SUPREME COURT OF QUEENSLAND

CITATION:	*Griffiths v State of Queensland* [2011] QCA 57
PARTIES:	**TRACEY LEANNE GRIFFITHS** (appellant) **v** **STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 9461 of 2010 SC No 4791 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 April 2011
DELIVERED AT:	Brisbane
HEARING DATE:	24 February 2011
JUDGES:	Muir, Chesterman and White JJA Separate reasons for judgment of each member of the Court, Muir and White JJA concurring as to the orders made, Chesterman JA dissenting
ORDERS:	**1. The appeal be allowed;** **2. The order of the primary judge made on 6 August 2010 be set aside;** **3. The respondent pay the appellant the sum of $639,435.91; and** **4. The respondent pay the appellant's costs of and incidental to the proceeding on the basis that it was appropriate that a senior and junior counsel be retained.**
CATCHWORDS:	STATUTES – ACTS OF PARLIAMENT – STATUTORY POWERS AND DUTIES – EXERCISE – LIABILITY – BREACH OF STATUTORY DUTY – where the appellant injured her back whilst lifting medical equipment out of a plastic tub sitting on the top shelf of a steel trolley – where the appellant was unsuccessful in proceedings against her employer for negligence and breach of statutory duty – whether the respondent employer discharged its obligation under s 26 *Workplace Health and Safety Act* 1995 (Qld) – whether the respondent employer failed to identify and assess the risk as prescribed by the *Manual Tasks Code of Practice* 2000 – whether the respondent employer exercised proper

diligence and took reasonable precautions to discharge its obligation – whether the primary judge erred in finding the respondent employer not liable for breach of statutory duty

Workplace Health and Safety Act 1995 (Qld), s 26, s 26(3), s 28, s 29B, s 30, s 37, s 37(1)

Henderson v Dalrymple Bay Coal Terminal [2005] QSC 124, cited
O'Brien v TF Woollam & Son Pty Ltd [2002] 1 Qd R 622; [2001] QSC 217, cited
Parry v Woolworths Limited [2010] 1 Qd R 1; [2009] QCA 26, cited
Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) [2001] 1 Qd R 518; [2000] QCA 18, considered
Wilkinson v BP Australia Pty Ltd [2008] QSC 171, cited

COUNSEL: L Kelly SC, with B Charrington, for the appellant
G Diehm SC, with R Treston, for the respondent

SOLICITORS: Maurice Blackburn Lawyers for the appellant
McInnes Wilson Lawyers for the respondent

[1] **MUIR JA:** The appellant was injured on 5 October 2004 when, in the course of her employment by the respondent as a nursing assistant at the Nambour General Hospital, she twisted her back lifting a soda lime canister out of a plastic tub sitting on the top shelf of a steel trolley. The appellant brought proceedings in the Supreme Court claiming damages for negligence and breach of statutory duty. Quantum was agreed between the parties to be $600,000.

[2] On 6 August 2010 the primary judge dismissed the appellant's claim. It was common ground between the parties, and the primary judge held, that the appellant, by proving that she had been injured at work, established *prima facie* that the respondent employer had breached its duty to ensure the appellant's "workplace health and safety". In order to escape liability, the respondent relied on s 26(3) of the *Workplace Health and Safety Act* 1995 (Qld) *("*the Act*")* which provided:

> "**26 How obligations can be discharged if regulation etc. made**
>
> …
>
> (3) If a code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation for exposure to the risk only by –
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> (a) adopting and following a stated way that manages exposure to the risk; or
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> (b) doing all of the following –
>
> (i) adopting and following another way that gives the same level of protection against the risk;
>
> (ii) taking reasonable precautions;
>
> (iii) exercising proper diligence."

[3] It was also common ground at the trial and on appeal that the *Manual Tasks Code of Practice* 2000 was a "code of practice" within the meaning of s 26(3) and that it applied in the circumstances under consideration. The appellant's negligence claim was not pursued on appeal.

[4] Section 37(1) of the Act is also relevant:

> "**37 Defences for div 2 or 3**
>
> (1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove –
>
> (a) if a regulation or ministerial notice has been made about the way to prevent or minimise exposure to a risk – that the person followed the way prescribed in the regulation or notice to prevent the contravention; or
>
> (b) if a code of practice has been made stating a way or ways to manage exposure to a risk –
>
> (i) that the person adopted and followed a stated way to prevent the contravention; or
>
> (ii) that the person adopted and followed another way that managed exposure to the risk and took reasonable precautions and exercised proper diligence to prevent the contravention; or"

[5] The primary judge held that the respondent had discharged its duties under the Act. Precisely how his Honour arrived at that conclusion is unclear. I will defer consideration of his Honour's reasons in this regard until after discussing the relevant evidence.

The issues for determination on appeal

[6] The grounds of appeal challenge a considerable number of the primary judge's findings but it is unnecessary to address all of them. The central issue between the parties, the resolution of which will determine the appeal, is whether the respondent adopted and followed the "way" stated in the Code for managing exposure to the subject risk or, failing that, whether it did all of the things specified in s 26(3)(b) of the Act.

The evidence

[7] The appellant's role, the canister and the way in which the accident occurred were described by the primary judge as follows:[1]

> "[2] The plaintiff was employed in the Central Sterilising Service Department ("**CSSD unit**"), which resembles a large industrial washing-up area, equipped with large sterilizing dishwashers and other equipment for high grade medical sterilization and cleaning. At the time of her employment there, the CSSD unit processed tens of thousands of pieces

[1] AR 348-349.

> of surgical equipment each month, of varying sizes and weights. Surgical items and equipment were transported on trolleys from operating theatres and other parts of the hospital to the CSSD to be cleaned, sterilized and returned. The trolleys had a number of shelves and a tub on each shelf. Each tub was covered with a fitted lid for safety and hygiene purposes. The height of the trolley at the top edge of the tub was 1066mm above floor level and the depth of the tub itself was 220mm, meaning, therefore, that the items were at a height of 846mm from the ground when they were removed from the trolley.
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> [3] The plaintiff's injury was sustained when she removed a soda lime canister from a tub on a trolley in order to place it in a decontaminator approximately one metre away from the trolley. A soda lime canister is a piece of surgical equipment weighing about 5 kilograms. It is made predominantly from stainless steel. It comprises a base (about 165mm square) and 2 vertical steel plates at the side, joined by a crossbar at the top. Fully assembled, it is about 430mm long by 240mm in diameter. On the day of the plaintiff's incident, the soda lime canister was unassembled, meaning the plastic internal canisters had been removed so that the equipment to be sterilized was only the base, the side plates and the top crossbar. A short hose of approximately 300mm in length was attached to the base of the item. The bottom of the square base was covered with a removable Perspex cover attached by three large screws which protruded from the base. The canister in question had been disassembled and rinsed off in theatre, before being brought to the sterilization area. The plaintiff described it as having droplets of water on it.
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> [4] The plaintiff claims to have lifted this disassembled soda lime canister from the trolley by grasping its top with her right hand and using a 'flat palm grip' with her left hand on the base, without attaching any part of her left hand onto or around any object (for example the screws protruding from the base). It slipped from her left hand and she bent down and to the right to catch the end she had dropped, and in doing so, injured her back."

[8] When the accident occurred, the appellant was lifting the canister to place it in a decontaminator situated 90 degrees to her right. As the canister cleared the side of the plastic tub, the appellant started turning to her right but immediately lost her grip on the base with her left hand. The base of the canister fell towards the floor, the appellant instinctively reached down to her right and caught the base with her left hand, and in so doing injured her back.

[9] Mr O'Sullivan, an ergonomist and safety consultant who gave evidence, stated in a report dated 11 September 2007:[2]

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[2] AR 136-137.

> "**The [canister] represents an awkward load primarily because of the combination of access to the item, within the tub, and the shape and size of the base of the unit.** It is clear that the base of the unit does not have an obvious, singular grasping method but may be grasped in a number of ways, including the flat palm and fingers against the base, the fingers hooked around the underside, the fingers hooked around the far side, finger tips hooked under one of the metal studs etc. In Ms Griffiths' situation, however, the method of grasping will be dictated to some extent by the positioning of the item within the tub.
>
> As can be seen in Photographs 9-11 Ms Griffiths' had to fully extend her elbows, round her shoulders and reach forward to grasp the item within the tub. This posture is necessary because the top of the tub exceeds Ms Griffiths' elbow height but also generates a need to grip the item with some significant amount of ulnar deviation of the left wrist and less likelihood of hooking the fingers under the lower edge of the unit. In other words, the depth of the tub and its height above floor level will tend to limit the security of grip on the base of the unit due to the increased forward reach required and the need to reach down and into the tub at a point forward of the body.
>
> Typical female elbow height is around 1005mm for the average female or 1035mm with shoes on. However, there is still a need to reach forwards at least 60mm to get into the tub (allowing for the trolley). **In essence, the height of the edge of the tub and its depth will make it more awkward for most females to grip an awkward or bulky item lying within the tub.**
>
> **Given the potential for attaining a less than optimal grip, the presence of water or wetness on the base of the unit, the nature of its base (smooth perspex) and the size of the base all represent circumstances allowing for potential slipping of the item from the grip.** Although rubber gloves normally provide good friction in dry conditions, in wet conditions the effect can be one where the grip may feel secure but the dynamic coefficient of friction is low, meaning that any slip can quickly progress to a loss of control.
>
> **Overall, the positioning and accessibility to the item is less than ideal and, combined with its nature, wetness, shape and size, etc, represents a potential for a loss of grip or loss of control during the lifting of such an item out of this style of tub at the height observed.**" (emphasis added)

[10] The appellant had handled the canister on only two or so occasions prior to the accident. She found it awkward to handle. She explained "I think because I'm short, the trolley is a little bit too high for me". She said it was "awkward to lift it out" and that its awkwardness was the subject of discussion amongst her work colleagues. Another nurse in the sterilising department, Ms Currey, gave evidence that she had handled the canister over a lengthy period. Asked if she had any problems in handling it she said, "When I first picked it up it was awkward. So from then on I sort of would leave it … till last or till I had to do it".[3] She explained

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[3] AR 58.

that it was awkward because its weight was not balanced and that "your handling was just unbalanced". She said that she complained about it and "just used to comment that it was awkward". She made a written complaint to her superiors after the appellant's accident.

In cross-examination this exchange occurred:[4]

> "And because of that, when you went to pick it up on any subsequent occasion after the first time, if you gripped it by the frame there was no difficulty with it the balance of it?-- Always the first impact is always a weight. You just have to assemble – I suppose you grip your muscle. You tense yourself for that imbalance…but there's always an initial grasp, if you know what I mean. Does that make any sense?"

[11] Ms Ricardi was the nurse unit manager of the sterilising department. She said in her evidence-in-chief that there was often general discussion between staff members regarding the handling of the canister. She qualified that by saying that discussions occurred "not often, occasionally". She said that there had been "general comments from staff … that it was awkward to handle, the weight distribution was uneven and it was seen to be difficult to load and unload from the Lancer batch washer ….".[5]

[12] Ms Ricardi was asked in evidence-in-chief:[6]

> "With these comments having been made to you, did you take any steps to look into the matter?"

