HIGH COURT OF AUSTRALIA

FRENCH CJ,
GUMMOW, HEYDON, CRENNAN AND BELL JJ

KATHRYN STRONG APPELLANT

AND

WOOLWORTHS LIMITED T/AS BIG W & ANOR RESPONDENTS

Strong v Woolworths Limited [2012] HCA 5
7 March 2012
S172/2011

ORDER

1. *Appeal allowed.*

2. *Set aside the orders of the New South Wales Court of Appeal made on 2 November 2010 and in lieu thereof dismiss the first respondent's appeal to that Court with costs.*

3. *The first respondent to pay the appellant's costs in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

B M Toomey QC with T J J Willis and E G Romaniuk for the appellant (instructed by Leitch Hasson Dent Lawyers)

J E Maconachie QC with P Biggins for the first respondent (instructed by Bartier Perry Solicitors)

Submitting appearance for the second respondent

CATCHWORDS

Strong v Woolworths Limited

Negligence – Causation – Slip and fall injury – Absence of adequate system for periodic inspection and cleaning – Whether factual causation under s 5D of *Civil Liability Act* 2002 (NSW) ("Act") excludes notions of "material contribution" – Whether appellant had proved factual causation under s 5D(1)(a) of Act – Whether open on evidence to apply probabilistic reasoning in *Shoeys Pty Ltd v Allan* (1991) Aust Torts Reports ¶81-104.

Words and phrases – "but for", "causation", "material contribution", "necessary condition", "slipping case", "system of periodic inspection and cleaning".

Civil Liability Act 2002 (NSW), ss 5D, 5E.

1 FRENCH CJ, GUMMOW, CRENNAN AND BELL JJ. The appellant suffered serious spinal injury when she slipped and fell while at the Centro Taree Shopping Centre ("the Centre"). At the time, she was in the sidewalk sales area outside the entrance to the Big W store. This area was under the care and control of the first respondent, Woolworths Limited, trading as Big W ("Woolworths"). The appellant is disabled. Some years before these events, her right leg was amputated above the knee. She walks with the aid of crutches. On this occasion, the tip of her right crutch came into contact with a greasy chip that was lying on the floor of the sidewalk sales area. The crutch slipped out from under her and she fell heavily.

2 The appellant brought proceedings in the District Court of New South Wales (Robison DCJ) claiming damages for negligence against Woolworths and the second respondent, CPT Manager Limited ("CPT"), the owner of the Centre. The appellant obtained judgment against Woolworths for $580,299.12. The claim against CPT was dismissed.

3 Woolworths appealed to the New South Wales Court of Appeal (Campbell JA, Handley AJA and Harrison J). It was not in question that Woolworths owed a duty to take reasonable care for the safety of persons coming into the sidewalk sales area[1]. Nor was it in question that, on the day of the appellant's fall, Woolworths did not have any system in place for the periodic inspection and cleaning of the sidewalk sales area. The Court of Appeal held that the appellant had failed to prove that Woolworths' negligence was a cause of her injury. The appeal was allowed, the judgment was set aside and the proceedings were dismissed.

4 The appellant appeals by special leave from the orders of the Court of Appeal. The determination of causation in a claim for damages for negligence in New South Wales is subject to the provisions of Div 3 of Pt 1A of the *Civil Liability Act* 2002 (NSW) ("the CLA"). Section 5D states the governing principles. Among the appellant's grounds of challenge was the contention that the Court of Appeal had adopted an unduly restrictive interpretation of s 5D. As will appear, the Court of Appeal's reasons should not be read as confining the operation of s 5D in the way suggested by the appellant. In any event, the issue raised by the appeal does not turn on the Court of Appeal's analysis of proof of factual causation under the statute. Rather, the appeal concerns the familiar difficulty in "slipping cases" of establishing a causal connection between the

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1 *Australian Safeway Stores Pty Limited v Zaluzna* (1987) 162 CLR 479; [1987] HCA 7.

absence of an adequate cleaning system and the plaintiff's injury when it is not known when the slippery substance was deposited[2]. In issue is the correctness of the Court of Appeal's conclusion that it was not open to infer that the chip had been on the ground long enough for it to have been detected and removed by the operation of an adequate cleaning system. CPT's interests are not affected by the outcome of the appeal. It filed a submitting appearance.

5 For the reasons to be given, the appeal should be allowed, the orders of the Court of Appeal set aside and, in lieu thereof, the appeal to that Court should be dismissed with costs.

<u>The facts</u>

6 The incident occurred at around 12.30pm on Friday, 24 September 2004. The appellant was at the Centre with her daughter and a friend, Ms Hurst. The Centre contained a Woolworths store and a Big W store separated by a common area, part of which was operating as a food court. Woolworths had the exclusive right under its lease with CPT to conduct "sidewalk sales" in an area that was roughly square, extending around 11 metres from the Big W entrance doors into the common area towards the food court. Two shoulder-high pot plant stands were positioned on either side of the sidewalk sales area, creating a wide corridor leading to Big W's entrance. The appellant was inside the corridor, walking towards Big W with her daughter on her left and Ms Hurst just a little in front to her right. As the appellant moved to her right to inspect the pot plants, the tip of her crutch came into contact with a chip, or with grease deposited by the chip, and the crutch slipped out from under her, causing her to fall. After her fall, the appellant saw a grease mark on the floor at the point where the crutch had slipped. Her daughter described the grease stain as being "as big as a hand". The daughter and Ms Hurst each saw a chip on the ground.

7 CPT, or a company associated with it, had a contract with a cleaning services company. The contract specified that the premises were to be maintained so that "floors are to be free of any rubbish and or spillages". The maximum time between cleaning inspections for the "mall/common areas" was

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2 *Dulhunty v J B Young Ltd* (1976) 50 ALJR 150; 7 ALR 409; *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 241; *Rose v Abbey Orchard Property Investments Pty Limited* (1987) Aust Torts Reports ¶80-121; *Drakos v Woolworths (SA) Ltd* (1991) 56 SASR 431; *Shoeys Pty Ltd v Allan* (1991) Aust Torts Reports ¶81-104; *Griffin v Coles Myer Ltd* [1992] 2 Qd R 478; *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408; *Timberland Property Holdings Pty Ltd v Bundy* [2005] NSWCA 419.

stipulated to be 15 minutes. Kathryn Walker was employed as a cleaner by the cleaning services company. Her hours of duty were from 7.30am to 4.00pm. Ms Walker was responsible for cleaning the common area but this did not extend to the sidewalk sales area. A second cleaner was on duty in the period 11.00am to 2.00pm. The second cleaner's duties were to clean the food court area, the public toilets and to respond to calls to clean up spillages. Security staff patrolled the Centre continuously and would contact the cleaner by two-way radio if a spillage was detected.

8 Big W employed a person to act as a "people greeter", to welcome people coming into the store and to check the bags of those leaving it. This employee was required to stand in the vicinity of the Big W entrance doorway. It was part of her duties to keep an eye out for spillages within the sidewalk sales area. All Big W employees were trained to be vigilant for spillages. It appears that another Big W employee was on duty at a cash register located in the sidewalk sales area. However, Woolworths acknowledged that it did not have any system in place on the day of the incident for the periodic inspection and necessary cleaning of the sidewalk sales area.

9 Ms Walker was on her lunchbreak at the time of the appellant's fall. She later completed a report concerning the incident in which she recorded that "the area" had last been cleaned or inspected at 12.10pm. The reference to "the area" was to the common area adjacent to the sidewalk sales area. Ms Walker recorded that "the area" was cleaned "every 20 minutes". There was no explanation for the difference between the 15 minute inspection intervals stipulated in the contract and the 20 minute inspection intervals recorded by Ms Walker.

<u>The proceedings in the District Court</u>

10 The appellant particularised Woolworths' negligence as including its failure to institute and maintain a cleaning system to detect spillages and foreign objects in and around the plant trolleys.

