# HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, KIRBY, HAYNE AND HEYDON JJ

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THELMA JEAN THOMPSON APPELLANT

AND

WOOLWORTHS (Q'LAND) PTY LIMITED RESPONDENT

*Thompson v Woolworths (Q'land) Pty Limited* [2005] HCA 19
*21 April 2005*
B54/2004

**ORDER**

1. *Appeal allowed with costs.*

2. *Set aside orders 2 and 3 of the orders of the Court of Appeal of the Supreme Court of Queensland made on 12 December 2003 and in their place order that judgment be entered for the appellant in the sum of $105,327.92.*

3. *Respondent to pay the appellant's costs of the proceedings in the District Court of Queensland.*

On appeal from the Supreme Court of Queensland

**Representation:**

B W Walker SC with M E Eliadis for the appellant (instructed by Shine Roche McGowan)

J A Griffin QC with M T O'Sullivan for the respondent (instructed by Blake Dawson Waldron)

## CATCHWORDS

### Thompson v Woolworths (Q'land) Pty Limited

Negligence – Duty of care – Independent contractor delivering goods in pursuit of mutual commercial purpose – Delivery person suffered back injury attempting to move industrial waste bins blocking supermarket loading dock – Content of duty to exercise reasonable care for safety of entrants – Consideration of aspects of relationship between occupier and entrant.

Negligence – Contributory negligence – Independent contractor – Relevance of failure to wait for assistance before attempting to move bins – Relevance of knowledge of previous injury.

1 GLEESON CJ, McHUGH, KIRBY, HAYNE AND HEYDON JJ. In an action brought in the District Court of Queensland, and heard by Samios DCJ, the appellant, who sustained a back injury while delivering goods to the respondent's store at Stanthorpe, sued the respondent for damages for negligence. She succeeded, and was awarded damages of $157,991.89. An allegation of contributory negligence was rejected[1]. By majority (de Jersey CJ and Williams JA; McMurdo J dissenting) the Court of Appeal of Queensland reversed the primary judge's finding of negligence and ordered that there be judgment for the defendant in the action[2]. The dissenting judge would have upheld the finding of negligence but reduced the judgment by one-third on account of contributory negligence. The primary question in this appeal is whether the Court of Appeal was justified in reversing the primary judge's finding of negligence. There is also a question as to contributory negligence.

The facts

2 The appellant's action arose out of an occurrence in late August 1999. She was unable to identify the precise date. She made no complaint to any employee of the respondent on the day. She first sought medical attention about three weeks later. The appellant had previously injured her back, in another work-related incident, a week or two before the events with which this case is concerned. Both injuries aggravated a pre-existing degenerative condition.

3 The appellant suffered the injury the subject of this appeal while she was on premises occupied by the respondent. However, the case is not simply concerned with an occupier's liability for hazards associated with the static condition of premises. The appellant was on the respondent's premises for a mutual commercial purpose, and was required to conform to certain systems and procedures established by the respondent. The case concerns those systems and procedures, and the risks they involved for persons in the position of the appellant. It is, therefore, necessary to explain the context in which the injury occurred.

4 The appellant and her husband conducted a bread delivery service in the Stanthorpe area pursuant to a contract with Cobbity Farm Bakeries Pty Ltd. They used two vehicles. The appellant's husband drove a van, and delivered

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**1** *Thompson v Woolworths* [2003] QDC 152.

**2** *Thompson v Woolworths (Q'land) Pty Ltd* [2003] QCA 551.

mainly to small retailers. The appellant drove a truck. She made daily deliveries to Woolworths' Stanthorpe store. She delivered at some time between 5 am and 5.30 am. The respondent's store was part of a shopping centre complex. Deliveries were made to a loading dock at the end of a lane. The loading dock led to a storeroom which was under the control of a storeman. There was a roller door between the loading dock and the storeroom. The appellant, like other deliverers of supplies, would reverse her truck along the laneway, and unload her goods onto the loading dock, from where they were taken to the storeroom.

