

# HIGH COURT OF AUSTRALIA

FRENCH CJ,  
KIEFEL, BELL, GAGELER AND NETTLE JJ

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KATHRYN DEAL

APPELLANT

AND

FATHER PIUS KODAKKATHANATH

RESPONDENT

*Deal v Father Pius Kodakkathanath*  
[2016] HCA 31  
24 August 2016  
M252/2015

## ORDER

1. *Appeal allowed.*
2. *Set aside the order of the Court of Appeal of the Supreme Court of Victoria made on 24 July 2015.*
3. *Remit the matter to the Court of Appeal for determination.*
4. *The respondent pay the appellant's costs of the appeal to this Court and of the appeal to date in the Court of Appeal.*

On appeal from the Supreme Court of Victoria

### Representation

A G Uren QC with A D B Ingram for the appellant (instructed by Melbourne Injury Lawyers)

M F Wheelahan QC with S E Gladman for the respondent (instructed by Minter Ellison Lawyers)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.



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## CATCHWORDS

### **Deal v Father Pius Kodakkathanath**

Occupational health and safety – Statutory duty – Occupational Health and Safety Regulations 2007 (Vic), regs 3.1.1, 3.1.2, 3.1.3 – Duties of employers in relation to hazardous manual handling tasks – Where primary school teacher tasked to use step ladder to remove papier mâché displays from pin-board on classroom wall – Where displays unstable or unbalanced, or difficult to grasp and hold – Where task constituted hazardous manual handling task – Where in course of task teacher fell from step ladder and injured knee – Whether evidence capable of supporting cause of action for breach of statutory duty – Whether risk of injury amounted to risk of musculoskeletal disorder "associated with a hazardous manual handling task" – Whether sufficient evidence for jury to infer it was reasonably practicable for employer to identify task as involving hazardous manual handling.

Statutes – Interpretation – Remedial legislation – *Occupational Health and Safety Act* 2004 (Vic) – Where Act and Regulations intended to protect employees against risk of injury in course of work – Where legislation imposes civil penalties on employers for breach of statutory duty – Whether fact of civil penalty requires narrow interpretation of provision.

Words and phrases – "associated with", "close connection", "combined in terms of circumstances", "combined in terms of classification", "hazardous manual handling task", "musculoskeletal disorder", "real risk", "reasonably practicable", "*Shirt calculus*".

*Occupational Health and Safety Act* 2004 (Vic), ss 2(1), 4, 20, 21, 158.

Occupational Health and Safety Regulations 2007 (Vic), regs 1.1.1, 1.1.5, 1.1.7, 3.1.1, 3.1.2, 3.1.3.



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1 FRENCH CJ, KIEFEL, BELL AND NETTLE JJ. This is an appeal from a judgment of the Court of Appeal of the Supreme Court of Victoria<sup>1</sup>, on appeal from the County Court of Victoria. The appellant's claim at first instance was for damages for a knee injury which she suffered in the course of her employment as a primary school teacher when she fell from a step ladder while removing papier mâché displays from a classroom pin-board. At trial, the appellant alleged that her injury was caused by the respondent's negligence or breach of statutory duty arising under regs 3.1.1, 3.1.2 and 3.1.3 of the Occupational Health and Safety Regulations 2007 (Vic) ("the Regulations"). Those provisions of the Regulations require an employer to identify tasks involving hazardous manual handling, control the risk of a musculoskeletal disorder associated with a hazardous manual handling task and review any risk control measures.

2 The trial judge took the issue of breach of statutory duty away from the jury. His Honour ruled that the evidence was incapable of supporting a finding that the appellant was engaged in a hazardous manual handling task within the meaning of reg 3.1.2. On appeal, a majority of the Court of Appeal (Warren CJ and Ashley JA) held that there was evidence capable of supporting a finding that the appellant was engaged in a hazardous manual handling task but that the association between the generic nature of the task of removing the displays from the pin-board and the risk of the appellant's injury was not sufficiently close to come within reg 3.1.2. Digby AJA dissented. For the reasons which follow, the appeal should be allowed.

#### Relevant legislative provisions

3 Section 2(1) of the *Occupational Health and Safety Act* 2004 (Vic) ("the Act") provides that the objects of the Act are:

- "(a) to secure the health, safety and welfare of employees and other persons at work; and
- (b) to eliminate, at the source, risks to the health, safety or welfare of employees and other persons at work; and
- (c) to ensure that the health and safety of members of the public is not placed at risk by the conduct of undertakings by employers and self-employed persons; and

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1 *Deal v Kodakkathanath* (2015) 45 VR 372.

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- (d) to provide for the involvement of employees, employers, and organisations representing those persons, in the formulation and implementation of health, safety and welfare standards—

having regard to the principles of health and safety protection set out in section 4."

4 Section 4 of the Act identifies five principles of health and safety protection:

"(1) The importance of health and safety requires that employees, other persons at work and members of the public be given the highest level of protection against risks to their health and safety that is reasonably practicable in the circumstances.

(2) Persons who control or manage matters that give rise or may give rise to risks to health or safety are responsible for eliminating or reducing those risks so far as is reasonably practicable.

(3) Employers and self-employed persons should be proactive, and take all reasonably practicable measures, to ensure health and safety at workplaces and in the conduct of undertakings.

(4) Employers and employees should exchange information and ideas about risks to health and safety and measures that can be taken to eliminate or reduce those risks.

(5) Employees are entitled, and should be encouraged, to be represented in relation to health and safety issues."

5 Section 21 of the Act establishes a duty on employers, so far as is reasonably practicable, to provide and maintain for employees a working environment that is safe and without risks to health.

6 The Regulations are promulgated pursuant to s 158 of the Act. Section 158 of the Act provides that the Governor in Council may make regulations for or with respect to, amongst other things, regulating or requiring the taking of any action to avoid an incident at a workplace and any other matter or thing required or permitted by the Act to be prescribed or that is necessary to be prescribed to give effect to the Act.

7 Regulation 1.1.1 provides that one objective of the Regulations is to further the objects of the Act by, amongst other things, providing for health and safety in relation to workplaces and hazards, activities and things at workplaces.

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8 Regulation 1.1.5 defines a number of terms for the purposes of the Regulations. "Manual handling" is defined as follows:

**"manual handling** means any activity requiring the use of force exerted by a person to lift, lower, push, pull, carry or otherwise move, hold or restrain any object".

The definition of "hazardous manual handling" provides:

**"hazardous manual handling** means—

- (a) manual handling having any of the following characteristics—
  - (i) repetitive or sustained application of force;
  - (ii) repetitive or sustained awkward posture;
  - (iii) repetitive or sustained movement;
  - (iv) application of high force being an activity involving a single or repetitive use of force that it would be reasonable to expect that a person in the workforce may have difficulty undertaking;

**Example**

The force required to lift or otherwise handle heavy weights, to push or pull objects that are hard to move, to operate tools that require the use of 2 hands to exert sufficient force but that are designed for one hand or to operate tools that require squeezing of grips that are wide apart.

