SUPREME COURT OF QUEENSLAND

CITATION:	*Savage v Dangan Pty Ltd* [2012] QSC 375
PARTIES:	**Marie SAVAGE** (plaintiff) **v** **DANGAN PTY LTD (ACN 064 593 586)** (defendant)
FILE NO/S:	SC 198/08
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Cairns
DELIVERED ON:	8 November 2012 (ex tempore)
DELIVERED AT:	Cairns
HEARING DATE:	5, 6 & 7 November 2012
JUDGE:	Henry J
ORDER:	**1. Judgment for the plaintiff in the sum of $200,000 clear of refunds but inclusive of statutory refunds.** **2. The defendant pay the plaintiff's costs of and incidental to the proceeding from the date of the compulsory conference conducted in accordance with the *Workers' Compensation and Rehabilitation Act* 2003 to be assessed on the standard basis in accordance with the District Court scale, if not agreed.**
CATCHWORDS:	EMPLOYMENT LAW – INJURY OF EMPLOYEE – BREACH OF STATUTORY DUTY – where the plaintiff suffered a permanent eye injury as a result of particle falling into her eye when looking up while sweeping the high part of a wall – where she was given no organised induction, training or specific instruction about how to clean the walls and ceiling – whether the *Workplace Health and Safety Act* 1995 imposed civil liability – whether the defendant adopted and followed any way to discharge their obligation for exposure to risk and took reasonable precautions and exercised proper diligence to ensure the obligation was discharged EMPLOYMENT LAW – INJURY OF EMPLOYEE – NEGLIGENCE – CONTRACT – whether the employer discharged its duty to its employees to take reasonable care for their safety at work

EMPLOYMENT LAW – INJURY OF EMPLOYEE – LIABILITY – differences between the an employer's obligations at common law and under statute

Workplace Health and Safety Act 1995 (Qld) (Reprint 6A) ss 22, 27, 27A, 28, 37

O'Connor v S.P. Bray Ltd (1937) 56 CLR 464
Parry v Woolworths Limited [2009] QCA 26
Rogers v Brambles Australia Limited [1998] 1 Qd R 212
Roman Catholic Trust Corporation v Finn [1995] QCA 476
Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2) [2001] 1 Qd R 518
Wyong Shire Council v Shirt (1980) 146 CLR 40

COUNSEL: DGH Turnbull for the plaintiff
G Diehm SC with CJ Ryall for the defendant

SOLICITORS: Dean & Bolton for the plaintiff
MacDonnells Law for the defendant

HIS HONOUR: The plaintiff, a cleaner, suffered a permanent eye injury in an incident at her workplace as a result of a particle falling into her eye when she was looking up while sweeping the high part of a wall. She claims damages for personal injury, relying upon a breach of statutory duty or breaches of the common law in negligence or contract.

Quantum is agreed, and the parties have agreed that if the plaintiff is successful I ought enter judgment for $200,000 clear of refunds, but inclusive of statutory refunds, and, I am also informed, apparently inclusive of any interest. Liability is in issue.

Background

The defendant conducted a backpacker hostel business known as Caravellas on The Esplanade at Cairns. It employed the applicant as a cleaner at the hostel in 1999. She had by then been working as a cleaner for 12 years in which capacity she performed cleaning tasks including dusting down walls and ceilings.

Her new employer was told by her about her past experience as a cleaner. She was given no organised induction, training, or written explanation of her duties on commencement. At that stage the cleaners at the complex worked in teams of two. She was left to work in tandem with her fellow or buddy cleaner who told her what to do and would answer her questions such that she was, in effect, learning the processes of this particular business on the job. The plaintiff says though

that she in effect knew what to do anyway, inferentially because she was an experienced cleaner.

In about 2002 or 2003 the buddy system changed and the plaintiff thereafter would work on her own, having responsibility in the main for a building known as the Morel block. It is apparent she took pride in her work and was a good cleaner. In addition to making up rooms and sweeping rooms and corridors, the plaintiff would sometimes use a broom to brush down the ceilings and walls of the corridors. The broom she used for the latter task had a brush forming a T shape with a broomstick which was as long as a domestic broom coming up to about chest height on the plaintiff who is about five foot two inches tall.

She could just reach the ceiling of the midsection of the upstairs corridor by holding the broom up above her. However, the end sections were higher and she could not reach those ceilings without using a stepladder. She did not feel safe using the stepladder and did not use it when cleaning the ceiling of the midsection of the upstairs corridor. She would clean the midsection ceiling and upper walls by holding the broom outstretched up above her and brushing it on the ceiling and walls. In doing so, her head would be craned back looking up, having the reflex consequence that her eyes would open even wider than normal.

She did not wear any eye protection, nor prior to the incident had she ever had a particle go into her eye when performing

this task. She would brush down the walls and ceilings in order to remove cobwebs and any other build up of dust and dirt such as gecko droppings. She performed that task about every three months prior to the break-up of the buddy system and after that she would sweep the walls about every three to four weeks. It appears consistently with her conscientious approach to her job that regularity prevented a particularly significant or obvious build up of cobwebs, dust and dirt.