5 The respondent's storeman was necessarily involved in that process, for the purpose of agreeing upon the quantities delivered, and, no doubt, seeing that they were appropriately stored. The checking of quantities was done on the loading dock. The storeman was often, but not always, in or around the storeroom or loading dock area when the appellant arrived. Sometimes he was elsewhere, and it was necessary to press a buzzer to attract his attention and bring him to the loading dock. On some occasions it took up to 10 or 15 minutes for the storeman to arrive. The appellant could not unload her bread and depart to do her other deliveries without the presence and co-operation of the storeman. Sometimes the appellant's would be the first of the delivery vehicles to arrive at Woolworths; sometimes others would arrive there before her. If she arrived first, the lane was not wide enough to permit another vehicle to take her place. The appellant was a small woman. Her husband frequently went to Woolworths after doing his first delivery in order to help her unload her truck. Occasionally, he arrived at Woolworths for that purpose before the appellant.

6 In a bay adjacent to the loading dock, there was an area, fenced on three sides, where two industrial waste bins were located. Next to the fenced area was a public parking area. The waste bins, when in use, were placed alongside the loading dock so that Woolworths staff could place waste in them. The bins belonged to the Stanthorpe Shire Council, and were emptied by Council employees on Mondays, Wednesdays and Fridays. The Council truck would reverse up the lane. Council workers would move the bins manually from the fenced area to the lane and place them in front of the loading dock. They would then be emptied mechanically into the Council truck. Routinely, the Council workers would leave the empty bins in the laneway in front of the loading dock without returning them to the fenced area. The bins constituted an obstacle to any delivery vehicle seeking access to the loading dock.

7 The Council truck arrived at varying times between 4 am and 6 am. Whether the Council workers were derelict in their duty to the Council by leaving the empty bins in the laneway, or whether the Council was in breach of some obligation it owed to the respondent, were not questions that were

investigated. The respondent's regular storeman, Mr Frank Thompson, acknowledged that his duties included returning the empty bins to the fenced area. Mr Thompson was away on holidays in August 1999, and his replacement, Mr Bennett, said in evidence that he was "not too sure" whether it was part of his job to move the bins.

8 The evidence showed that the presence of industrial waste bins in the laneway, blocking access to the loading dock, was a long-standing source of friction between the appellant and employees of the respondent. There was evidence from other delivery drivers, who gave varying accounts of the problem. The bins were large, but were designed to be moved manually. That is how they were moved by the Council employees, the storeman and, not infrequently, delivery drivers themselves. The male witnesses in the case gave evidence of moving the bins without suffering any harm. But they presented a problem to the appellant.

9 What delivery drivers achieved in terms of saving of time by moving the bins is not entirely clear. It was the storeman's job to move them. A driver could not complete the process of delivery without the presence of the storeman. Even if, as sometimes occurred, the storeman was not present when the driver arrived, and even if there was a delay of 10 to 15 minutes in responding to the buzzer, there was no possibility of the driver getting on with his or her rounds until the storeman arrived. Nevertheless, it is clear that, on occasion, if the storeman was not there when a driver arrived, the driver would move the empty bins back to the fenced area and thus clear the path to the loading dock. The drivers obviously thought this saved them some time.

10 Over the months before August 1999, the appellant and her husband complained to the respondent's staff and management about the bins being left in the laneway. Mr Frank Thompson said that the appellant's husband complained to him seven times or more. On 22 May 1999, the appellant noted in her diary: "too heavy for manual moving ... too heavy for me to move by myself." The appellant's husband sometimes moved the bins for her. The appellant said that between March 1998 and August 1999 she moved the bins between 20 and 30 times.

11 A week or two before the incident the subject of this litigation, the appellant was attempting to lift a crate of bread in a shed at her home. She had to reach up to the crate. As she was twisting to lower the crate, she felt a pain in her back. The pain subsided.