- (v) exposure to sustained vibration;
- (b) manual handling of live persons or animals;
- (c) manual handling of unstable or unbalanced loads or loads that are difficult to grasp or hold".

"Musculoskeletal disorder" is defined to mean:

**"musculoskeletal disorder** means an injury, illness or disease that arises in whole or in part from manual handling in the workplace, whether

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occurring suddenly or over a prolonged period of time, but does not include an injury, illness or disease that is caused by crushing, entrapment or cut resulting primarily from the mechanical operation of plant".

9 Part 3.1 of Ch 3 of the Regulations is directed to manual handling. Regulation 3.1.1 imposes a duty on employers to identify tasks involving hazardous manual handling. It provides that:

"(1) An employer must, so far as is reasonably practicable, identify any task undertaken, or to be undertaken, by an employee involving hazardous manual handling.

...

(2) An employer may carry out a hazard identification under subregulation (1) for a class of tasks rather than for individual tasks if—

(a) all the tasks in the class are similar; and

(b) the identification carried out for the class of tasks does not result in any person being subject to any greater, additional or different risk to health and safety than if the identification were carried out for each individual task."

10 Regulation 3.1.2 is directed to eliminating, reducing and controlling the risk of a musculoskeletal disorder associated with a hazardous manual handling task, so far as is reasonably practicable. Regulation 3.1.2(1) provides that:

"An employer must ensure that the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee is eliminated so far as is reasonably practicable."

11 Regulation 3.1.2(2) provides that, if it is not reasonably practicable to eliminate the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee, the employer must reduce that risk so far as is reasonably practicable by:

"(a) altering—

(i) the workplace layout; or

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- (ii) the workplace environment, including heat, cold and vibration, where the task involving manual handling is undertaken; or
  - (iii) the systems of work used to undertake the task; or
- (b) changing the objects used in the task involving manual handling; or
  - (c) using mechanical aids; or
  - (d) any combination of paragraphs (a) to (c)."

12 Regulation 3.1.3 provides that any measures implemented to control risks in relation to musculoskeletal disorders must be reviewed and, if necessary, revised.

#### The facts

13 The appellant was employed by the respondent as a primary school teacher. Her employment contract contained no reference to occupational health and safety issues. From the time of her engagement by the respondent in or about early 2002 until the time of the workplace injury the subject of this proceeding, the appellant taught classes from preparatory grade to grade 6.

14 During 2007, she taught grade 3. On 19 September 2007, it was necessary for her as part of her job as the grade 3 teacher to remove a number of papier mâché displays mounted on large sheets of "stock card" from a pin-board on the classroom wall. The task of attaching such displays to the pin-board and later removing them was one which the appellant had to undertake periodically. There were two sizes of "stock card", each of which was larger than A3 size. The "stock card" was said to be somewhat thicker than "copy paper" but prone to buckle unless supported with at least one hand in the middle beneath.

15 The appellant was only 156 cm tall and could not reach the pin-board from floor level. Accordingly, she used a two step ladder provided by the respondent. The step ladder was of "A" frame configuration of which the top step was 450 mm above the floor. There was a larger step ladder available elsewhere at the school but the appellant said that there was no need for her to use that ladder because she could reach the displays using the step ladder. In practice, the appellant had to set the step ladder at right angles to the pin-board, ascend the step ladder to the top step, reach up above her head and unpin one or more displays at a time, and then carry them as she descended backwards down the step ladder to the floor.

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16 On the occasion in issue, the appellant was carrying more than one display at once, and holding them with both hands beneath to prevent them from bending as she descended backwards down the step ladder. At trial she stated that, "[b]ecause I held them underneath and not to the side they did move a little bit. They wouldn't move too much, but probably enough to concentrate on them as well as ... the step". She further deposed that, because the displays were in front of her, "I couldn't literally see down past them" and consequently that she "just went cautiously and tried to feel for the ladder, the step as I went. Each time, I didn't go fast, I was always going slow enough to feel for it, but this time I missed". As a result, she fell, and suffered a knee injury.

17 There were some instructions on the step ladder, of which the appellant was aware and with which she complied. But the respondent had not given the appellant any written warning of the risks of falling from step ladders or that the appellant should not work alone when using the step ladder or of the danger of using the step ladder to perform the task of removing displays from the pin-board, or any other instructions as to how to perform the task. The appellant gave unchallenged evidence that she had no knowledge of the Regulations or of any assessment undertaken pursuant to the Regulations or of any occasion on which any manual handling risks associated with the placing or removing of such displays had been discussed in a safety context.

18 The appellant called a forensic consulting engineer, Mr Contoyannis, to give expert opinion evidence. He described the accident, in part, as follows:

"When stepping down, Ms Deal had both of her hands holding the displays which eliminated the possibility of her using her hands for stabilisation as well as obscuring her vision for ... locating the intermediate (lower) step.

The combination of those two circumstances evidently led to her mishap as she stepped down, and the inevitable fall causing her injury."

19 Mr Contoyannis stated that in order to avoid the risk of injury to which the appellant was exposed, the displays should have been handed to an assistant while the appellant was standing surely on the platform so that the appellant would have had both hands free to grasp the ladder as she descended.

20 In answer to interrogatories delivered by the appellant, the respondent stated that, prior to 19 September 2007, a hazard identification had been undertaken, pursuant to reg 3.1.1 of the Regulations, with respect to the task which the appellant alleged resulted in her injury. The respondent identified a Manual Handling Risk Assessment (16), for the job/task of hanging large/heavy

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artwork for displays, and a Manual Handling Risk Assessment (17), for the job/task of hanging paper and cardboard displays, as the documents which evidenced the performance of hazard identification.