She was never specifically instructed by her employer to perform the task. However, over and above her own conscientiousness she understood the business owner, Mr Caravella, would visit and inspect the cleanliness of the premises about every two months, although on the evidence it may, in fact, have been closer to monthly. He had high expectations of cleanliness. The on site business manager would walk around and inspect the hostel every one or two days.

She received no specific instruction about how to clean the walls and ceiling or what to use when doing it. While both the business manager and Mr Caravella must have been viewing generally clean walls and ceilings, there is no evidence they ever saw the plaintiff cleaning the walls and ceilings or were in fact aware of the fact that she would do so, let alone the method she used to do so.

The incident

On 6 November 2005 the plaintiff had finished cleaning the

floors upstairs in the Morel building and having some time left in her working day she commenced brushing the ceilings and walls of the midsection of the corridor. She swept part of the ceiling and a wall and was running her broom along brushing the upper part of that wall along a section of batten or ribbing which ran along the wall parallel to, and near, the ceiling. At one point she agreed the height of that batten was about eight feet, but her pointing to heights in this courtroom suggests it may have been another foot or two higher.

She explained the air around her appeared clean. She said:

> "I suppose, yeah, there would have been particles in the air, but I didn't see anything at the time.
>
> ...
>
> I couldn't really see anything, but I knew there would have been stuff probably coming down."

She was close to the wall, arms extended up, holding the broom, head back, eyes wide open looking virtually straight upwards. When she was just about at the end of the section she felt something land in her eye. It stung and her eye started watering.

She went downstairs and rinsed her eye out. She returned upstairs and swept up the cobweb and gecko droppings on the floor. This process actually involved sweeping up other debris which had been swept up in nearby rooms as well. The overall impression is that there was not likely to have been a significant quantity of debris on the floor resulting from the

ceiling and wall cleaning, as distinct from debris which was already on the upstairs floors and had been swept up. She went home.

She worked the next day, but her eye had become sore and quite swollen. She saw Dr Franz and was given cortisone drops which she used. Over the next few days her eye injury worsened and she was hospitalised. Treatment ensued.

The injury

The plaintiff had suffered an abrasion to the eye from the penetrating effect of a foreign particle which had breached the outer surface of the left cornea. An infected corneal ulcer developed as a result of the corneal foreign body. The infection was microbial keratitis, which can have serious consequences. The consequence of this injury, the infectious keratitis, and the consequent corneal scaring, meant the plaintiff lost about 85 per cent of her normal vision in her left eye.

Infectious keratitis, a term used to describe inflammation of the cornea as a result of a contaminating organism, has an incidence of about 11 cases per year of corneal ulceration per 100,000 people in the USA. The cortisone administered by her first treating doctor may have aggravated the risk of infection according to Dr Harrison, the ophthalmologist called by the defendant. But the evidence of her treating ophthalmologist, Dr O'Hagan, is that by that time the bacterial microbial keratitis was already present. He did not

think the cortisone affected the ultimate outcome of her condition. Indeed, he expressed the opinion, rationally explained and which I accept, that it was likely the bacteria which caused the infection was on the penetrating particle, so that the infectious keratitis resulted from the time of the original abrasion.

Other aspects of the evidence

I note for completeness the following additional features of the evidence. There was evidence that at the workplace the employer had provided wraparound glasses for cleaners to use when using chemicals in cleaning toilets and bathrooms. The plaintiff initially described these as sunglasses, then conceded she could not remember if they were tinted, and subsequently said she was sure they did have tint. Given her significant variability on this point, the evidence of the manager, Mr Gudaitis, that they were clear safety glasses is more reliable. A dust mask was also provided.

It appeared ultimately in the course of addresses that the evidence about this topic was of no significant moment in the context of the case. There was no serious suggestion that there was any link between this particular aspect and any of the issues with which I was concerned. Certainly, there is no suggestion that there was any use of the glasses that were provided for that exercise in any other context, or any instruction that they should be used in any other context.

The other aspect which also ultimately appeared to be

irrelevant was that there was some evidence adduced in relation to a so-called checklist. As I understood it, it was likely the purpose of adducing the evidence was to cultivate the impression that there was at least some degree of proactivity or organisation in the way in which this business dealt with the cleaners and their tasks. The evidence of the plaintiff is that the checklists about which Karen Farina later gave evidence were not in fact provided to her at all.

Ms Farina's evidence is ambiguous in that it relies on assumptions made about what other staff members did with these checklists rather than her direct knowledge. But in any event, even if the checklists had been used, they are checklists about work tasks and have nothing to do with issues of safety. Once again, it appeared to be acknowledged in the course of addresses that that area of the evidence is also ultimately irrelevant to the pertinent issues to which I now turn.