11 The primary judge delivered ex tempore reasons for judgment. His Honour found that Woolworths was the occupier of the sidewalk sales area and that it owed a duty of care to persons coming within it. The essence of the balance of his reasoning as to Woolworths' liability was as follows[3]:

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3 *Woolworths Limited v Strong* [2010] NSWCA 282 at [26].

> "If other people could see [the grease mark] apart from the plaintiff after the event then it begs a serious question as to why it was not seen by an employee of [Woolworths] in those particular circumstances and it should have been removed either by [Woolworths] or [Woolworths] alerting a cleaner to remove it which was entirely open to [Woolworths] to do and if that had been done the [appellant] simply would not have come to grief. I can put it no more simply than that.
>
> So therefore [Woolworths] is guilty of negligence."

The Court of Appeal

12 The Court of Appeal noted that the primary judge had not addressed either breach of duty or causation of damage[4]. Nothing turned on the former omission in circumstances in which Woolworths did not challenge the finding that its conduct was negligent. The sole ground of appeal was directed to the implicit finding that Woolworths' negligence was a cause of the appellant's injury.

13 In the absence of findings by the primary judge, it was necessary for the Court of Appeal to make factual findings concerning causation. The Court of Appeal found that reasonable care did not require the continuous presence of a person looking out for slippery substances in the sidewalk sales area[5]. It followed from this that proof of breach of duty did not of itself make it likely that, had the duty been performed, the appellant would not have suffered harm. Periodic inspection and cleaning were all that reasonable care required[6]. This conclusion gave rise[7]:

> "to the possibility that, even if periodical inspections and cleaning had been carried out, with the minimum frequency required …, the chip fell between the last such inspection and the time the [appellant] encountered it".

14 Woolworths conceded that the evidence of the cleaning system employed by CPT in the common areas was available to determine the requirements of a

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4 *Woolworths Limited v Strong* [2010] NSWCA 282 at [24].

5 *Woolworths Limited v Strong* [2010] NSWCA 282 at [66].

6 *Woolworths Limited v Strong* [2010] NSWCA 282 at [66].

7 *Woolworths Limited v Strong* [2010] NSWCA 282 at [66].

reasonable system in the sidewalk sales area. The Court of Appeal approached the matter on the view of the evidence that was most favourable to the appellant, which was that reasonable care required periodic inspection and necessary cleaning of the sidewalk sales area at 15 minute intervals.

15 The Court of Appeal found that there was no basis for concluding that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system[8]. In the absence of evidence supporting an inference that the chip had been there for some time, such as that the chip was dirty or cold to touch, the Court of Appeal said that there was no basis for concluding that it was more likely than not that it had not been dropped shortly before the appellant slipped[9]. The scene of the incident was very close to the food court and the incident occurred at lunchtime. The engagement of the second cleaner for the hours 11.00am to 2.00pm provided some basis for the inference of an increased risk of things being dropped in the area of the food court during that time period[10]. In the result, the Court of Appeal reasoned that it could not be concluded that it was more likely than not that, had there been dedicated cleaning of the sidewalk sales area at 15 minute intervals, the appellant would not have suffered her injury[11].

16 Before turning to the correctness of this conclusion, something should be said about proof of causation under the CLA, in light of the appellant's challenge to aspects of the Court of Appeal's analysis of the statute.

<u>Causation under the CLA</u>

17 Part 1A of the CLA applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise[12]. "Negligence", for the purpose of Pt 1A, means the failure to exercise reasonable care and skill[13]. Section 5E provides that, in

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8 *Woolworths Limited v Strong* [2010] NSWCA 282 at [67].

9 *Woolworths Limited v Strong* [2010] NSWCA 282 at [67].

10 *Woolworths Limited v Strong* [2010] NSWCA 282 at [68].

11 *Woolworths Limited v Strong* [2010] NSWCA 282 at [69].

12 CLA, s 5A(1).

13 CLA, s 5, definition of "negligence".

determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation. As earlier noted, the principles governing the determination of causation are set out in s 5D. Relevantly, that provision states:

> "(1) A determination that negligence caused particular harm comprises the following elements:
>
> (a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and
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> (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).
>
> (2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

18 The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation[14]: the plaintiff would not have suffered the particular harm but for the defendant's negligence. While the value of that test as a negative criterion of causation has long been recognised[15], two kinds of limitations have been identified. First, it produces anomalous results in particular cases, exemplified by those in which there is more than one sufficient condition of the plaintiff's harm. Secondly, it does not address the policy considerations that are bound up in the attribution of legal responsibility for harm[16].

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14 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 443 [55] per French CJ, Gummow, Hayne, Heydon and Crennan JJ; [2009] HCA 48.

15 *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 515-516 per Mason CJ; [1991] HCA 12.

16 *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6-7 per Deane, Dawson, Toohey and Gaudron JJ; [1995] HCA 5; *Chappel v Hart* (1998) 195 CLR 232 at 255-256 [62]-[63] per Gummow J; [1998] HCA 55; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 639 [28] per Gleeson CJ; [2005] HCA 69; *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870 at

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19 The division of the causal determination under the statute into the distinct elements of factual causation and scope of liability is in line with the recommendations in the Final Report of the Committee convened to review the law of negligence ("the Ipp Report")[17]. The authors of the Ipp Report acknowledged their debt to Professor Stapleton's analysis in this respect[18]. The policy considerations that inform the judgment of whether legal responsibility should attach to the defendant's conduct are the subject of the discrete "scope of liability" inquiry[19]. In a case such as the present, the scope of liability determination presents little difficulty. If the appellant can prove factual causation, it is not in contention that it is appropriate that the scope of Woolworths' liability extend to the harm that she suffered. In particular cases, the requirement to address scope of liability as a separate element may be thought to promote clearer articulation of the policy considerations that bear on the determination. Whether the statutory determination may produce a different conclusion to the conclusion yielded by the common law is not a question which is raised by the facts of this appeal[20].

20 Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm[21].

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878 [32] per Gummow, Hayne and Heydon JJ, 896 [135] per Kiefel J; 245 ALR 653 at 662-663, 687; [2008] HCA 19.

17 Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, (2002) at 109-119 [7.26]-[7.51].

18 Ipp Report at 109 [7.27], citing Stapleton, "Cause-in-Fact and the Scope of Liability for Consequences", (2003) 119 *Law Quarterly Review* 388. See also Wright, "Causation in Tort Law", (1985) 73 *California Law Review* 1735.

19 Section 5D(4) provides that: "[f]or the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party".

20 Nor was it necessary for the determination of the causation issue in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 440 [44] per French CJ, Gummow, Hayne, Heydon and Crennan JJ.

21 As McHugh J points out in *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 529-530, the concept of a condition that is necessary to an occurrence is the lawyers' adaptation of John Stuart Mill's theory that the cause of an event is

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A necessary condition is a condition that must be present for the occurrence of the harm. However, there may be more than one set of conditions necessary for the occurrence of particular harm and it follows that a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s 5D(1)(a)[22]. In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm. This is pertinent to the appellant's attack on the Court of Appeal's reasons, which is directed to par 48 of the judgment:

> "Now, apart from the '*exceptional case*' that section 5D(2) recognises, section 5D(1) sets out what must be established to conclude that negligence caused particular harm. That emerges from the words '*comprises the following elements*' in the chapeau to section 5D(1). '*Material contribution*', and notions of increase in risk, have no role to play in section 5D(1). It well may be that many actions or omissions that the common law would have recognised as making a material contribution to the harm that a plaintiff suffered will fall within section 5D(1), but that does not alter the fact that the concepts of material contribution and increase in risk have no role to play in deciding whether section 5D(1) is satisfied in any particular case." (emphasis in original)

21 The appellant submitted that the Court of Appeal had proceeded upon a view that factual causation under s 5D(1)(a) excludes consideration of factors making a "material contribution" to the harm suffered by a plaintiff. This interpretation was said to require that the defendant's negligence be the "sole necessary condition of the occurrence of the harm" and to have prompted a differently constituted Court of Appeal to disagree with it. The latter submission was a reference to the observations made by Allsop P in *Zanner v Zanner*[23], to which reference will be made later in these reasons.

