Strong v Woolworths Ltd - [2012] HCA 5

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.

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

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4. **Following paragraph cited by:**

Nepean Blue Mountains Local Health District v Starkey (25 July 2016) (McColl and Payne JJA, Garling J)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

> 77. The effect of s 5D(1) and s 5E is that the respondent had to prove that if there had been a proper system of water blasting the ramp, that system would have removed whatever caused the slipperiness in the area where he fell prior to his accident: *Dulhunty v J B Young Ltd* (1975) 50 ALJR 150 (at [151]) per Jacobs J; *Strong v Woolworths Ltd* (at [4]); *Timberland Property Holdings Pty Ltd v Bundy* [2005] NSWCA 419 (at [37]) per Basten JA (Handley JA and Hunt AJA agreeing).
>
> ***Conclusion***

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 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.

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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; *S hoeys 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.

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.

The facts

6. **Following paragraph cited by:**

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

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 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 4.00 pm. 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.

The proceedings in the District Court

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] :

> "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."

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

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.

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

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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".

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[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] .

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14. **Following paragraph cited by:**

Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

> 191. Ms Norton points to the evidence that, from time to time, the Council cleaned the ramp and that there were (or was an expectation in the maintenance reports that there would be) three-monthly maintenance reviews. It was submitted that this evidence showed the requirements of a reasonable cleaning and maintenance system, i.e., on a three-monthly basis. Ms Norton referred to *Strong v Woolworths Ltd* at [14] in this regard.

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

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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] .

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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.

Causation under the CLA

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 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
>
> (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."

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[12] CLA, s 5A(1) .

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

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18. **Following paragraph cited by:**

Gomez v Woolworths Group Limited (21 May 2024) (Bell CJ, Gleeson and Adamson JJA)
Gomez v Woolworths Group Limited (21 May 2024) (Bell CJ, Gleeson and Adamson JJA)
Russell v Carpenter (08 December 2022) (Meagher, Gleeson and Kirk JJA)

> 54. That finding manifests error on its face. Pursuant to s 5D(1)(a) of the CLA it was necessary for the respondent to establish that the negligence was a necessary condition of the occurrence of the harm (leaving aside any exceptional case addressed under s 5D(2)). This is a statutory statement of the "but for" test: *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5 at [18] . Under s 5E the respondent bore the onus of proving any fact relevant to the issue of causation. That the precaution of providing a handrail *could* have assisted in minimising the risk of harm does not establish on the balance of probabilities that it *would* have done so; that is to say, it does not establish that but for the absence of a handrail the injury would not have occurred. The possibility of a different result is not enough: *Derrick v Cheung* [2001] HCA 48; (2001) 181 ALR 301 at [13] .

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd (15 June 2020) (Blow CJ, Estcourt and Pearce JJ)
Sutherland Shire Council v Safar (15 December 2017) (Macfarlan and White JJA, Harrison J)
ALDI Foods Pty Ltd v Young (13 May 2016) (Meagher and Simpson JJA, Adamson J)

> 179. The only act or omission which contributed to the respondent's losing her balance was Mr Tidmarsh's act of parking the pallet jack across the side lane between the counters. Had the act of parking the pallet jack been negligent, then the requirement for factual causation would have been fulfilled: s 5D(1)(a) . The test in s 5D(1)(a) is no more than the "but for" test: *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] . However, I do not consider this act to have been negligent for the reasons given above.

Chu v Russell (12 February 2016) (Blow CJ, Porter and Estcourt JJ)
Chu v Russell (12 February 2016) (Blow CJ, Porter and Estcourt JJ)
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy (27 August 2015) (McColl, Basten and Leeming JJA)

Anwar v Mondello Farms Pty Ltd (10 August 2015) (Kourakis CJ; Gray and Stanley JJ)
Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)
Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)
Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)

31. At common law, "when separate and independent acts of negligence on the part of two or more persons ... directly contributed to cause injury and damage to another, the person injured [could] recover damages from any one of the wrongdoers, or from all of them" (*Grant v Sun Shipping Co Ltd* [1948] AC 549 at 563 ; *Bennett v Minister of Community Welfare* [1992] HCA 27; 176 CLR 408 at 429 per McHugh J). Thus "each sufficient condition [was] treated as an independent cause of the plaintiff's injury" (*Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] and [28] ; *March v E & MH Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506 at 534). The "but for" test did not adequately deal with such cases of separate and sufficient causes (*March v Stramare* at 516 and 523) and was not therefore applied at common law in them.

Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)

15. The task involved in s 5D(1)(a) ("factual causation") is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm: *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 at [15] per French CJ, Crennan, Kiefel, Gageler and Keane JJ) approving Allsop P in *Wallace v Kam* [2012] NSWCA 82; (2012) Aust Torts Reports ¶82-101 (at [4]). The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [55]) per French CJ, Gummow, Hayne, Heydon and Crennan JJ; *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

103. The effect of s 5D(1)(a) is that factual causation is to be determined by the "but for" test: "but for the negligent act or omission, would the harm have occurred?": *Adeels Palace* at [45] ; *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] (*per curiam*). The test requires the Court to determine whether, if the defendant had not breached its duty of care, the harm complained of would have been prevented. The test is not satisfied merely by showing that taking the steps the plaintiff alleges should have been taken might have made a difference: *Adeels Palace* at [50] . The plaintiff must show that it is more probable than not that, if the defendant had taken reasonable care, the harm would have been prevented: *Adeels*

Palace at [53] . However, if the defendant's negligent act or omission is necessary to complete a set of conditions jointly sufficient to account for the occurrence of the harm, the test of factual causation will be satisfied: *S trong v Woolworths Ltd* at [20] .

Warth v Lafsky (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

58. In order to establish that any breach of duty on the appellant's part caused his harm, the respondent had to establish "factual causation" in accordance with s 5D(1)(a) of the *Civil Liability Act* , that is to say that the appellant's negligence was a necessary condition of the occurrence of that harm. That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E ": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Lucantonio v Stichter (06 February 2014) (McColl, Basten and Barrett JJA)

79. In order to establish that any breach of duty on the respondent's part caused the appellant harm, the appellant had to establish that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a), *Civil Liability Act* 2 002 . That required the appellant establishing that the respondent's negligence was a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [1 8] , [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.

Settlement Group Pty Ltd v Purcell Partners (17 December 2013) (Maxwell P, Redlich JA and Dixon AJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1) (a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeel s Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)
Varipatis v Almario (18 April 2013) (Basten, Meagher and Ward JJA)

Lesandu Blacktown Pty Ltd v Gonzalez (08 February 2013) (Basten and Meagher JJA, Davies J)
Garzo v Liverpool/Campbelltown Christian School (25 May 2012) (Basten and Meagher JJA, Tobias AJA)

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

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19. **Following paragraph cited by:**

Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)
Wallace v Kam (13 April 2012) (Allsop P, Beazley and Basten JJA)

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]. T he 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] .

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[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.

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20. **Following paragraph cited by:**

Ethicon Sarl v Gill (05 March 2021) (Jagot, Murphy and Lee JJ)
Sutherland Shire Council v Safar (15 December 2017) (Macfarlan and White JJA, Harrison J)
Gary Nigel Roberts v Westpac Banking Corporation (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)
Electro Optic Systems Pty Ltd v State of New South Wales (31 October 2014) (Murrell CJ, Jagot and Katzmann JJ)
Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)
AV8 Air Charter Pty Limited v Sydney Helicopters Pty Limited (12 March 2014) (Barrett, Hoeben and Ward JJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Coles Supermarkets Australia Pty Ltd v Meneghello (15 August 2013) (Barrett, Ward and Emmett JJA)

> 35. It was necessary for the respondent to show at trial that the negligence of the appellant was indispensable to occurrence of her injury or, putting it another way, that such negligence had to be present for the occurrence of the harm that befell her. These are formulations found in *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [20] and [44]), a

case involving facts similar to those of this case, save that it was not in contest that the slip had occurred through contact with greasy material on the floor.

Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

73. The effect of s 5D(1) is that "the 'but for' test [of causation] is now to be ... a necessary test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2) ": *Adeels Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ. The s 5D(1)(a) element of factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm, that is to say, a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* (at [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.

Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

162. Section 5D(1)(a) requires proof that "but for" the negligence, Mr Pender would not have slipped and fallen suffering the injuries that he did (see *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [20]). This focuses attention on how and why it was that Mr Pender fell.

Baden Cranes Pty Ltd v Smith (27 May 2013) (Basten and Ward JJA, Tobias AJA)
State of New South Wales v Mikhael (22 October 2012) (Allsop P, Beazley JA and Preston CJ of LEC)
Garzo v Liverpool/Campbelltown Christian School (25 May 2012) (Basten and Meagher JJA, Tobias AJA)

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

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[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 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.

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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.

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[23] [2010] NSWCA 343 at [11] .

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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 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].

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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.

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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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[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.

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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'."

[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] .

25. **Following paragraph cited by:**

The Corporation of the Synod of the Diocese of Brisbane v Greenway (26 May 2017) (Morrison and McMurdo JJA and Bond J,)

39. These provisions, such as that considered in *Strong v Woolworths* and s 305D of the WCR Act , were enacted upon the recommendations in the Final Report of the *Review of the Law of Negligence* published in 2002, the so-called Ipp Report. As was discussed in *Strong v Woolworths* ,[7] the Ipp Report instanced two categories of cases which would not pass the "but for" test of causation and for which special legislative provision should be made. The first category was said to be exemplified by *Bonnington Castings Ltd v Wardlaw* . [8] It was in the description of that category of case that the majority in *Strong v Woolworths* referred to cases which involve "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". [9] The majority in *Strong* summarised that decision as follows: [10]

> "In *Bonnington Castings Ltd v Wardlaw* , 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. The swing grinders had contributed a quote of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease."
>
> (footnotes omitted)

via

[10] Ibid at 193 [23] .

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

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

[34] Ipp Report at 109 [7.28].

[35] Ipp Report at 110 [7.30].

[36] [2003] 1 AC 32 .

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26. **Following paragraph cited by:**

Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt (23 August 2022) (Brereton, Beech-Jones and Mitchelmore JJA)
Berhane v Woolworths Ltd (08 August 2017) (Gotterson and Morrison JJA and Dalton J,)
The Corporation of the Synod of the Diocese of Brisbane v Greenway (26 May 2017) (Morrison and McMurdo JJA and Bond J,)
Settlement Group Pty Ltd v Purcell Partners (17 December 2013) (Maxwell P, Redlich JA and Dixon AJA)
CSR Timber Products Pty Ltd v Weathertex Pty Ltd (11 March 2013) (Bathurst CJ, Meagher and Hoeben JJA)
Allianz Australia Ltd v Sim (04 April 2012) (Allsop P, Basten and Meagher JJA)

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] . Ne gligent 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.

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[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.

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27. **Following paragraph cited by:**

The Corporation of the Synod of the Diocese of Brisbane v Greenway (26 May 2017) (Morrison and McMurdo JJA and Bond J,)

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.

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

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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 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.

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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 *Moder n Law Review* 66 at 71.

[41] Ipp Report at 109 [7.26].

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29. **Following paragraph cited by:**

Minister for the Environment v Sharma (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

880. There are many academic works where problems associated with this fourth scenario have been considered, including by reference to North American authority: see, Hart and Honoré, *Causation in the Law* (2nd ed) at 225-235; Stapleton, *Factual Causation* [2010] Federal Law Review 467; Stapleton, *Unnecessary Causes* (2013) 129 LQR 39; Stapleton, *An 'Extended But-For' Test for the Causal Relation in the Law of Obligations* (2015) 35 OJLS 697. Elements of the fourth scenario were also referred to in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] AC 649 at [183]-[185] (Lord Hamblen and Lord Leggatt). The academic works propose answers to many hypothetical problems that arise in connection with the fourth scenario, but the High Court has not ventured into that territory: see, *Strong v Woolworths Ltd* at [29] , fn (58).

Azar v Kathirgamalingan (18 December 2012) (McColl, Basten and Campbell JJA)

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].