Did the *Workplace Health and Safety Act* impose civil liability?

The plaintiff pleads a breach of statutory duty relying on a breach of the duty to ensure workplace health and safety under the *Workplace Health and Safety Act* 1995 as a basis for civil liability.

The defendant contends the relevant *Workplace Health and Safety Act*, which it is common ground was Reprint 6A, does not impose civil liability. The point is of obvious importance

given the much less demanding pathway to liability which that Act provides in comparison with common law.

Section 28(1) of the *Workplace Health and Safety Act*, referring to the Act as it was at the time of the incident, provides:

> "A person (the ***relevant person***) who conducts a business or undertaking has an obligation to ensure the workplace health and safety of the person, each of the person's workers and any other persons is not affected by the conduct of the relevant person's business or undertaking."

On the face of it, the defendant had this obligation. It is a very onerous obligation in that workplace health and safety is only ensured if persons are free from death, injury or illness: see s 22.

On the face of it, an injury caused in the workplace is prima facie evidence of a failure to meet the obligation to ensure workplace health and safety. It became well settled in 2000 that a breach of the obligation or duty in s 28, at least as it then stood, gives rise to a civil cause of action. See *Schiliro v Peppercorn Child Care Centres Pty Ltd (No 2)* [2001] 1 Qd R 518. The question of whether the legislation prior to the *Workplace Health and Safety Act* also imposed civil liability had been the subject of some earlier decisions.

In *Rogers v Brambles Australia Limited* [1998] 1 Qd R 212 at 217 Pincus JA observed:

"The appellant relied on s. 9(1) of the *Workplace Health and Safety Act* 1989:-

> 'An employer who fails to ensure the health and safety at work of all his employees, save where it is not practicable for him to do so, commits an offence against this Act'.

Although the provision in its terms merely creates an offence, it was conceded, and I think correctly, that a civil action may be brought by persons damaged by failure to comply with the provision."

The *Workplace Health and Safety Act* 1989 to which his Honour was there referring was substantially different to the Act later considered in *Schiliro*. In *Heil v Suncoast Fitness* [2000] 2 Qd R 23, the Court was there dealing with s 10(1) of the by then repealed *Workplace Health and Safety Act* 1989 which provided:

> "An employer who fails to conduct his or her undertaking in such a manner as to ensure that his or her own health and safety and the health and safety of persons not in the employer's employment and members of the public who may be affected are not exposed to risks arising from the conduct of the employer's undertaking, save where it is not practicable for the employer to do so, commits an offence against this Act."

There, the appellant argued that the respondent was liable civilly for having failed to conduct its undertaking in such a manner as to ensure that the appellant was not exposed to risks arising from the conduct of the employer's undertaking. The plurality observed at 27 to 29:

> "The task of determining whether it should be inferred 'on a balance of considerations from the nature, scope and terms of the statute, including the nature of the evil against which it is directed, the nature of the conduct prescribed the pre-existing state of the law, and, generally, the whole range of circumstances relevant upon a question of statutory interpretation', that an action for breach of statutory duty exists is made more difficult by the absence of any precise test. Two recurrent themes, however, are that courts may be more free to discern that an offence-creating statute also gives rise to a civil cause of action where it prescribes a specific precaution for the safety of others and, perhaps, that the Court may be more ready to decide such a point in favour of a plaintiff where the statute seems to have been passed for the benefit of a class or section of the public. In so far as these criteria give any guidance they tend to point against the appellant's argument; the duty created by s. 10 is perfectly general, not specific, and if the appellant's argument is accepted it is a duty owed to all persons whatever, not to a category of persons...
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> Looking at the matter more broadly, there is a degree of

> improbability about the proposition that this group of sections were intended by the legislature to create a civil cause of action. The improbability is less with respect to s. 9, if only because 'courts think that industrial safety legislation ought to give rise to actions'. Having regard to the state of the law when the statute was passed, it would hardly have been a matter for surprise that a provision so expressed as to show an intention to protect employees, specifically, should have been held to give rise to a right of civil action; rights of action based on statutory duty to employees, whether logically or otherwise, appear to be in a special category.
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> Another factor which appears to tend against the appellant's argument with respect to s. 10(1) is that the offence it creates depends on proof of mere exposure to risk; had it been intended to create a right of civil action, one might have expected there to be some reference to prevention of injury or damage." (citations omitted)

Turning then to *Schiliro's* case, it was an appeal from a dismissal of the appellant's action against her employer in negligence and breach of statutory duty. The action was based upon an injury she had suffered at work on 17 January 1996. The learned Judge found the respondent did not breach its statutory duty under s 28(1) of the *Workplace Health and Safety Act* as it then stood. It then read:

"28(1) An employer has an obligation to ensure the workplace health and safety of each of the employer's workers at work.

(2) Also, an employer has an obligation to ensure his or her own workplace health and safety and the workplace health and safety of others is not affected by the way the employer conducts the employer's undertaking."