22 The reference to "*material contribution*" (Court of Appeal's emphasis) in the third sentence of par 48 was not to a negligent act or omission that is a

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the sum of the conditions which are jointly sufficient to produce it. See also Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 68-69, 109-114.

22 Fleming, *The Law of Torts*, 9th ed (1998) at 219; *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 509 per Mason CJ. See also Hart and Honoré, *Causation in the Law*, 2nd ed (1985) at 18.

23 [2010] NSWCA 343 at [11].

necessary, albeit not the sole, condition of the occurrence of the harm. So much is clear from the sentence that follows. Any confusion arising from the Court of Appeal's analysis may be the result of the different ways in which the expression "material contribution" has come to be used in the context of causation in tort[24]. The expression can be traced to developments in the law of nuisance in Scotland in the nineteenth century[25]. In a case in which several factories had contributed to the pollution of a river, the defendant factory owner was held liable in nuisance for the discharge of pollutants from his factory which had "materially contributed" to the state of the river. Liability was not dependent upon proof that the pollutants discharged by the defendant's factory alone would have constituted a nuisance[26].

23 In *Bonnington Castings Ltd v Wardlaw*[27], the expression "material contribution" was employed in determining the causation of the pursuer's pneumoconiosis, a disease caused by the gradual accumulation of particles of silica in the lungs. There were several sources of exposure: the pneumatic hammers, the floor grinders and the swing grinders. The employer's breach of statutory duty lay only in exposing the pursuer to the dust generated by the swing grinders. The greater proportion of the pursuer's exposure to silica dust had come from the use of the pneumatic hammers. Lord Reid characterised the "real question" as whether the dust from the swing grinders "materially contributed" to the disease[28]. The swing grinders had contributed a quota of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease[29].

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24 *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 514 per Mason CJ, citing *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 417 per Gibbs J; 1 ALR 125 at 138; *Tubemakers of Australia Ltd v Fernandez* (1976) 50 ALJR 720 at 724 per Mason J; 10 ALR 303 at 310; *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620; *McGhee v National Coal Board* [1973] 1 WLR 1 at 4, 6, 8, 12; [1972] 3 All ER 1008 at 1010, 1012, 1014, 1017-1018.

25 The history is traced in Steel and Ibbetson, "More Grief on Uncertain Causation in Tort" (2011), 70 *Cambridge Law Journal* 451 at 453.

26 *Duke of Buccleuch v Cowan* (1866) 5 M 214.

27 [1956] AC 613.

28 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 621.

29 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 623.

24 The Ipp Report distinguished the concept of "material contribution to harm" applied in *Bonnington Castings* from the use of the same expression merely to convey "that a person whose negligent conduct was a necessary condition of harm may be held liable for that harm even though some other person's conduct was also a necessary condition of that harm"[30]. Allsop P made the same point in *Zanner v Zanner*[31]:

> "[T]he notion of cause at common law can incorporate 'materially contributed to' in a way which would satisfy the 'but for' test. Some factors which are only contributing factors can give a positive 'but for' answer."

His Honour illustrated the point by reference to two negligent drivers involved in a collision that is the result of the conduct of the first, who drives through the red light, and of the second, who is not paying attention. His Honour went on to observe[32]:

> "However, material contributions that have been taken to be causes in the past (notwithstanding failure to pass the 'but for' test) such as in *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 are taken up by s 5D(2) which, though referring to 'an exceptional case', is to be assessed 'in accordance with established principle'."

25 This observation is consistent with the discussion in the Ipp Report of cases in which an "evidentiary gap" precludes a finding of factual causation on a "but for" analysis and for which it was proposed that special provision should be made[33]. The Ipp Report instanced two categories of such cases. The first category involves the cumulative operation of factors in the occurrence of the total harm in circumstances in which the contribution of each factor to that harm is unascertainable[34]. *Bonnington Castings* was said to exemplify cases in this category. The second category involves negligent conduct that materially increases the risk of harm in circumstances in which the state of scientific or medical knowledge makes it impossible to prove the cause of the plaintiff's

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30 Ipp Report at 110 [7.29].

31 *Zanner v Zanner* [2010] NSWCA 343 at [11].

32 *Zanner v Zanner* [2010] NSWCA 343 at [11].

33 Ipp Report at 109-112 [7.27]-[7.36].

34 Ipp Report at 109 [7.28].

harm[35]. *Fairchild v Glenhaven Funeral Services Ltd*[36] was said to exemplify cases in this category.

26 Section 5D(2) makes special provision for cases in which factual causation cannot be established on a "but for" analysis. The provision permits a finding of causation in exceptional cases, notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm. Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of causation in accordance with established principles under the common law of Australia has not been considered by this Court[37]. Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may, in accordance with established principles[38], be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed.

27 The authors of the Ipp Report and Allsop P in *Zanner v Zanner* assume that cases exemplified by the decision in *Bonnington Castings* would not meet the test of factual causation under s 5D(1)(a). However, whether that is so would depend upon the scientific or medical evidence in the particular case, a point illustrated by the decision in *Amaca Pty Ltd v Booth* with respect to proof of causation under the common law[39]. In some cases, although the relative contribution of two or more factors to the particular harm cannot be determined, it may be that each factor was part of a set of conditions necessary to the occurrence of that harm.

28 As earlier noted, the limitations of the "but for" analysis of factual causation include cases in which there is more than one sufficient condition for the occurrence of the plaintiff's injury. At common law, each sufficient condition

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35 Ipp Report at 110 [7.30].

36 [2003] 1 AC 32.

37 *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111 at 123 [12]; [2010] HCA 5; *Roads and Traffic Authority v Royal* (2008) 82 ALJR 870 at 888-889 [94] per Kirby J; 245 ALR 653 at 677.

38 *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 514 per Mason CJ.

39 (2011) 86 ALJR 172; 283 ALR 461; [2011] HCA 53.

may be treated as an independent cause of the plaintiff's injury[40]. The Ipp Report noted the conceptual difficulty of accommodating cases of this description within a "but for" analysis, but made no recommendation because the common law rules for resolving cases of "causal over-determination" were generally considered to be satisfactory and fair[41]. How such cases are accommodated under the scheme of s 5D does not call for present consideration.

29 Correctly understood, there is no conflict between the Court of Appeal's analysis of s 5D in this proceeding and Allsop P's analysis of the provision in *Zanner v Zanner*. The Court of Appeal correctly held that causation is to be determined by reference to the statutory test. Contrary to the appellant's submission, the Court of Appeal said nothing about how the application of that test might lead to an outcome that differed from the outcome that would have been reached by the application of the common law. The causation issue presented by the appellant's claim has nothing to do with concepts of material contribution to harm, material increase in risk of harm, or any of the difficulties discussed by the text writers in the context of the limitations of a "but for" analysis of factual causation[42].

30 The Court of Appeal, in approaching the determination of causation under the statute, accepted that Woolworths' negligent failure to implement a system of periodic inspection might be shown to have been a necessary condition of the appellant's harm by the process of probabilistic reasoning adopted in *Shoeys Pty Ltd v Allan*[43]. In issue in the appeal is whether the Court of Appeal was right to conclude that it was not open on the evidence to apply that reasoning in this case.

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40 *Amaca Pty Ltd v Booth* (2011) 86 ALJR 172 at 187C [70]; 283 ALR 461 at 480; *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 534 per McHugh J. See also Glanville Williams, "Notes of Cases: The Two Negligent Servants", (1954) 17 *Modern Law Review* 66 at 71.

41 Ipp Report at 109 [7.26].

42 Stapleton, "Reflections on Common Sense Causation in Australia", in Degeling, Edelman and Goudkamp (eds), *Torts in Commercial Law*, (2011) 331 at 338-342.

43 *Woolworths Limited v Strong* [2010] NSWCA 282 at [60], citing *Shoeys Pty Ltd v Allan* (1991) Aust Torts Reports ¶81-104.