She responded:

> "I did. I spoke with staff in theatre to see whether or not the instrument or the soda lime needed to be processed in CSSD. It did."

Ms Ricardi said that although the canister was "awkward to handle because it is off-balanced … you can still hold it quite firmly with the frame". She said she did not consider that it posed a risk of injury.

[13] This exchange occurred in Ms Ricardi's cross-examination:[7]

> "Similarly, I'm suggesting to you that you must have then turned your mind, on receiving those complaints, to the risk that someone could injure themselves by lifting the awkward item? - - Again, I would say, based on the fact that we lift upwards of 150 trays a day, at any given time in my department there is risk of someone injuring themself lifting or dropping an item. The soda lime is not the only item that we deal with that is at risk of being dropped. It is – it is no different to the nurses on the ward giving injections and having to deal with a sharps injury every time they use a needle."

[14] Asked in cross-examination if she consulted with the workers in the sterilising department she said:[8]

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4 T1-61, ll20-30.
5 AR 94.
6 AR 94-95.
7 T2-35, Ll23-33.
8 T2-38, l10.

> "We did discuss the fact that there was nothing we could do about this piece of equipment because it needed to be – it needed to be decontaminated and we also discussed the fact that even though it was awkward, it was within our weight and it was manageable."

[15] The discussion, she said, occurred between "general members of staff".

Relevant provisions of the Code

[16] The Code relevantly provides:[9]

> **2. Workplace obligations**
> The objective of the W*orkplace Health and Safety Act* 1995 is to prevent a person's death, injury or illness being caused by a workplace, relevant workplace areas, and work activities and by plant or substances for use at a workplace. This objective is achieved by preventing or minimising a person's exposure to the risk of death, injury or illness. Under the Act, workplace health and safety must be managed by:
>
> - identifying hazards
> - assessing risks that may result because of the hazards
> - deciding on control measures to prevent, or minimise the level of, the risks
> - implementing control measures, and
> - monitoring and reviewing the effectiveness of the measures.
>
> …
>
> 2.1 Preventing or minimising exposure to the risk of musculoskeletal disorders caused by manual tasks requires the following:
>
> **Management of risk**
>
> **Identify** problem tasks (see chapter 7). Although manual tasks can be identified as a hazard, not all manual tasks have significant risks associated with them. Select tasks for assessment that may have the potential to contribute to a musculoskeletal disorder, or have caused one.
>
> **Assess** the risks associated with the problem tasks (see chapter 8).
>
> **Control** the risk (see chapter 9), by selecting and implementing solutions to prevent or minimise the risk (see chapter 10).
>
> **Monitor** and review the effectiveness of the controls (see chapter 9).
>
> **Plan, design and purchase to reduce risks**
> To prevent musculoskeletal disorders the relevant person who is an employer must make sure:

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9 AR 182-183.

- work processes involving manual tasks are designed to be safe and without risk to health and safety, and
- work items including plant, tools, containers, workbenches, furniture, mechanical devices and vehicles are designed, purchased and maintained to be safe and without risk to health and safety (see chapter 3).

Consultation
Consultation is an effective way of identifying risks and developing controls in the workplace (see chapter 4). It encourages a cooperative approach to health and safety while recognising the decision-making role of the relevant person who is an employer.

Consultation will be enhanced if the provisions regarding workplace health and safety representatives (WHSR), workplace health and safety committees and workplace health and safety officers (WHSO) are implemented. These are contained in **parts 7** and **8** of **the act.**

Training
Training is essential for workers to perform manual tasks without risk to health and safety. Provide workers and others at the workplace with information, instruction, training and supervision (see chapter 5) sufficient to enable them to do their work in a safe manner."

Did the respondent adopt and follow the Code's requirements in relation to the identification of problem tasks?

[17] The first step required of the respondent, if it was to avail itself of the protection of the Code, was to have and utilise a procedure for identifying "problem tasks" as part of a risk management process. It may be inferred from the wording of s 2.1 that for a task to qualify as a "problem task" it must be one which "may have the potential to contribute to a musculoskeletal disorder, or [to] have caused one". As the following discussion shows, the respondent did not have and did not utilise any such procedure. Section 6.1 of the Code explains that risk management for manual tasks "involves a systematic process aimed at preventing work related musculoskeletal disorders". No such systematic process was employed. The task of moving the canister from the tub on the trolley into the steriliser ("the Task") was not considered with a view to determining whether it was a "potentially risky job" and it was not identified by the respondent as a "problem task".

Did the respondent adopt and follow the Code's requirements in relation to the assessment of risks?

[18] Ms Ricardi said, variously, that she did not consider that the handling of the canister posed; any risk of injury, "any great risk", and more than "minimal risk". She said, in the passage from her evidence quoted in paragraph [13] above, that the canister was not "the only item [dealt with in the sterilising department] that is at risk of being dropped".

[19] Ms Ricardi was aware that staff in the department had voiced concerns to the effect that the canister was awkward to handle because of its uneven weight distributions.

She shared these views. Acting on such expressions of concern, and perhaps prompted in part by her own concerns, she offered to have the sterilising department relieved of responsibility for handling the canister.

[20] Ms Currey was sufficiently concerned about the awkwardness involved in handling the canister to comment on that to colleagues from time to time and to have a practice of leaving it to the last to unload or load.

[21] The appellant had a particular problem with the canister because she was short and the trolley was "a bit high" for her. Mr O'Sullivan describes the appellant as being "a fairly short person, around 160, and her elbow height is at the lower end". He said, "So when you're reaching for something at that distance, there's more risk of something going wrong". Mr O'Sullivan explained that because of the positioning of a woman's shoulders and arms when reaching forward and into a tub such as the one containing the canister, the ability to grip an object was reduced.

[22] Mr O'Sullivan appeared to accept in cross-examination that the height of the tops of the tubs was fairly close to what would ordinarily be considered as a normal working height. In his opinion though, it would have been preferable for the top of the tub to have been lower to facilitate reaching into it. He explained, in substance, that a height generally considered appropriate for a work bench may not be ideal for a tub used in the way the tubs in the sterilising department were used. In the former case "you can easily swing your arm across the top to get the items without risk of impact".

[23] In one of his two reports, Mr O'Sullivan concluded:[10]

> "Overall, it should be considered that potential existed for a significant low back stresses produced both by the item being handled and also by internal stresses generated within the body due to bodily motion sufficient to give rise to a risk of low back injury."

The evidence thus established that the Task had the potential to contribute to a musculoskeletal disorder. It was the case, and Mr O'Sullivan conceded in cross examination, that there were a variety of ways in which the canister could be held which posed no or minimal risk of it slipping. But the fact that an object may be lifted safely in some ways does not mean that the lifting of it by a worker in a work environment must be considered risk free or attended with minimal risk only. Not all manual tasks are approached and performed consistently with optimum concentration and the best ways of undertaking a task are not always thought out. They were not in this case. As later discussed, a number of things could have been done with a view to minimising risk.

[24] Exhibit 4 is a DVD recording of Ms Racardi demonstrating the handling of the canister. It illustrated what was not disputed: that there were ways of grasping and handling the canister safely. It demonstrated also that Ms Racardi, at the time of the demonstration and focussing fully on her role as demonstrator, could handle the canister, for the most part, with apparent ease and without it slipping from her grasp. The DVD also showed, as was apparent from other evidence, that much of the weight of the canister was at one end with the consequence that if one hand was not placed on that end (the base) when picking it up, the load could be unbalanced

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[10] AR 135.

and the way in which the item was held could need adjustment. Risk free handling was not assisted by the use of rubber gloves, which were apparently required, or by the fact that the canister was wet when unloaded from the tub.

[25] I do not consider it of much significance that Ms Ricardi asserted that she never thought that anyone would injury himself or herself by dropping the canister. She gave other inconsistent evidence. She had not read the Code and, in response to the question "What was your understanding at that time about when a risk assessment should be carried out?", she replied "My understanding of a risk assessment would be something that I would consider to be of a great risk at that time, and at that point in time I didn't consider the soda lime of any great risk."[11] This response and other evidence of Ms Ricardi referred to above, reveals a robust disposition to "get on with the job" and cope with any difficulties rather than reflecting on how they arose or whether they could be minimised.

[26] In my view the above evidence established that the Task was "a problem task" and that the respondent failed to employ a risk management process to determine whether the Task was a "problem task". Ms Ricardi did not turn her mind to the questions of whether the Task exposed staff to the risk of musculoskeletal disorders. If I am not correct in concluding that the respondent could not obtain the protection of the Code without utilising a process for the identification of "problem tasks", the respondent, nevertheless, failed to adopt and follow the way stated in the Code for identifying the Task as a "problem task" and thus failed to come within s 26(3)(a).

Were the risks associated with the Task assessed?

[27] Apart from the matters just discussed, there are other reasons for concluding that the risks associated with the Task were not assessed.

[28] Section 6.2 of the Code states that:[12]

> "Successful risk management of manual tasks needs the involvement of both the **relevant person who is an employer** and **workers** plus the WHSR [workplace health and safety representative], WHS committee and the WHSO [workplace health and safety officer]".

[29] Section 6.1 provides:[13]

> "Risk management for manual tasks involves a systematic process aimed at preventing work-related musculoskeletal disorders. Major stages in the risk management process include:
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> - **Risk identification**: Identify the problem jobs/tasks which are likely to, or have caused injury. If there is more than one, decide in what order they should be investigated.
> - **Risk assessment**: Investigate the problem jobs/tasks, determine the risk factors and evaluate them, assess their importance, and look for their causes, and
> - **Risk control**: Decide on solutions, trial and implement them, and check later to see the changes are working successfully."

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11 AR 95, T 2-33, ll 20-8.
12 AR 191.
13 AR 190-191.

[30] Section 6.6 of the Code, under the heading "An overview of the risk management process" relevantly provides:[14]

Risk identification Find the problem jobs which need investigating – not all manual tasks are hazardous.	**Where there are indications something could be wrong:** Observe work processes and speak with workers. Use a checklist to identify problems.
Risk assessment Analyse the problem jobs to find out the risk factors that are causing problems.	**Prepare:** Get ready to assess the task by observing the task being done and taking any necessary measurements. **Consult:** Talk to the workers doing the job, and the supervisor or mechanic. **Checklists:** Use the checklists in Chapter 10 to analyse risk factors. **Decide:** Examine the risk factors, decide which need to have solutions found for them, and place in priority order for attention.

[31] The primary judge appears to have concluded that the respondent had met the requirements of the Code. In that regard his Honour said:[15]

> "[48] It is important to note that the Code recognises that all manual tasks could potentially be recognised as a hazard, but that not all manual tasks have significant risks associated to them such as would warrant the implementation of a formal risk assessment. It is my opinion that, having regard to all the factors and the requirements of the Code, namely the relatively light weight of the soda lime canister, the infrequent nature of the task, the other options available to the hospital to have a vital piece of equipment sterilized, the lack of suggestion of possible injury, the large number of items processed in the CSSD and the nature of the work being undertaking in general in the area, that the defendant was reasonable in not identifying this as a task which would require a formal risk assessment under the Code."