21 The respondent's Manual Handling Risk Assessment (17) included the following:

School:					Assessment date:			
Location: Classrooms & hallways					Job/Task: Hanging paper & cardboard displays			
<b>Hazard Identification</b>								
Identify hazardous manual handling by assessing task against the stressors listed below and place a tick (b) in the box only. (see the Manual Handling Code of Practice for guidance)								
Stressors								
	Task/ process steps	Repetitive or sustained application of force	Repetitive or sustained awkward posture	Repetitive or sustained movement	Application of high force	Exposure to sustained vibration	Handling of live people & animals	Handling loads that are unstable, unbalanced or difficult to move
A	Climbing ladders to hang light displays		✓	✓				✓
B	Stretching up to hang displays		✓	✓				
C								
D								
<b>Risk Assessment</b>								
					Yes/No	Briefly explain each finding		
1a	Does the task involve repetitive or sustained postures, movements or forces?				Yes	Displaying posters		
1b	Is the task done for more than 2 hours over a whole shift or continually for more than 30 minutes at a time?				Yes			
2	Does the task involve high force?				No	For specific projects eg Art show		
3	Is there a risk? (yes if, yes to 1a & 1b or 2)				Yes			
4	Are environmental factors increasing the risk?				No			
5	Rate task as high, medium or low risk.				Medium			
<b>Manual Handling Stressors</b>					<b>Risk Ranking</b>		<b>Number of Stressors</b>	
Greater than 9 stressors					High			
5-9 stressors					Medium		5	
1-4 stressors					Low			
<b>Risk Control Recommendations</b>								
List in order based on hierarchy of controls (see below)								
1. Install a pulley system.								
2. Mark maximum height that posters etc can be placed on walls.								
3. Design mechanical aids to place art work – eg coat hanger on pole to reach hooks or wires.								
4. Advise staff to use suitable ladder, not chairs/tables etc.								
5. Provide documented SWP instructions on how to use pulley system.								
6. Provide information, instruction and supervision to enforce above.								
<b>Control hierarchy</b> -1. Alter workplace or environment. 2. Alter system of work. 3. Change the objects used. 4. Use mechanical aids. 5. Provide information, instruction & training (If 1-4 not practicable)								
Management Representative:					Employee Health and Safety Representative			

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22 The respondent's Manual Handling Risk Assessment (17) did not include any recommendation that, if the manual handling task required both hands to stabilise the load, an assistant should be available to enable the person handling the load to pass the load to the assistant while the person handling the load was standing securely on the platform. Nor was there any evidence of a hazard identification process under the Regulations, or otherwise, identifying the need for, or recommending, the system of work involved in the task.

Proceedings below

23 By amended writ filed on 20 September 2013, the appellant sought damages for her injury, which she alleged was caused by the respondent's negligence or breach of statutory duty constituted by breach of the Regulations, in particular breach of regs 3.1.1, 3.1.2 and 3.1.3. The appellant's particulars of negligence included the alleged breaches of the Regulations.

24 The matter came on for hearing before a judge and jury in the County Court at Melbourne on 25 August 2014. At the conclusion of the appellant's evidence, the judge proposed that he "determine the first issue, that is, whether the regulations themselves are applicable". After argument, the judge ruled that, although there had been manual handling, it had not been hazardous manual handling, and thus that the Regulations did not apply to the circumstances of the appellant's injury. Consequently, her case in reliance on them could not be put to the jury. The matter thus proceeded to verdict as a claim in negligence only, without the benefit of the alleged particular of negligence comprised of breach of regs 3.1.1, 3.1.2 and 3.1.3. On 2 September 2014, the jury returned a verdict for the respondent.

25 The appellant appealed to the Court of Appeal but the appeal was dismissed. The majority accepted that the injury which the appellant suffered could, as a matter of fact, be characterised as a musculoskeletal disorder as defined, namely, an injury that arose in whole or in part from manual handling in the workplace. Their Honours were also persuaded, contrary to the trial judge's ruling, that "there was evidence fit to go to the jury that the load being carried by the appellant was unstable or unbalanced (or, possibly, difficult to grasp or hold)"<sup>2</sup>. It followed that the task in which the appellant was engaged when she was injured could be described as a hazardous manual handling task. But, their Honours said, the risk of injury was not "the risk of a musculoskeletal disorder associated with a hazardous manual handling task affecting an employee" within

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2 *Deal* (2015) 45 VR 372 at 397 [133].

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the meaning of reg 3.1.2, because the association between the risk and the injury was not sufficiently close to come within the regulation. Their Honours stated that the words "associated with" in reg 3.1.2 required a "close connection"<sup>3</sup> between the risk of harm and the generic nature of the manual handling task, in contrast to some form of connection between the risk and one of the several ways in which the generic task might conceivably be performed, and that it was the manner in which the appellant performed the task of removing the displays from the pin-board while standing on the step ladder, rather than the generic nature of the task, which caused her to fall. It followed, their Honours held, that the risk of injury was not "associated with" the task within the meaning of reg 3.1.2.

26 Alternatively, the majority said, if the risk were one which nominally fell within par (c) of the definition of hazardous manual handling, it was not "reasonably practicable for an employer considering the generic task of removing light displays from pin boards using steps of the kind used by the appellant to conclude that the task would, or even might, involve hazardous manual handling"<sup>4</sup>.

27 Digby AJA reasoned to the contrary that, because the Act and the Regulations were designed to protect workers from injury, they should not be given a narrow interpretation. The activity of demounting the displays was an activity that required the appellant to lift, lower, carry, move and hold the displays, and, therefore, it was arguable (in the sense of it being an issue fit to go to the jury) that it was a manual handling task within the meaning of reg 1.1.5. The whole activity comprised of unpinning the displays, demounting them from the pin-board and lowering them to the ground using the step ladder was arguably a related set of activities which together comprised a manual handling task that had the characteristics of manual handling of unstable or unbalanced loads, or loads that were difficult to grasp or hold, and thus was arguably a hazardous manual handling task within the meaning of reg 1.1.5. The risk of musculoskeletal disorder of the kind sustained by the appellant was arguably one which was "associated with" the hazardous manual handling task within the meaning of reg 3.1.2. There was evidence that the respondent had identified the task of putting up the displays on the pin-board with the use of the step ladder as a hazardous manual handling task but had not identified the task of taking them down with the use of the step ladder as a hazardous manual handling task. Consequently, it was arguable that the respondent was in breach of reg 3.1.1 in

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3 *Deal* (2015) 45 VR 372 at 398 [143].

4 *Deal* (2015) 45 VR 372 at 399 [145].

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failing so to identify the task. It was also arguable that the respondent was in breach of reg 3.1.2 in failing to reduce the risk of musculoskeletal disorder as far as was reasonably practicable by altering the systems of work used by the relevant staff to undertake the task and arguable that that breach of the Regulations caused the appellant's injury. Accordingly, the trial judge had erred by taking the matter away from the jury and, because one of the particulars of negligence had been breach of the Regulations, the verdict should be set aside and the matter should be remitted for retrial on all issues.

28 For the reasons which follow, Digby AJA was right to hold that the issue of breach of statutory duty was fit to be left to the jury.

#### The appellant's contentions

29 Before this Court, the appellant contended that it was plain that the activity of removing the displays from the pin-board was a "manual handling" task as defined in reg 1.1.5 (*scil*, an activity requiring the use of force exerted by a person to lift, lower, push, pull, carry or otherwise move, hold or restrain any object). It was equally plain, it was submitted, that the task involved manual handling of unstable or unbalanced loads, or loads that were difficult to grasp or hold, and thus that it was a "hazardous manual handling" task as defined in reg 1.1.5. Nor should there be any doubt that the risk of the appellant suffering the injury was a risk "associated with" that task within the meaning of reg 3.1.2. Contrary to the majority's construction of reg 3.1.2, there is nothing in the text, context or purpose of reg 3.1.2 which limits "associated with" to "closely associated with". If the purpose of reg 3.1.2 were to require a close connection between the risk and the task, reg 3.1.2 would have been expressed in terms of a risk being "closely associated with" the task. "Associated with" is an ordinary English expression, which is used in reg 3.1.2 in its ordinary sense, and it necessarily follows that it was a question of fact<sup>5</sup> fit to go to the jury whether the risk of the injury the appellant suffered was associated with the hazardous manual handling task of removing displays from the pin-board with the use of the step ladder.