Woolworths' submissions

31 Woolworths submitted that the appellant had simply failed to prove causation on the facts. It was necessary, so it was said, for her to have led *some* evidence from which it could be concluded that the chip had been deposited more than 15 minutes before her fall. The Court of Appeal rejected probabilistic reasoning based on the length of the non-inspection interval from the start of the day's trading until the time of the fall because the evidence established the likelihood that the chip was deposited at lunchtime. While, in Woolworths' submission, the evidence supporting this conclusion may have been slight, the inference was open to the Court of Appeal as the tribunal of fact[44].

Discussion

32 The appellant was required to prove on the balance of probabilities that Woolworths' negligence was a necessary condition of her harm. Woolworths' negligence lay in its failure to employ a system for the periodic inspection and cleaning of the sidewalk sales area. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred. Here, the appellant was required to prove that, had a system of periodic inspection and cleaning of the sidewalk sales area been employed on the day of her fall, it is likely that the chip would have been detected and removed before she approached the entrance to Big W.

33 The sidewalk sales area was not inspected in the four and a half hours between the time when the area was set up for the day's trading and the time of the appellant's fall. There was no dispute that, had the area been inspected, the chip would have been detected and removed. The Court of Appeal observed that the chip was not lying at the very edge of the corridor, given that Ms Hurst was walking next to the appellant on her right, and noted the evidence that it was visible after the appellant's fall.

34 Woolworths' submission that it was necessary for the appellant to point to some evidence permitting an inference to be drawn concerning when the chip was deposited must be rejected. It was incumbent on the appellant to prove that it was more probable than not that Woolworths' negligence was a necessary condition of her fall, but this onus could be discharged by consideration of the probabilities in circumstances in which the evidence did not establish when the

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44 *Bradshaw v McEwans Pty Ltd* (1951) 217 ALR 1 at 5; *Luxton v Vines* (1952) 85 CLR 352 at 358 per Dixon, Fullagar and Kitto JJ; [1952] HCA 19.

chip was deposited. The point was illustrated by Hayne JA (as he then was) in *Kocis v S E Dickens Pty Ltd*[45]. His Honour posited a case in which reasonable care required the occupier of premises to carry out inspections at hourly intervals. Assume that no inspection is made on the day the plaintiff slips on a spill eight hours after the premises opened for trading. If there is no basis for concluding that the spill is likely to have occurred at some particular time rather than any other time, the probability is that that the spill occurred in the first seven hours of trading and not in the hour preceding the plaintiff's fall[46]. As Hayne JA observed, a plaintiff must prove his or her case on the balance of probabilities and it is no answer to the question whether something has been demonstrated as being more probable than not to say that there is another possibility open[47]. The determination of the question turns on consideration of the probabilities.

35 The Court of Appeal rejected reasoning along these lines because it found that the deposit of the chip was not a hazard with an approximately equal likelihood of occurrence throughout the day[48]. That conclusion was based on a consideration of three circumstances. First, chips are a type of food some people eat for lunch[49]. Secondly, the appellant's injury occurred at lunchtime[50]. Thirdly, a second cleaner was engaged for the three hours commencing at 11.00am, which was suggestive of an increased risk of things being dropped during that period[51]. These circumstances led the Court of Appeal to say[52]:

> "[I]t cannot be concluded that it was more likely than not that if there had been dedicated cleaning of the area every 15 minutes, supplemented by employees who happened to see a danger either removing it themselves,

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45 [1998] 3 VR 408.

46 *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408 at 432.

47 *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408 at 430.

48 *Woolworths Limited v Strong* [2010] NSWCA 282 at [66].

49 *Woolworths Limited v Strong* [2010] NSWCA 282 at [62].

50 *Woolworths Limited v Strong* [2010] NSWCA 282 at [62].

51 *Woolworths Limited v Strong* [2010] NSWCA 282 at [68].

52 *Woolworths Limited v Strong* [2010] NSWCA 282 at [69].

or calling a cleaner, it is more likely than not that the [appellant] would not have fallen."

36 The engagement of the second cleaner provides no support for a conclusion that the probabilities were against the chip being deposited before 12.15pm. At most, it is a circumstance that may provide some basis for an inference of increased traffic in the Centre in the period from 11.00am to 2.00pm. However, it would be necessary to take into account that the fulltime cleaner took her lunchbreak within this period, leaving one cleaner on duty during that time. Furthermore, the contract with the cleaning company did not provide for more frequent inspections of the common areas in the period from 11.00am to 2.00pm, which tends against any conclusion of an increased risk of the kind suggested by the Court of Appeal.

37 If one reckons lunchtime as between 12.00pm and 2.00pm, it is right to say that the probabilities are evenly balanced as to the deposit of the chip between 12.00pm and 12.15pm and 12.15pm and 12.30pm, provided the chip was acquired for consumption at lunch. The Court of Appeal said that there was no basis for concluding that it was more likely than not that the chip was not dropped "comparatively soon before the [appellant] slipped"[53]. It did not explain how it reasoned as to the likelihood that the chip was acquired at lunchtime. There was no basis for concluding that chips are more likely to be eaten for lunch than for breakfast or as a snack during the course of the morning. The inference was open that the chip was not present on the floor of the sidewalk sales area at the time the area was set up for the day's trading. However, the conclusion that the chip had been deposited at a particular time rather than any other time on the day of the incident was speculation.

38 Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area, which was adjacent to the food court. The evidence did not permit a finding of when, in the interval between 8.00am and 12.30pm, the chip came to be deposited in that area. In these circumstances, it was an error for the Court of Appeal to hold that it could not be concluded that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system[54]. The probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm and not the shorter period between 12.10pm and the time of the fall.

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53 *Woolworths Limited v Strong* [2010] NSWCA 282 at [67].

54 *Woolworths Limited v Strong* [2010] NSWCA 282 at [67].

39 The appellant submitted that, despite the unsatisfactory nature of the trial, as the sole question raised by Woolworths on its appeal was whether causation was open, the appropriate order, should she succeed in this Court, was the restoration of her verdict. Woolworths did not submit to the contrary. In the circumstances, it is appropriate to make the orders that the appellant seeks.

Orders

40 For these reasons, the following orders should be made.

1. Appeal allowed.

2. Set aside the orders of the New South Wales Court of Appeal made on 2 November 2010 and in lieu thereof dismiss the first respondent's appeal to that Court with costs.

3. The first respondent to pay the appellant's costs in this Court.

41 HEYDON J. The background circumstances of this case are extremely unfortunate. While the appellant was walking in a shopping centre, she fell heavily when her crutch slipped on a chip or on grease from the chip. The chip was lying on the floor just outside a supermarket operated by the first respondent. The area was controlled by the first respondent, and a "sidewalk sale" was being conducted there.

42 The pleaded allegations which were central to this appeal centred on one or more of three failures "to implement and/or maintain a proper cleaning system". The Court of Appeal found that the avoidance of negligence did not require "the continuous presence of someone always on the lookout for potential slippery substances."[55] The appellant did not challenge that finding and did not contend in this Court that the first respondent's duty of care obliged it to maintain a permanent system of surveillance in relation to the floor on which the appellant fell and removal of items which might cause a fall. The appellant accepted that a system of inspection and cleaning at 15 minute intervals, as required by a contract for the cleaning of the shopping centre generally, or 20 minute intervals, as was typical in parts of the common areas outside the place in which the appellant fell, would have sufficed to avoid negligence. Although there were some techniques by which the cleanliness of the floor was attended to, there was no system of either kind in the vicinity of the fall.

<u>The question in the appeal: causation</u>

43 The question in this appeal is one of causation. Causation is an element in the tort of negligence on which the plaintiff bears the burden of proof. This was so at common law and remains the case under s 5E of the *Civil Liability Act* 2002 (NSW) ("the Act"). Section 5E provides (ungrammatically):

> "In determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation."

The question is whether a failure to have in place a system pursuant to which the floor was inspected no more than 15 minutes before the fall caused the appellant's injury at 12.30pm.