12 On the day in question the appellant arrived at the shopping complex at about 5.15 am. No other person was present. The roller door between the loading dock and the storeroom was down. No storeman came out. There were empty waste bins in front of the loading dock. The appellant reversed her truck along the laneway towards the loading dock. She then left her truck and attempted to move one of the bins. She attempted to push the bin with her arms, but it would not move. She then brought one of her legs into play and as she pushed again she felt pain radiate down her back and leg. The appellant's husband arrived. She told him she had hurt her back. He then moved the bins. The two of them unloaded the bread onto the loading dock. An unidentified "store person" then came out of the storeroom, opened the door, and checked the quantity of bread. No complaint was made by the appellant or her husband to the "store person" or anyone else. After unloading they drove off to continue their deliveries.

The decision of the primary judge

13 There were issues at trial as to whether the appellant suffered the injuries she alleged, and as to the extent of those injuries. Those issues were resolved in favour of the appellant, and are not the subject of appeal.

14 The appellant's case on liability was not that the respondent was vicariously liable for some casual act of negligence on the part of an employee of the respondent, but that there was a systemic failure to exercise reasonable care for the safety of the appellant.

15 An expert witness, Mr McDougall, whose qualifications were in engineering, and who reported on matters of industrial safety, expressed the opinion that the respondent should have conducted an appropriate audit of the extent of manual handling of the waste bins and either eliminated manual handling by providing truck access to the bin storage area through the car park, or introduced effective procedural controls to ensure that the respondent's employees relocated the bins after they were emptied and that delivery drivers were instructed not to move them. The trial judge found that, as between the respondent and the delivery drivers, it was the respondent's responsibility to move the bins. This does not seem to have been disputed. He found that employees of the respondent knew that the bins were an obstacle for delivery drivers, that they knew that drivers often moved the bins, and that they should have expected that the appellant would try to move them. He found that employees of the respondent were aware that moving the bins involved a risk of injury to someone of the appellant's size and strength.

16 The primary judge found that the respondent "was aware of the risk of injury to the [appellant] pushing the bins and that some change ought to be made so that the [appellant] was not placed at risk of injury moving the bins." He held that the respondent "should have as a reasonable person implemented either of the measures identified by Mr McDougall in his evidence as either of those measures was not expensive or difficult or inconvenient to implement." As to the first of the measures recommended by Mr McDougall, there was nothing in the reasons for judgment dealing with the practicability of providing access to the bins through the car park except what is implicit in the statement just recorded. The matter was not explored in evidence in chief or cross-examination.

The decision of the Court of Appeal

17 In the Court of Appeal, McMurdo J, who would have upheld the decision of the primary judge on liability, summarised his conclusions as follows:

> "In the present case, the trial judge found that the risk of injury to the [appellant] was reasonably foreseeable. There is no basis for a challenge to that finding and I do not understand that it is challenged. In the context then of the [appellant] being a permitted entrant to premises in the [respondent's] occupation, the [respondent] owed her a duty to do what was reasonable to avoid the risk of injury from her attempting unassisted to move the bins.
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> The content of this duty was then affected by a consideration of 'the magnitude of the risk and the degree of 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.' To these considerations can be added others such as the relationship between the parties, but ultimately the factual question is what a reasonable person, in the position of the respondent, would do by way of response to the risk.
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> The trial judge held that reasonable care required the avoidance of the risk by one of two alternative courses, neither of which was said to be significantly expensive or problematical. In my view there was no error in that factual conclusion. The risk may have been obvious, but the probability of the occurrence of injury was relatively high. To the extent that the [respondent] did anything towards discharging its duty, it knew that this had not avoided the risk, and it knew or should have known that this was because the [appellant], like other drivers, was likely to run the risk of injury through the pressure of meeting the requirements of her

> work programme. It was, of course, a risk that came from the way in which the [respondent] organised its own business and premises. Because neither of the available steps was taken, the [appellant] remained exposed to the risk and the [respondent's] duty of care was breached." (references to authority omitted)

18 McMurdo J found that there had been contributory negligence. Plainly, the appellant was or ought to have been aware of the risk of injury. McMurdo J did not mention expressly, but no doubt had in mind, not merely the diary note of May 1999 and the appellant's expressions of concern on previous occasions, but also the fact that she knew (and the respondent did not know and could not have known) of her recent back injury. He thought it appropriate that the judgment should be reduced by one-third, to $105,327.92.