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5 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 395-397; [1996] HCA 36; cf *Aussie Vic Plant Hire Pty Ltd v Esanda Finance Corporation Ltd* (2008) 232 CLR 314 at 334 [49] per Kirby J; [2008] HCA 9.

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The respondent's contentions

30 The respondent contended that the majority of the Court of Appeal were correct in holding that the phrase "associated with" in the context in which it appears in reg 3.1.2 requires a causal connection with the generic nature of a particular hazardous manual handling task, as opposed to a causal connection with the several ways in which a generic task might possibly be performed. In the respondent's submission, the majority were also right in concluding that the jury could not have found that it was reasonably practicable for the respondent to identify the generic nature of the task of removing the displays from the pin-board using a step ladder as one involving hazardous manual handling. It was only because of the manner in which the appellant chose to perform the task, by handling multiple displays at once, and so descending the ladder while using both hands to support the displays, that the risk of injury arose. In the respondent's submission, it followed that it would not have been open to the jury to conclude that it was a risk to which reg 3.1.2 was directed.

Manual handling of an unstable load

31 It is convenient to begin with what is not in dispute. It is not in dispute, and thus it may be accepted, that the injury suffered by the appellant was an injury that arose in whole or in part from manual handling in the workplace (other than an injury, illness or disease that was caused by crushing, entrapment or cut resulting primarily from the mechanical operation of plant), and was, therefore, a "musculoskeletal disorder" within the meaning of reg 1.1.5.

32 It is also not in dispute, and equally may be accepted, that the task comprised of removing the displays from the pin-board with the use of the step ladder was an activity which required the use of force exerted by a person to lift, lower, push, pull, carry or otherwise move, hold or restrain any object, and was, therefore, a "manual handling" task within the meaning of reg 1.1.5.

33 It is to be observed that the displays were light, or perhaps, as the majority of the Court of Appeal described them, "unquestionably light"<sup>6</sup>, and thus it may be said that the task did not require the use of a great deal of force. But there is nothing in the text or context of reg 1.1.5 which implies that "force" in the definition of "manual handling" is restricted to a large or substantial force. Although some paragraphs of the definition of "hazardous manual handling" (in particular, pars (a)(i) and (iv) and (b)) are directed to activities involving large or

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6 *Deal* (2015) 45 VR 372 at 394 [116].

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substantial forces, others (in particular pars (a)(ii) and (iii) and (c)) are evidently designed to embrace situations where the force involved is minimal.

34 It is not in dispute either, and therefore it may also be accepted, that the task of removing the displays from the pin-board with the use of the step ladder involved the manual handling of unstable or unbalanced loads, or loads that were difficult to grasp or hold, and that it was, therefore, a "hazardous manual handling" task<sup>7</sup>. The displays were unstable in the sense of being prone to bend unless supported, and to that extent were difficult to grasp or hold. And, although "load", like "force", is a protean conception, it appears to be used in the definition of "hazardous manual handling" in the natural and ordinary sense that includes anything to be carried<sup>8</sup>.

35 Two issues remain to be determined. The first is whether the risk of a musculoskeletal disorder of the kind suffered by the appellant can properly be conceived of as a risk "associated with" the hazardous manual handling task comprised of removing the displays from the pin-board with the use of the step ladder. If so, the second issue is whether a jury could have inferred, as a matter of objective fact, that it was reasonably practicable to identify the risk and take steps to eliminate or reduce it as required by regs 3.1.1 and 3.1.2.

#### Associated with a hazardous manual handling task

36 Whether the risk of musculoskeletal disorder was "associated with" that manual handling task depends on the way in which reg 3.1.2 should be construed. Since reg 3.1.2 is remedial legislation passed for the protection of employees, it should be construed so as to afford to employees the protection which Parliament intended<sup>9</sup>. To that end, the width of the objects identified in s 2 of the Act, the breadth of the principles adumbrated in s 4 of the Act and the extent of the aims identified in reg 1.1.1 of the Regulations are indicative of a

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7 Occupational Health and Safety Regulations, reg 1.1.5.

8 *The Oxford English Dictionary*, 2nd ed (1989), vol VIII at 1062, "load", sense 2.

9 *Bull v Attorney-General for New South Wales* (1913) 17 CLR 370 at 384 per Isaacs J; [1913] HCA 60; *Waugh v Kippen* (1986) 160 CLR 156 at 164-165 per Gibbs CJ, Mason, Wilson and Dawson JJ; [1986] HCA 12; *Devenish v Jewel Food Stores Pty Ltd* (1991) 172 CLR 32 at 44 per Mason CJ; [1991] HCA 7; *R v Irvine* (2009) 25 VR 75 at 91-92 [90]-[92] per Neave JA (Nettle JA agreeing at 77 [1], Lasry AJA agreeing at 106 [160]).

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legislative purpose to afford relatively broad ranging protection to employees against the risks of hazardous manual handling tasks.

37 By contrast, the majority's requirement of "close connection"<sup>10</sup> appears to have been influenced more by what their Honours considered should be the appropriate scope of regs 3.1.1, 3.1.2 and 3.1.3 than by the legislative purpose as it is to be derived from the text, context and purpose of the legislation<sup>11</sup>. If so, it suggests the kind of error, against which this Court has warned on more than one occasion, of approaching the task of statutory construction by reference to what a judge might regard as desirable policy, imputing that to the legislation and then characterising that as the purpose of the legislation<sup>12</sup>.

38 It is also apparent that the majority were considerably influenced in their construction of reg 3.1.2 by concerns about the penal and civil consequences if "associated with" were not limited to a "close connection"<sup>13</sup>. But, given the statutory purpose of the Act and the Regulations already referred to of affording broad ranging protection to employees against the risks of hazardous manual handling tasks, and the statutory purpose of occupational health and safety penalty provisions more generally<sup>14</sup> of deterring employers from doing less than is reasonably practicable to guard against risks that are naturally and ordinarily occurring in the workplace, it would invert logic to read down "associated with" so that employers are relieved of liability for failure to guard against such risks.

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10 *Deal* (2015) 45 VR 372 at 398 [143].

11 *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378 at 388-390 [23]-[26] per French CJ and Hayne J; [2012] HCA 56.