44 Section 5D(1)(a) of the Act provides:

> "A determination that negligence caused particular harm comprises the following elements:

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55 *Woolworths Ltd v Strong* [2010] NSWCA 282 at [66] per Campbell JA (Handley AJA and Harrison J concurring).

(a) that the negligence was a necessary condition of the occurrence of the harm …".

A necessary condition is one that cannot be dispensed with. A condition is an event or state of affairs on which another event or state of affairs is contingent. Accordingly, the appellant was required to prove that her injury was contingent upon the first respondent's negligence in relation to its lack of a cleaning system, and that that lack of a cleaning system was indispensable to the occurrence of her injury. If the chip fell before 12.15pm, the lack of a cleaning system was indispensable to the occurrence of the appellant's injury because had the system been in place the chip and the grease would have been detected and removed before she had arrived at the area where she fell. If the chip fell after 12.15pm, the lack of a cleaning system was not indispensable: the injury would have happened whether or not the system had been in place. Hence the question is whether the appellant has pointed to material from which it can be concluded, on the balance of probabilities, that the chip fell before 12.15pm. The appropriate material could include direct evidence, evidence from which circumstantial inferences can be drawn, and the teachings of common experience.

45 Before going to that question, it is desirable to deal with two particular arguments advanced by the appellant.

<u>The appellant's "evidential burden" argument and the "very slight" evidence argument</u>

46 Normally when the legal (ie persuasive) burden of proof rests on a party, what is called an "evidential burden" rests on that party also. The appellant submitted, however, that while the legal (ie persuasive) burden of proof lay on her, an "evidential burden" of proof lay on the first respondent. For that proposition the appellant cited statements of Lawton LJ and Megaw LJ in *Ward v Tesco Stores Ltd*[56] and statements in the Full Court of the Supreme Court of South Australia in *Brown v Target Australia Pty Ltd*[57].

47 The appellant also advanced a second submission – that an inference that causation existed could be drawn in this case from "very slight" evidence. That was said to be so because the first respondent's failure to have a system in place "removes resort to the documents recording the performance and non-performance of the system, and removes witnesses to give testimony as to that performance and non-performance, making slight evidence appropriate and

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56 [1976] 1 WLR 810 at 814 and 816; [1976] 1 All ER 219 at 222 and 224 respectively.

57 (1984) 37 SASR 145.

sufficient". The appellant cited three authorities in support of this submission. The first was *De Gioia v Darling Island Stevedoring & Lighterage Company Ltd*[58]. Jordan CJ there dealt with the sufficiency of evidence to support a jury verdict where "some of the facts essential to the plaintiff's case are peculiarly within the knowledge of the defendant, and it is, in the nature of things, difficult for the plaintiff to produce evidence of them." He said:

> "Such a state of things does not absolve the plaintiff from adducing some evidence of those facts; but where it exists it is legitimate for the trial Judge to hold that very slight evidence pointing to their existence may be treated as sufficient to justify a jury in holding that they do exist, if, but only if, there is no explanation of that evidence by the defendant".

The second was *Hampton Court Ltd v Crooks*[59]. In it Dixon CJ said:

> "[A] plaintiff is not relieved of the necessity of offering some evidence of negligence by the fact that the material circumstances are peculiarly within the knowledge of the defendant; all that it means is that slight evidence may be enough unless explained away by the defendant and that the evidence should be weighed according to the power of the party to produce it".

The third was the case from which the concluding words of Dixon CJ were taken: *Blatch v Archer*[60]. Lord Mansfield CJ said:

> "[A]ll evidence is to be weighed according to the proof which it was in the power of one side to have produced, and the power of the other to have contradicted."

The appellant relied on the second submission partly in its own right and partly as support for her submission about the evidential burden. It was said that the second submission "substantively accommodated the shift of the evidential burden to a defendant".

48 By "evidential burden", the appellant said that she meant what Wigmore called the "risk of nonpersuasion". Wigmore said[61]:

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58 (1941) 42 SR (NSW) 1 at 4.

59 (1957) 97 CLR 367 at 371; [1957] HCA 28.

60 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

61 *Evidence in Trials at Common Law*, Chadbourn rev (1981), vol 9 at ¶ 2487.

> "The important practical distinction between these two senses of 'burden of proof' is this: The *risk of nonpersuasion* operates when the cases come *into the hands of the jury*, while the *duty of producing evidence* implies a liability to a *ruling by the judge* disposing of the issue without leaving the question open to the jury's deliberations." (emphasis in original)

49 This submission is misleading. To explain why makes it necessary to describe how the expression "burden of proof" can be employed.

50 To speak of a legal (ie persuasive) burden is to speak of a burden of satisfying the trier of fact on the balance of probabilities when all the evidence has been received. This is what Wigmore called a risk of nonpersuasion.

51 Of the expression "evidential burden", Sir Nicolas Browne-Wilkinson V-C said that in his "experience, every time the phrase 'evidential burden' is used it leads to error"[62]. It can be used in at least three senses.

52 In the first sense, "evidential burden" refers to the duty of one party (usually the party bearing the legal (ie persuasive) burden, who in most instances will be the plaintiff) to call sufficient evidence to raise an issue as to the existence or non-existence of a fact in controversy. This must be done to prevent a no case submission succeeding (or if the relevant evidential burden rests on the defendant, to prevent the issue otherwise being withdrawn from the jury). The Privy Council (Lord Hodson, Lord Devlin, Viscount Dilhorne, Lord Donovan and Lord Pearson) criticised the expression "evidential burden of proof" as follows[63]:

> "It is doubtless permissible to describe the requirement as a burden, and it may be convenient to call it an evidential burden. But it is confusing to call it a burden of proof. Further, it is misleading to call it a burden of proof, whether described as legal or evidential or by any other adjective, when it can be discharged by the production of evidence that falls short of proof."

However that may be, this is what Wigmore called the duty of producing evidence.

53 In the second sense, "evidential burden" refers to circumstances in which a plaintiff calls evidence sufficiently weighty to entitle, but not compel, a reasonable trier of fact to find in the plaintiff's favour. There is then said to be an

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62 *Brady (Inspector of Taxes) v Group Lotus Car Cos plc* [1987] 2 All ER 674 at 687.

63 *Jayasena v The Queen* [1970] AC 618 at 624.

"evidential burden" in the sense of a "provisional" or "tactical" burden on the defendant: if the defendant fails to call any or any weighty evidence, it will run a risk of losing on the issue – that is, a risk that at the end of the trial the trier of fact will draw inferences sufficiently strong to enable the plaintiff to satisfy the legal (ie persuasive) standard of proof. The "provisional" or "tactical" burden raises the question whether a defendant should as a matter of tactics "call evidence or take the consequences, which may not necessarily be adverse"[64].

54 The third sense in which the expression "evidential burden" is employed arises where a plaintiff, in discharging the evidential burden in the first sense, calls evidence so strong that a reasonable trier of fact would be bound to decide the issue in the plaintiff's favour if the defendant calls no evidence[65]. It is sometimes said that an "evidential burden" rests on the defendant which, if not discharged, will cause the defendant to lose and which, if discharged so as to cause the trier of fact either to reject the plaintiff's evidence or to be undecided, will result in the legal (ie persuasive) burden on the plaintiff not being satisfied.

