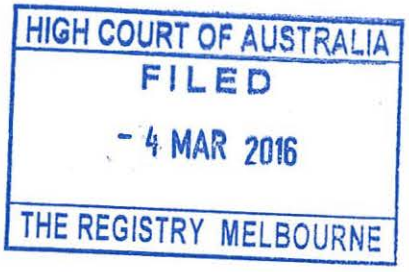
IN THE HIGH COURT OF AUSTRALIA

MELBOURNE REGISTRY

No. M252 of 2015



BETWEEN

KATHRYN DEAL

Appellant

and

FATHER PIUS KODAKKATHANATH

10 Respondent

APPELLANT'S REPLY

Part I: Certification for publication on the Internet.

1. The appellant certifies that this reply is in a form suitable for publication on the Internet.

Part II: Argument in reply.

2. As to paragraphs 12 and 13 of the respondent's submission, regulation 1.1.7 is authorised
20 by s 158(1)(a) of the *Occupational Health and Safety Act* 2004, and sets out the way in which a person's duty or obligation under an identified section of the Act is to be performed in relation to the matters and to the extent set out in the regulation. However, that consideration is not itself relevant to the resolution of this appeal.

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3. As to paragraphs 16 to 22 of the respondent's submissions, the majority in the Court of Appeal did not apply the test referred to in *Naxakis v Western General Hospital* (1999) 197 CLR 269 in dismissing the appeal, on its analysis of the basis of the trial judge's decision, see at [118] and [119]. It is submitted that the majority was correct in that regard. *Naxakis v Western General Hospital* concerned the principle on which a trial judge should act when it is submitted that there is no evidence to go to the jury on an issue of fact. The appellant would have succeeded on that basis (see at 118] if it had not been for the view which the majority took as to the meaning of regulation 3.1.2.

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4. As to paragraphs 23 to 28 of the respondent's submissions:
   a) The submissions, and the reasoning of the majority, appears to take the approach that the duty prescribed by regulation 3.1.2 depends on a view of the risk assessment obligation imposed by regulation 3.1.1. However, regulation 3.1.2 imposes a "stand alone" duty, separate from the duties imposed by regulation 3.1.1, see *Duma v Mader International Pty Ltd* (2013) 42 VR 351 at 358 [21]. That case concerned regulations 12, 14 and 15 of the 1999 Regulations, which have been remade (but, it is submitted) not relevantly changed[1] by the present regulations, see *Govic v Boral Australian Gypsum Ltd* [2015] VSCA 130 at [144].

20 b) In any event, the obligations of an employer under occupational health and safety legislation are not limited to risk assessment of, or elimination of, risk associated with "generic tasks", and the respondent's submission that this follows from regulations 3.1.1-3.1.3 is wrong. Any process of assessment must involve looking forward, but this does not require a split between "generic" and "actual" tasks. An employer's obligations in these regards concerns the risks associated with the actual task engaged in, or to be engaged in, by an employee. That is to say, what are the risks of injury affecting an employee associated with a task engaged in or to be engaged in by the employee (which is what the regulation applies to) must depend on what the employee is actually doing. The limiting effect of the respondent's submission is

30 inconsistent with the objects of the Act and of the Regulations.

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[1] Regulation 3.1.2 now applies to "hazardous manual handling". The 1999 regulation referred to "manual handling".

c) The fact that an employer has not provided a *site specific or task specific* safe work method plan has often been considered to be relevant in a prosecution[2].

d) Regulation 3.1.2 simply applies in accordance with its own terms, i.e. (relevantly) to require that the risks of musculoskeletal disorder associated with a hazardous manual handling task affecting an employee be eliminated as far as reasonably practicable. That obligation is perfectly clearly expressed, and requires no gloss or alternative expression. The only relevant "looking forward" involved in this regulation is that 20(2)(c) of the *Occupational Health and Safety Act* 2004 provides (inter alia) that "To avoid doubt, for the purposes of this Part and the regulations, regard must be had ..... in determining what is (or was at a particular time) reasonably practicable in relation to ensuring health and safety [to] 'what the person concerned knows, or ought reasonably to know, about the hazard or risk and any ways of eliminating or reducing the hazard or risk'". The matter of what was reasonably practicable to be done had not arisen at the time of the trial judge's ruling.

e) At the time of her injury, the appellant was engaged in the task of carrying unstable displays from a height to ground level by descending a stepladder backwards, with no support. This task was correctly described by both the trial judge and by the Court of Appeal as falling within the description of a hazardous manual handling task. There was a risk of injury from a misstep associated with that task. Therefore that risk had to be eliminated.

