16.

61 This is not an exercise in hindsight. This is not a dangerous step, per se, but this was an accident the defendant, as an employer, should have and could have avoided by proper supervision and training of the plaintiff and other employees.

62 This claim can be distinguished from Vincent (supra) in that whilst there was also use of a safety step in that case, the plaintiff agreed she had been given a demonstration by her employer as to how to use that step and to be careful in getting up and down and she collided with a shopping trolley when getting down. Whilst the initial judge found there to be a reasonably foreseeable risk of harm, there was a very low probability of the collision with a trolley and therefore the plaintiff had not proved the risk to be not insignificant.

63 I am satisfied on the balance of probabilities that the plaintiff has established liability on the part of the defendant and has met the provisions of the Civil Law (Wrongs) Act 2002. I do not accept there to have been the requisite training in the use of the step and there appears to have been no supervision or monitoring of the plaintiff in the performance of her work whilst using the step.

50. Her Honour appears to have placed considerable emphasis on what the appellant subjectively knew (arising from the risk assessment), what it subjectively intended to do (provide training to the respondent in the use of the step) and what the appellant could have done to prevent the respondent's now-known injury. Although that is suggestive of a retrospective approach, the appellant's written submissions did not impugn the judgment on the ground that her Honour failed to adjudge the standard of care prospectively: cf *Dederer* at [65] (Gummow J); *Vairy* at [128] (Hayne J). There is no ground of appeal directly going to that issue. Rather, submissions concerning the alleged misapplication of the Act focused firstly on the obviousness issue, secondly on the probability, and thirdly on an all-encompassing submission to the effect that use of the step was overly simple so as to justify leaving the task to the ordinary care and skill of the worker.

51. The contention as to obviousness must be rejected for the reasons already stated.

52. As to the rate of incidents, and accepting the rate to be as asserted by the appellant, the rate is not to be fixed with the adjective "low" in the abstract. Rather, the rate of incidents is to be weighed against other considerations, some of which have already been

mentioned. The trial judge properly referred to the opinion of an ergonomist, Mr Dohrmann, who expressed the view that the rate of incidents was sufficient to warrant the appellant undertaking a risk assessment in the course of its business in relation to the causes of the mishaps. It was not erroneous for the primary judge to view the rate of incidents through that broad lens. If the rate of employee mishaps occurring when dismounting the step was to be expressed (correctly) as approximately 24 per year, the probability of harm is more difficult to characterise as "low", even having regard to the number of stores operated by the appellant and the common use of the step.

53. Among the other relevant considerations was the burden that must be shouldered by the appellant should the standard of care be found to require the taking of precautions in the nature of training and supervision, including in respect of similar risks of harm for which the appellant was responsible: see s 43(2)(c) and s 44 of the Act. On the evidence before the trial judge, that burden was not shown to be an onerous one.

54. The fact that the appellant had already assumed the responsibility to train its employees in respect of the use of the step was admissible and relevant to determine the discrete issue of whether the legal imposition of such a burden would be unreasonably burdensome. On the facts, the burden of training was neither inconvenient, nor impractical, nor prohibitively expensive. All of that is demonstrated by evidence of the appellant's voluntary assumption of the burden of preparing training materials relating to the use of the step. To have regard to the appellant's voluntary assumption of that burden is not to determine the standard of care retrospectively. It is simply to point to the forensic obstacle faced by the appellant at trial insofar as it claimed that the precautions under consideration would be impractical, unreasonably inconvenient or prohibitively expensive having regard to the low risk of harm.

55. We would arrive at the same conclusion in relation to the precaution of supervision. The trial judge (at [41]) referred to evidence (which she implicitly accepted) to the effect that a line manager should supervise workers and see that safe work practices were being followed, and if workers were using the step in a manner not prescribed, then management should discourage the practice and correct it. It was not shown on the evidence that the imposition of a legal requirement for supervision would be unreasonably burdensome in all of the circumstances, even having regard to the numerically low rate of incidents evidenced by the spreadsheet.