19 McMurdo J remarked, in connection with contributory negligence, that the circumstances "at least to some extent" explained why the appellant attempted to move the bins on the day in question. The reservations expressed in that qualification are understandable. Clearly, the appellant believed she was saving some time by moving the bins herself, and the fact that she and other drivers had often moved the bins on other occasions indicates that there must have been something to be gained by doing that. But the gain can hardly have been great, bearing in mind that the appellant was going to have to wait for a storeman before she could depart. The evidence of the appellant and her husband was that, on the day of the injury, they unloaded their bread onto the loading dock before the storeman arrived. Whatever time was involved in moving the bins and unloading, therefore, was saved by not waiting for the storeman to arrive and move the bins himself. That time was never quantified.

20 The majority in the Court of Appeal stressed that the risk to the appellant involved in moving bins was not only foreseeable by the respondent but was foreseen by the appellant. This was not a case of alleged failure to warn. Nevertheless, de Jersey CJ said, the obviousness of the risk was factually significant in deciding what, if anything, reasonableness required of the respondent by way of response to that risk. He treated the question as one of "delineation of the scope of the duty of care owed by the [respondent]" to the appellant, and said:

> "In my view the duty of care owed by the [respondent] to the [appellant] did not embrace the [respondent's] taking steps to protect her from this particular risk. What occurred is explained by the circumstance that the [appellant], an independent contractor vis a vis the [respondent], chose unnecessarily to take that risk, the existence of which was clear to

her. It is not explained by any tortious breach on the part of the [respondent].

The learned Judge's factual conclusion that the duty of care owed by the [respondent] extended to protection against this risk was not ... reasonably open."

21 The other member of the majority, Williams JA, said that, as static objects, the bins blocked access to the loading dock, but they did not constitute a risk. No one could trip over them or inadvertently walk into them. "The only risk to the [appellant] came after she made a conscious decision to move, or attempt to move, the bins." He also said:

"It is clear that as the occupier of the property, and as the entity for whose benefit the bins were on site, the [respondent] had the ultimate responsibility for moving the bins from where they were left by the local authority employees into the latticed area. My concern has been as to whether the [respondent] had a proper system in place to see that that was done. Given the irregular times at which the bins were emptied a reasonable occupier in the position of the [respondent] could really do no more than it had done in that regard. If able bodied delivery drivers did not move the bins for their own convenience without calling for assistance from employees of the [respondent], the bins were moved by employees of the [respondent] as soon as practicable after becoming aware of the fact they needed to be moved. The [appellant's] evidence was that if Frank Thompson saw her attempting to move a bin, he would always move it himself. Any delivery driver, male or female, requiring assistance had only to press the buzzer to call for assistance. A delay of 10 to 15 minutes on occasions was not unreasonable in that regard. The [appellant] in evidence referred to a concern that her place in the delivery queue would be lost if that was done. That is demonstrably not the case. It would be impossible on the evidence for any other delivery driver to get past her vehicle if it was at the head of the queue and its progress halted by the bins."

22 Williams JA concluded that the evidence did not establish that there was any breach by the respondent of a relevant duty owed to the appellant.

Duty of care

23 It was not in question that the respondent owed a duty of care to the appellant, although there was a disagreement about the appropriate formulation of that duty.