12 *Miller v Miller* (2011) 242 CLR 446 at 459-460 [29] per French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ; [2011] HCA 9; *Australian Education Union v Department of Education and Children's Services* (2012) 248 CLR 1 at 14 [28] per French CJ, Hayne, Kiefel and Bell JJ; [2012] HCA 3; *Certain Lloyd's Underwriters* (2012) 248 CLR 378 at 390 [26] per French CJ and Hayne J.

13 *Deal* (2015) 45 VR 372 at 398 [143].

14 *Waugh v Kippen* (1986) 160 CLR 156 at 164-165 per Gibbs CJ, Mason, Wilson and Dawson JJ; *Capral Aluminium Ltd v WorkCover Authority of New South Wales* (2000) 49 NSWLR 610 at 643 [73]; *R v ACR Roofing Pty Ltd* (2004) 11 VR 187 at 202-203 [43] per Nettle JA (Ormiston JA agreeing at 188 [1], Vincent JA agreeing at 189 [2]); *Irvine* (2009) 25 VR 75 at 91-92 [90]-[92] per Neave JA (Nettle JA agreeing at 77 [1], Lasry AJA agreeing at 106 [160]).

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39 In its natural and ordinary sense, the phrase "associated with" may mean either combined in terms of circumstances or combined in terms of classification<sup>15</sup>. If it is used in reg 3.1.2 in the former sense of combined in terms of circumstances, it would imply that the risk of an employee suffering a musculoskeletal disorder while carrying out a hazardous manual handling task could fall within reg 3.1.2 whatever the cause of the musculoskeletal disorder. By contrast, if it is used in the more limited sense of combined in terms of classification, it would imply that a risk of musculoskeletal disorder cannot fall within reg 3.1.2 unless the risk is caused by one or more of the characteristics which define a manual handling task as a hazardous manual handling task, namely, repetitive or sustained application of force, repetitive or sustained awkward posture, repetitive or sustained movement, application of high force, exposure to sustained vibration, manual handling of live persons or animals, or manual handling of unstable or unbalanced loads or loads that are difficult to grasp or hold<sup>16</sup>. There is therefore a constructional choice to be made between those two possible meanings.

40 In the course of their reasoning, the majority of the Court of Appeal referred with approval<sup>17</sup> to the following observations of J Forrest J in *Lindsay-Field v Three Chimneys Farm Pty Ltd*<sup>18</sup> concerning the scope of regs 3.1.1 and 3.1.2:

"In any event, I do not accept that this activity is of the type intended to be covered by the Regulations. The objective of the Regulations, I think, is directed towards activities (and, particularly repetitive actions) which require the application of force in the course of the particular activity (be it lifting, pushing, pulling or holding) and thus result in a risk of injury. It is that type of injury which the Regulations are designed to prevent."

41 To that extent, the majority were correct. A number of considerations point in favour of the conclusion that "associated with" in reg 3.1.2 is used in the sense of combined in terms of classification rather than combined in terms of circumstances, with the result that the risks of musculoskeletal disorder to which

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15 *The Oxford English Dictionary*, 2nd ed (1989), vol I at 718, "associated", sense 3.

16 Occupational Health and Safety Regulations, reg 1.1.5, definition of "hazardous manual handling".

17 *Deal* (2015) 45 VR 372 at 400 [149].

18 [2010] VSC 436 at [104].

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reg 3.1.2 is directed are confined to risks of musculoskeletal disorder that arise from, and thus are caused by<sup>19</sup>, something which is intrinsic to the hazardous manual handling task.

42 First, it is apparent from the Regulatory Impact Statement accompanying the Regulations that the manual handling provisions of the Regulations were intended to limit the reach of the obligation to identify and guard against the risk of a musculoskeletal disorder arising from a manual handling task in the workplace to risks resulting from manual handling "[o]ccupational factors ... [which] can increase the risk of [musculoskeletal disorders] occurring"<sup>20</sup>. As was emphasised in the Regulatory Impact Statement to the Occupational Health and Safety (Manual Handling) Regulations 1999 (Vic) ("the 1999 Regulations") – from which the Regulations are derived – by so limiting the scope of the term "musculoskeletal disorder" to the specific context of manual handling, overlap and conflict with other hazard-specific regulations could be avoided<sup>21</sup>.

43 Secondly, as originally promulgated, what is now reg 3.1.2 of the Regulations appeared as reg 15(1) in the 1999 Regulations, as follows:

"An employer must ensure that any risk of a musculoskeletal disorder affecting an employee occurring—

- (a) is eliminated; or
- (b) if it is not practicable to eliminate the risk, is reduced so far as is practicable."

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19 See and compare *Pizzino v Finance Brokers (WA) Pty Ltd* (1982) 56 ALJR 843 at 845 per Gibbs CJ, Murphy and Wilson JJ, 846-847 per Brennan and Deane JJ; 43 ALR 16 at 20, 22-24; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165-167 per Gleeson CJ (Meagher and Sheller JJA agreeing at 168); *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (No 5)* (1998) 90 FCR 1 at 6 per Beaumont J.

20 Victoria, WorkSafe Victoria, Occupational Health and Safety Regulations 2007, Regulatory Impact Statement at 63; see *Interpretation of Legislation Act* 1984 (Vic), s 35.

21 Victoria, Victorian WorkCover Authority, Occupational Health and Safety (Manual Handling) Regulations 1999, Regulatory Impact Statement at 10-11, 17.

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44 Later, however, in response to recommendations of the Maxwell Inquiry in 2004<sup>22</sup>, the Act was amended to reduce the burden on employers to identify and guard against risks from what was practicable, and in 2007 reg 15 of the 1999 Regulations was recast consistently with the changes to the Act (as reg 3.1.2 of the Regulations) with the purpose of "includ[ing] greater specificity of the factors to be controlled"<sup>23</sup>. Consequently, whereas before that change, reg 15 of the 1999 Regulations might have been seen as extending to the risk of any musculoskeletal disorder arising in whole or in part from manual handling in the workplace, the addition of the requirement that a risk be "associated with a hazardous manual handling task" presents as calculated to restrict the reach of reg 3.1.2 to the risk of a musculoskeletal disorder arising in whole or in part from one or more of the hazardous manual handling task force factors of repetitive or sustained application of force, repetitive or sustained awkward posture, repetitive or sustained movement, application of high force, exposure to sustained vibration, manual handling of live persons or animals, or manual handling of unstable or unbalanced loads or loads that are difficult to grasp or hold.

45 Thirdly, unless reg 3.1.2 is construed as confined to the risks of a musculoskeletal disorder that are caused by something that is intrinsic to the hazardous manual handling task, other hazard-specific parts of the Regulations – such as Pt 3.3, which deals with falls – would overlap and to some extent conflict with the manual handling provisions of the Regulations, and in particular reg 3.1.2<sup>24</sup>.