The primary Judge had found in the alternative that if there was a breach, the respondent took reasonable precautions and exercised proper diligence to prevent the contravention, establishing a defence under s 37 of the Act. On the appeal the respondent asserted that s 28 of the Act and its related provision did not provide a civil cause of action to an employee injured at work. The five member Bench concluded otherwise.

It was observed that the issue was primarily one of statutory construction. The Court referred at [10] to *O'Connor v S.P. Bray Ltd* (1937) 56 CLR 464 where Dixon J observed:

"...The received doctrine is that when a statute prescribes in the interests of the safety of members of the public or a class of them a course of conduct and does no more than penalize a breach of its provisions, the question whether a private right of action also arises must be determined as a matter of construction. The difficulty is that in such a case the legislature has in fact expressed no intention upon the subject, and an

> interpretation of the statute, according to ordinary cannons of construction, will rarely yield a necessary implication positively giving a civil remedy."

The Court considered that s 28 of the Act, and for that matter s 9 of the 1989 Act, were of the kind referred to by Dixon J, in that the legislature had not expressed any clear intention in either Act as to whether it intended to create a civil cause of action. It was submitted before the Court in *Schiliro* that s 28 was not for the benefit of a particular class of the public and therefore did not give rise to a civil cause of action. The Court observed at [28]:

> "The class of the public that s. 28(1) protects is employees; it does not apply to the public generally; that distinction was indirectly averted to by this Court in *Heil v Suncoast Fitness*."

The Court continued at [49]:

> "When looked at in its historical legislative context and in the absence of a clearly discernable intention in the legislature to do otherwise, an examination of the scheme of the Act suggests that it is one intended to impose civil liability on employers who have failed to ensure the health and safety of their employees and thereby caused injury to those employees, unless the employer demonstrates that it has discharged its obligations under s. 26 or s. 27 or that it has established a defence under s. 37 of the Act...We are satisfied the imputed intention of s. 28(1) of the Act is to provide a civil cause of

action to such employees."

The defendant submits that despite *Schiliro*, the wording of s 28(1) as it was by the time of the incident did not give rise to a civil cause of action. The argument advanced was that s 28(1) had been amended to refer in the one section to categories of protected persons previously referred to in more than one section. The Explanatory Notes in respect of that amendment said:

> "Clause 68 omits ss 28-29B which impose obligations on employers, self-employed persons and persons conducting a business or undertaking and re-enacts them as a single s 28. These sections are very similar, in that the Act ensures that the party who generates the risk (i.e. employer, self-employed person, or person conducting a business or undertaking) has the workplace health and safety obligation to ensure that they, their workers, or any other person are not exposed to health and safety risks. There is no need for three separate provisions given that employers and self-employed persons are captured under the broader category of persons who conduct a business or undertaking. The clause consolidates and simplifies these provisions which do not change the policy intention, or their current legal status." (emphasis added)

The argument of the defendant is that because s 28(1) no longer refers to workers only but also refers to "any other persons", that it does not apply to a limited class. The

argument assumes there is some conceptual transition occasioned because the protection of a special class and a general class once effected from different sections is now effected in the same section. There is not. The reasoning in the above line of cases went to the category or class of person protected and did not derive its force from whether those categories or classes were addressed in separate sections rather than the same section.

There is no logical reason in the light of that line of authority to which I have referred why the specific attention afforded to workers still present in s 28(1) ought not still have the continued effect of imposing civil liability as it was found to have in *Schiliro* by a five member Court of the Court of Appeal.

I am fortified in reaching that conclusion by the *Workers' Compensation and Rehabilitation and Other Legislation Amendment Act* 2010, although, it is certainly not necessary to my reasoning. That Act's amendments included a new s 37A headed "No civil cause of action based on contravention of Act" which provides that "[n]o provision of this Act creates a civil cause of action based on a contravention of the provision". The amending legislation also inserted s 197 titled "Retrospective extinguishing of statutory cause of action" which provided:

> "Section 37A has the effect to extinguish without compensation any right to take action based on a civil cause of action arising from-

(a) a contravention of a provision of this Act that happens after the commencement of section 37A; and

(b) a contravention of a provision of this Act, whether as originally enacted or as amended since its original enactment, that happened before the commencement of section 37A, if-

(i) proceedings for the action have not started before the commencement of section 37A; or

(ii) proceedings for the action started after 8 August 2008 but the trial in the proceedings has not started before the commencement of section 37A."

There is no issue here that the old legislation applies in this case and the retrospective reach of the abolition of civil liability does not extend to the time of the incident here. Put simply, the abolition effected by those amendments does not claw back as far in time as the case with which we are concerned. However, if the defendant's argument were correct, then it plainly is at odds with this amending provision's implicit acknowledgment that the former legislation did create a civil cause of action.

In all of the circumstances I find s 28(1) still did, at the relevant time, impose civil liability for a breach of s 28(1) in respect of a worker. I turn then to consider whether there

was a breach of statutory duty.