24 The status of the respondent as occupier of the land on which the appellant was injured was one aspect of the relationship that gave rise to a duty of care. It gave the respondent a measure of control that is regarded by the law as important in identifying the existence and nature of a duty of care[3]. There was, however, more to the relationship than that, and, as was agreed on both sides, the problem was not one that concerned only the physical condition of the respondent's premises. There was a time when the common law sought to define with precision the duty of care owed by an occupier of land, and treated the content of the duty as variable according to categories fixed by reference to the status of entrants[4]. The common law has since rejected the approach of seeking to construct a series of special duties by reference to different categories of entrant[5]. The problems involved in the former approach included the rigidity of the classification of entrants, and the artificiality of distinguishing between the static condition of premises and activities conducted on the premises. That is not to say, however, that the law now disregards any aspect of the relationship between the parties other than that of occupier and entrant. On the contrary, other aspects of the relationship may be important, as considerations relevant to a judgment about what reasonableness requires of a defendant, a judgment usually made in the context of deciding breach of duty (negligence).

25 Even in the days when the content of an occupier's duty of care was defined by reference to fixed categories, within those categories the requirements of reasonableness were affected by a variety of considerations. Mason J, in *Papatonakis v Australian Telecommunications Commission*[6], said:

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**3** *Commissioner for Railways v McDermott* [1967] 1 AC 169 at 186; *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254 at 263 [18], 270 [42], 292 [112].

**4** See, for example, *Lipman v Clendinnen* (1932) 46 CLR 550 at 554-556 per Dixon J.

**5** *Australian Safeway Stores Pty Ltd v Zaluzna* (1987) 162 CLR 479.

**6** (1985) 156 CLR 7 at 20.

> "The content of the occupier's duty to exercise reasonable care for the safety of an invitee must, of course, vary with the circumstances including the degree of knowledge or skill which may reasonably be expected of the invitee and the purpose for which the invitee enters upon the premises."

26 The purpose for which, and the circumstances in which, the appellant was on the respondent's land, constituted a significant aspect of the relationship between them. The appellant, in the pursuit of her own business, was delivering goods to the respondent for the purpose of sale in the course of the respondent's business. To do that, she was required to conform to a delivery system established by the respondent. She was directed by the respondent when, where, and by what method she was to deliver. She was required to arrive between 5 am and 5.30 am, and to drive her truck along the laneway leading up to the respondent's loading dock. She was required to unload at a designated place, where the goods were to be counted and accepted by the respondent's storeman. Since the respondent established the system to which the appellant was required to conform, the respondent's duty covered not only the static condition of the premises but also the system of delivery. Some aspects of what went on were within the independent discretion of the appellant. She was not the respondent's employee. Within a fairly narrow time frame, she could choose when she made her deliveries. She could choose what kind of delivery vehicle suited her purpose. Decisions about the management of the vehicle, and the method of unloading, were largely left to her.

27 Even so, the respondent established and maintained a system, and its obligation to exercise reasonable care for the safety of people who came onto its premises extended to exercising reasonable care that its system did not expose people who made deliveries to unreasonable risk of physical injury. A number of aspects of the facilities and procedures for the delivery of goods into the respondent's store might have involved issues of health and safety. Many, perhaps most, of the people who made the actual deliveries were outside the respondent's organization, and were not subject to the direct control it exerted over its employees. Even so, they were regular visitors to the premises, for a mutual commercial purpose, and it was reasonable to require the respondent to have them in contemplation as people who might be put at risk by the respondent's choice of facilities and procedures for delivery.

28 The essential issue in the case concerns, not the existence or general nature of the duty owed by the respondent to the appellant, but whether there was a breach of duty.

Breach of duty

29 The appellant does not complain of a failure to warn her of a risk of which she was unaware. On the contrary, her evidence was that she knew of the risk of injury to herself involved in moving the industrial waste bins that sometimes blocked access to the loading dock, and had complained to the respondent about being exposed to that risk. We are not concerned with a question of the kind that arises where a plaintiff asserts that reasonableness required that a defendant warn of a hazard, and the defendant responds by saying that the hazard was so obvious that no warning was required[7].