55 Contrary to what she submitted, the appellant did not mean by "evidential burden" the "risk of nonpersuasion". By "risk of nonpersuasion" Wigmore referred to the legal (ie persuasive) burden of proof, and the appellant did not deny that she bore that burden of proof. Nor did the appellant mean by "evidential burden" an evidential burden in the first sense: that the first respondent, if it did not call any or any sufficient evidence to establish that the chip was dropped after 12.15pm, would automatically fail in the sense that if the trial had been by jury the issue would have been withdrawn from the jury and the judge would have directed that the appellant must succeed on that issue. Nor did the appellant use the expression "evidential burden" in the third sense. Instead the appellant meant to use the expression "evidential burden" in the second sense. She meant that the weakness of the first respondent's evidence made a conclusion in the appellant's favour more likely. So understood, the appellant's "evidential burden" argument could, as she said, be accommodated by her argument that the

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64 Denning, "Presumptions and Burdens", (1945) 61 *Law Quarterly Review* 379 at 380. See also *Government Insurance Office of NSW v Fredrichberg* (1968) 118 CLR 403 at 413; [1968] HCA 54; *Katsilis v Broken Hill Pty Co Ltd* (1977) 52 ALJR 189 at 196-197; 18 ALR 181 at 197 and *Cameron v Holt* (1980) 142 CLR 342 at 347; [1980] HCA 5. See further *Poricanin v Australia Consolidated Industries Ltd* [1979] 2 NSWLR 419 at 425-426 and *Huyton-with-Roby Urban District Council v Hunter* [1955] 1 WLR 603 at 609; [1955] 2 All ER 398 at 400-401.

65 It was in this sense that Sir Nicolas Browne-Wilkinson V-C used the expression in *Brady (Inspector of Taxes) v Group Lotus Car Cos plc* [1987] 2 All ER 674 at 686.

slightness of evidence in favour of the first respondent facilitated an inference in favour of the appellant.

The "evidential burden" argument considered

56 The first difficulty in the appellant's "evidential burden" argument concerns the authorities it relies on to support the proposition that the first respondent bore an evidential burden. *Ward v Tesco Stores Ltd* concerned a shopper who slipped on yoghurt spilled by another customer on the supermarket floor. She recovered a verdict in negligence against the owner of the supermarket. The floor was brushed six times a day and cleaned every night. There was no evidence as to when the last brushing took place before the accident. After discussing *Richards v W F White & Co*[66], a case on breach of duty, Lawton LJ quoted the following words of Erle CJ in *Scott v The London and St Katherine Docks Co*[67]:

> "[W]here the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

Erle CJ's famous words are directed to breach of duty, not causation. Lawton LJ then said[68]:

> "The accident was such as in the ordinary course of things does not happen if floors are kept clean and spillages are dealt with as soon as they occur. If an accident does happen because the floors are covered with spillage, then in my judgment some explanation should be forthcoming from the defendants to show that the accident did not arise from any want of care on their part; and in the absence of any explanation the judge may give judgment for the plaintiff. Such burden of proof as there is on defendants in such circumstances is evidential, not probative."

Those words, too, are directed to breach of duty, not to causation. McHugh JA criticised this passage for misstating Erle CJ's test and for failing to inquire

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66 [1957] 1 Lloyd's Rep 367 at 369.

67 (1865) 3 H & C 596 at 601 [159 ER 665 at 667].

68 [1976] 1 WLR 810 at 814; [1976] 1 All ER 219 at 222.

whether the evidence was sufficient to establish causation[69]. He made that latter criticism perhaps in view of the following words of Lawton LJ[70]:

> "The trial judge thought that prima facie this accident would not have happened had the defendants taken reasonable care. In my judgment he was justified in taking that view because the probabilities were that the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff."

This statement of Lawton LJ is, with respect, only a conclusion. His Lordship's underlying reasoning is quite unspecific.

57 The next point is that Erle CJ's statement is a statement of the res ipsa loquitur principle. In England that principle was for some time one which casts the legal (ie persuasive) burden of proof on the defendant[71]. Another view, perhaps now preponderant in England, is that if the plaintiff calls evidence raising a "prima facie inference" that the accident was due to the defendant's negligence, this places an evidential burden upon the defendant in the sense that if the plaintiff's evidence is unanswered, "the issue will be decided in the plaintiff's favour"[72]. This view uses "evidential burden" in the third sense described above. However, the res ipsa loquitur "principle", if it is that, is much weaker in Australia. It refers to a state of evidence which permits, but does not require, an inference of breach of duty at the close of the plaintiff's case. As Barwick CJ said[73]:

> "[I]f the evidence remains in the same state as the plaintiff has left it at the close of his case in chief, the tribunal of fact will be justified in inferring negligence in the defendant causing the event. Whether or not that inference will be drawn remains an open question for that tribunal."

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69 *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 241 at 251-252.

70 [1976] 1 WLR 810 at 814; [1976] 1 All ER 219 at 222.

71 Examples include the analyses of Asquith LJ in *Barkway v South Wales Transport Co Ltd* [1948] 2 All ER 460 at 471, of Lord Reid in *Henderson v Henry E Jenkins & Sons* [1970] AC 282 at 291 and of Lord Donovan in the same case at 301.

72 *Henderson v Henry E Jenkins & Sons* [1970] AC 282 at 301 per Lord Pearson. See also the Privy Council decision of *Ng Chun Pui v Lee Chuen Tat* [1988] RTR 298 at 301.

73 *Nominal Defendant v Haslbauer* (1967) 117 CLR 448 at 453; [1967] HCA 14.

His Honour was speaking of a "provisional" or "tactical" burden – an "evidential burden" in the second sense discussed above. Citing English authorities on causation which rely on decisions in relation to breach of duty turning on a different res ipsa loquitur principle is not necessarily a helpful course.

58 A further curiosity about *Ward v Tesco Stores Ltd* is the way the appeal proceeded in the Court of Appeal. According to the Weekly Law Reports[74]:

> "[The County Court], finding that the plaintiff had proved a prima facie case of negligence, gave judgment for the plaintiff. The defendants appealed on the grounds, inter alia, that the judge, having found as facts (a) that the yoghurt on which the plaintiff slipped had more probably than not been spilled by a customer and not by a servant or agent of the defendants and (b) that the yoghurt might have been spilled only seconds before the plaintiff slipped on it, was wrong in law in holding that the defendants had been negligent; and that the judge was wrong in law in holding that the onus was on the defendants to prove how long the yoghurt had been on the floor."

Lawton LJ said[75]:

> "The judge was of the opinion that the facts … constituted a prima facie case against the defendants. I infer that this case, which involves only a small amount of damages, has been brought to this court because the defendants are disturbed that any judge should find that a prima facie case is established merely by a shopper proving that she slipped on a supermarket floor."

His Lordship also said[76]:

> "The main complaint of the defendants in this case has been that the judge should never have taken the view that the plaintiff had proved a prima facie case. It was submitted before this court that it was for the plaintiff to show that the spillage had been on the floor for an unduly long time and that there had been opportunities for the management to clean it up which they had not taken."

These references to a "prima facie case" are references to a prima facie case of negligence in the sense of breach of duty. They do not concentrate on the

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74 [1976] 1 WLR 810 at 811.

75 [1976] 1 WLR 810 at 812; [1976] 1 All ER 219 at 221.

76 [1976] 1 WLR 810 at 813; [1976] 1 All ER 219 at 221.

soundness of the conclusion that there existed actionable negligence by reason of all ingredients of the tort (including causation) being established. An error about whether there was a prima facie case of breach of duty suggests a complaint about where the trial judge placed the burden of proof – either an evidential burden in the sense of what must be established if a no case submission is not to succeed at the close of the case of the party bearing it, namely, the plaintiff, or a shifting of the legal (ie persuasive) burden of proof from the plaintiff to the defendant once the plaintiff has established a prima facie case. But Lawton LJ seems to be discussing neither of these things. What then did he mean by "evidential" burden of proof? There is a related question, which arises from his statement that "the judge may give judgment for the plaintiff". By "may", did he mean "must"? If so, he was referring to an evidential burden in the third sense discussed above. Or was he merely referring to the consequences for a defendant of failure to produce evidence in answer to the plaintiff's? In that case he was speaking of a "provisional" or "tactical" burden – an "evidential burden" in the second sense discussed above. It is not clear. But Lawton LJ was clear on one point: the legal (ie persuasive) burden of proof – or as Lawton LJ called it, "the probative" burden of proof – does not rest on the defendant.