Breach of statutory duty

The defendant accepts a contravention of the obligation and s 28(1) has been established. That was a proper concession. The fact of the plaintiff's workplace injury having occurred here demonstrates the defendant did not ensure the plaintiff was not affected by the conduct of the defendant's business. Section 28 imposes a very high obligation, plainly much higher than that imposed on an employer at common law. That it is a high obligation is readily apparent from the use of the word "ensure" in s 28(1), and s 28(2)'s provision that the obligation is only discharged if a worker is not exposed to a risk to her workplace health and safety from the conduct of the business.

The obvious intention of such provisions is to promote a proactive approach to prevent, or at least minimise, risk of injury in the workplace. That is also reflected in s 27A which relevantly provides:

> "(1) To properly manage exposure to risks, a person must-
>
> (a) identify hazards; and
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> (b) assess risks that may result because of the hazards; and
>
> (c) decide on appropriate control measures to

prevent, or minimise the level of, the risks; and

(d) implement control measures; and

(e) monitor and review the effectiveness of the measures.

(2) To properly manage exposure to risks a person should consider the appropriateness of control measures in the following order-

(a) eliminating the hazard or preventing the risk;

(b) if eliminating the hazard or preventing the risk is not possible, minimising the risk by measures that must be considered in the following order-

(i) substituting the hazard giving rise to the risk with a hazard giving rise to a lesser risk;

(ii) isolating the hazard giving rise to the risk from anyone who may be at risk;

(iii) minimising the risk by engineering means;

(iv) applying administrative measures;

(v) using personal protective equipment.

...

(4) compliance with subsection (1) does not excuse a person from an obligation to ensure workplace health and safety or a particular obligation imposed on the person under this Act."

The mandatory five point process which must be complied with in order to properly manage risk further emphasises the legislature's obvious intention of compelling employers to take a proactive approach to managing workplace health and safety in the workplace. As s 27A(4) indicates, compliance with that process will not excuse an employer from its obligation to ensure workplace health and safety but it would be a relevant consideration in considering whether the employer has discharged its obligation, or has a defence to a breach of its obligation, in that it complied with the least that must be done. I emphasise the word "must" appears in section 27A(1) in respect of the five point process.

Turning to the defences which the defendant accepts it carries the onus to make out, it is common ground that ss 26 and 27 of the Act provide defences and common ground that it is s 27 of those two sections which is here relevant given the absence of a relevant regulation ministerial notice or code of practice. In referring to s 27 as a "defence", I do so merely adopting the language adopted by counsel in the course of the case. It is not expressly phrased as a defence, but the practical effect of it, as was accepted by the defendant, was that in order to rely on it to establish that it has in fact

discharged its obligations, it carries the onus of demonstrating that it has complied with the section.

Section 27(2) provides:

> "A person discharges the person's workplace health and safety obligation for exposure to the risk by doing both of the following-
>
> > (a) adopting and following any way to discharge the person's workplace health and safety obligation for exposure to the risk;
> >
> > (b) taking reasonable precautions, and exercising proper diligence, to ensure the obligation is discharged."

I note for completeness the defence provided for at s 37(1) of the Act, namely:

> "It is a defence in a proceeding against a person for a contravention of an obligation imposed on the person...for the person to prove- \
> > (c) if no regulation, ministerial notice, or code of practice has been made about exposure to risk - that the person chose any appropriate way and took reasonable precautions and exercised proper diligence to prevent the contravention."

That defence adopts similar, but not identical, language as s 27(2). Such difference as there is appears to be irrelevant in the context of a case like the present.

The defendant did not submit for the s 37 defence and rather focussed entirely upon s 27 apparently perceiving, correctly, that if it could not make out a s 27 defence or discharge of obligation, it would not make out the s 37 defence either.

It warrants emphasis that the introductory words of s 27(2) refer to the person discharging their workplace health and safety obligation "for exposure to the risk". It is clear from the words used, particularly the words "the risk" that the defence or obligation to be discharged falls to be considered by reference to the risk which has manifested itself in the case under consideration; in this instance, an eye injury.

Section 27(2) has two limbs, both of which must be complied with. It is significant in a case like this where really the employer has not been proactive in taking action to manage risk that both limbs involve the taking of action. Those limbs are:

> "(a) adopting and following any way to discharge the person's workplace health and safety obligation for exposure to the risk;
>
> (b) taking reasonable precautions, and exercising proper diligence, to ensure the obligation is discharged."

It warrants emphasis that both limbs must be complied with.

It is not enough to take precautions and exercise proper diligence to ensure the obligation is discharged. That would only satisfy the second limb. The first limb speaks of adopting and following any way to discharge the obligation for exposure to risk. This suggest that limb will not be satisfied if the "way" unwittingly chosen was to do nothing to discharge the defendant's workplace health and safety obligation for exposure to the risk. That seems readily apparent from s 27A(1)'s mandatory minimum requirement of what must be done to properly manage exposure to the risk.