5. The submissions also mistake the reasons of the majority. Those reasons, at [143]-[145], show that the majority considered that a limited meaning or application should be given to the words "associated with" because otherwise the burden on an employer would be a heavy one, and (see at [147]-[149] later in the reasons) would involve a possible criminal liability. See the references at [144] to those tasks which an employer would find it "easy to contemplate" or "might readily" perceive or "could and should readily identify" as being hazardous, so that "the conception of the risk of injury 'associated with' the work

[2] See for example *Workcover Authority of NSW (Insp West) v Jr & Eg Richards Pty Ltd* [2002] NSWIRComm 285 at [25], [32]; *Inspector Christopher Chadwick v Rail Infrastructure Corporation* [2003] NSWIRComm 391 at [20]; *Inspector Green v Coffey and Cork* [2004] NSWIRComm 110 at [20]; *Inspector Colin Price v Cc Pines Pty Ltd* [2005] NSWCIMC 3; *Inspector Gjaltema v Errington and MJ Baker Constructions Pty Ltd* [2010] NSWIRComm 37 at [45]; *Inspector Christensen v Wadwell Group Pty Ltd* [2012] NSWIRComm 126 at [18]; *Inspector Bultitude v Eagles* [2012] NSWIRComm 139 at [31].

activity could be seen to sensibly operate". As previously submitted, this is not a relevant consideration in the present context. At [145] the majority made reference to the "generic" task, and to the actual task as performed. It is submitted that the proper view is that the majority considered that this distinction supported the above reasoning, not that the majority considered, without specifically stating so, that the regulations applied to the former and not the latter, and that the reasons of the majority implicitly accept that the regulations apply to the actual task as performed by an employee, and would apply to the present case unless the concept of "close association" was adopted.

6. As to paragraphs 27 to 33 of the respondent's submission, it appears to be accepted that the meaning given by the majority to the words "associated with" is not the natural and ordinary meaning, and also that if those words were given their natural and ordinary meaning, the appeal would succeed. The "contextual" reason given for limiting the meaning of those words appears to be only that an employer might be liable if the words bore their ordinary meaning. As previously submitted, this is not a valid reason for limiting the protective obligations of an employer. The respondent's submissions do not engage with the appellant's submissions on this aspect. The statute intends, in this regard, that the employer's obligations are limited only by a consideration of "so far as is reasonably practicable" in regulation 3.2.1, and in s 21 (inter alia).

7. The respondent's submissions as a whole are, indeed, only an assertion that the majority was correct in its view, and that view is, it is submitted, not got from the text or purpose of the legislation, but from the majority's view of where the obligations imposed on an employer should stop. However, the protective purposes of the legislation, clearly expressed, are adversely affected by such an approach.

8. On any view of the meaning or application of "associated with", on the facts of the present case a risk of injury was associated with the performance of the task which the appellant was actually undertaking. The respondent can only avoid that result by submitting that the task which is relevant for the purposes of the regulations is not the task as done by the appellant (who was left to devise her own method in the present case) but some "generic" task, without the components of the task actually performed. But the regulations operate in the area of real world risk, which means, in the world of tasks as

they might be actually performed, i.e "whether accidents of some class or other might conceivably happen, and whether there is a practicable means of avoiding injury as a result" see *DPP v Coates Hire Operations Pty Ltd* (2012) 36 VR 361 at 378 [73], citing a passage from *Holmes v R E Spence & Co Pty Ltd* (1992) 5 VIR 119 at 126, per Harper J.

9. As to paragraph 24 of the respondent's submission, the passages complained of were more than a passing observation by the majority, and were a reason advanced for its conclusion.

10 Dated: 3 March 2016

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