46 Fourthly, and more generally, if the reach of reg 3.1.2 were not so limited, it would have the relatively remarkable consequence that any musculoskeletal disorder suffered in the course of performing a hazardous manual handling task in the workplace might fall within reg 3.1.2, regardless of the cause of the musculoskeletal disorder. For example, it might include the risk of an office worker whose job it is many times a day (and thus repetitively) to replenish the paper supply in a photocopier, slipping or falling on a greasy floor while carrying a single ream of A4 copy paper to the photocopier, in circumstances where the

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22 Maxwell, *Occupational Health and Safety Act Review*, (2004) at 100-105.

23 Victoria, WorkSafe Victoria, *Occupational Health and Safety Regulations 2007, Regulatory Impact Statement* at 65.

24 Victoria, Victorian WorkCover Authority, *Occupational Health and Safety (Manual Handling) Regulations 1999, Regulatory Impact Statement* at 10-11, 17; see also Victoria, WorkSafe Victoria, *Occupational Health and Safety Regulations 2007, Regulatory Impact Statement* at 11, 36.

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carriage of the copy paper in no way contributes to the fall. Similarly, it might include the risk of an employee furniture removalist being struck by a passing motor car while removing a heavy load from the back of a parked furniture van, in circumstances where the fact that the load is heavy in no way contributes to the exposure of the employee to the oncoming path of the motor car. Although a risk of either kind is such that an employer may otherwise be required to foresee it and, to the extent that is reasonably practicable, take care to guard against it (for example, under the general duty to provide a working environment that is safe and without risks to health in accordance with s 21 of the Act), it forces language to describe a risk of either kind as one of musculoskeletal disorder arising in the workplace associated with that hazardous manual handling task. In each case, the cause of the accident is extraneous to the task<sup>25</sup> and the fact that the worker was undertaking a hazardous manual handling task at the time of the accident was mere coincidence. According to ordinary acceptance, the risk of the fall in the first example would be said to be associated with the dangers of a dirty floor rather than carrying the copy paper and the risk of the impact in the second example would be said to be associated with the dangers of working in close proximity to passing motor cars rather than carrying a heavy load.

47 Given that the evident object of reg 3.1.2 is to guard against the risks of hazardous manual handling tasks, and that hazardous manual handling tasks are defined in terms of the force necessary to lift, lower, push, pull, carry, or otherwise move, hold or restrain an object, needing to be applied repetitively or for sustained periods of time, being substantial, or needing to be applied to loads that for one reason or another are unpredictable, unstable, unbalanced or difficult to hold, the natural and ordinary implication of the text of reg 3.1.2 is that it is confined to risks which arise from or, in other words, are caused by<sup>26</sup> one or more of those hazardous manual handling task force factors.

48 As was earlier noticed, it is not in dispute that the task of taking down the displays with the use of the step ladder was a hazardous manual handling task. It involved manual handling of unstable or unbalanced loads or loads that were

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25 Cf *Kavanagh v The Commonwealth* (1960) 103 CLR 547 at 581-587 per Windeyer J (in dissent); [1960] HCA 25.

26 See and compare *Pizzino* (1982) 56 ALJR 843 at 845 per Gibbs CJ, Murphy and Wilson JJ, 846-847 per Brennan and Deane JJ; 43 ALR 16 at 20, 22-24; *Francis Travel* (1996) 39 NSWLR 160 at 165-167 per Gleeson CJ (Meagher and Sheller JJA agreeing at 168); *Hi-Fert Pty Ltd* (1998) 90 FCR 1 at 6 per Beaumont J.

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difficult to grasp or hold. Nor did the respondent contend that the jury could not have found that the instability or imbalance or difficulty of grasping or holding the displays caused the appellant to miss her step on the step ladder and thereby caused the musculoskeletal disorder which she alleged. On that basis, it would have been open to the jury to find that the risk of the appellant falling from the step ladder as she did in the course of carrying out the hazardous manual handling task of removing displays from a pin-board with the use of a step ladder was a risk of musculoskeletal disorder "associated with" that hazardous manual handling task within the meaning of regs 3.1.1 and 3.1.2.

#### Reasonable practicability of identifying the risk

49 It will be recalled that the majority of the Court of Appeal reasoned that, if the risk of injury suffered by the appellant were "associated with" the generic nature of the hazardous manual handling task of removing the displays while standing on the step ladder, it was not "reasonably practicable for an employer considering the generic task of removing light displays from pin boards using steps of the kind used by the appellant to conclude that the task would, or even might, involve hazardous manual handling"<sup>27</sup>. It was the manner in which the appellant performed the task of removing the displays while standing on the step ladder, as opposed to the generic nature of the task, which caused her to fall, and it was not reasonably practicable for the respondent to identify that the appellant might perform the task in that manner.

50 Counsel for the respondent embraced that aspect of the majority's reasoning and attempted to support it by reference to what he described as an overriding legislative limitation of employer obligations to that which is reasonably practicably capable of achievement. He identified in particular that each of the principles of health and safety protection identified in s 4 of the Act is expressed in terms of what is reasonably practicable and that the obligation to identify risks imposed by reg 3.1.1 and the obligation to guard against risk imposed by reg 3.1.2 are expressly limited to what is reasonably practicable. In counsel's submission, those limitations yield an implication that, in order for a risk of injury to be associated with a hazardous manual handling task within the meaning of reg 3.1.1 or reg 3.1.2, it must be a risk which is reasonably practicably capable of identification and therefore, in effect, that it must be a "real risk" as opposed to a risk which, in the terms of the *Shirt* calculus<sup>28</sup>, a

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27 *Deal* (2015) 45 VR 372 at 399 [145].

28 *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 per Mason J (Stephen J agreeing at 44, Aickin J agreeing at 50); [1980] HCA 12.

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reasonable person would brush aside as far-fetched. In counsel's submission, the risk that the appellant would carry more than one display at a time as she descended the step ladder was not a real risk but one which a reasonable person would regard as far-fetched. Accordingly, it was submitted, it was not a risk of the kind which engaged regs 3.1.1 and 3.1.2.

51 Those submissions, and the reasoning of the majority on which they were based, face difficulties at several levels. In the first place, as has been observed, it is not in dispute that the task of taking down the displays with the use of the step ladder was a hazardous manual handling task. It involved manual handling of unstable or unbalanced loads or loads that were difficult to grasp or hold. Equally, as has been observed, it is not in dispute that it would have been open to the jury to find that it was the fact of the instability or imbalance or difficulty of grasping the displays that caused the appellant to miss her step on the step ladder and so caused the musculoskeletal disorder which she alleged. It follows that it would have been open to the jury to find that the risk of the appellant falling from the step ladder in the course of carrying out the hazardous manual handling task of removing the displays from the pin-board with the use of the step ladder was a risk of musculoskeletal disorder that arose in whole or in part from one or more of the factors which defined the task of removing the displays as a hazardous manual handling task.

