# KOONJUL v. THAMESLINK HEALTHCARE SERVICES

COURT OF APPEAL (Hale L.J. and Sir Christopher Staughton): March 28, 2000

*Personal injuries—liability—breach of statutory duty—Manual Handling Operation Regulations 1992*

The claimant was a care assistant employed by the defendant at a small residential home for children. The claimant had been employed at the home for over eight years before her accident, had been taught how to go about tasks including bending, pulling and lifting and had undergone a university taught moving and handling course some 10 months before the accident. On April 28, 1996 the claimant was making beds. She was required to make an unusually low bed that was kept with one side pushed against a wall, as it was in use for children who had conditions which meant that they might easily fall out of bed. The claimant ricked her back when attempting to move the bed. The case before the judge was based on the Manual Handling Operations Regulations 1992 (S.I. 1992 No. 2793) ("the Regulations") and an allegation of negligence at common law. It was accepted that the task in question was a manual handling operation, but the judge held, in effect, that no obligation arose under regulation 4(1) because there was no significant risk of injury. The judge also dismissed the negligence claim. The claimant appealed, but only in relation to the claim based on the Regulations.

**Held,** dismissing the appeal, for regulation 4 of the Regulations to apply the level of risk of injury required was a real risk, a foreseeable possibility of injury, but certainly nothing approaching a probability. In making an assessment of whether there is such a risk, an employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. In making such an assessment there should also be an element of realism. The question of what does involve a risk of injury must be context based, looking at the particular operation in the context of the particular place of employment and the particular employee involved, including the experience and training which had been given to that employee.

*Per* Hale L.J.: whilst prepared to assume that some risk could be envisaged from the operation in question so that regulation 4 applied, in the circumstances, there had been no breach of the Regulations.

*Per* Sir Christopher Staughton: whilst inclined to say that there was no risk of injury within regulation 4(1)(a) so that the regulation had no application, in any event the defendant had done all that it was required to do under regulation 4 in the circumstances of the case.

*Per* Hale L.J.: it was entirely appropriate that the bed should have been positioned against a wall, given that the purpose was to save children from risk of harm through falling out of bed. Accordingly, there had been no breach of the obligation, under regulation 4(1)(a), to avoid the need for employees to undertake manual handling operations, so far as is reasonably practicable. There was no breach of the obligation, under regulation 4(1)(b), to take appropriate steps to reduce the risk of injury to employees, arising out of manual handling operations, to the lowest level reasonably practicable despite the defendant's failure to give a specific instruction to the claimant as to how to go about moving the bed. In the context of the employment there were innumerable everyday tasks, any one of which could be described as a manual handling operation. The suggestion that the low level of risk involved should be met by a precise evaluation of each of the tasks and precise warnings to each

employee as to how each was to be carried out took the matter well beyond the realms of practicality.

**Cases judicially considered:**
(1) *Hawkes v. London Borough of Southwark*, unreported, February 10, 1998, CA.
(2) *London Passenger Transport Board v. Upson* [1949] A.C. 155, HL.
(3) *Cullen v. North Lanarkshire Council* [1998] S.C. 451.

**Statutory instruments judicially considered:**
(1) Manual Handling Operation Regulations 1992 (S.I. 1992 No. 2793), regulation 4.

**Appeal** by the claimant, Keelatswanee Koonjul, against the order of District Judge Lipton, sitting as a deputy county court judge in the Mayor's and City of London County Court, made on October 12, 1999, giving judgment for the defendant, Thameslink Healthcare Services, on the claimant's claim for damages for personal injury.

*R. Weir*, instructed by Thompsons, London, for the claimant (appellant).
*A. Sharp*, instructed by Hextall Erskine, London, for the defendant (respondent).

**HALE L.J.** This is a claimant's appeal with permission of the trial judge from the order of District Judge Lipton sitting as a deputy county court judge in the Mayor's and City of London County Court on October 12, 1999. He gave judgment for the defendant in a case concerning a personal injury sustained by the claimant at work on Sunday, April 28, 1996.

The claimant is a lady who was then aged 47 and worked as a care assistant at Rainbow Lodge in Dartford. This is a small residential home for children with learning disabilities which is also used for respite care for children with emotional and behavioural disorders. The claimant had worked there since 1988; therefore for some eight years before the accident. Before that she had worked as a care assistant in Darenth hospital. That Sunday she was making the beds. The bed in question was unusually low. It was some 18 inches off the ground, and the bar along the side, which she pulled, was some five inches from the ground. These beds were used for children who had epilepsy or other conditions which meant that they might easily fall out of bed. If they did so, they would have a relatively small distance to fall on to the carpeted floor. For that reason the bed had one side pushed against the wall. In order to make the bed, the claimant moved a chest of drawers and a chair out of the way and pulled the bed away from the wall. She did so by pulling it sideways from a point towards the foot of the bed. She bent down in order to do so, and ricked her back. The home had three such beds, two metal and one wooden. The metal ones had castors on the bedhead legs but not all four legs, also for safety reasons. The wooden bed may or may not have had castors on at the time, but the judge made no finding as to that. He also made no finding as to which type of bed was involved. This was because it was not necessary to do so: the metal beds were only slightly heavier than the wooden one. The experts called for each side agreed that the force required to move either bed was, in the words of the judge, "very modest".

