Therefore, on the facts, he was not satisfied that the painted surface played any causative role in the plaintiff's fall. His Honour concluded that this was a case where there were multiple possible causes of the fall. If there is more then one cause, the onus is on the plaintiff to 'lead evidence which tends both to prove the negligent cause and to exclude the other possible causes as being likely to have had a causal effect'. Factual causation was not established in this case under s5D.

The plaintiff was unsuccessful in her action against both defendants. His Honour appears to have overlooked the strictures on the use of the 'but for' test expressed in the High Court on many occasions. See, for example, *March v E & MH Stramare Pty Ltd*,[11] *RTA v Royal*[12] and similar comments in the Court of Appeal in *Elayoubi v Zipser*.[13] In *Nguyen v Cosmopolitan Homes*,[14] it was noted that s5D required that 'negligence was a necessary condition of the occurrence of the harm', but that this does not alter the common law position. He also appears – in relation to causation – to have required the plaintiff to negate alternative possibilities on causation, even though they were neither raised nor argued ultimately by the defendant. That seems both a harsh and excessive imposition on a plaintiff, notwithstanding that the onus remains upon the plaintiff. ■

Notes: 1 [2011] NSWSC 292. **2** Per Garling J at 2: injuries included injury to her face, damaged teeth and a fractured right elbow. **3** At 67 to 98. **4** A summary of the findings, on the evidence, is at 92. **5** At 98. **6** At 99 to 115. **7** At 116 to 252. **8** At 252. **9** At 263. See 253 to 269 for causation. **10** At 260. **11** *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 at [22]-[27]. **12** *RTA v Royal* (2008) 82 ALJR 870 at [83] **13** *Elayoubi v Zipser* [2008] NSWCA 335 at [53]. **14** *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246 at [69].

With special thanks to Andrew Morrison SC.

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Slip & falls: proving causation of damages more difficult in cases of recent spillage

Woolworths Ltd v Strong [2010] NSWCA 282

By Ian Newbrun

The Court of Appeal's recent decision in *Woolworths Ltd v Strong*,[1] in upholding an appeal by a shopping mall occupier in a slip-and-fall case, has emphasised the importance of a plaintiff adducing evidence of the length of time a spillage was present on the ground, in situations where the accident occurred at a time and place when spillages are more likely to have occurred comparatively soon before the accident.

In this case, the Court of Appeal[2] found that there was a greater likelihood that the spillage of a french fry occurred comparatively soon before the accident. The court gave consideration to the time and location of the spill where the accident had occurred at lunchtime close to the shopping mall's food court. The Court was not satisfied that, even if a reasonable cleaning system was in place, the spill had been on the floor for a sufficient time to be detected. In these circumstances, the Court found that the plaintiff had failed to prove 'causation of damage' despite the occupier having had no system in place for inspecting and detecting spillages.

THE FACTS

On 24 September 2004,[3] the bottom of the plaintiff amputee's crutch slipped on a french fry, or some grease that had come from it, in a 'sidewalk sales area' forming part of the common area of a shopping mall at Taree, NSW. The sales area was just outside a large retail store. The area was 'quite close' to a food court and the accident occurred at about 12.30pm.

On appeal, the occupier, Woolworths Ltd, conceded that the evidence at trial revealed that it had no system for inspecting and detecting spilled substances in the sidewalk sales area. The occupier further accepted that a 20-minute rotation system was available to the trial judge to determine what was a reasonable cleaning system to apply in the sidewalk sales area. The occupier's cleaning system comprised the employment of a cleaner on duty from 7.30am to 4pm and a second cleaner on duty from 11am to 2pm.

The trial judge had found against the occupier, stating:[4]

> 'The second defendant was the occupier of the relevant portion. The second defendant, through its employees, had a duty of care to anyone walking in there. The second defendant ought to have seen something on the ground in the nature of what has been described by the plaintiff and others.
>
> Secondly, and indeed returning to the location of the grease mark and the size of the grease mark, it was not an insignificant grease mark and the size of the grease mark was not an insignificant grease mark. If other people could

see it apart from the plaintiff after the event then it begs a serious question as to why it was not seen by an employee of the second defendant in those particular circumstances and it should have been removed either by the second defendant or the second defendant alerting a cleaner to remove it which is entirely open to the second defendant to do and if that had been done the plaintiff simply would not have come to grief. I can put it no more simply than that.

So therefore the second defendant is guilty of negligence.'

Court of Appeal

The Court of Appeal stated that the sole dispute in the appeal concerned whether the plaintiff had established causation of damage. The trial judge, it stated, had failed to deal with the causation issue according to s5D(1) of the *Civil Liability Act* 2002 (NSW) (CLA). The Court referred to the relevant statutory test for causation contained within that section, which provides:

'(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

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (*scope of liability*).'