The primary judge then said:[16]

> "[49] This situation resonates with the sentiments conveyed by Fraser JA in *Parry* that the significance of the triviality of the risk is important, not in determining liability under section 28(1), but in the ease with which the defendant can rebut the prima facie liability established by the proven contravention.
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> [50] I am satisfied that the defendant has discharged its duties under the WHSA and would therefore not grant the relief sought for breach of section 28(1) WHSA."

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14 AR 192-193.
15 AR 359.
16 AR 359.

[32] The fact that the canister was a vital piece of equipment which had to be sterilised would not seem to me to detract from the need for a risk assessment or from the need to handle it safely. A purpose of the Code is to ensure that workplace activities are performed safely, not that they be prevented or restricted. The fact that a task is performed infrequently may not mean that it is any safer to perform. Lack of familiarity with the problems involved in performing the task may increase the risks involved in performing it and thus suggest a greater need for a risk assessment.

[33] It does not appear to me that the conclusion that the respondent was reasonable in not identifying the Task as one "which would require a formal risk assessment" was, in my view, debatable. The Code stated a way of managing exposure to the risk of musculoskeletal disorders caused by manual tasks by, as has already been discussed in more detail, identifying problem tasks, assessing the risks associated with such tasks, controlling the risk and monitoring to review the effectiveness of the controls. Consultation and training were stated to play important roles in the process. Formal, in the context of a risk assessment under the Code does not equate necessarily with "elaborate".

[34] But even if the primary judge was correct in concluding that a formal risk assessment was not required, what was done by the respondent fell short of meeting the risk assessment requirements of the Code.

[35] Despite the level of concern about the Task expressed by staff which had prompted Ms Ricardi to attempt to have the Task removed from her department's duties, after she was told that her department could not avoid responsibility for it, she did not "see anything of benefit discussing it further because we know that we need to process this item, we know that it's awkward to handle". A short while later in her evidence Ms Ricardi reaffirmed that, in her view, it was futile to further discuss the problem of the canister. The sterilising department had responsibility for it and that was that.

[36] It is reasonably plain from Ms Ricardi's evidence that she did not give consideration to any consequences which might flow from: the canister's uneven weight distribution; the fact that the canister was wet and awkward to handle and from the need to grasp the canister and lift it from a tub of a particular height. Certainly, no thought was given by her to how the canisters might best be handled to minimise awkwardness and difficulty in handling and the risk of its slipping. Ms Ricardi made no risk assessment of any kind as she did not perceive there to be a "great risk" associated with the handling of the canister. The personnel referred to in s 6.2 of the Code as necessary for "successful risk management" were not involved.

[37] As counsel for the appellant pointed out, Ms Ricardi based her no "great risk" conclusion on her own handling of the canister rather than on a risk assessment, informal or otherwise. It was not part of her role to observe whether the appellant or others were handling the canister in an appropriate way to avoid risk. She did not observe "work processes" or "speak with workers" in any relevant way.[17]

Was there consultation within the meaning of the Code?

[38] An issue which loomed large on the trial and on the appeal was whether consultation within the meaning of s 2.1 of the Code had taken place and whether

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[17] Section 6.6 of the Code.

training had been given to the appellant "in sufficient depth to do [her] jobs safely". The primary judge did not decide directly that such a consultation had taken place but if that inference may be drawn from paragraph [46] of the primary judge's reasons, it is my view that he erred.

[39] Workplace discussions about the awkwardness involved in handling the canister do not amount to a relevant consultation. The consultation the Code has in mind is "an important risk management strategy"[18] for use in "identifying risks and developing controls in the workplace". A "consultation" may be informal[19] but if the purpose or effect of conduct is not to identify, assess and/or control risks it will not constitute a relevant "consultation". That was the case here. The absence of consultation would not, of itself, necessarily establish that the way stated in the Code for managing risk was not followed. Consultation is "an effective way of identifying risk" but s 8 of the Code accepts that risks may be otherwise identified. The significance of the lack of consultations for present purposes is that it is a further illustration of the respondent's failure to comprehend and apply the Code's requirements.

Was there compliance with the Code's training requirement?

[40] The primary judge peremptorily dismissed the submission that compliance with s 2.1 of the Code required training in relation to the handling of the canister. His Honour said that:[20]

> "[47] …Counsel for the plaintiff suggested that the plaintiff should have been shown specifically how to lift this particular item. The logical consequence of this submission is the preposterous proposition that the plaintiff should have received specific individual lifting instruction in relation to each item which passed through CSSD."

[41] The "logical consequence" of the submission was not as the primary judge perceived. The canister was known to be awkward to handle. It was wet and its weight unevenly distributed. It caused concern. There was an attempt to avoid having to handle it at all. The evidence did not suggest that there was any other such item among the large number of items sterilised every day. The great bulk of those, it would seem, were contained in trays. To the extent that they were not handled in trays there is no specific evidence about them.

[42] The fact of the matter was that the rudimentary training given to the appellant about the lifting and handling of objects had little, if any, bearing on the handling of the canister. A precaution which could have been taken in relation to the canister was the giving of instructions to shift it by grasping it firmly in a described place or places using both hands. Staff could have been warned not to lift it with one hand placed on a flat, slippery surface and to ensure that their grip was secure. They could have also been told to pause and think before handling it as it was awkward. Consideration could also have been given to whether it was desirable that it be handled by shorter than average or weaker than average persons. Mr O'Sullivan's opinion was that staff should have been instructed to avoid sudden, extreme or very rapid movements to save a falling item. He said that "such a moreover is widely recognised as a risk factor for low back injury" and should be avoided.

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18 Section 4.1 of the Code.

19 Section 4.2 of the Code.

20 AR 359.

[43] The primary judge observed that the five kilogram canister was "considerably less than the weight referred to in *Schiliro*[21] where the court held that shovelling 8.5 kilograms of sand was of minimal risk and did not warrant a risk assessment. If, which may be doubted, there was utility in comparing the facts of *Schiliro* with the facts of this case, the appropriate weight related comparisons would not be dead weights but the forces to which the relevant activities exposed the plaintiff at the critical time.

[44] Mr O'Sullivan's evidence was to the effect that some 14.45 kilograms of force were necessary to arrest the fall of the base of the canister. It is relevant also that a four kilogram load weight held close to the body equates to a 20 kilogram load weight if held 50 centimetres from the body.[22]

The appellant has thus established errors in the primary judge's reasoning but in view of earlier findings it is unnecessary to conclude whether there was non-compliance with the provisions of the Code in relation to training.

Was there compliance with s 26(3)(b) of the Code?

[45] Once it is concluded that the respondent failed to adopt and follow the way stated in the Code to manage exposure to the subject risk, liability has been established unless the respondent has shown that it did all that was required by it under s 26(3)(b) of the Act It is apparent from the above discussion that the respondent did not "adopt and follow another way that gives the same level of protection against risk".

Conclusion

[46] For the above reasons, the respondent failed to escape the liability imposed on it by operation of s 28 of the Act. In particular, it failed to establish that it adopted and followed the "way" stated in the Code for managing exposure to the relevant risk. It also failed to prove that it had satisfied the requirements of s 26(3)(b) of the Act.

[47] I would therefore order that:

1. The appeal be allowed;
2. The order of the primary judge made on 6 August 2010 be set aside;
3. The respondent pay the appellant the sum of $639,435.91; and
4. The respondent pay the appellant's costs of and incidental to the proceeding on the basis that it was appropriate that a senior and junior counsel be retained.

[48] **CHESTERMAN JA:** The appellant was injured on 5 October 2004 when employed as an assistant in nursing by the Nambour General Hospital. The *quantum* of her damages was agreed at $639,435.91. The action proceeded on the question of liability only. The appellant claimed damages on the basis of the respondent's breach of statutory duty and negligence. She was unsuccessful with respect to both causes of action and judgment was given against her on 6 August 2010. She appeals only against the judgment dismissing her claim for breach of statutory duty. She does not now contend that the respondent was negligent.

[49] The trial judge described the circumstances of the injury:

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21 *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [2001] 1 Qd R 518.

22 *Manual Tasks Code of Practice* 2000, appendix 4.

> "[2] The plaintiff was employed in the Central Sterilising Service Department ("**CSSD unit**"), which resembles a large industrial washing-up area, equipped with large sterilizing dishwashers and other equipment for high grade medical sterilization and cleaning. At the time of her employment there, the CSSD unit processed tens of thousands of pieces of surgical equipment each month, of varying sizes and weights. Surgical items and equipment were transported on trolleys from operating theatres and other parts of the hospital to the CSSD to be cleaned, sterilized and returned. The trolleys had a number of shelves and a tub on each shelf. Each tub was covered with a fitted lid for safety and hygiene purposes. The height of the trolley at the top edge of the tub was 1066mm above floor level and the depth of the tub itself was 220mm, meaning, therefore, that the items were at a height of 846mm from the ground when they were removed from the trolley.
>
> [3] The plaintiff's injury was sustained when she removed a soda lime canister from a tub on a trolley in order to place it in a decontaminator approximately one metre away from the trolley. A soda lime canister is a piece of surgical equipment weighing about 5 kilograms. It is made predominantly from stainless steel. It comprises a base (about 165mm square) and 2 vertical steel plates at the side, joined by a crossbar at the top. Fully assembled, it is about 430mm long by 240mm in diameter. On the day of the plaintiff's incident, the soda lime canister was unassembled, meaning the plastic internal canisters had been removed so that the equipment to be sterilized was only the base, the side plates and the top crossbar. A short hose of approximately 300mm in length was attached to the base of the item. The bottom of the square base was covered with a removable Perspex cover attached by three large screws which protruded from the base. The canister in question had been disassembled and rinsed off in theatre, before being brought to the sterilization area. The plaintiff described it as having droplets of water on it.
>
> [4] The plaintiff claims to have lifted this disassembled soda lime canister from the trolley by grasping its top with her right hand and using a 'flat palm grip' with her left hand on the base, without attaching any part of her left hand onto or around any object (for example the screws protruding from the base). It slipped from her left hand and she bent down and to the right to catch the end she had dropped, and in doing so, injured her back."

[50] Because the appellant criticises a number of the trial judge's findings of fact it is convenient, and perhaps necessary, to set out something of the evidence.

[51] In order to lift the canister from the tub the appellant gripped the lighter end of the canister by one of the steel plates and put the palm of her left hand on its base. She

said that after she had lifted the canister out of the tub and turned to her right it "slipped out of (her) left hand and (she) twisted down to the floor and caught it" to prevent any damage to the canister which was both expensive and necessary for surgery. She had maintained her grip with her right hand on one of the steel plates. She managed to grasp it again with her left hand when the canister was at about ankle height. She described the canister as "awkward and a horrible thing".

[52] When cross-examined the appellant agreed that her role involved handling "tens of thousands of pieces of equipment" which came through the CSSD each month. They varied in shape, size and weight. Many items posed their own difficulty or hazard in handling and "when picking up these various pieces of equipment (one had) to use (one's) judgment as to the best way to pick them up." She agreed as well that the base of the canister had three or four legs or screws which protruded from it and on which it apparently sat when in use in the operating theatre. It would have been, the appellant agreed, simple to obtain a secure grip on the base by placing her fingers around a leg, or legs.