The case before the judge was put in two ways, firstly in reliance on the Manual Handling Operations Regulations 1992 and, secondly, on breach of the common law duty of care. However, there was a finding by the learned

judge that there was no negligence at common law, and that is not pursued before us. The matter therefore turns entirely on the Manual Handling Operations Regulations.

Regulation 2 defines a manual handling operation as:

> "... any transporting or supporting of a load (including the lifting, putting down, pushing, pulling, carrying or moving thereof) by hand or by bodily force."

As I understand it, it is accepted that the task in question was such an operation. The duties of employers are then set out in regulation 4. Regulation 4(1) provides:

> "Each employer shall
> (a) so far as is reasonably practicable, avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured; or
> (b) where it is not reasonably practicable to avoid the need for his employees to undertake any manual handling operations at work which involve a risk of their being injured—
>
> (i) make a suitable and sufficient assessment of all such manual handling operations to be undertaken by them, having regard to the factors which are specified in column 1 of Schedule 1 to these Regulations and considering the questions which are specified in the corresponsding entry in column 2 of that Schedule,
> (ii) take appropriate steps to reduce the risk of injury to those employees arising out of their undertaking any such manual handling operations to the lowest level reasonably practicable, and
> (iii) take appropriate steps to provide any of those employees who are undertaking any such manual handling operations with general indications and, where it is reasonably practicable to do so, precise information on
> (aa) the weight of each load, and
> (bb) the heaviest side of any load whose centre of gravity is not positioned centrally."

The judge held, in effect, that regulation 4(1) did not arise because there was no significant risk of injury. He said this:

> "There is in the Manual Handling Regulations an assessment checklist, because obviously every employer has to see whether the task is dangerous or not—capable of causing an injury. That itself begs the question, the phrase, that if you take the normal task and assume it is carried out in the normal manner, would the task of making a bed cause an injury? Dr Graham just smiled at that and said: 'Question 1: does the operation involve a significant risk of injury?' 'No', came back the answer. Mr Taylor really did not disagree with that. He was not asked the question in those terms, and if the answer is 'No', then you do not have to do anythng more under the regulations; that is it. If someone carries it out wrongly—we will come on to a safe system of work—or in an unexpected manner, then the employer says, 'This is something I could not foresee, so the Regulations do not apply if it is risk that I do not think is likely to happen.' A significant risk of injury."

Then slightly later on he says that:

> "... the Manual Handling Regulations seem to me as far from this case as I could possibly envisage, making a bed."

Mr Weir, on behalf of the appellant, complains about several features in that approach. Firstly, he complains that the judge should not have assumed, for the sake of asking whether there was a risk, that the task would be carried out in a normal manner. This is to turn the Regulations on their head. The whole purpose of the Regulations is to impose upon employers the obligation of protecting their employees from such risks and therefore carrying out an assessment of what the risk is. He draws some support from the words of Lord de Parcq in the case of *London Passenger Transport Board v. Upson* [1949] A.C. 155 at 174. Here Lord du Parcq was dealing with pedestrian crossings and the obligation of drivers, when approaching pedestrian crossings where they did not have a clear view of the crossing, to proceed at such a speed as to be able, if necessary, to stop before reaching the crossing. Lord du Parcq said:

> "It must be agreed, I think, that one object of these Regulations is to save foot passengers from injury, and since foot passengers are not prohibited from using a 'pedestrian crossing place' controlled by lights even when a green light is being shown to on-coming traffic, though it is sometimes negligent and often perilous for them to do so, it does not seem to me to be surprising that the Minister should think that the lives and limbs even of persons who may have been careless should to some extent be protected."

Mr Weir also complains that the risk of injury need not be significant. He refers to the one case (as far as we know) in which these Regulations have previously been considered by this court, the case of *Hawkes v. London Borough of Southwark* (unreported, February 20, 1998). In that case, Aldous L.J. referred to there having to be a "real" risk for the purpose of the regulations. Mr Weir refers also to the Scottish case of *Cullen v. North Lanarkshire Council* [1998] S.C. 451 at 455, where the court referred to the risk of injury needing to be "no more than a foreseeable possibility; it need not be a probability".

For my part, I am quite prepared to accept those statements as to the level of risk which is required to bring the case within the obligations of regulation 4; that there must be a real risk, a foreseeable possibility of injury; certainly nothing approaching a probability. I am also prepared to accept that, in making an assessment of whether there is such a risk of injury, the employer is not entitled to assume that all his employees will on all occasions behave with full and proper concern for their own safety. I accept that the purpose of regulations such as these is indeed to place upon employers obligations to look after their employees' safety which they might not otherwise have.