52 In the second place, while reg 3.1.1 limits an employer's obligation to identifying the risks associated with a hazardous manual handling task to the identification of risks which are reasonably practicably capable of identification, it does not assist in the comprehension of that limitation to invoke common law conceptions of reasonable foreseeability of the kind essayed in *Wyong Shire Council v Shirt*<sup>29</sup>. Although there may be similarities in some contexts, in others there are likely to be significant differences. The test is whether it was reasonably practicable for the respondent to identify the task of removing displays from the pin-board with a step ladder as involving hazardous manual handling. That is an objective question of fact which, in this case, was for the jury to decide.

53 In the third place, authority makes clear that, where a task is capable of being carried out in more than one way, as it was in this case, it is the employer's responsibility so far as is reasonably practicable to identify the risks potentially associated with each way and, so far as is reasonably practicable, to guard against those risks by implementing systems calculated to constrain the employee to

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29 (1980) 146 CLR 40.

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carrying out the task in the safest way<sup>30</sup>. Accordingly, it would be contrary to principle and illogical to suppose that, simply because there were a number of possible ways in which the appellant could have carried out the task of removing the displays with the use of the step ladder, it was not reasonably practicable for the respondent to identify the risks associated with the majority if not all of those possible ways. An employer cannot escape responsibility by identifying that there is one or even a number of ways of carrying out a task which do not attract such risks and assuming, without ensuring so far as is reasonably practicable, that the task will be carried out in those ways. Unless and until the employer has done what is reasonably practicable to prevent the employee performing the task other than in the safest way, the employer will be potentially liable for breach of regs 3.1.1 and 3.1.2.

54 In the fourth place, although it might be thought that climbing backwards down a step ladder without a clear view of the steps and at least one free hand to steady oneself is to court a degree of personal danger, the fact that an employee acts without full regard for his or her personal safety in performing an otherwise authorised task does not of itself preclude a finding that the resultant risk is one which could reasonably practicably be identified and eliminated or reduced. Here, the appellant gave evidence that she was carrying out the task after school hours and so without means of assistance from her pupils, and that she was carrying more than one display at once in order to complete the task within a reasonable time. Since the respondent had not issued the appellant with any instructions as to how she should go about the task, still less warned her that she should not proceed without assistance or that, if proceeding alone, she should only carry one display at a time, why should it not be thought that the appellant might take the risk of carrying down more than one display at once and so need to use both hands to support the displays?

55 Finally, in that connection, it may be observed that while the test of whether it was reasonably practicable to identify and guard against the risk of the appellant falling as she did is an objective test, it is not without significance that the respondent was able to and did identify the task of putting the displays on the

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**30** See, eg, *Smith v The Broken Hill Pty Co Ltd* (1957) 97 CLR 337 at 341-343 per Taylor J (Dixon CJ, Fullagar and Kitto JJ agreeing at 339); [1957] HCA 34; *Da Costa v Cockburn Salvage & Trading Pty Ltd* (1970) 124 CLR 192 at 198 per Barwick CJ, 218 per Gibbs J; [1970] HCA 43; *Ferraloro v Preston Timber Pty Ltd* (1982) 56 ALJR 872 at 873-874; 42 ALR 627 at 629-630; *Czatyрко v Edith Cowan University* (2005) 79 ALJR 839 at 842-843 [12]-[13]; 214 ALR 349 at 353; [2005] HCA 14.

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pin-board with the use of a step ladder as a task which involved hazardous manual handling<sup>31</sup>. The jury would be entitled to take that evidence into account and to ask themselves why, if the respondent were able to identify the risks associated with putting up the displays on the pin-board, it was not reasonably practicable for the respondent to identify the attendant risks of later taking them down.

### Conclusion and orders

56 In the result, it should be concluded that there was evidence fit to go to the jury from which the jury could have inferred as a matter of objective fact that it was reasonably practicable for the respondent to identify the task of taking down the displays with the use of the step ladder as a task involving hazardous manual handling and reasonably practicable for the respondent to take steps to eliminate or substantially reduce the risk, which in this case eventuated, of a musculoskeletal disorder associated with that task.

57 The appeal should be allowed. The orders of the Court of Appeal should be set aside and the matter should be remitted to the Court of Appeal to be dealt with according to law. The respondent should pay the appellant's costs of this appeal and the appellant's costs of the appeal to the Court of Appeal to date.

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31 See above at [20].

58 GAGELER J. Part 3 of the Act prescribes general duties relating to health and safety. Part 3 commences with s 20.

59 Section 20(1) provides:

"To avoid doubt, a duty imposed on a person by this Part or the regulations to ensure, so far as is reasonably practicable, health and safety requires the person—

- (a) to eliminate risks to health and safety so far as is reasonably practicable; and
- (b) if it is not reasonably practicable to eliminate risks to health and safety, to reduce those risks so far as is reasonably practicable."

60 Section 20(2) provides:

"To avoid doubt, for the purposes of this Part and the regulations, regard must be had to the following matters in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety—

- (a) the likelihood of the hazard or risk concerned eventuating;
- (b) the degree of harm that would result if the hazard or risk eventuated;
- (c) what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk;
- (d) the availability and suitability of ways to eliminate or reduce the hazard or risk;
- (e) the cost of eliminating or reducing the hazard or risk."

61 Section 21 relevantly provides as what is described in Pt 3 as a "main duty" of an employer that "[a]n employer must, so far as is reasonably practicable, provide and maintain for employees of the employer a working environment that is safe and without risks to health". Non-compliance is an offence whether or not an employee is injured as a result.

62 Read in light of s 20, that main duty of an employer is to provide and maintain a working environment in which all workplace risks to the health and safety of employees are eliminated, and if not eliminated then reduced, so far as is reasonably practicable having regard to considerations set out in s 20(2). The

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duty "is to ensure that employees are not exposed to risks, rather than to prevent a particular accident"<sup>32</sup>.

63 The calculus of considerations set out in s 20(2) makes clear that the concept of risk with which s 21 is concerned is nothing more than a finite potential for the occurrence of harm to the health or safety of an employee. The concept of risk is inherently forward looking. But it is not tied to the knowledge or understanding of an employer. An objectively identified potential for the occurrence of harm to the health or safety of an employee constitutes a risk whether or not the employer knows or ought reasonably to know about that potential. The degree of likelihood that a risk will eventuate and what the employer knows or ought reasonably to know about the risk are factors that are taken into account at the stage of determining what action on the part of the employer is reasonably practicable to eliminate or reduce the risk.

64 The regulations in question in this appeal, regs 3.1.1, 3.1.2 and 3.1.3, were made under s 158(1)(a) of the Act, which provides for the making of regulations for or with respect to the way in which duties imposed by the Act are to be carried out. That link to s 158(1)(a) is made clear by a note in each which states "Act compliance" followed by a reference to s 21. The significance of that note is spelt out in reg 1.1.7: the note indicates that each regulation sets out the "way" in which an employer's main duty under s 21 is to be performed in relation to the "matters" and to the "extent" set out in the regulation.