Referring to the High Court's recent decision in *Adeels Palace Pty Ltd v Moubarak*,[5] confirming that the effect of s5D(1) CLA was to impose the 'but for' test of causation, the Court of Appeal stated:

'Now, apart from the "exceptional case" that s5D(2) recognises, s5D(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 s5D(1). "Material contribution", and notions of increase in risk, have no role to play in s5D(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 s5D(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 s5D(1) is satisfied in any particular case.'[6]

The Court said that the 'critical question' for deciding whether s5D(1)(a) CLA was satisfied was whether it had been established that the plaintiff would not have slipped had the occupier 'been exercising care to the minimum extent at which it would have been performing its duty to take reasonable care'.[7]

The Court noted that where the evidence indicated that the occupier had no relevant cleaning system at all, it was easy to conclude that it breached its duty of care to the plaintiff. However it was not possible for the Court to decide whether the breach of duty was 'a necessary condition of the occurrence of the harm' (s5D(1)(a)) 'without giving consideration to what the minimum content of the obligation to take reasonable care to prevent patrons from slipping would have been'.[8]

Referring to earlier High Court authority on breach of duty,[9] their Honours noted that, had the evidence justified a conclusion that taking reasonable care by the occupier would have 'required the continuous presence of someone always on the lookout for potential slippery substances',[10] proof of the breach of duty of care in itself may have allowed the Court to infer that, if reasonable care, involving that degree of close attention, had been taken, a particular source of danger would have been promptly removed, and hence the slipping would not have occurred.

However, in this case, the Court found that 'periodical inspections and cleanings were all that reasonable care required'[11] from the occupier. Accordingly, the possibility arose that, even if periodical inspections and cleaning had occurred, with the minimum frequency required for the occupier to be taking reasonable care, the french fry 'fell between the last such inspection and the time the [plaintiff] encountered it'.[12] In these circumstances, the plaintiff would fail to prove causation of damage.

The Court emphasised the time when the slip occurred. Their Honours found that the plaintiff's slip on the spillage was *not* one with 'an approximately equal likelihood of occurrence throughout the day'.[13] The plaintiff had slipped on a french fry near a food court at lunchtime, and the 'reasonableness of a cleaning system' depended on the range of items it was foreseeable might be dropped 'rather than just on the particular hazard' encountered by a particular plaintiff.[14] The Court was therefore not prepared to draw the inference that if the steps involved in taking reasonable care had been taken, the plaintiff's harm was 'more likely than not' to have not arisen.

The Court was of the view that there was 'no basis for concluding' that the french fry had 'been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system'.[15] In this context, the Court observed that:[16]

- there was no evidence about the physical appearance of the french fry, 'such as it being dirty', that might support an inference that it had been there for some time;
- there was no basis for 'any conclusion' that the food court was less busy immediately before the accident than usual – rather it could be expected to be busier around lunchtime than at some other times;
- there was no basis for concluding that the spillage could have occurred at 'any time of the day', or at least for concluding that it was more likely not dropped comparatively soon before the plaintiff slipped;
- there was no basis for inferring whether the 'grease stain' existed and was visible before the fall, rather than it had been squeezed out of the chip when compressed by the plaintiff's crutch;
- there was no evidence concerning the temperature of the chip;
- the site of the accident was very close to the food court; and
- the time the slip occurred, at 12:30 pm, fitted comfortably within the period when people ordinarily ate their lunch.

The Court considered whether dedicated cleaning and inspection at 15-minute intervals, rather than at 20-minute >>

intervals, made it 'more likely than not' that the plaintiff would not have fallen. Their Honours found that, even if there had been such dedicated cleaning systems, supplemented by other employees noticing and attending spillages, the evidence did not allow the conclusion that it was 'more likely than not' that the plaintiff would not have fallen.

CONCLUSIONS

Prior appellate decisions of the NSW and Victorian Court of Appeals[17] had indicated that a plaintiff would not necessarily fail to prove causation of damage, where the evidence was silent as to how long the spillage had been on the ground prior to the fall, in circumstances where it was shown that the defendant had no system in place for cleaning and inspections. In those circumstances, the Court was able to infer that had *a reasonable system of inspection* been in place prior to the accident, the spillage would have been detected.

In the leading Victorian Court of Appeal decision,[18] it had been stated:[19]

> 'The longer the period since the last actual inspection and the greater the number of inspections that, in the view of the fact-finding tribunal, ought to have been carried out in the meantime, the greater the probability that the defendant's neglect was a cause of the plaintiff's accident.'