59 Contrary to the appellant's submission, however, Megaw LJ took a different view[77]:

> "It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault; and to my mind the judge was right in taking that view of the presence of this slippery liquid on the floor of the supermarket in the circumstances of this case: that is, that the defendants knew or should have known that it was a not uncommon occurrence; and that if it should happen, and should not be promptly attended to, it created a serious risk that customers would fall and injure themselves. When the plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they *could show that the accident must have happened, or even on balance of probability would have been likely to have happened*, even if there had been in existence a proper and adequate system, in relation to the circumstances, to provide for the safety of customers. But, if the defendants wished to put forward such a case, it is *for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given*, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection to customers." (emphasis added)

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77 [1976] 1 WLR 810 at 815-816; [1976] 1 All ER 219 at 224.

The references to "balance of probability" reveal that Megaw LJ is imposing a legal (ie persuasive) burden on the defendant[78]. That is not the rule in Australia at common law[79]. Nor is it the rule under s 5E.

60 The better view is that the "evidential burden" to which Lawton LJ referred was the "provisional" or "tactical" burden of meeting the plaintiff's evidence or facing the possible peril that the trier of fact would draw inferences from it sufficient to satisfy the legal (ie persuasive) burden resting on the plaintiff. This is what Jacobs J was referring to when he said that in some circumstances "the plaintiff need only produce slight evidence of negligence before a factual onus may shift to a defendant."[80] That is an "evidential burden" in the second sense discussed above.

61 If Lawton LJ was using "evidential" burden in that sense, it is important to remember that the Court of Appeal in *Ward v Tesco Stores Ltd*, unlike the present appellant, was not precise about what the standard of care was. The Court of Appeal in that case did not specify the number of inspections required. According to Lawton LJ it was necessary that spillages be "dealt with as soon as they occur", and the question was whether "the spillage had been on the floor long enough for it to have been cleaned up by a member of the staff."[81] That is a very much higher standard than that advocated by the appellant and accepted by the first respondent in this appeal. It is harder to meet. Thus the tactical problem for Tesco Stores Ltd was more intense. In a practical sense, it could probably only be solved by calling evidence. It does not follow that that is so in relation to the lower standard involved in these proceedings.

62 The appellant relied on the fact that *Ward v Tesco Stores Ltd* was followed in *Brown v Target Australia Pty Ltd*. However, King CJ said that Lawton LJ and Megaw LJ "made use … of the notion of an evidential onus passing to the defendant in the circumstances proved."[82] That is in a sense true of Lawton LJ. But it is not true of Megaw LJ, for in his view a legal burden passed to the defendant. Similarly, Millhouse J, with respect, erred in saying that Megaw LJ

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78 Cf *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 241 at 252, which reads Megaw LJ's judgment as imposing an "evidential" burden.

79 *Dulhunty v J B Young Ltd* (1975) 50 ALJR 150 at 151; 7 ALR 409 at 411.

80 *Dulhunty v J B Young Ltd* (1975) 50 ALJR 150 at 151; 7 ALR 409 at 411.

81 [1976] 1 WLR 810 at 814; [1976] 1 All ER 219 at 222.

82 (1984) 37 SASR 145 at 149.

agreed with Lawton LJ[83]. In *Brady v Girvan Bros Pty Ltd* McHugh JA explained *Brown v Target Australia Pty Ltd* on a narrow ground[84]:

> "Whether or not the defendant had an efficient cleaning system, the critical issue was whether on the probabilities the existence of a proper system would have removed the spilt oil before the plaintiff's fall. That issue necessitated an estimation of the time that the oil had been there and a judgment as to what sort of a cleaning system was required. In particular it was necessary to make an assessment as to how regularly the floor should have been inspected and cleaned. In the circumstances of that case, reasonable care required as a minimum that the floor should be clean at the commencement of business. I think that the occurrence of the accident within half an hour of the store opening gave rise to a prima facie inference that the oil was on the floor at the commencement of the business."

He then held that the Full Court of the Supreme Court of South Australia had erred in accepting the authority of *Ward v Tesco Stores Ltd*. He also declined to accept wide statements made in *Brown v Target Australia Pty Ltd*, such as King CJ's denial "that a plaintiff can succeed in an action for injury sustained in a slip on a slippery substance on a floor only if he can prove the length of time for which the substance has been on the floor."[85]

63 It follows that if "evidential burden" is used in the second sense to mean that the strength of a plaintiff's causation case may imperil the defendant who fails to answer it, then it was possible that the strength in the appellant's causation case here would imperil the first respondent, if it went unanswered. But that begs the question whether there *was* strength in the appellant's case on causation.

64 There is one submission of the first respondent which must be rejected. That submission was that s 5E, when read in light of the report that led to its enactment, was a complete answer to the appellant's submissions about the evidential burden. In fact s 5E addresses a different problem. It deals with a proposition stated thus in *Bennett v Minister for Community Welfare*[86]:

> "[G]enerally speaking, if an injury occurs within an area of foreseeable risk, then, in the absence of evidence that the breach had no effect, or that

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83 (1984) 37 SASR 145 at 154.

84 (1986) 7 NSWLR 241 at 254.

85 (1984) 37 SASR 145 at 148.

86 (1992) 176 CLR 408 at 420-421; [1992] HCA 27 (footnotes omitted).

> the injury would have occurred even if the duty had been performed, it will be taken that the breach of the common law duty caused or materially contributed to the injury."

As the appellant correctly pointed out, that passage concerned a doctrine permitting the shifting of the legal (ie persuasive) burden of proof of causation, and that doctrine was what s 5E abolished. The submission of the appellant about the "evidential burden" does not seek to shift a legal (ie persuasive) burden of proof. Its goals are less ambitious.

The "very slight" evidence argument considered

65 One difficulty in the appellant's "very slight" evidence argument is that the words of Jordan CJ in *De Gioia v Darling Island Stevedoring & Lighterage Co Ltd*[87] and Dixon CJ in *Hampton Court Ltd v Crooks*[88] turn on circumstances where some of the facts essential to the plaintiff's case are peculiarly within the defendant's knowledge. In the proceedings leading to this appeal, duty and breach were not seriously in issue. At all times the first respondent's case on these issues faced grave difficulties. Causation, however, *was* in issue, despite the trial judge's failure to deal with it. But what facts relevant to causation were peculiarly within the first respondent's knowledge in circumstances where its difficulty on breach was that a system was called for, and it had no system? What light could have been cast on the probable time when the chip fell by factual material which might have been collected if a system had been in place which was not in place? Had a system been in place, it might have generated material tending to show that it was a defective system. But that would have gone only to breach in relation to a defective system, not causation in relation to a non-existent system. For the same reason, Lord Mansfield CJ's celebrated words in *Blatch v Archer*[89] do not apply: if the appellant had little power to produce evidence on causation, the first respondent had equally little power to contradict it. Doctrines of the type appealed to by the appellant apply where there are matters of which a plaintiff is ignorant, but of which a defendant actually does have knowledge. They do not apply where the defendant lacks knowledge as much as the plaintiff does, even if the defendant might have had more knowledge had it not been in breach of a duty of care. Further, there is force in the first respondent's argument that the appellant's appeal to *Blatch v Archer* was unsupported by any factual analysis of how it applies in the circumstances of this appeal.

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87 (1941) 42 SR (NSW) 1 at 4.

88 (1957) 97 CLR 367 at 371.

89 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

The evidentiary problem

66 There was no direct evidence of when the chip fell. Was there sufficient evidence from which to draw a circumstantial inference on the balance of probabilities that it fell before 12.15pm?