By reference to s 27A(1) it appears the defendant, whose manager did not even have knowledge of the *Workplace Health and Safety Act* failed at the threshold. It did not here identify the hazard, which was particles dislodged by cleaning falling towards the cleaner beneath. The associated risk was that the particles may fall into a cleaner's eyes and occasion injury. The defendant neither identified the hazard or assessed the risk. It did not even know of the activity. It was content that the premises were kept clean but took no proactive action relevant to the present activity to ensure they were being cleaned safely.

If the defendant did not even identify the hazard, or identify the risk, which are mandatory steps in managing exposure to risk, that is to say the bare minimum, how can it be said it adopted a "way" to discharge its workplace health and safety obligation for exposure to risk? The defendant submits, in effect, that even though ignorant of the activity and the

risk, it did adopt and follow a way to discharge the workplace health and safety obligation.

The way it adopted, according to the defendant, appears in fact to be an aftermath construct, a hindsight stringing together of five aspects of its conduct as distinct from a way which was actually adopted and followed to discharge a workplace health and safety obligation which the defendant seemed not to even know that it had. In any event, assuming it may be possible to adopt a "way" in complete ignorance, and not in any organised or deliberative sense, I shall consider the five aspects identified. I do so alive to the need to consider the way in not too demanding a fashion given the risk with which we are here concerned was low.

In that regard, I am conscious of the observations of Fraser J in *Parry v Woolworths Limited* [2009] QCA 26 where at [36] he observed:

> "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."

The five aspects contended for by the defendant were that it:

> "(a) maintained the premises in a very clean state minimising the amount of "foreign bodies" there would be. This [is] a highly effective means of minimising from risk and a form of "eliminating" the risk. People in general keep premises clean like this for both appearance and for health reasons; more generally, even if not for this specific one;
>
> (b) employed...an experienced cleaner;
>
> (c) provided the Plaintiff with on the job training and instruction from a co-worker to supplement the Plaintiff's own knowledge
>
> (d) the manager was accessible to the Plaintiff and the Plaintiff was able to report problems to him and he responded as he could when she did;
>
> (e) inspected regularly the work done. If it was not being done effectively it would risk the manager to a problem in its performance."

I assume in (e) the reference to "risk" may have meant "alert".

In respect of (a), it is undoubtedly correct that keeping the walls clean would minimise the risk in that it would minimise the hazard of falling particles, but in order to keep the walls clean, they need to be cleaned from time to time and

during that exercise the hazard, and thus the risk, will be present. There is obvious circulatory in this aspect. At best for the defendant, the point is that the more often the cleaning of the walls occurred, the less the quantity of falling particles. However, there is no evidence of any instruction or direction that the walls be cleaned with any specific frequency. There was merely generalised pressure to keep the premises clean. This might have been a way to discharge an obligation to keep the place clean, but more would be required for it to be a way of it doing so safely.

The defendant's difficulty is that there is really no more of any substance. Aspects (b), (c), (d) and (e) are, in substance, that: (b) the defendant employed an experienced cleaner; (c) left her initial training to another cleaner; (d) reacted only when it was told of problems, and (d) checked the premises was being kept clean.

These five aspects considered collectively may have been a way of keeping the premises reasonably clean but they were not a way of discharging a workplace health and safety obligation for exposure to risk. Nor, by reference to the second limb of the defence, did they amount to taking reasonable precautions and exercising proper diligence to ensure the workplace health and safety obligation was discharged.

The defendant's fallback position against the reality that in truth it did not take action under either limb, is to submit in effect that no action was necessary. It submits had it identified the hazard and assessed the risk, it would have concluded no control measures were necessary to prevent or minimise the level of risk of eye injury. It submits that conclusion would be reached because the hazard was so minimal and the risk so remote.

The submission ignores the setting in which these matters fall to be considered. They do not fall to be considered by reference to the common law obligation of an employer. There is a much higher obligation at work in the context of this Act. There was a positive obligation on the defendant in properly managing risk to identify hazards and assess risks. If that did not occur, and it did not, then in the light of ss 27 and 27A, the defendant failed to meet the threshold requirements which might have potentially entitled it to the operation of the s 27 defence or discharge of obligation provision.

However, even if I am wrong about that, I do not agree that on identifying the hazard and assessing the risk, the appropriate response was to do nothing about it. Again, I come to this issue in a completely different setting than I would were I considering the employer's obligations at common law. The

obligation of the employer under this legislation was to ensure workplace health and safety. The expectation that it would respond appropriately with a higher regard to safety than might be imposed under the test of reasonableness relating to an employer at common law, is self-evident.