56. As to simplicity, in our view, to ask whether the use of the step was "simple" is to ask the wrong question. The risk inherent in the task did not result from its complexity. Rather, the risk arose by the foreseeable use of a simple device in a manner said by both parties' expert witnesses to be dangerous. The danger was known to the appellant, and it was the appellant that provided the device to the respondent and directed her to use it. Unlike a case in which a worker collides with another object when stepping backwards from a height without first glancing for obstacles, and unlike a case in which a worker leans sideways on a three-footed ladder so as to throw it off balance, the danger inherent in the respondent's manoeuvre was not so obvious that it could reasonably go without saying. Nor was the use of the step in a sideways manner reckless or "unnecessary". The respondent gave evidence that she perceived the use of the step in a sideways motion to be more productive because she could immediately kick the step further along the aisle and then remount from the same side. It seems to me that one reason the risk of harm was foreseeable and not insignificant was the circumstance that employees charged with the task of repeatedly mounting and dismounting the step to work the length of an aisle might reasonably be expected to find the most efficient use of time and space in which to

complete the work. To the extent that the respondent's method of using the step avoided the need to turn the body before stepping down, the method was a timesaver. The risk that an employee might use the step in that way and so be exposed to a risk of injury was foreseeable for that very reason.

57. The trial judge did not err in her ultimate conclusion that the standard of care required the taking of the precautions in the nature of training and supervision. Conversely, the primary judge did not err in rejecting the submission that a reasonable person in the appellant's position would do nothing in response to the risk.

58. The grounds of appeal challenging the conclusion that the appellant was liable in negligence should be rejected.

Contributory negligence

59. The substantive grounds of appeal impugning the conclusion that the respondent was not guilty of contributory negligence are expressed at [1(g)] and [1(h)] of the NOA as follows:

> g) In considering the question of contributory negligence, Ashford AJ asked herself the wrong question, namely whether the Respondent used the Safe-T-Step contrary to a directive by the Appellant. The correct question was whether the Respondent used the step in a way she knew or ought to have known exposed her to a risk of harm.
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> h) If the Appellant was negligent, Ashford AJ erred in failing to find that the Respondent was guilty of contributory negligence to the extent of at least 25% in stepping down to the side of the Safe-T-Step.

60. As the appellant correctly submitted, the test is whether the respondent used the step in a way that she knew or ought to have known exposed her to a risk of harm.

61. The evidence before the trial judge does not demonstrate that the respondent in fact knew that her method of using the step exposed her to a risk of harm. The trial judge did not err in failing to make a finding that the respondent was guilty of contributory negligence for that reason.

62. The remaining question is whether the respondent ought to have known that she would be exposed to a risk of harm by using the step in the manner that she did. Submissions in respect of that question went no further than the contention that the safe use of the step was obvious and that the task allocated to the respondent was simple. Those contentions must be rejected for the reasons already given.

63. The finding of the trial judge that the respondent did not act contrary to a directive given by the appellant was factually correct. Whether or not the respondent acted contrary to any such directive was clearly relevant, although not determinative. In *Czatyrko* the High Court overturned a finding of contributory negligence against a worker who suffered injuries when he fell backwards from a truck. The worker had not checked to ensure that a safety platform remained in place behind him before stepping backwards. The High Court said (at [18]):

> In the present case, the appellant did no doubt omit to take a simple precaution of looking to see whether the platform was raised before stepping on to it, and this omission was a cause of his injuries. But in acting as he did, the appellant did not disobey any direction or warning from the respondent. No directions or warnings of any kind were given by the respondent in relation to the use of the platform. Furthermore, both the appellant and Mr Fendick were under pressure from their supervisor to complete the job promptly. The work was repetitive. In all of these circumstances it presented a fertile field for inadvertence. The onus of proving contributory negligence lay upon the respondent. This

> it failed to do in this case. The appellant's attempt to step on to the platform in the mistaken belief that it was still raised, and in an effort to finish loading the truck, was the product of nothing more than 'mere inadvertence, inattention or misjudgment'. It was not a remote risk that the appellant might step back without looking behind him. His actions were neither deliberate, intentional, nor in disregard of a direction or order from the respondent. No finding of contributory negligence should have been made. …
>
> (footnote omitted)

64. Similarly, it is not enough to say that the respondent on the present appeal could have taken a simple precaution against the risk of harm by stepping directly backwards from the step rather than sideways. It is reasonable for an employee in the respondent's position to expect that if there was an unsafe method of using the step that was not otherwise obvious upon a cursory inspection, the danger would be brought to her attention and she would receive some instruction as to its safe method of use. It has not otherwise been shown on the evidence that the appellant ought to have known about the risk such that she should be liable in contributory negligence for her injuries. If the trial judge failed to consider the multitude of considerations relevant to adjudging contributory negligence, the error does not justify a departure by this Court from the ultimate result.

65. The appeal should be dismissed.

I certify that the preceding sixty-five [65] numbered paragraphs are a true copy of the Reasons for Judgment of the Court.

Associate:

Date: 29 June 2018