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

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30. **Following paragraph cited by:**

Greenslade v Hiew (04 May 2022) (Murphy JA, Beech JA, Vaughan JA)
Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

331. The appellants contended that, where the precise cause of the accident was unknown, the driver being deceased and there being no eyewitnesses, the trial judge was required to determine whether the negligence of the respondent was "a necessary condition of the appellants' harm by the process of probabilistic reasoning adopted in *Shoeys Pty Ltd v Allan"* [1991] Aust Torts Rep ¶81-104, relied on in *Woolworths Ltd v Strong* [2010] NSWCA 282 at [60] and referred to without dissent by the High Court in *Strong v Woolworths Ltd* at [30] . That premise may be accepted: the proposition that the trial judge did not in fact adopt such an approach should be rejected.

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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[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 noninspection 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] .

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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 .

Discussion

32. **Following paragraph cited by:**

Stanberg v State of New South Wales (06 June 2025) (Mitchelmore and McHugh JJA, Griffiths AJA)
Jfit Holdings Pty Ltd t/as New Dimensions Health and Fitness v Powell (08 July 2021) (White JA, Simpson AJA and Harrison J)
Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network (31 May 2017) (Meagher, Gleeson and Payne JJA)

168. The appellant's supplementary written submissions were directed to the first counterfactual (that Mrs Smith would not have allowed the appellant to go out with his friends). Reference was made to *Strong v Woolworths Ltd* at [32] , *State of New South Wales v Mikhael* at [94] , and *Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12 for the proposition that the appellant need only establish the probable course of events had the omission not occurred and that the appellant could rely upon likely inferences from proved facts.

Ralston v Jurisich (03 April 2017) (Ward JA, Emmett AJA and McDougall J)
Thomas v Trades and Labour Hire Pty Ltd (in liq) (09 December 2016) (Morrison and Philippides JJA and Flanagan J,)

85. There was also no dispute with the appellant's submissions that the following steps were required to be undertaken in determining the content of the duty of care, whether the duty of care was breached and whether the breach of that duty caused or contributed to the injury:

1. The existence of a duty of care owed by an employer to an employee is an established category of case. It amounts to "no more than the obligation to take reasonable care to avoid exposing the employee to an unnecessary risk of injury". [102]

2. Foreseeability of risk of injury in the context of breach of duty is determined by inquiring whether it 'was reasonably foreseeable as a possibility that the kind of carelessness charged against the defendant might cause damage of some kind to the plaintiff's person or property". [103] The requirement of foreseeability that "some kind" of damage was foreseeable is an "undemanding" [104] test and the risk must not be far-fetched or fanciful. [105]

3. The employer is bound to have regard to a risk that an injury may occur because of inattention or misjudgement by the employee in performing his or her allotted task. [106] In giving content to the words of generality in the employer's duty and in determining whether a breach of it was foreseeable and, if foreseeable, involved so small a

risk that the employer was justified in disregarding it, the employer's obligation extends to establishing, maintaining and enforcing a safe system of work and includes a duty to take account of the employee's negligence, inadvertence and carelessness in carrying out their work. [107]

4. In determining causation, the Court must consider the alleged breach of duty and, if the breach of duty is an omission, determine whether the plaintiff would have acted differently had the omission not occurred. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred. [108] As Gotterson JA observed in *Wolters v University of the Sunshine Coast* : [109]

"As noted, in *Sabatino*, Mason P reminded, as Gaudron J had pointed out in *Bennett v Minister of Community Welfare*, that in cases of negligence by omission, a finding of liability is necessarily based upon a hypothetical inquiry, Here, as principle required, the primary judge set about such an inquiry. It was into whether the incident (and hence injury) would have been avoided if the respondent had discharged its duty of care by taking appropriate action to reprimand and counsel Mr Bradley. That the incident occurred is a historical fact. Whether it would have been avoided is not, of itself, a fact. It is a conclusion with respect to the likelihood that the incident would have been avoided had the duty been discharged. The objective of the inquiry undertaken by the primary judge was to assess the likelihood of that.

The frame of reference for such an inquiry is set by reference to that which the duty of care required have been done. The inquiry is undertaken by assessing all relevant facts and circumstances from which a conclusion is then drawn as to the likelihood that the performance of that which the duty required have been done, would have avoided the incident.