30 Even so, the respondent relies upon the appellant's knowledge of the risk involved in attempting to move the bins herself. Indeed, the respondent points out that in one respect the appellant's knowledge was better than that of the respondent, in that the appellant knew, and the respondent did not know, that the appellant had suffered a recent back injury. As is common, questions of degree of risk are involved. Evidently, the bins were designed to be moved manually, and they were moved routinely by Council workers, the respondent's storemen, and other (male) delivery drivers without injury. Yet the appellant and her husband had told the respondent's employees that she could not move them safely, and Mr Frank Thompson agreed that she should not be moving them. What was involved was not a risk to everybody, but it was a risk to the appellant, and that was a risk of which the respondent was aware.

31 The principal argument for the respondent is that the risk to the appellant arose, not from the respondent's delivery system, and the facilities and procedures associated with that system, but from the appellant's independent and unnecessary conduct in attempting to move the bins herself rather than waiting for a storeman to move the bins for her. This view of the facts is expressed in the passage from the reasons of Williams JA quoted above. Associated with this argument is the proposition that, in truth, the appellant achieved little or nothing by moving the bins. She had to wait for a storeman in any event. She could not leave before a storeman had checked off her delivery. There was no risk of her losing her place in a queue. On this approach, her action was one of pointless impatience. The respondent's system, it is said, did not oblige the appellant to move the bins, and she achieved little by doing so.

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**7** cf *Woods v Multi-Sport Holdings Pty Ltd* (2002) 208 CLR 460.

32 To say that the system did not oblige the appellant to move the bins involves some over-simplification. The evidence showed that it was not unusual for delivery drivers, including the appellant, to move the bins themselves. It appears that they believed they were achieving some worthwhile saving of time, presumably because it enabled them to reach the loading dock more quickly, and commence unloading without having to wait for the arrival of a storeman. On a busy delivery run, at an early hour, it was clearly open to the delivery drivers to regard even a modest saving of time as worthwhile. It was open to the primary judge to regard that attitude as reasonable in the circumstances.

33 There was evidence of delays of up to 10 or 15 minutes on the part of storemen when a delivery driver pressed a buzzer to call for a storeman's attendance for the purpose of accepting the delivery. The primary judge found that there was inconsistency between storemen in their responsiveness to the buzzer, and also in their understanding and acceptance of a responsibility to move the bins. He found that there was a reasonable concern on the part of the appellant that she would be delayed for a significant time if she did not move the bins herself. He also found that employees of the respondent, for their own benefit, were prepared to let delivery drivers move the bins rather than do the job themselves. In making those findings, the primary judge had the advantage of seeing and assessing the delivery drivers, including the appellant, and the employees of the respondent.

34 The respondent's system for receiving deliveries from its suppliers, at least up until the time of the appellant's injury, left unresolved the problem created by the Council's method of dealing with the waste bins, that is to say, moving them into the laneway, emptying them, and leaving them obstructing access to the loading dock. That moving the bins could injure a driver of the appellant's stature was foreseeable, and foreseen; as was the risk that drivers of all sizes might attempt to move the bins in order to reduce delay. The respondent's employees would move the bins if asked to do so, but there was no procedure that meant they would always move them promptly, or that established that they, and not the delivery drivers, were to clear the access to the loading dock.

35 When a person is required to take reasonable care to avoid a risk of harm to another, the weight to be given to an expectation that the other will exercise reasonable care for his or her own safety is a matter of factual judgment. It may depend upon the circumstances of the case. To take a commonplace example, in ordinary circumstances a motorist in a city street, approaching a pedestrian crossing, will reasonably assume that the pedestrians assembled on the footpath will observe the lights which control the crossing. Most people drive as though it may be expected that other road users will be reasonably careful. At the same

time, it is often judged reasonable to expect a motorist to allow for the possibility that some other road users will be inattentive or even negligent.