However, in making such assessments there has to be an element of realism. As the guidance on the regulations points out, in appendix 1 at paragraph 3:

> "... a full assessment of every manual handling operation could be a major undertaking and might involve wasted effort."

It then goes on to give numerical guidelines for the purpose of providing "an initial filter which can help to identify those manual handling operations deserving more detailed examination".

It also seems to me clear that what does involve a risk of injury must be

context-based. One is therefore looking at this particular operation in the context of this particular place of employment and also the particular employees involved. In this case, we have a small residential home with a small number of employees. But those employees were carrying out what may be regarded as everyday tasks, and this particular employee had been carrying out such tasks for a very long time indeed. The employer in seeking to assess the risks is entitled to take that into account.

Furthermore, when one comes to the question of whether there was indeed a risk in this case, one has to bear in mind that this particular employee accepted that she had been taught in the hospital that if she bent down she had to keep her knees bent and her back straight. She knew, therefore, as a result of her employment of long standing, how to go about tasks which involved pulling, pushing or lifting, for which it might be necessary to reduce her height. Furthermore, she had also gone on a Moving and Handling Course at the Faculty of Health at the University of Greenwich in June 1995, some 10 months before the accident; the content of that course makes it plain that it entailed the principles involved in avoiding injury when carrying out manual handling tasks of the sort involved, in particular, in lifting patients; but those principles are of course applicable in other contexts as well. So that is the context in which the employer would be approaching the assessment of risk.

Against that, of course, it can be said that it is obvious that if somebody bends down to pull a bed away from the wall, that involves a risk of injury to the back. The European Union directive upon which these Regulations are based is particularly aimed at preventing injuries to the back. Therefore some risk could indeed be anticipated from such an operation.

For my part, I am prepared to assume that some risk could be envisaged from such an operation, albeit with the reservations already expressed. However, when it comes to whether or not there was a breach of the regulations, it seems to me that in the particular circumstances of the case there was no such breach. The first obligation is to avoid the need for employees to undertake such operations, as far as reasonably practicable. In this case, it is alleged that the bed did not need to be against the wall and has since been moved away from the wall. But the purpose of having the bed against the wall was to save children from risk of harm through falling out of bed, and it seems to me that if there are children resident in the home for whom there is a risk, it is entirely appropriate that such beds should be against the wall and it is therefore not right to expect the employer to have the beds away from the wall in every circumstance.

The other relevant obligation is to take appropriate steps to reduce the risk of injury to employees, arising out of their undertaking any such manual handling operations, to the lowest level reasonably practicable. Mr Weir argues that it was the simplest thing in the world to tell the claimant in this case that she had to kneel down or squat down when trying to pull this bed away from the wall. That has a superficial attraction to it. Nevertheless, if one again looks at it in the context of this particular employment, it is an employment involving a number of everyday tasks, any one of which could involve something which could be described as a manual handling operation—lifting bedding, moving beds around in order to make them, moving the chest of drawers, or moving the chair in order to make the bed. There are innumerable tasks around such a home, and the idea that the level of risk involved (which I have already said was very low) should be met by a precise

evaluation of each of those tasks and precise warnings to each employee as to how each was to be carried out, seems to me to take the matter way beyond the realms of practicability.

It has to be borne in mind throughout that this is an experienced employee who knew how she should be carrying out tasks of this sort. In those circumstances it does not seem to me that there is any breach of these regulations involved. It follows that it is not necessary to consider the further argument, in that the learned judge found that the claimant was in any event 100 per cent contributorily negligent to her own injury. I express no view on that point, but for my part I would dismiss this appeal.

**SIR CHRISTOPHER STAUGHTON:** In my judgment no sensible person would carry out the task with which Mrs Koonjul was faced in the way that she did. So I would be inclined to say that there was no risk within regulation 4(1)(a) of these regulations. But I may be wrong about that, and Hale L.J. has left that point open. So I would add that I agree that the Health Trust did all that it was required to do under regulation 4(1)(a) and 4(1)(b) in the circumstances of this case, in the light of the experience, age and training of Mrs Koonjul. I too would dismiss the appeal.

One point has puzzled me in the thoughtful argument of Mr Weir. He submits that the burden of proof is on the employer to show that he has fulfilled the requirements of regulation 4(1)(b), and he relies for that purpose on a passage in the judgment of Aldous L.J. in the case of *Hawkes v. London Borough of Southwark* (unreported, February 20, 1998) at p. 9. Aldous L.J. said there that the onus of showing that the defendants had taken appropriate steps was placed upon them by the regulations; and he said at the end of the paragraph that the defendants had discharged the onus that was upon them.

Of course the regulation imposed a burden on the employer: a burden to carry out those tasks in fact. But I am not sure that it imposed a burden of proof, to show that they had carried out those tasks. However, Mr Weir was good enough not to remind me of my own judgment. I appear to have said the same thing, although acting upon a concession. I leave it there, at any rate for the time being.