The integrity of the inquiry is therefore dependent upon both a precise articulation of what it is that the duty of care required and an appraisal of all relevant facts and circumstances in order to assess likelihood. A failure to articulate the former or to undertake the latter risks a miscarriage of the inquiry and a resultant lack of legitimacy in the ultimate conclusion drawn from it."

via

[108] *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [32] per French CJ, Gummow, Crennan and Bell JJ .

Boateng v Dharamdas (02 August 2016) (Gleeson and Leeming JJA, Davies J)
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy (27 August 2015) (McColl, Basten and Leeming JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)

Central Darling Shire Council v Greeney (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)
Warth v Lafsky (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

59. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred: *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ. Causation is "approached by applying common sense to the facts of the particular case": *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 623 (at [43]) per French CJ, Hayne and Kiefel JJ. If factual causation is established, the plaintiff must also establish that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability"): s 5D(1)(b) *Civil Liability Act* . The appellant did not contend that there was any reason why his liability should not so extend if factual causation was established.

Lucantonio v Stichter (06 February 2014) (McColl, Basten and Barrett JJA)

80. Such determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E" (*Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14])) and is approached by applying common sense to those facts: *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 (at [43] ; [56]) per French CJ, Hayne and Kiefel JJ. It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]). "Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred": *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ.

Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Oyston v St Patrick's College (No 2) (23 September 2013) (Macfarlan and Barrett JJA, Tobias AJA)

62. The appellant submitted that, had the College's policy been implemented, as this Court found in the May judgment that it should have been, the probable course of events that would have ensued (see *Strong v Woolworths* [2012] HCA 5; (2012) 246 CLR 182 at [32] (per French CJ, Gummow, Crennan and Bell JJ)) was that disciplinary action against the major perpetrators of the bullying of the appellant would have deterred those students and other potential bullies. Consequently, the bullying of the appellant would have ceased. What was lacking in the College's attempts to deter bullying was the reinforcement of its stance by action; a firm message needed to be sent. By contrast, the College's failure to implement the policy condoned bullying and sent the wrong message to those students inclined towards such behaviour.

Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

198. Ms Norton submits that it is obvious that, had the ramp been cleaned more often, then on the balance of probabilities Mr Pender would not have slipped. However, as made clear in *Strong v Woolworths Ltd* , at [32] , in such a case what must be considered is the likelihood that the injury would have been avoided had a particular system been in place.

Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)

97. Finally, in my view, the appellant's submission that the respondent failed to establish that any breach of duty on its part caused his injury should be accepted. The respondent was required to prove on the balance of probabilities that the appellant's negligence was a necessary condition of his harm. The appellant's alleged negligence was a failure to have a regular system of water blasting the ramp to prevent it being slippery. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred: *Strong v Woolworths Ltd* (at [32]). The mere presence (had it been established) of a dry slippery surface on the ramp was not sufficient to establish causation: *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367 (at 371) per Dixon CJ. For the reasons I have given in respect of the lack of evidence concerning the ramp developing a degree of slipperiness requiring cleaning, the evidence did not support the conclusion that, had the appellant had a system of regularly water blasting the ramp it would not have been slippery on the day he fell: see *Garzo* (at [170]). This was not a case where the probabilities assist in reaching that conclusion: *Strong v Woolworths Ltd* (at [34]).

Idameneo (No 123) Pty Ltd v Gross (14 December 2012) (McColl, Hoeben and Ward JJA)

76. It was, of course, entirely correct and indeed necessary for the primary judge to determine causation on a hypothetical basis. It is difficult to see how else the analysis required by the "but for" test could occur in circumstances where what is being relied upon is an omission to do something. *Strong* accepted that this was so at [32] where the plurality said:

"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."