The Court of Appeal's decision in *Woolworths Ltd v Strong* has effectively confined the causation principle from these prior appellate decisions to cases where the spillage has been shown to have had an approximately equal likelihood of occurring during the whole of the period that the occupier has unreasonably failed to have instituted a cleaning and inspection regime: for example, in the case of dropped vegetable matter,[20] spilt Pine-O-Clean[21] or cleaning fluid[22] in a supermarket shopping aisle. By comparison, and following *Woolworths Ltd v Strong*, where the evidence indicates that there is a greater likelihood that a spillage has occurred between the last notional inspection (that the Court finds should reasonably have taken place) and the accident as might have occurred before such last notional inspection, as in a slip on a french fry near a food court at lunchtime, the plaintiff will fail to prove causation of damage *despite the absence of any inspection regime* having been instituted by the occupier.

The NSW Court of Appeal, since *Woolworths Ltd v Strong*, has stated that the findings on causation from these prior appellate decisions do not mean that, once a breach of duty is proved giving rise to a risk that a floor will become slippery, the plaintiff does not have to prove on the balance of probabilities that fulfilment of the duty would have prevented the accident; causation must be established in accordance with ss5D and 5E CLA.[23]

The decision in *Woolworths Ltd v Strong*, on one view, makes it very difficult for plaintiffs to prove causation of damage in cases where the accident has taken place at a time and place when one would usually expect spillages of the kind encountered to occur, irrespective of whether the occupier had any system of cleaning and inspection in place. On the facts in *Woolworths Ltd v Strong*, for example, it was hardly to be expected that the plaintiff, or her witnesses, in the immediate aftermath of the accident, would have considered touching the offending chip to check for its temperature or have estimated whether it was dirty or clean.

The logical extension of *Strong*'s case is that had the plaintiff slipped on the french fry at a time other than lunchtime – say at 4.30pm in the afternoon – she may well have proved causation of damage. In such a scenario, the Court could readily infer that the spillage might have occurred at any time between lunchtime and 4.30pm, a period spanning at least several hours, during which period numerous inspections ought reasonably to have been performed but which did not occur because the occupier had no system for inspections in place. In those circumstances, the critical question would be whether, on the balance of probabilities, the occupier's neglect in that regard was cause of the plaintiff's slipping.[24]

Disappointingly for the plaintiff in *Strong*'s case, the finding that the french fry was more likely to have been dropped at 'lunchtime' and comparatively soon before the accident was not an inevitable finding on the evidence. There was evidence that a second cleaner was on duty from 11am to 2pm, in addition to the primary cleaner from 7.30am to 4pm, which suggests that 'there was an increased risk of things being dropped in that area during the time period'.[25] Furthermore, it is not easy to understand why the Court did not find that there was at least the equal likelihood that the chip could have been dropped at any time between 11am and 12.30pm. During this period of some 1.5 hours, six 15-minute inspections would have been permitted by the occupier's cleaner prior to the accident, and the Court could more readily infer that the spillage occurred at some time more than 15 minutes before the accident and find causation of damage proven.

Finally, the Court of Appeal's construction of s5E of the CLA, including its statement that 'material contribution' and notions of increase in risk, have no role to play in s5D(1), now remain to be decided by the High Court of Australia, special leave to appeal having been granted to the plaintiff.[26] ■

Notes: **1** [2010] NSWCA 282. **2** Comprising Campbell JA, Handley AJA and Harrison J. **3** *Strong v Woolworths Ltd*, District Court, No. 5795/06, 28.8.09, Robison DCJ. **4** Quoted at [26] in *Strong*. **5** (2009) 239 CLR 420 at [53]. **6** At [48]. **7** At [51]. **8** At [63]. **9** *Hanpton Court Ltd v Crooks* (1957) 97 CLR 367. **10** At [66]. **11** *Ibid*. **12** *bid*. **13** *Ibid*. **14** *Ibid*. **15** At [67]. **16** At [67]-[68]. **17** *Shoeys Pty Ltd v Allan* (1991) Aust Torts Rep 81-104, *Kocis v S E Dickens Pty Ltd (t/a Coles New World Supermarket)* (1996) Aust Torts Rep 81-382, *Franklins Ltd v Hunter*, [1998] NSWCA239 (1 May 1998). **18** *Kocis*. **19** *bid*, at 63, 306 per Phillips JA. **20** *Shoeys*. **21** *Kocis*. **22** *Franklins Ltd v Hunter*. **23** *Harris v Woolworths* Ltd [2010] NSWCA 312 at [34]. **24** *Kocis* at 63, 299 per Phillips JA. **25** *Strong* at [68]. **26** *Strong v Woolworths Ltd* [2011] HCA Trans 131 (13 May 2011). The High Court appeal will be held on 5 August 2011.

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