[53] This was said:

> "If you were to … (pick) up a canister frame … that was a simple thing … to do, … to place your fingers around that screw head? – Yes.
>
> So that, too, was a way in which you could get a secure grip on this object without simply placing your hand flat against the surface? – Yes, I could have.
>
> … if the way the frame was lying in the tub when you went to pick it up meant that it was not so easy to get a grip or to take hold of the frame other than placing your hand flat against a flat surface? – Yes.
>
> If that was the way the frame was lying … it was a very simple matter to, using your other hand, adjust the position of the frame within the tub so that you could get a secure grip by other means on the frame with your left hand? – Yes.
>
> … if … what you wanted to do was to hook your fingers underneath the bottom edge of the base of the frame, you could do that simply by moving the frame with your right hand, tilting it slightly and placing your fingers underneath? – Yes, I could have.
>
> Do you say that you did not do any of those things on this day? – On that day, no.
>
> It was the case, wasn't it, that you simply didn't stop to think for even a moment … about how you should take hold of this device securely? – It's just a time-consuming thing that I had just picked it up and … I picked it up wrong and it slipped out of my hands.
>
> You just made an error of judgment I suggest; is that right? I suppose I did."

[54] The appellant commenced work in the CSSD at the Nambour General Hospital in April 2004. She had previously worked in a similar role in hospitals in New South Wales for two or three years but had not had to handle a soda canister. Both in New South Wales and Nambour the appellant was given a course of instruction in lifting

and handling the objects she was likely to encounter in her employment. There was no specific instruction with respect to lifting or handling the soda canister. The appellant accepted that she had been instructed when inducted into the employment with the respondent that "when lifting you should make sure you have a secure grip", and that "when lifting you should first test the weight".

[55] There was evidence that the canister was awkward to handle and that the staff in CSSD had grumbled to each other about it. None of them, however, ever complained to a superior about any particular risk they identified with handling the canister. Though there were several references in the evidence to the awkwardness of the canister as an object to be handled the only specific cause of the difficulty identified in the evidence was that its weight was unevenly distributed. Most of the weight was in the base and the metal plates which formed a frame above the base, though much longer than the thickness of the base, were considerably lighter.

[56] One of the appellant's co-workers, Gwendoline Currey, had worked in CSSD for about seven years during which she handled the canister about once a week. Ms Currey "used to comment that it was awkward" to whomever "was … out the back and had to listen to (her)". She did not complain about it to any superior. She did make a formal complaint after the appellant's injury which, so far as the evidence goes, was the first occasion on which there was any mishap in handling the canister.

[57] The appellant's case was supported by evidence from Mr O'Sullivan a physiotherapist and ergonomist. He provided a number of reports describing the mechanics and forces involved in the appellant's lifting the canister from the tub and in catching it after it was dropped. His analysis and conclusion were premised on the appellant gripping the top of the canister by the metal plate or frame with her right hand and placing her left hand flat against the clear plastic base so that no part of that hand interlocked on any protruding surface.

[58] The canister weighed 5.4 kg. Mr O'Sullivan estimated that the weight of the base was 3.78 kg. Because the appellant did not grasp the base of the canister securely but relied upon force exerted laterally through the flat of the hand on the base:

> "… force had to be overcome by pressure of the glove against the base to create an upward frictional force equivalent to 3.78kg. With a coefficient of friction of 0.23, the pressure required to be applied by (the appellant's) gloved hand will have been in the order of 16.4kg … applied in a direction across the front of (the appellant's) body … 16.4kg (of) pressure … against the acrylic base of the soda lime canister, sufficient to prevent the … base slipping out of the grip, is beyond the capacity of most females."

[59] Mr O'Sullivan said this in cross-examination:

> "… there are very many different ways in which a woman in (the appellant's) circumstances could securely take hold of that object in that tub on that trolley and lift it out of the trolley? - … There's a number of ways, yes.
>
> And if the orientation of it isn't what suits you at the moment you go to pick it up, it can easily be moved … ? – Yes.
>
> Turned on its side, turned on its end, tilted – any of those things? – Yes.

> And in doing that, the person could readily get a secure grip either on the frame or, indeed, with their hand underneath with a locking grip on the base? – That method sounds probably more appropriate.
>
> … that is one of the methods that could … safely have been employed? – Yes."

[60] The respondent called evidence from a registered nurse, Joanne Ricardi, who at the relevant time was the manager of CSSD. She had been so employed since the beginning of 2000. She was aware of occasional discussion by staff members "regarding the handling of the soda lime frame." The comments were that:

> "… it was awkward to handle, the weight distribution was uneven and it was seen to be difficult to load and unload from the … washer … ."

In response to the comments Ms Ricardi spoke to staff in the operating theatre to see whether or not the instrument:

> "… needed to be processed in CSSD. It did. … It did require decontamination through the CSSD batch washers. And it is a critical piece of equipment. … so… it did need to be processed through CSSD."

[61] Notwithstanding the reply from theatre staff and the comments from her own staff Ms Ricardi did not think it necessary to undertake a risk assessment "on the process of picking up that frame and carrying it within the department," because:

> "Although the piece of equipment (was) awkward to handle because it (was) off-balanced … you (could) still hold it quite firmly with the frame and (she) didn't consider it to be of any risk to injure."

[62] She explained that she thought a risk assessment was not necessary unless the risk was perceived to be "great". She did not consider there was any great risk to staff who handled the canister.

[63] With respect to the last point a DVD was put into evidence which demonstrated Ms Ricardi lifting a canister from a trolley. The depiction shows her handling it with relative ease and grasping it, apparently securely, in four different ways. The demonstration was produced to support the respondent's case at trial but there is no reason to doubt the easy manner in which the handling was accomplished.

[64] When shown the proficiency with which Ms Ricardi had handled the canister the appellant agreed that "each of the ways that she demonstrated to pick up the frame was a way which you could have picked up the frame on the day in question." Mr O'Sullivan, too, conceded that Ms Ricardi had demonstrated that "using two hands and obtaining a secure grip" of the canister it could be lifted out of the tub "quite easily".

[65] Ms Ricardi was pressed in cross-examination with the proposition that her approach to theatre staff to ask whether the decontamination of the frame had to be done in CSSD indicated a level of unease in its staff about the handling which led her to perceive there was a risk of injury to those who had to handle it. Her response was that she regarded the risk as "minimal" and that she received "general grumbles about a lot of things" and that it would be unrealistic "to do a risk assessment on

every single item" of the ten thousand or so processed every month. Ms Ricardi noted that murmurings she heard about the canister was that it was "awkward to load and unload" but not "that it was a risk … through a slip or drop." The canister was not the only object that was awkward to handle. She insisted that "At no point in time did I ever think anybody would ever injure themselves by dropping it." She did not personally consider it to be "unduly awkward, heavy (or) difficult to handle."

[66] After Ms Ricardi had been told by theatre staff that the canister had to be decontaminated in CSSD she consulted some, though not all, of its staff who agreed with her:

> "… the fact that there was nothing we could do about this piece of equipment because it needed to be … decontaminated and we also discussed the fact that even though it was awkward, it was within our weight and it was manageable."

[67] The comments, or grumbles, about the frame were never expressed in a formal setting but in the course of the day's work:

> "… along the lines of "Oh … here's the (frame)" and "it's hot" and "it's awkward" and it was just general conversation on the floor, a bit like general conversation … You know, "Watch out girls …"."

[68] The trial judge found that the appellant had established a *prima facie* contravention of the obligation to ensure her work place health and safety imposed on the respondent by s 28 of the *Workplace Health and Safety Act* 1995 ("the Act") and therefore an entitlement to damages for breach of statutory duty. His Honour found, however, that the respondent had established a defence to the contravention pursuant to s 26 and/or s 37 of the Act.

[69] Section 28 provides:

> "(1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking."

[70] Section 22 defines how one ensures workplace health and safety. It provides:

> "Workplace health and safety is ensured when persons are free from –
>
> (a) death, injury or illness caused by any workplace, workplace activities, or specified high risk plant; and
> (b) risk of death, injury or illness created by any workplace, workplace activities, or specified high risk plant."

[71] In *Parry v Woolworths Limited* [2010] 1 Qd R 1 Fraser JA (with whom the President and White JA agreed) said:

> "[26] In *Schiliro* the Court concluded that the weights involved in that plaintiff's task did not exceed the recommendations in the standard then applicable, there appeared to be no particular reason to identify a risk, and the risk assessment process in accordance with that standard suggested the

absence of any risk for which the standard would have called for any control. The Court nevertheless found that the employer had contravened the obligation in s 28(1) by failing to "ensure the workplace safety" of the employee at work. The employer escaped liability only because it was held that the employer had satisfied the onus on it of establishing a defence under each of s 26(3)(b) and s 37(1)(b)(ii).

…

[29] In *Bourk v Power Serve Pty Ltd*, Chesterman J referred to *Schiliro* and said:

> "[69] The statutory obligation is to ensure the employee's safety at work. If any injury is caused to an employee at work which could by some means have been prevented by the employer, s 28 will have been contravened and the employer will be liable in damages for the injury, unless it can make good one of the defences provided by s 27 or s 37 of the Act. See *Hardy v St Vincent's Hospital Toowoomba Ltd* [2000] 2 Qd R 19 at 21-22. The standard is higher than that imposed by the common law."

[30] An appeal concerning causation, which is not in issue here, was allowed from that decision in *Bourk v Power Serve Pty Ltd*. In that case Muir JA described the statutory scheme in terms which are consistent with the decisions to which I have so far referred:

> "[32] Under s 28(1) the employer's duty to ensure the employee's safety is absolute. It is not expressed as a duty to supply equipment, advice, training, conditions, or assistance of a particular type or at all. Subject to the operation of s 26, s 27 and s 37, if an employee such as the appellant is injured through the failure of a piece of necessary safety equipment provided to him by his employer there is a breach of the obligation imposed by s 28(1). The employer has failed to ensure the safety of the employee. Causation is established. If the employee's safety had been ensured, the employee would not have been so injured." (footnotes omitted)

[72] The exculpatory provisions of the Act are *s* 26 and *s* 37. Relevantly they provide:

> "26
> (1) …
> (2) …

(3) If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation only by –

(a) adopting and following a stated way that manages exposure to the risk; or

….

37

(1) It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person under division 2 or 3 for the person to prove –

(a) …

(b) if an advisory standard or industry code of practice has been made stating a way or ways to manage exposure to a risk –

(i) that the person adopted and followed a stated way to prevent the contravention; or

… ."

[73] There was, for the purposes of this case, a code of the kind referred to in ss 26(3) and 37(1)(b). It was the *Manual Tasks Code of Practice* 2000 ("the Code"). The Code says of itself that it:

> "…states ways to prevent or minimise exposure to risk factors that can contribute to or aggravate work related musculoskeletal disorders."

To remove all doubt about the matter the Code then explains that manual tasks are those which require:

> "… a person to grasp, manipulate, strike, throw, carry, move (lift, lower, push, pull), hold or restrain an object, load or body part."