The method adopted by the plaintiff to perform this work was described in the witness box with various movements and adoption of positions in and near the witness box which cried out for correction for some safety control measures. It struck me in observing how the plaintiff, in demonstrating and explaining what she did, with her head craned back, looking directly upwards with eyes wide open, that any employer seeing her perform the task of cleaning above her in this way would realise there was a risk of dust and dirt particles being brushed off the wall, falling into her wide, open eyes below and possibly causing an eye injury.

It is true that the risk of that occurring was moderate to low and certainly the risk of such a serious injury, as occurred here, was low. However, equally it would have been a simple thing to adopt some undemanding control measures, particularly having regard to the onerous obligation to ensure workplace, health and wafety imposed by this legislation in comparison to the less stringent obligation imposed on an employer at common law. The defendant could for instance have:

(1) told her to desist and not clean the walls;

(2) told her to wipe, not brush, the walls;

(3) supply a longer broom and tell her not to stand underneath, or

(4) supply her with safety glasses and tell her to use them when cleaning in this situation.

The case involved principal focus on the second-last and last of those. But they are all examples of ways in which, in the context of the provisions of the Act I am considering, there were undemanding control measures to adopt. The ease with which those things could be done renders it implausible that had the hazard and risk been identified, it would have been appropriate to not adopt one or more of them as a control measure, particularly bearing in mind we are dealing here not with a common law obligation, but the employer's obligation to ensure workplace health and safety.

The defendant sought to draw on the facts of *Schiliro* in support of its submissions. That was a case in which the injured plaintiff was a worker at a child care centre who was shifting sand which apparently spilled from time to time out of sandpits. The Court was there concerned with a code that applied, so the considerations were slightly different. The Court observed at [67]:

"The Code requires risk identification, assessment and control. Risk identification is only the first step in

identifying factors likely to cause manual handling injury and is aimed at identifying tasks likely to be a risk to health and safety; it requires identification and placing in priority order the jobs or tasks which require risk assessment by an analysis of workplace injury records; consultation with employees and direct observation or inspection of the task or work area. Only if any of these steps indicate the need for assessment is it necessary to move onto the second step, risk assessment. In this case it is not suggested there were any workplace injury records which identified the appellant's task as such a risk. Although there was no formal consultation between the respondent and its employers over this task, one employee, Ms Jewel, indicated that she had a back problem and it was accepted that she would not shovel the sand. There was no suggestion that the appellant or other employees raised or had concerns as to the safety of moving the sand in the manner undertaken. There was nothing unusual about the way the appellant was performing her work so that direct observation in this case would not identify a risk."

The distinction between that case and this is obvious. As I have already indicated, direct observation of how the plaintiff was performing her task here would have identified a

risk.

Whether one describes s 27(2) as a defence, as the defendant has, or the meeting of a provision in order to discharge an obligation, as it might also be characterised, the defendant has not met its onus of meeting the section's requirements.

I formally find for the same reasons already outlined that it does not establish a s 31(7) defence either.

The Act has the effect of rendering the defendant civilly liable for failing to ensure the safety of the plaintiff and liable for the injury suffered in consequence of that failure. The plaintiff has made good its case for liability through breach of statutory duty and I will give judgment in its favour.

It is appropriate, nonetheless, to address the plaintiff’s case under common law.

An employer has a duty to its employees to take reasonable care for the safety of its employees at work, see *Kondis v State Transport Authority* (1984) 154 CLR 672. The duty is co-extensive with those that would be imposed by a term to be implied into the plaintiff's contract of employment, so that no separate consideration is required here of the two common law base causes of action.

In cases of this kind, it is usual to have regard to the statement of law by Mason J in *Wyong Shire Council v Shirt* (1980) 146 CLR 40 at 47-48 where his Honour said:

> "the tribunal of fact must first ask itself whether a reasonable man in the defendant's position would have foreseen that his conduct involved a risk of injury to the plaintiff or to a class of persons including the plaintiff. If the answer be in the affirmative, it is then for the tribunal of fact to determine what a reasonable man would do by way of response to the risk. The perception of the reasonable man's response calls for a consideration of the magnitude of the risk and the degree of the probability of its occurrence, along with the expense, difficulty and inconvenience of taking alleviating action and any other conflicting responsibilities which the defendant may have. It is only when these matters are balanced out that the tribunal of fact can confidently assert what is the standard of response to be ascribed to the reasonable man placed in the defendant's position.
>
> The considerations to which I have referred indicate that a risk of injury which is remote in the sense that it is extremely unlikely to occur may nevertheless constitute a foreseeable risk. A risk which is not far-fetched or fanciful is real and therefore foreseeable. But, as we have seen, the existence of a foreseeable risk of injury does not in itself dispose of the question of breach of

duty. The magnitude of the risk and its degree of probability remain to be considered with other relevant factors."