65 The context of ss 20, 21 and 158(1)(a) and reg 1.1.7 explains the focus of regs 3.1.1, 3.1.2 and 3.1.3: on a particular category of workplace activity, and on exposure to a particular category of workplace risk. The activity and the risk together define the matters in relation to which those regulations prescribe the manner in which an employer's main duty under s 21 is to be performed.

66 The particular category of workplace activity is a sub-category of "manual handling". Specifically, the activity is manual handling that meets the particular description of "hazardous" manual handling. The definitions in reg 1.1.5 make clear that hazardous manual handling is a subset of manual handling. Manual handling encompasses any workplace activity which requires use of force by an employee to lift, lower, push, pull, carry or otherwise move, hold or restrain an object. Hazardous manual handling is manual handling which falls within any one of three descriptions. The first is manual handling which has any of a number of specified characteristics: repetitive or sustained application of force, awkward posture or movement; application of high force being an activity that it would be reasonable to expect a person in the workforce might have difficulty

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32 *Director of Public Prosecutions v Coates Hire Operations Pty Ltd* (2012) 36 VR 361 at 378 [73].

undertaking; or exposure to sustained vibration. The second is manual handling of live persons or animals. The third is manual handling of unstable or unbalanced loads or loads that are difficult to grasp or hold.

67 The particular category of workplace risk is the risk of musculoskeletal disorder. The definition in reg 1.1.5 importantly limits the statutory concept of musculoskeletal disorder to harm that is causally related to manual handling in the workplace. Subject to immaterial exceptions, a musculoskeletal disorder is "an injury, illness or disease that arises in whole or in part from manual handling in the workplace, whether occurring suddenly or over a prolonged period of time".

68 The context therefore makes plain that the purpose of regs 3.1.1, 3.1.2 and 3.1.3 is to prescribe how an employer must perform the main duty imposed by s 21 in relation to the particular matter of the risk of a musculoskeletal disorder causally related to hazardous manual handling. A construction of each regulation which would promote that purpose is to be preferred to a construction which would not<sup>33</sup>.

69 How the regulations set out to achieve that purpose is by obliging the employer to undertake a structured sequence of actions. Those actions are indicated by the headings which form part of the regulations<sup>34</sup>: "[h]azard identification", "[c]ontrol of risk" and "[r]eview of risk control measures".

70 First, reg 3.1.1 addresses hazard identification. The employer must, so far as is reasonably practicable, "identify any task undertaken, or to be undertaken, by an employee involving hazardous manual handling". Performance of that obligation should not be unduly complicated. What the employer must do, so far as is reasonably practicable having regard to the calculus of considerations set out in s 20(2), is nothing more than to look to the real-world tasks actually to be undertaken by an employee and to identify any such task that has a component of manual handling meeting the description of hazardous manual handling. The reference in reg 3.1.1 to a task "involving" hazardous manual handling is simply to a real-world task to be undertaken by an employee that has hazardous manual handling as a component.

71 Next, reg 3.1.2 addresses control of risk. It imposes a three-tiered obligation. The employer must eliminate "the risk of a musculoskeletal disorder associated with a hazardous manual handling task" so far as is reasonably practicable. If it is not reasonably practicable to eliminate that risk, the employer is obliged to reduce that risk so far as is reasonably practicable by means of one

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33 Section 35(a) of the *Interpretation of Legislation Act* 1984 (Vic).

34 Section 36(2A)(a) of the *Interpretation of Legislation Act* 1984 (Vic).

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or a combination of different risk control measures. If it is not reasonably practicable to reduce that risk by those means, the employer is obliged to control that risk by providing information, instruction or training. Determination of what is or is not reasonably practicable at each tier of the obligation is again informed by the calculus of considerations set out in s 20(2).

72 The reference in reg 3.1.2 to "the risk of a musculoskeletal disorder associated with a hazardous manual handling task" needs to be read bearing in mind that a musculoskeletal disorder is an injury, illness or disease that is caused by manual handling, albeit that manual handling need not be the sole cause. The words "associated with" do not introduce some further or different causal connection. What the words signify is that the particular risk of a musculoskeletal disorder concerned is the risk of an injury, illness or disease caused, in whole or in part, by manual handling meeting the description of hazardous manual handling.

73 Lastly, reg 3.1.3 addresses review of risk control measures. The employer must ensure that any risk control measures that have been implemented are reviewed, and if necessary revised, in specified circumstances. The reference in the regulation to revision of risk control measures cannot be seen to impose a free-standing obligation. The reference serves rather to emphasise that the three-tiered obligation imposed by reg 3.1.2 is ongoing. A review conducted in accordance with reg 3.1.3 might well result in reconsideration of what is or is not reasonably practicable in the performance of the obligation imposed by reg 3.1.2 by reference to changes in circumstances that have affected the calculus of considerations set out in s 20(2) since earlier risk control measures were put in place.

74 Turning to the facts of the present case, there is no dispute that the real-world task actually undertaken by the appellant in her capacity as an employee of the respondent was fairly described as removing a light display from a pin board using a step ladder. On the evidence fully set out in the joint reasons for judgment, the jury was entitled to conclude that one of the components of that overall task – carrying the light display – constituted manual handling of an unstable or unbalanced load or a load that was difficult to grasp or hold, and therefore that the task was objectively one involving hazardous manual handling within the meaning of reg 3.1.1. That another component of the task was using the step ladder could not affect that conclusion.

75 The respondent's Manual Handling Risk Assessment identified hanging a light display on a pin board using a step ladder as a task involving hazardous manual handling. Against that background, the jury was obviously entitled to conclude that it was reasonably practicable for the respondent to identify the corresponding task of removing a light display from a pin board using a step ladder as a task involving hazardous manual handling.

76 Turning to the application of reg 3.1.2, the jury was entitled to conclude from the appellant's evidence that the injury she sustained to her knee was caused, at least in part, by manual handling which answered the description of hazardous manual handling – being her handling of an unstable or unbalanced load or a load that was difficult to grasp or hold. That the injury might have been caused in part by her missing her step could not affect that conclusion. Nor could it matter that the injury might not have occurred if she had handled the load in a different way.

77 In the result, the jury was entitled to find that the risk which came home to the appellant answered the description of the risk of a musculoskeletal disorder associated with a hazardous manual handling task, and the jury was entitled to conclude that the respondent failed to meet the obligation to act so far as was reasonably practicable to reduce or control that risk.

78 On the orders proposed in the joint reasons for judgment, the consequences of that result for the rights of the parties determined at trial will be for the Court of Appeal to determine on remitter. I agree with those orders.



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