[74] The trial judge noted the authorities I have mentioned, and others to the same effect, then recited the relevant provisions of the Act and the Code, and correctly analysed the crux of the case before him:

> "[30] The defendant, therefore, had an obligation under the Code to identify problem tasks, bearing in mind that while all tasks could be identified as some sort of hazard, it is important to prioritise tasks which have significant risk associated with them. Chapter 7 – Risk identification, lists the first step in managing risk as being to target potentially risky jobs/tasks for assessment. It suggests that problem tasks could be identified when changes to the work environment are planned, when there are indications for potential injury or after an incident or injury has occurred. The Code suggests that consultation with employees can be 'valuable' in identifying risks as workers will know best the difficulties they experience in performing particular manual tasks. Once problem tasks are identified, the employer must decide which tasks are most in need of assessment by considering the number of risk factors involved, the frequency of the task and the proportion of workers who are completing the task."

[75] The trial judge considered the circumstances of the appellant's injury, noting that her task was not one which was frequent or repetitive but was brief and performed about once a week. His Honour remarked that neither the appellant nor Ms Currey had complained in any formal way to Ms Ricardi or any other person in authority in CSSD about difficulties in handling the canister.

[76] The trial judge then rehearsed Ms Ricardi's evidence in terms which expressed acceptance of it. His Honour said:

> "[42] Ms Ricardi said that she was familiar with the process of risk assessment and understood that a risk assessment was 'something you do on an article, an item or a practice if you feel you wish to assess…the level of the hazard, the level of the risk in handling that piece of equipment or in doing that type of task'. She said that she did not consider the soda lime canister to be of 'any great risk' so as to warrant a risk assessment being undertaken.
>
> [43] Nevertheless, in response to concerns raised in general conversation, she did discuss the issue with theatre staff to ascertain whether there was an alternative. The plaintiff submits that this discussion with theatre staff inherently means that Ms Ricardi must have thought the item posed a risk.
>
> [44] The issue of the soda lime canister specifically must be considered in the context of the overall activity of the CSSD and the factors referred to in the Code, namely the number of risk factors involved, the frequency of the task and the proportion of workers who are completing the task. The uncontradicted evidence before me was that the CSSD processed more than 12,000 items each month, many of which could be considered awkward (due to factors such as length, size or weight distribution) or even dangerous (such as scalpels and other sharp objects). This item weighed only 5 kilograms, which is considerably less than the weight referred to in *Schiliro,* where the court held that shovelling 8.5 kilograms of sand was of minimal risk and did not warrant a risk assessment. The task was performed infrequently; it would appear that the soda lime canister was brought to the CSSD only about once a week and that the same staff member was not required to process it each time.
>
> …
>
> [46] The plaintiff's counsel placed great weight in their written submissions on the issue of consultation, namely that the Code required a formal process of consultation with workers during the risk identification process. However, the Code states that consultation 'can take the form of informal on the job interaction during a walk through of the work unit' and recommends that it may be desirable to put a formal structure into place. Ms Ricardi worked alongside the other employees in the CSSD and appeared to be willing to listen to their concerns as evidenced by her actions in noting

> concerns about the soda lime canister and attempting to make other arrangements through discussions with theatre staff. The plaintiff and Ms Currey both seemed well aware that they were able to make formal or written complaints about any item they had an issue with and that their concerns would be considered. Ms Ricardi said that it was known to all staff that they were able to fill out a risk assessment form if they felt that any item or object that they were handling was a risk.
>
> [47] It was also submitted by counsel for the plaintiff that insufficient training was provided in relation to the handling of the soda lime canister. The plaintiff gave evidence of receiving manual handling training during a training and induction session in the form of a lecture and a video. She was unable to recall with certainty if it was the same video which was marked for identification in the proceeding, but conceded that the video was of a similar kind and that it included instruction on lifting techniques and safety when lifting. She also recalled being shown a video called "Child's Play", another video on safety and techniques related to manual handling. Counsel for the plaintiff suggested that the plaintiff should have been shown specifically how to lift this particular item. The logical consequence of this submission is the preposterous proposition that the plaintiff should have received specific individual lifting instruction in relation to each item which passed through CSSD.
>
> [48] It is important to note that the Code recognises that all manual tasks could potentially be recognised as a hazard, but that not all manual tasks have significant risks associated to them such as would warrant the implementation of a formal risk assessment. It is my opinion that, having regard to all the factors and the requirements of the Code, namely the relatively light weight of the soda lime canister, the infrequent nature of the task, the other options available to the hospital to have a vital piece of equipment sterilized, the lack of suggestion of possible injury, the large number of items processed in the CSSD and the nature of the work being undertaken in general in the area, that the defendant was reasonable in not identifying this as a task which would require a formal risk assessment under the Code."

[77] This reasoning led his Honour to conclude that the respondent had discharged its duties under the Act and found no basis for an award of damages.

[78] It might be mentioned in passing that the trial judge refused to entertain a claim for damages for breach of s 30 of the Act. It is accepted that the reason given by the trial judge for rejecting this claim was wrong, but the error has no practical effect. Section 30, if it conferred a right to recover damages where an employer was in breach of its provisions, did not go beyond an injured worker's rights to recover damages for breach of s 28, and the same defences available to an employer, those

given by s 26 and s 37, applied equally to s 30. If the respondent made good its defence by showing compliance with ss 26(3) or 37(1)(b) it escapes liability, whether under ss 28 or 30.

[79] Before turning to a consideration of the arguments it is appropriate to refer to a point recognised by the authorities and to an acknowledgment made in the Code.

[80] The task on which the appellant was engaged when she suffered her injury was simple and was within her capacity to perform. I do not understand that contention to be disputed. The court said in *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [2001] 1 Qd R 518 at 532:

> "[46] The natural extension of that argument is that it would be unlikely the legislature would intend to create an offence for failing to identify and assess trifling manual handling tasks. The respondent's submission overstates the effect of the Code which requires "identification of risk factors in the workplace *likely to cause manual handling injury*" and the identification of "manual handling tasks *likely to be a risk to health and safety* in order that they can be effectively examined and assessed" (our emphasis). Only if the risk identification procedure indicates a need for risk assessment is it necessary to move to the second step of risk assessment which is defined as "the identification of risk involved with a manual handling task that is *likely to be a risk to health and safety*" (our emphasis). The Code provides a framework for employers in consultation with employees to assess, identify and deal with risks, but only those risks *likely to be a risk to health and safety*. If, for example, the manual handling task was not likely to be a risk to health and safety, the Code would cease to apply."

[81] In *Parry* Fraser JA said, in a passage cited by the trial judge:

> "[36] My own view is that the judgment in *Schiliro* made it clear that though the workplace activities there in question exposed the employee only to a trivial risk of injury, a prima facie contravention was established because of the absolute nature of the obligation in s 28(1). The significance of the triviality of the risk lay in the relative ease with which the employer could rebut the prima facie case of liability established by proof of an apparent contravention of s 28."

[82] Section 2 of the Code deals with the obligations of employers. Under "Management of risk" it states that the first task is to "Identify problem tasks". It goes on:

> "Although manual tasks can be identified as a hazard, not all manual tasks have significant risks associated with them. Select tasks for assessment that may have the potential to contribute to a musculoskeletal disorder, or have caused one."

The next step is to:

> "**Assess** the risks associated with the problem tasks," after which the employer must
>
> "**Control** the risk … ."

[83] Section 4 deals with "consultation", and answers the question "Why consult?" with the answer:

> "Consultation is an important risk management strategy … . Because workers perform tasks, they should be included in the process of identifying, assessing and controlling risks. Workers know the difficulties … and may be able to suggest ways to improve work practices."

[84] The Code makes the point that consultation may take many forms, and in particular:

> "… the form of informal on the-job interaction during a walk through of the work unit. … ."

[85] Section 7 deals with the identification of risks. The "first step" is said to be "target potentially risky jobs … for assessment." It explains that:

> "Problem tasks can be identified:
> (1) when changes in the work environment are planned
> (2) when there are indications for potential injury
> (3) after an incident or injury has occurred."

[86] Section 26(3)(a) of the Act exonerates an employer from liability under s 28 if it adopted and followed a stated way that manages exposure to the risk of injury found in the Code. A way of managing the risk of injury, stated in the Code, was to consult in order to identify tasks which appeared to have the potential to contribute to injury. Consultation may be informal. Speaking of a code which was in similar though not identical terms the court said in *Schiliro* that "Only if the risk identification … indicates a need for risk assessment is it necessary to move to the second step of risk assessment … ".

[87] It should be noted that none of the indications identified in s 7 of the Code for "targeting" "potentially risky jobs" for the purpose of carrying out a risk assessment was applicable. No changes to the work environment were anticipated or planned. There had been no incident or injury before the appellants arising from handling the canister. There was, in Ms Ricardi's experience of the task performed by CSSD staff, no indications for potential injury. The reasons for that conclusion have already been explained.

[88] Ms Ricardi formed the opinion that the task of lifting and carrying the canister posed a minimal, or trivial, risk of injury. The trial judge accepted her characterisation of the risk which is, in my opinion, supported by the evidence. That being so it was, on the authorities, relatively easy for the respondent to "rebut the prima facie case of liability established by proof of an apparent contravention of s 28." Section 26(3)(a) and s 37(1)(a) would be satisfied if a way stated in the Code was adopted and followed. One such way was the identification of a risk with the potential for injury. Ms Ricardi thought there was no such risk. That being so the Code did not require the subsequent steps of risk assessment and control to be undertaken. The first step was sufficient and it was adopted and followed.

[89] That finding, which was one of fact, was open to the trial judge. It was supported by the evidence of Ms Ricardi which his Honour was entitled to accept. The trial judge's depiction of the task of handling the canister was accurate. All witnesses agreed that it could be picked up and carried safely and with relative ease. There

had been no prior injury caused to anyone who had handled the canister and no complaint had been made about it. Despite the uneven weight distribution and the fact that the appellant was a small framed woman the task of moving the canister from trolley to steriliser was simple and was within the capacity of those employed to do it.

[90] Unless it was established that Ms Ricardi's assessment, that handling the canister did not give rise to a potential risk of injury, had not in fact been made by her, or could not reasonably have been made, a way of managing risk, described by the Code, had been followed.

[91] The trial judge accepted that Ms Ricardi had made that assessment and that it was right. The finding was one of fact and was based, at least in part, on credit. It cannot be disturbed except in the well defined circumstances established by the authorities, which are not said to exist here. That apart, the finding is, with respect, entirely consistent with the evidence. It is not at all surprising that Ms Ricardi would not think that the risk of injury from handling the canister was worth investigating further. There had been no past mishap involving the canister on the many occasions it had been lifted from the trolley to the steriliser or steriliser to the trolley. It could be handled easily. No member of staff had ever complained that she had dropped the canister or had it slip from her grasp.

[92] Moreover any risk of injury from dropping the canister could only be controlled, to use the words of the Code, by training CSSD staff members in proper techniques of lifting. All staff members, including the appellant, had received such training. It is not to the point that there was no specific training or instruction for lifting the canister. There was general training which equipped the appellant (and other staff members) in general techniques of lifting. The evidence established that, as the appellant accepted, the instruction equipped her to lift the canister. She was injured because she did not lift it in the manner she had been taught.