The magnitude of a risk or the probability of an occurrence may be determined to be so low that an employer acting reasonably would not have taken any action by way of response to the risk. It appears, when considering the risk, it is not only the chance of the event occurring, but the likelihood of the event causing some significant harm that needs to be considered. In *Roads and Traffic Authority of New South Wales v Dederer* (2007) 234 CLR 330 at [61] Gummow J observed:

"As Lord Porter observed in *Bolton v Stone*, 'in order that the act may be negligent there must not only be a reasonable possibility of its happening but also of injury being caused'."

At [274] Callinan J observed:

"But even so, and despite flagrant defiance of the ban, not one out of the many who had dived in the forty or so years that had elapsed since the construction of the bridge had been injured, so far as anyone could recall, let alone severely injured. This is to say that the risk, although undisputedly present, had a very low degree of probability of realisation. And although the first respondent's injuries were grave, that is of great magnitude, seemingly minor mishaps can sometimes cause grave injuries."

In *Roman Catholic Trust Corporation v Finn* [1995] QCA 476, Williams J, after repeating the obligation is one to take reasonable care and that the scope of the duty is limited to the area of foreseeable risk, observed:

> "It is important when considering evidence said to be relevant to such issues to have regard only to what was considered reasonable, and what was foreseeable, at the material time. It is easy for both employers and judges to be wise after an event, but hindsight cannot convert what was at the material time the taking of reasonable precautions into a failure to discharge the duty of care."

The defendant submits there was nothing out of the ordinary in the task being undertaken insofar as a risk of foreign objects damaging the plaintiff's eyes was concerned. While it was foreseeable that brushing the walls could end in dust particles entering the atmosphere adjacent to the plaintiff during the course of her employment, the defendant submits the nature and extent of such dust was not out of the ordinary or in any significant way different to that encountered in ordinary domestic dusting tasks. It submits the chance of dust entering the eyes and causing anything more than minor short term irritation was low. It contends that the probability of an employee suffering any eye injury while brushing the walls prior to the plaintiff's injury was so low that a reasonable employer would not have taken any precautions to guard against the risk.

That submission is made free of the shackles of the higher obligations otherwise imposed on an employer when on is having regard to the statutory obligations discussed earlier in this judgment. There is a clear difference here from the assessment of a defence or whether a compliance with an obligation has been made out in the context of a breach of statutory duty.

In the context of the breach of statutory duty, earlier discussed by me, the defendant was already prima facie liable, that liability flowing from the very fact of the workplace injury. It flowed by operation of law unless, in effect, a defence or discharge of obligation was established. Approaching liability under common law, the plaintiff does not have the benefit of the higher obligation imposed on the defendant as an employer by the *Workplace Health and Safety Act*.

The defendant accepts that it is not necessary that the precise condition suffered here was foreseeable and that rather it is enough that some serious eye injury was foreseeable. The risk of serious eye injury was very unlikely, but it was nonetheless foreseeable. However, to adopt the language of Mason J in *Wyong Shire Council v Shirt*, the existence of a foreseeable risk of injury is not enough. The question remains whether an employer, and I emphasise an employer unburdened by the higher obligations of the *Workplace Health and Safety Act* and burdened only by its common law obligations, would, acting reasonably, have taken any action

by way of response.

In considering that equation, I note that it was found in *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 that a trial Judge should not approach an action in negligence by an employee against an employer on the basis of some perceived principle that the heavy obligation upon an employer is to be emphasised or that the standard of care required of an employer has moved close to the border of strict liability.

The point I am making in this context, of course, is that in considering this matter under the banner of a breach of statutory duty, I was considering it in the context of laws that moved the matter much closer to the border of strict liability than the common law.

This activity was being undertaken by an experienced cleaner who had performed the task that way for years without incident. The wall was not excessively dirty. The probability of the admittedly foreseeable risk of eye injury was so low that in those circumstances, even allowing for the relative preventative ease with which some response might have been taken, an employer acting reasonably and unshackled by the higher obligations of the *Workplace Health and Safety Act* was unlikely to have taken any action by way of response to the risk.

I emphasise I come to that conclusion in a quite different context than in my earlier consideration of the mandatory

requirements of s 27A of the *Workplace Health and Safety Act*. There is an obviously fundamental difference in assessing the reasonableness of response at common law compared to under the mandatory requirements of the *Workplace Health and Safety Act*. There are plainly matters of degree involved and the pivot point in that assessment of degree is invariably more onerous on an employer in the context of the *Workplace Health and Safety Act* setting than that at common law.

The claim's reliance on negligence and breach of contract must therefore fail. Given the plaintiff's success on the statutory breach of duty, the plaintiff's claim has succeeded.

My orders are:

(1) judgment for the plaintiff in the sum of $200,000, clear of refunds, but inclusive of statutory refunds;

(2) I will hear the parties as to costs.

...

HIS HONOUR: Having heard the parties as to costs, I further order the defendant pay the plaintiff's costs of and incidental to the proceeding from the date of the compulsory conference conducted in accordance with the *Workers' Compensation and Rehabilitation Act* 2003, to be assessed on the standard basis in accordance with the District Court scale if not agreed.