36 The obviousness of a risk, and the remoteness of the likelihood that other people will fail to observe and avoid it, are often factors relevant to a judgment about what reasonableness requires as a response. In the case of some risks, reasonableness may require no response. There are, for instance, no risk-free dwelling houses. The community's standards of reasonable behaviour do not require householders to eliminate all risks from their premises, or to place a notice at the front door warning entrants of all the dangers that await them if they fail to take care for their own safety. This is not a case about warnings. Even so, it may be noted that a conclusion, in a given case, that a warning is either necessary or sufficient, itself involves an assumption that those to whom the warning is addressed will take notice of it and will exercise care. The whole idea of warnings is that those who receive them will act carefully. There would be no purpose in issuing warnings unless it were reasonable to expect that people will modify their behaviour in response to warnings.

37 The factual judgment involved in a decision about what is reasonably to be expected of a person who owes a duty of care to another involves an interplay of considerations. The weight to be given to any one of them is likely to vary according to circumstances. If the obviousness of a risk, and the reasonableness of an expectation that other people will take care for their own safety, were conclusive against liability in every case, there would be little room for a doctrine of contributory negligence. On the other hand, if those considerations were irrelevant, community standards of reasonable behaviour would require radical alteration.

38 There was no sufficient reason for the Court of Appeal to set aside the primary judge's finding of negligence. The question was whether the respondent had a proper delivery system in place. Such a system should have included arrangements for moving the waste bins left in the laneway by the Council workers in order to clear access to the loading dock. The appellant, and the other delivery drivers, had no responsibility to design, and no power to implement, the delivery system operating on the respondent's premises. That power and responsibility belonged to the respondent alone. The respondent, in truth, had no system for that particular purpose. In practice, the respondent's employees either moved the bins themselves or left it to the delivery drivers to move the bins for them, according to the convenience of the respondent's employees and any other demands upon their time and attention. In the circumstances that prevailed, the respondent knew that, frequently, delivery drivers would move the bins. The respondent knew that not all drivers were capable of doing that without risk of

injury. The reasoning of McMurdo J set out above is persuasive. The primary judge's finding of negligence should have been upheld.

Contributory negligence

39 McMurdo J was also correct to conclude that a case of contributory negligence had been established and that the primary judge had erred in failing so to find. The appellant was aware of the risk involved in moving the bins herself. She had recorded in her diary that they were too heavy for her. She and her husband had complained about the matter.

40 The factors that weighed with the majority in the Court of Appeal, while not sufficient to displace the finding of negligence, were significant for the issue of contributory negligence. In this regard it is important to remember that, in her relationship with the respondent, the appellant was not an employee but an independent contractor. Different considerations arise in the case of contributory negligence on the part of employees[8].

41 Although some saving in time was achieved by the delivery drivers when they moved the bins themselves, it cannot have been great. Furthermore, in the case of the appellant, not only did she have to wait for the storeman before she completed her delivery, she was also accustomed to waiting for her husband to assist her with unloading and, if necessary, with moving the bins. On the occasion in question, the appellant attempted to move the bins without waiting either for the storeman or for her husband. Furthermore, the appellant knew, and the respondent did not know, that she had injured her back only a few days previously.

42 The amount allowed by McMurdo J by way of apportionment should not be disturbed. The orders he proposed should be given effect.

Orders

43 The appeal should be allowed with costs. Orders 2 and 3 of the Court of Appeal should be set aside. In place of those orders it should be ordered that there be judgment for the appellant against the respondent in the action for

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**8** *McLean v Tedman* (1984) 155 CLR 306 at 315; *Bankstown Foundry Pty Ltd v Braistina* (1986) 160 CLR 301 at 309; *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 877 [60], 884 [87]; 179 ALR 321 at 333, 344.

*Gleeson CJ*
*McHugh J*
*Kirby J*
*Hayne J*
*Heydon J*



$105,327.92. The respondent should pay the appellant's costs of the proceedings at first instance. There should be no order as to the costs of the appeal to the Court of Appeal.