[93] The appellant complains that the trial judge made three substantial errors which vitiate the findings of fact which led to the verdict adverse to the appellant. The first identified error is that his Honour referred "repeatedly" to the canister's weight as being 5 kilograms. This overlooked, it was submitted, Mr O'Sullivan's evidence that the effective weight the appellant had to lift was 16.4 kilograms. The result is, the submission continues, that the judge grossly underestimated the difficulty of the task the appellant had to perform.

[94] With respect to the learned counsel who pressed the point so earnestly I cannot think it is right. Accepting the accuracy of Mr O'Sullivan's calculation, the force of 16.4 kilograms which the appellant had to exert to lift the canister clear of the tub and carry it to the steriliser was necessary only because of the incorrect manner in which she chose to grasp it. Had she taken hold of it in any of the ways demonstrated by Ms Ricardi she would have had to contend with a weight of about 5 kilograms. The additional weight or force was applicable only because the appellant took hold of the canister by its flat base and had to exert lateral pressure to create enough friction to avoid the base slipping across the flat surface of her hand. Had she taken hold of one of the protruding legs or another part of the metal plate she would not have to exert that lateral pressure. No doubt the base slipped from the appellant's grasp because she had to exert a lateral force of 16.4 kilograms but the appellant was in that position only because, as she accepted, she did not pick it up correctly.

[95] Mr O'Sullivan's figure is relevant to an understanding of why the canister would have dropped and how the appellant was injured. It did not provide a description of the task the appellant had to undertake.

[96] The second error identified by the appellant is that the trial judge wrongly viewed Ms Ricardi's inquiry of theatre staff as "some kind of compliance with s 26, sufficient to establish a defence" when in reality she did nothing in response to her staff's concerns.

[97] The submission ignores the evidence Ms Ricardi gave, which I set out earlier in these reasons, and which the trial judge accepted, that she did not take the matter further because the risk constituted by handling the canister was not such as to require a formal risk assessment. Ms Ricardi testified that she spoke to some employees in CSSD and their consensus was that the canister, while awkward to handle, was manageable and within their capacity to lift and carry. She said, as well, that it never occurred to her that anyone might be hurt in handling it.

[98] The appellant sought to impugn Ms Ricardi's evidence by using the fact of her approach to the theatre staff to show that the level of discontent among the employees who had to handle the canister was such as to give rise to an assessment that moving it did give rise to a risk of injury. Ms Ricardi said otherwise and that question of fact and credit was resolved against the appellant by the trial judge. There is no sufficient basis for setting it aside and I do not understand that this Court was asked to do so. The result is that there was a finding of fact that the risk identification process described in the Code was followed.

[99] The third error complained of is that trial judge found because CSSD handled ten or twelve thousand items a month it was neither realistic nor feasible to conduct a risk assessment with respect to each of them. The error is said to be that there was evidence that handling the canister was awkward, and was known to be so, but the evidence did not indicate any particular awkwardness or difficulty in handling any other item. It was not therefore necessary to conduct a risk assessment with respect to those. There was, it was argued, a need to conduct a risk assessment with respect to the object known to be awkward.

[100] There was a secondary complaint that the finding in paragraph [44]:

> "… more than 12,000 items each month, many of which could be considered awkward (due to factors such as length, size or weight distribution) or even dangerous (such as scalpels and other sharp objects)"

was unsupported by any evidence. This particular criticism appears to have no significance to the argument but it is, I think, wrong. The number of items, twelve thousand a month, was given in evidence. The appellant accepted in cross-examination that those items of equipment differed in shape, size and weight. There was evidence that some of the equipment was sharp and some of it, to varying extents, was awkward to handle. Ms Ricardi gave evidence that minor injuries were occasioned by an item other than the canister. Nor was it the only item about which staff grumbled.

[101] The appellant's submission loses much of its force from the failure of this criticism of the judgment. It should be rejected for another reason, which is that it is based upon a distortion of Ms Ricardi's evidence. She did not say that she did not

undertake a consideration of risks posed to CSSD staff from the canister because the task of considering risks associated with twelve thousand items was too large to undertake. Her evidence was that she did turn her mind to whether handling the canister gave rise to a risk of injury so as to require further assessment or control, and concluded it did not. She described the risk as "minimal", and made the point that no one had complained to her about dropping the canister, or having it slip from their grasp.

[102] It is apparent the trial judge accepted her evidence and its corollary that it was not necessary to move to step 2, the assessment of the magnitude risk with a view to seeing whether it should be controlled.

[103] The appellant's attack on the judgment founders on this essential finding of fact.

[104] Some remaining submissions made by the appellant should be noted. The trial judge was criticised for basing his decision in part by reference to what was said in the judgments about the facts in other cases, particularly to *Schiliro* and *Parry*. It is true that the trial judge appeared to find support for his conclusion by comparing the facts in the case before him with those in the cases just mentioned. I would, with respect, accept that such an approach is always likely to be unhelpful and may mislead but the comparison made by his Honour was not critical to the decision. That turned upon the facts which I have discussed, and which justified that judgment.

[105] The last point to mention is the complaint that Ms Ricardi did not "undertake any process of formal or structured consultation about problem tasks … ." More specifically it is said that she did not consult CSSD staff "about all aspects of handling the canister … despite (her) awareness that the item was awkward … ."

[106] The Code itself recognises that consultation may be informal and may occur on a "walk through of the work unit". The evidence establishes that consultation of that kind took place. Ms Ricardi was well aware of the groans of CSSD staff about the canister and other items. It was, obviously, that awareness which led her to approach theatre staff to inquire whether her unit had to continue handling it.

[107] In my opinion there was evidence to support the trial judge's findings of fact that the respondent had followed and adopted a way that managed exposure to risk stated in the Code. Sections 26(3) and 37(1)(b) were satisfied. Accordingly the appeal should be dismissed with costs.

[108] **WHITE JA:** The appellant was employed as an Assistant in Nursing at the Nambour Hospital in the Central Sterilising Service Department ("CSSD") where her duties involved the sterilisation of medical equipment. She suffered an injury to her lumbar spine in the course of her employment on 5 October 2004 whilst lifting equipment. She brought proceedings for damages against the respondent alleging breach of a common law duty of care in negligence, breach of contract and breach of ss 28 and 30 of the *Workplace Health and Safety Act* 1995 (Qld) ("the Act").

[109] The trial proceeded on the issue of liability only as quantum had been agreed between the parties in the sum of $639,435.91. On 6 August 2010 the primary judge dismissed the appellant's claim on all bases. The appellant appeals only with respect to his Honour's conclusion that although the respondent had breached the

duty imposed upon it by s 28 of the Act by not ensuring the appellant's workplace health and safety, it had discharged that obligation pursuant to s 26(3).[23]

The legislation[24]

[110] The obligations of an employer to its workers are set out in s 28. It provides, relevantly:

> "(1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers in the conduct of the employer's business or undertaking."

It was common ground between the parties that the appellant, by proving that she had been injured at work, had prima facie established that the respondent had breached its duty to ensure her workplace health and safety. The liability is not absolute and the obligation imposed by s 28 may be discharged by the employer in ways identified in s 26:

> "(1) If a regulation or ministerial notice prescribes a way of preventing or minimising exposure to a risk, a person may discharge the person's workplace health and safety obligation for exposure to the risk only by following the prescribed way.
>
> (2) If a regulation or ministerial notice prohibits exposure to a risk, a person may discharge the person's workplace health and safety obligation for exposure to the risk only by ensuring the prohibition is not contravened.
>
> (3) If an advisory standard or industry code of practice states a way of managing exposure to a risk, a person discharges the person's workplace health and safety obligation only by –
>
> (a) adopting and following a stated way that manages exposure to the risk; or
>
> (b) adopting and following another way that gives the same level of protection against the risk."

Because the failure to discharge the obligation has penal sanctions, Division 4 of the Act provides defences to proceedings brought against a person for contravention. They are set out in s 37 and reflect the ways in which the obligation may be discharged as provided for in s 26.

[111] Section 29B expands upon s 28 by expressly mentioning what the obligation in s 28 "may" include. The obligation may be discharged by:

> "(a) identifying hazards, assessing risks that may result because of the hazards, deciding on control measures to prevent, or minimise the level of, the risks, implementing control

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[23] The appellant also challenges the conclusion about s 30, but, as will be seen, if it applies, there is no different outcome if resort is had to that provision.

[24] It was common ground that the version of the *Workplace Health and Safety Act* 1995 which applied was Reprint 5C effective at 1 March 2004. There is some variation in the relevant provisions quoted in the primary judge's reasons which seems to be Reprint 9C current as at the time of judgment but the differences are not material to the issues to be considered.

measures and monitoring and reviewing the effectiveness of the measures;

(b) providing and maintaining a safe and healthy work environment;

(c) providing and maintaining safe plant;

(d) ensuring the safe use, handling, storage and transport of substances;

(e) ensuring safe systems of work;

(f) providing information, instruction, training and supervision to ensure health and safety."

It was uncontroversial at the trial that the *Manual Tasks Code of Practice 2000* ("the Code") was a code of practice within the meaning of s 26(3) of the Act which applied to the appellant's employment.

The Code

[112] The Code reflects the matters mentioned in s 29B. It opens by telling the reader that manual tasks can contribute to a number of musculoskeletal disorders including injuries to "muscles, ligaments, intervertebral discs and other structures in the back".[25] Musculoskeletal disorders can, according to the Code, occur in two ways, namely, by gradual wear and tear and through "sudden damage caused by … unexpected movements such as when materials being handled move or change position suddenly".[26] The Code identifies load handling as an activity which can contribute to musculoskeletal disorders in the back identifying "frequent and repetitive lifting with a bent and/or twisted back (even for relatively light loads) …".[27]

[113] The Code then moves to "Risk factors":

"1.3 Risk factors

Risk factors are a focus of this document. They are defined as factors associated with the demands of a task that can contribute to or aggravate musculoskeletal disorders. Risk factors are used to analyse manual tasks."[28]

Risk factors are described as falling within three different categories: direct stressors, contributing risk factors, and modifying risk factors. Direct stressors include factors "such as the level of muscular force exerted, working postures, repetition of actions…."[29] Other risk factors are described as "contributing risk factors" which include layout of the work area and "modifying risk factors" which can contribute to a further change in the impact of other risk factors. Following, the Code identifies for the reader that:

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25 AR 179.
26 AR 179.
27 AR 179.
28 AR 180.
29 AR 181.

> "Individual factors such as an operator's physical capacity or previous injury can modify the effects of the direct stressors on the body. This can mean that a task may have adverse health effects for one operator, but not another."[30]

[114] To prevent or minimise exposure to the risk of musculoskeletal disorders caused by manual tasks requires, according to the Code, the management of risk. This occurs by identifying problem tasks. The process for doing so is discussed in a subsequent chapter in some detail.