67 Inquiries of that kind, in this case and other cases of its type, are obviously highly specific to the facts of the particular case. The appellant assumed, favourably to the first respondent, that cleaning should have taken place at only 20 minute intervals. On that assumption, the appellant submitted:

> "The sidewalk sale was in place from 8.00am and the incident occurred at 12.30pm. The contract cleaner responsible for the common area including the food court started at 7.30am and there was a second cleaner working in the same general area from 11.00am to 2.00pm, but the first cleaner was absent on a meal break at 12.30pm (the time of the appellant's fall) and had been so for half an hour or so …, so that a single cleaner was performing those duties. … In the period from 11.00am to the time of the appellant's fall at 12.30pm, four and a half 20-minute intervals passed in which the first respondent ought [to] have had at least four cleaning services performed. In that artificially constrained period (11.00am to 12.30pm) the probabilities properly suggest the lack of any system of cleaning was responsible for the debris remaining on the floor. There is no permissible basis for the conclusion that the debris had come on to the floor in the 10-minute or 20-minute intervals immediately preceding the appellant's fall. Such a finding could only properly arise if there were evidence of the debris not being present at the start of or during the last cleaning period by reason of the proper performance of a system of periodic cleaning".

The last two sentences of this submission place the legal (ie persuasive) burden of proof not on the plaintiff (ie the appellant) but on the defendant (ie the first respondent). As discussed above[90], this is impermissible. It is not for the first respondent to demonstrate that the chip fell after 12.15pm. It is for the appellant to demonstrate that it fell before 12.15pm. The balance of the quoted submission does not point to any reason for concluding that the chip fell before 12.15pm (or, taking the figures in the submission, 12.10pm).

68 There was, as already indicated, no direct evidence either way. Nor was there much circumstantial evidence. This made it hard to draw circumstantial inferences. Two possible chains of inference from circumstantial evidence were unavailable because the attention of witnesses was directed to the task of caring

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90 See [59].

for the appellant, rather than to examining the condition of the floor. The Court of Appeal pointed out correctly that there was no evidence as to the temperature of the chip. Hence, if it were hot, no inference could be drawn from its heat that it had just fallen. And, if it were cold, no inference could be drawn from its coldness that it had fallen more than 15 minutes earlier. Nor, as the Court of Appeal also pointed out correctly, was there evidence as to any feature of the physical appearance of the chip permitting any inference as to the time when it fell.

69 It is therefore necessary to turn to some considerations which do not have to be supported by evidence, but which flow from the common experience of ordinary life. One problem with this approach is that the common experience of ordinary life is a subject on some aspects of which appellate courts are not necessarily well equipped to speak. That is true in relation to common experience of the shopping centres to be found in large country towns like Taree. Another problem is that, like "common" sense, "common" experience tends to elicit answers which are not common, but diverse.

70 As the Court of Appeal correctly noted, the chip on which the appellant slipped was an item of takeaway food often consumed as, or as part of, lunch, and the fall took place at lunchtime in an area near a food court. The Court of Appeal also correctly pointed out that areas in which takeaway food are sold are likely to be busier at lunchtime than at other times. Chips available for sale in a shopping centre can no doubt be eaten at any time from the time when the shops selling them open until the time when they close. But common experience suggests that the numbers of people who walk about eating chips are likely to be greater at conventional mealtimes than at other times. So far as this practice took place at breakfast time, if the relevant shops in the food court were open then, the chance of chips which had fallen to the floor being noticed before 12.15pm is increased by the following state of affairs. Colleen Carle, an employee of the first respondent, who was a witness whose evidence the trial judge accepted, and who worked as "people greeter" near the place where the appellant fell, said it was her duty and practice to call the cleaners as soon as she saw a spillage, and that they would respond in a minute or two. She also said that the employees of the first respondent were trained to be constantly vigilant for spillages in the shopping centre in which the appellant fell. It is true that the answers of the first respondent to interrogatories admitted that no specific employee was responsible for the cleanliness of the accident area and no employee had been directed to inspect it before 12.30pm. That shows the responsible attitude of counsel for the first respondent in accepting that the first respondent had no operative system for taking precautions against the risk of people slipping and falling where the appellant slipped and fell. But Colleen Carle's evidence indicates that the risk was reduced by the unsystematic means she described. And so does the evidence of Kathryn Walker, an employee not of the first respondent but of the shopping

centre owner, who cleaned other areas, but saw employees of the first respondent "in the area of sidewalk sales and cleaning up."[91]

71 For those reasons the following arguments of the appellant, directed respectively to the 11.00am-12.30pm period and the 8.00am-12.30pm period, must be rejected:

> "[T]he probabilities were 8 to 1 (80 minutes against 10 minutes) or 5 to 1 (75 minutes against 15 minutes) that the debris was dropped on the floor at a time when a proper cleaning system would have detected and removed it. Further, as the sidewalk sale was in place from about 8.00am on the day of the incident, there was a further three-hour period in which periodic cleaning should have been done. The debris could have been dropped in that period, or even on a prior day. If 8.00am to 12.30pm were taken as the operative times, the probabilities would have been 17 to 1 (15-minute intervals) or 13 to 1 (20-minute intervals)."

72 Was the Court of Appeal right to say that the engagement of a second cleaner between 11.00am and 2.00pm supported the likelihood that areas in which takeaway food was sold were busier at lunchtime than at other times? In assessing the force of the Court of Appeal's reasoning it is necessary to bear in mind that the engagement of a second cleaner from 11.00am to 2.00pm may have been made in part so that the first cleaner could have lunch. However, that event would not have taken up the whole three hours, and the evidence was that it took only half an hour on the day in question.

73 Does the lack of a provision in the contract with the cleaning company for more frequent inspections of the common areas in the period from 11.00am to 2.00pm weaken the Court of Appeal's view that there was an increased risk of items being dropped during that period? To the contrary, the lack of that provision appears to be neutral.

74 Though the appellant accepted for many purposes that the legal (ie persuasive) burden of proving causation rested on her, the arguments she advanced to suggest that the chip was dropped earlier than 12.15pm tended to involve an assumption that it was for the first respondent to prove that it had not been dropped then.

75 The considerations on which the Court of Appeal relied do not prove the first respondent's case on the balance of probabilities. Nor do other considerations favourable to the first respondent's case. But the first respondent

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91 *Woolworths Ltd v Strong* [2010] NSWCA 282 at [11] per Campbell JA (Handley AJA and Harrison J concurring).

did not bear the burden of proving its case that the chip fell after 12.15pm. It was the appellant who had to prove her case that the chip fell before 12.15pm on the balance of probabilities. What those considerations did was to render the appellant's recourse to what she called "probability theory" unconvincing.

76 Dixon J said[92]:

> "The truth is that, when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found. It cannot be found as a result of a mere mechanical comparison of probabilities independently of any belief in its reality."

H H Glass has spoken of "the subjective phenomena involved in mental satisfaction or proof."[93] Thus the state of mind described as "an actual persuasion" or "satisfaction" is subjective belief. I do not subjectively believe that the chip was probably dropped before 12.15pm.

77 Thus the first respondent must succeed. Its success is not entirely satisfactory, but it flows simply from the location of the legal (ie persuasive) burden of proof and the inherent difficulty which a plaintiff in a slipping case faces where the standard of care calls only for periodical inspections, not constant vigilance. It cannot be said that the first respondent, who had no proper system of caring for the appellant's safety, is in a better position than if it had had a proper system in place[94] – only that its position is no worse.

<u>Other issues concerning the construction of s 5D of the Act</u>

78 The appellant elaborately attacked the Court of Appeal's construction of s 5D of the Act. In particular, it was submitted that the Court of Appeal erred in saying that the concept of "material contribution" and "notions of increase in risk" had no role to play in s 5D(1)[95]. To decide this appeal it is not necessary to examine the merits of the appellant's attacks. Thus, for example, the present appeal does not raise "material contribution" problems: the question is not whether the first respondent's breach of duty made a material contribution to the injury, for it made either no contribution at all, or the only contribution. Hence it

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92 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361; [1938] HCA 34.

93 Glass, "The Insufficiency of Evidence to Raise a Case to Answer", (1981) 55 *Australian Law Journal* 842 at 846.

94 Cf *Shoeys Pty Ltd v Allan* [1991] Aust Torts Rep 81-104 at 68,941 per Mahoney JA.

95 *Woolworths Ltd v Strong* [2010] NSWCA 282 at [48].

is not desirable to consider the validity of the appellant's submissions on this point.

Orders

79 The appeal should be dismissed with costs.