[115] Section 2 develops the content of "workplace obligations" and directs:

> "Although manual tasks can be identified as a hazard, not all manual tasks have significant risks associated with them. Select tasks for assessment that may have the potential to contribute to a musculoskeletal disorder, or have caused one."[31]

As an overview, the Code then directs the employer to assess the risks associated with the problem tasks (discussed in ch 8), control the risk (discussed in ch 9) and monitor and review the effectiveness of the controls (discussed in ch 9). The Code directs:

> "To prevent musculoskeletal disorders the relevant person who is an employer must make sure:
>
> - work processes involving manual tasks are designed to be safe and without risk to health and safety …"[32]

The Code notes that consultation is an effective way of identifying risks and developing controls in the workplace:

> "It encourages a cooperative approach to health and safety while recognising the decision-making role of the relevant person who is an employer.
>
> Consultation will be enhanced if the provisions regarding workplace health and safety representatives (WHSR), workplace health and safety committees and workplace health and safety officers (WHSO) are implemented."[33]

The Code also notes that training is essential for workers to perform manual tasks without risk to health and safety.

[116] Under the section concerning "Design" the Code notes:

> "An important aspect in the design of equipment or work processes is individual differences in body dimensions and physical capacity."[34]

[117] The Code emphasises the importance of consultation between the employer and the workers. It is described as "an important risk management strategy".[35] Whether

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30 AR 181.
31 AR 182.
32 AR 183.
33 AR 183.
34 AR 185.
35 AR 187.

consultation of the kind envisaged by the Code occurred in the CSSD was a matter much canvassed at trial and on appeal. The Code recommended consulting with workers and their WHSRs "routinely" at all stages of the risk management process "regularly on an informal basis to canvas opinions"[36] on whether any task is a problem, how work areas can be improved and whether there are better ways of moving materials between different work areas to reduce the frequency and distance of handling.

[118] Section 6 of the Code concerns risk management, that is, how risk may be identified and managed:

> "Risk management for manual tasks involves a systematic process aimed at preventing work-related musculoskeletal disorders. Major stages in the risk management process include:
>
> - **Risk identification:** Identify the problem jobs/tasks which are likely to, or have caused injury. If there is more than one, decide in what order they should be investigated.
> - **Risk assessment:** Investigate the problem jobs/tasks, determine the risk factors and evaluate them, assess their importance, and look for their causes, and
> - **Risk control**: Decide on solutions, trial and implement them, and check later to see the changes are working successfully."[37]

The Code notes that successful risk management of manual tasks needs to involve both the employer and the worker as well as the workplace health and safety representative, committee and officers. Area supervisors are mentioned as people who could be involved in the task.

[119] Under the heading "An overview of the risk management process" the following appears:

> "**Risk Identification**
>
> Find the problem jobs which need investigating – not all manual tasks are hazardous."

Associated with that direction the following is set out:

> "**When there are indications something could be wrong**: Observe work processes and speak with workers. … Occasionally use a discomfort survey[38] to pick up problems."[39]

The Code directs that in assessing risk, the problem jobs should be analysed to find out the risk factors that are causing problems.

[120] The Code proceeds through the other steps necessary to discharge the obligation when a task has been identified with the potential to cause musculoskeletal injury but it is unnecessary to discuss them as these proceedings were concerned with the threshold process of identification.

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36 AR 188.

37 AR 190 - 191.

38 Appendix 1 to the Code is a "discomfort survey" which would not have been apt for the task under consideration because it does not provide for a task being "awkward".

39 AR 192.

Issues

[121] The issue for determination at the trial was, essentially, whether the respondent had discharged the onus imposed on it by proving to the requisite standard that it had followed the stated way in the Code or whether it had adopted and followed another way that gave the same level of protection against the risk. It was conformity with the Code which was the focus both at trial and on appeal. The primary judge concluded that, consistently with its obligations, the respondent had applied the Code.

The circumstances of the injury

[122] The CSSD was a large area for cleaning medical equipment. At the time the appellant worked there in 2004 it was responsible for cleaning tens of thousands of individual pieces of surgical equipment each month. These ranged from very small items, generally contained in trays, to larger items such as the soda lime canister ("the canister") an expensive, essential item used in theatre. The canister was 430 mm long and 240 mm in diameter when fully assembled. The base was approximately 165 mm square and had a perspex cover. On the day of injury the canister arrived at the CSSD disassembled with the plastic internal canisters and perspex cover removed. The canister lifted by the appellant had a total weight of 5 kg. As identified by expert Mr Justin O'Sullivan, the weight distribution was such that approximately 70 per cent of the weight was at the base and 30 per cent at the top. Three metal studs were used to screw on the base and part of them protruded. From the base two vertical steel plates protruded approximately 430 mm in length joined by a cross bar at the top. A 300mm long hose was attached near the base.

[123] The canister arrived in the CSSD in a plastic tub sitting on the top shelf of a stainless steel trolley. The tub was 630 mm long x 390 mm wide and 220 mm in height externally. The internal dimensions were 600 mm x 350 mm x 210 mm. The top edge of the tub, when on the trolley, was 1,066 mm above floor level. The trolley was 800 mm long x 270 mm wide. The canister was wet with droplets of water on its surface having been hosed off prior to arrival at the CSSD by theatre staff. It was lying on its side in the plastic tub with the base at the left end of the tub and the cross bar at the right. It had to be placed in a decontaminator. The workers in the CSSD were required to wear rubber gloves. Those supplied were standard domestic (pink) rubber gloves.

[124] The appellant's elbow height with arms relaxed by her side and elbows at 90 degrees was measured at 1,000 mm. The appellant lifted the canister by placing her left hand flat against the bottom of the base while her right hand held the cross bar at the top. In order to clear the top of the side of the plastic tub in which the canister was contained the appellant lifted her shoulders up and put her elbows out in order to get her hands into the tub and lift the canister over the tub. The appellant said that it was "a little bit awkward" because the item was "long and a bit heavy", she was short and the trolley was a little too high for her. As the appellant was lifting the canister to place it into the decontaminator she had to turn about 90 degrees to her right. As she did so, she lost her grip on the base with her left hand and it fell towards the floor. She twisted down to the floor and caught it while her right hand was still gripped to the top of the canister. She was able to re-grip it as it was at a height just above her ankles. In so doing she sustained an injury to her back. The canister was understood by the appellant to be an expensive, essential piece of equipment required to be back in theatre within two hours.

The expert evidence

[125] Mr Justin O'Sullivan, a physiotherapist and ergonomics and safety specialist, prepared a number of reports which were admitted into evidence. He identified the key issues apparent in the incident as including:

> "● [The appellant] lost grip of the heavier base of the unit as she turned towards the steriliser, possibly holding the unit at a height around 1200mm above floor level (having just cleared the top edge of the tub);
>
> ● The base fell out of her left hand and the unit swung rapidly towards the floor, being held only by the top, lighter end;
>
> ● [The appellant] was unable to control the force applicable to her right hand by the downwards swinging load, being only able to retain control once she had gotten her left hand back under the unit;
>
> ● In order to get her left hand under the unit [the appellant] described very rapidly bending, twisting and side bending down to the left to attain a grip at approximately 400mm above floor level."[40]

The evidence at trial supported that account of the event.

[126] Mr O'Sullivan identified the critical factors in the work design or system of work as:

> "● The depth of the tub from which the item had to be obtained;
>
> ● The height of the tub above floor level combined with [the appellant's] stature;
>
> ● The graspability of the base of the [canister];
>
> ● Wetness of the unit at the time and typically in this process;
>
> ● The requirement to wear rubber gloves."[41]

Mr Sullivan's report then contains the following:

> "The [canister] represents an awkward load primarily because of the combination of access to the item, within the tub, and the shape and size of the base of the unit. It is clear that the base of the unit does not have an obvious, singular grasping method but may be grasped in a number of ways, including the flat palm and fingers against the base, the fingers hooked around the underside, the fingers hooked around the far side, finger tips hooked under one of the metal studs etc. In [the appellant's] situation, however, the method of grasping will be dictated to some extent by the positioning of the item within the tub.
>
> As can be seen in Photographs 9-11 [the appellant] had to fully extend her elbows, round her shoulders and reach forward to grasp

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40 AR 133.
41 AR 136.

> the item within the tub. This posture is necessary because the top of the tub exceeds [the appellant's] elbow height but also generates a need to grip the item with some significant amount of ulnar deviation of the left wrist and less likelihood of hooking the fingers under the lower edge of the unit. In other words, the depth of the tub and its height above floor level will tend to limit the security of grip on the base of the unit due to the increased forward reach required and the need to reach down and into the tub at a point forward of the body.
>
> Typical female elbow height is around 1005mm for the average female or 1035mm with shoes on. However, there is still a need to reach forwards at least 60mm to get into the tub (allowing for the trolley). In essence, the height of the edge of the tub and its depth will make it more awkward for most females to grip an awkward or bulky item lying within the tub.
>
> Given the potential for attaining a less than optimal grip, the presence of water or wetness on the base of the unit, the nature of its base (smooth perspex) and the size of the base all represent circumstances allowing for potential slipping of the item from the grip. Although rubber gloves normally provide good friction in dry conditions, in wet conditions the effect can be one where the grip may feel secure but the dynamic coefficient of friction is low, meaning that any slip can quickly progress to a loss of control.
>
> Overall, the positioning and accessibility to the item is less than ideal and, combined with its nature, wetness, shape and size, etc, represents a potential for a loss of grip or loss of control during the lifting of such an item out of this style of tub at the height observed."[42]

[127] Mr O'Sullivan calculated that the pressure required to be applied by the appellant's gloved hand on the bottom of the canister was of the order of 16.4 kg. He was asked to reconsider the figures as the evidence suggested that the perspex base had been removed in theatre. He estimated that a reduction of 15 per cent should be allowed. He concluded that a force of that kind was beyond the capacity of most females.

Other evidence

[128] The applicant had commenced employment with the respondent in April 2004. She noted that the canister came to the CSSD approximately weekly but she had handled it only a few times and this was the first occasion on which, to her, it had appeared wet. She said "I think because I'm short, the trolley is a little bit too high for me".[43] She had said a little earlier in her evidence that she could not bring the canister back in towards her body after lifting it out of the tub because "Well, it's a little bit awkward because it's long and a bit heavy, so not really."[44] When discussing the weight of the canister she was asked about the manner of grasping it. She said: "The lighter end I had to grip hold with a fist and the heavier end was much wider, I had to put my hands – like put my hands out like that."[45]

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42 AR 136-137.
43 AR 27, Transcript 1-27.
44 AR 27, Transcript 1-27.
45 AR 28, Transcript 1-28.

She explained her gesture as a flat palm with stretched out fingers on the base of the canister. She was unable to get her fingers hooked underneath the base. She said she could not get her fingers underneath because of the awkardness of the item. She had been able to take the canister out of the tub on the previous occasions but it was awkward to lift.

[129] The appellant said that the canister "was always talked about, amongst everybody"[46] but she never spoke to her manager about it. It appears that the conversation about the awkwardness of the canister occurred in general discussion on the floor, for example, when the workers were having lunch. The appellant said "I just said it was awkward and a horrible thing that we had to sterilise".[47]

[130] In cross-examination the appellant was asked about other ways in which she could have picked up the canister which would have given her a secure grip. The following exchange occurred:

> "If you were to have been picking up a canister frame with a clear perspex base on it and you were to be placing your hand in that sort of a fashion to pick up the object, that was a simple thing for you to do, wasn't it, was to place your fingers around that screw head?-- Yes.
>
> So that, too, was a way in which you could get a secure grip on this object without simply placing your hand flat against the surface?— Yes, I could have.
>
> …
>
> If that was the way the frame was lying, I suggest to you that it was a very simple matter to, using your other hand, adjust the position of the frame within the tub so that you could get a secure grip by other means on the frame with your left hand?-- Yes.
>
> Indeed, if you what you wanted to do was to hook your fingers underneath the bottom edge of the base of the frame, you could do that simply by moving the frame with your right hand, tilting it slightly and placing your fingers underneath?-- Yes, I could have.
>
> Do you say that you did not do any of those things on this day?-- On that day, no.
>
> It was the case, wasn't it, that you simply didn't stop to think for even a moment on the occasion about how you should take hold of this device securely?-- It's just a time-consuming thing that I had just picked it up and it - I picked it up wrong and it slipped out of my hands.
>
> You just made an error of judgment I suggest; is that right?-- I suppose I did."[48]

[131] Ms Gwendoline Currey, an enrolled nurse, also worked in the CSSD and had done so for some years. She had handled the canister regularly. She said the first time she picked it up it was awkward and "so from then on I was – sort of would leave it

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46 AR 28, Transcript 1-28.
47 AR 29, Transcript 1-29.
48 AR 47, Transcript 1-47.

… till last or till I had to do it".[49] It was awkward because it was not balanced with the weight being heavy at one end and lighter at the other. "So it's just your handling was just unbalanced. It wasn't for good – it was awkward".[50] Ms Currey had no particular problems getting the canister out of the tub because she "was tall enough to manage. Like, so that part didn't worry me".[51] She said that she had complained about the canister, commenting that it was awkward and although she could not pinpoint any particular conversation on any particular day the tenor of her evidence is that these complaints were fairly regular and well known. She did not complain to any "superior" until she sent an email after the appellant's injury. She said she "[j]ust kept whinging, really" about the awkwardness of the canister.[52] In cross-examination Ms Currey said that its awkwardness lay in being heavier at one end than the other "… and it just unbalances your grip if – if you are not aware – the first time I picked it up it was like, 'Oh,' because it is different."[53] She said that when first picking up the item "[y]ou tense yourself for that imbalance of that particular machinery".[54]

[132] Ms Joanne Ricardi was the nurse unit manager of CSSD and a registered nurse. She had a certificate in occupational health and safety from New South Wales. Ms Ricardi accepted that there was general discussion regarding the handling of the cylinder in the department "Not often, occasionally, yeah".[55] She said that it was more often general conversation on the floor regarding that piece of equipment and that at any given time there might be two or three people involved in the conversation. She said:

> "The general comments from staff was that it was awkward to handle, the weight distribution was uneven and it was seen to be difficult to load and unload from the Lancer batch washer [decontaminator], and of course when it came out of the batch washer it was hot."[56]

As a consequence of these comments and complaints Ms Ricardi spoke with staff in theatre to see whether the cylinder needed to be processed in the CSSD. She was told that it did as there was not then a batch washer in theatre to decontaminate the item and it was a critical piece of equipment. Having consulted with the theatre staff and learning that the canister needed to be dealt with in the CSSD she concluded that there was no risk of a worker dropping the item because of its awkwardness. Ms Ricardi discussed "generally" with workers in the CSSD that, although it was awkward, it was within "our weight and it was manageable".[57] Ms Ricardi was at great pains to emphasise that in the CSSD workers would lift upwards of 150 trays of items a day and handle over 10,000 to 12,000 items in a month. It was, in that circumstance, unrealistic to give training "on each and every item" that came through the department.

[133] Ms Ricardi gave her understanding of "a process known as risk assessment" in October 2004:

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49 AR 58, Transcript 1-58.
50 AR 58, Transcript 1-58.
51 AR 58, Transcript 1-58.
52 AR 59, Transcript 1-59.
53 AR 61, Transcript 1-61.
54 AR 61, Transcript 1-61.
55 AR 94, Transcript 2-32.
56 AR 94, Transcript 2-32.
57 AR 100, Transcript 2-38.

> "A risk assessment is something that you do on an article, an item or a practice if you feel you wish to assess whether or not – the level of the hazard – the level of the risk in handling that piece of equipment or in doing that type of task … My understanding of a risk assessment would be something that I would consider to be of a **great risk** at that time, and at that point in time I didn't consider the soda lime [canister] of any **great risk**."[58] [emphasis added]

In cross-examination Ms Ricardi conceded that she was not familiar with the Code and had not read it. She said "[c]hances are we probably have a copy in the department".[59]

[134] Ms Ricardi had participated in a filmed demonstration for these proceedings showing secure ways of handling the canister, taking it out of the tub and turning to put it into the decontaminator. This could have been of very little, if any, evidentiary value because the activity was conducted with the litigation in mind and Ms Ricardi would have been alert to the task and careful.

[135] Staff had been given general training on lifting when commencing with the respondent.

Discussion

[136] The objective of the Act was (and is) to prevent a person being injured by a workplace.[60] That objective is achieved by preventing or minimising a person's exposure to the risk of injury caused by workplace activities.[61] The Act establishes a framework for preventing or minimising exposure to risk by imposing workplace health and safety obligations and establishing benchmarks for industry through, *inter alia*, advisory standards and the development of codes of practice involving both employers and workers. The purpose was and is to help reduce the human cost and financial burden of injury as well as the cost of the workers' compensation scheme caused by workplace injuries. The *Manual Tasks Code of Practice 2000* sought to implement the object of the Act in relation to manual tasks undertaken in the workplace. The focus of the Code is the identification of "problem tasks" as an aspect of risk management. The Code emphasises the need to identify manual tasks which have the potential to contribute to a musculoskeletal disorder.

[137] The evidence at trial failed to indicate any systemic process at all for identifying manual tasks which had the potential for musculoskeletal injury. Even if Ms Ricardi did not, herself, think that moving the canister from the tub to the decontaminator was a manual task that had the potential to contribute to a musculoskeletal disorder, the concerns of more than two or three workers who had expressed their unhappiness with the item were directly known to her. From her own evidence it appears that Ms Ricardi thought that she need only engage in a risk assessment if she was of the view that it constituted a "great" risk.[62] As the Code makes clear, individual factors such as a worker's physical capacity may mean that a task will have adverse health effects for one person and not another. The appellant's height may have caused difficulty in performing the task.

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58 AR 95, Transcript 2-33.
59 AR 101, Transcript 2-39.
60 Section 7(1).
61 Section 7(2).
62 AR 101, Transcript 2-39 l 10.

Ms Ricardi being of approximately the same height as the appellant and not regarding the task as involving great risk, did not, apparently, consider this as a factor. It is clear that the task was, at least for some of the workers in the CSSD, a problem task.

[138] The process employed by Ms Ricardi in dealing with their concerns was to attempt to avoid cleaning the canister in the CSSD. When that was unsuccessful she abandoned the attempt. That was hardly responsive to a risk management process envisaged by the Code. The primary judge concluded that because Ms Ricardi worked alongside other workers in the CSSD, "appeared to be willing to listen to their concerns,"[63] and had discussions with theatre staff, that was sufficient to discharge any obligation to identify a problem task and assess it for its potential to cause a musculoskeletal injury. His Honour appears to have concluded that while awkward, the canister had no potential for causing such an injury. He described it as weighing "only 5 kilograms", and a weight "considerably less than the weight referred to in *Schiliro*".[64] This suggests a disregard for the evidence of Mr O'Sullivan that the weight the appellant had to contend with at the crucial time after the slip was a weight in excess of 15 kg.

[139] The primary judge appears to have adopted Ms Ricardi's strongly expressed evidence that it would be impossible to carry out a risk assessment and training for each of the 10,000 to 12,000 items which passed through the CSSD each month.[65] That was not the appellant's case. So far as the evidence revealed it was only the canister which was the subject of complaint, and from more than one worker. His Honour said:

> "It is important to note that the Code recognises that all manual tasks could potentially be recognised as a hazard, but that not all manual tasks have significant risks associated to them such as would warrant the implementation of a formal risk assessment."[66]

It is true that the expression "significant risks" is used in s 2 of the Code but immediately following is the directive to select tasks for assessment "that may have the potential to contribute to a musculoskeletal disorder". Furthermore, as mentioned, the Code refers to the needs of individual workers and, importantly, for a systemic approach to the identification of manual tasks having risks associated with them, not to approach the discharge of the obligation on an ad hoc casual basis. The Code is at pains to emphasise the importance of the identification of risk by consultation and observation in the workplace itself but that is only part of the process.

[140] The primary judge concluded:

> "It is my opinion that, having regard to all the factors and the requirements of the Code, namely the relatively light weight of the soda lime canister, the infrequent nature of the task, the other options available to the hospital to have a vital piece of equipment sterilized, the lack of suggestion of possible injury, the large number of items processed in the CSSD and the nature of the work being undertaken

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63 Reasons at [46], AR 358.

64 Reasons at [44], AR 358.

65 Reasons at [44], AR 358.

66 Reasons at [48], AR 359.

> in general in the area, that the defendant was reasonable in not identifying this as a task which would require a formal risk assessment under the Code."[67]

His Honour apparently regarded the risk of injury as trivial since he referred to observations of Fraser JA in *Parry v Woolworths Ltd*[68] that the significance of the triviality of the risk was important to demonstrate the ease with which a defendant could rebut the prima facie liability established by the proven contravention. His Honour was satisfied that the respondent had discharged that onus.

[141] A number of the factors which influenced the primary judge in reaching that conclusion were not, in my view, relevant to the enquiry. The infrequent nature of the task is no reason for failing to undertake a risk assessment. If it constitutes a risk it will be a risk on each occasion no matter how infrequently carried out. That it was a vital piece of equipment needing to be sterilised did not detract from the obligation to assess the risk. How the problem would be managed after the assessment process was for the next stage. The concept of a formal risk assessment under the Code might have involved referring the matter to the respondent's relevant workplace health and safety committee. The Act and the Code are fundamentally concerned with the reduction of injury in the workplace for the very laudable motives of reduction in the toll on individuals, their families and the overall cost to the community, including to employers. In my view the primary judge erred in his ultimate conclusion. The respondent failed to demonstrate that it had followed the way set out in the Code to manage exposure of a worker to the relevant risk. Neither did it prove it had discharged its obligation by "adopting and following another way that gives the same level of protection against the risk."[69]

[142] The primary judge also concluded that s 30 of the Act did not confer a civil cause of action. There are mixed authorities on this issue[70] which it is unnecessary to resolve. It was accepted by both parties on appeal that his Honour's reasoning was incorrect. But even if s 30 conferred a right to recover damages, that right does not go beyond those rights in s 28.

[143] I agree with the orders proposed by Muir JA.

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67 Reasons [48], AR 359.

68 [2010] 1 Qd R 1; [2009] QCA 26.

69 Section 26(3)(b).

70 *O'Brien v TF Woollam & Son Pty Ltd* [2002] 1 Qd R 622 per Philippides J who held it did not; *Henderson v Dalrymple Bay Coal Terminal* [2005] QSC 124 per Dutney J at [22] and *Wilkinson v BP Australia Pty Ltd* [2008] QSC 171 per McMeekin J who held that it likely did at [22] and [25]-[26] respectively.