Indigo Mist Pty Ltd v Palmer (09 August 2012) (Beazley, Macfarlan and Hoeben JJA)

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. **Following paragraph cited by:**

Woolworths Ltd v McQuillan (14 August 2017) (Basten, Gleeson and Payne JJA)

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. **Following paragraph cited by:**

Stanberg v State of New South Wales (06 June 2025) (Mitchelmore and McHugh JJA, Griffiths AJA)
Kone Elevators Pty Ltd v Shipton (05 November 2021) (Murrell CJ; Loukas-Karlsson and Stewart JJ)
Xie v The Queen (15 February 2021) (Bathurst CJ, R A Hulme and Beech-Jones JJ)
Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales (25 February 2020) (Macfarlan and White JJA, Simpson AJA)
Sutherland Shire Council v Safar (15 December 2017) (Macfarlan and White JJA, Harrison J)

> 8. So far as causation is concerned, in my view the appellant's negligence was a necessary condition of the accident and it is appropriate for the scope of the appellant's liability to extend to the harm caused to the respondent (s 5D(1)). Applying the balance of probabilities test stated in *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5 at [34], it should be concluded that the likelihood is that the respondent's injury would have been avoided if the precautions had been taken. The following considerations are relevant in this regard.

Toll Pty Ltd v Harradine (21 December 2016) (Meagher JA, Sackville AJA and Schmidt J)
Chen v State of New South Wales (No 2) (27 October 2016) (McColl and Leeming JJA, Emmett AJA)
BHP Billiton Ltd v Dunning (11 March 2015) (Basten, Macfarlan and Meagher JJA)

> 108. Similarly, in *Strong v Woolworths Ltd* , [95] the appellant was held to be able to discharge her onus of proof that a particular event occurred by relying on evidence of the probabilities of it having occurred, in circumstances in which there was no evidence which established the precise facts about it.

via
[95] [2012] HCA 5 ; 246 CLR 182 at [34] .

Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)
Geyer v Redeland Pty Limited (14 October 2013) (Beazley P, Ward and Emmett JJA)
Shoalhaven City Council v Pender (10 July 2013) (McColl, Barrett and Ward JJA)
Jones Lang LaSalle (NSW) Pty Ltd v Taouk (24 October 2012) (McColl and Meagher JJA, Sackville AJA)

> 63. That being the position, the probability is that the spillage commenced between 8.00pm and 10.00pm rather than after 10.00pm and before about 10.45pm: *Strong v Woolworths Ltd* [2012] HCA 5; 86 ALJR 267 at [34] ; *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408; *Rose v Abbey Orchard Property Investments Pty Limited* (1987) Aust Torts Reports 80-121 at 68, 928. It follows that the primary judge's conclusion that a system which required inspections at least once every hour would have prevented Mr Taouk's accident was justified on the evidence.

Conclusion in relation to JLL's appeal

State of Queensland v Nudd (19 October 2012) (Holmes and Fraser JJA and Atkinson J,)

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 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.

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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.

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

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[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] .

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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. **Following paragraph cited by:**

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

87. Contrary to the conclusion of the judge, the facts of the present case are relevantly distinguishable from the facts in *Strong* . Specifically:

(1) The plaintiff in *Strong* slipped on a chip on a 'sidewalk sales area' outside a department store in a shopping centre. The sidewalk area was under the control of the store operator. Importantly, the relevant timeframe within which the chip could have been spilt onto the sidewalk area was between 8:00 am and 12:30 pm. [51]

(2) In the High Court, the case was conducted on the basis that reasonable care required the inspection and removal of slipping hazards in areas under the control of Woolworths at intervals of not greater than 20 minutes. [52]

(3) The majority of the High Court,[53] in overturning the conclusion of the New South Wales Court of Appeal on causation, said that there was 'no basis for concluding that chips were more likely to be eaten for lunch than for breakfast or as a snack during the course of the morning'. [54] Thus, it followed that the probability of the chip being dropped at any time between 8:00 am and 12:30 pm on the sidewalk sales area was *uniform* throughout this period of time.

(4) The majority then concluded that the probabilities thus favoured a conclusion that the chip was deposited in the longer period between 8:00 am and 12:10 pm, and not the shorter period between 12:10 pm (the time of the last hypothetical reasonable inspection) and the time of the fall. [55]

via

[55] Ibid 198 [38] .

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.

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

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

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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.

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

The question in the appeal: causation

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. **Following paragraph cited by:**

Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

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

> "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 …".

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.

The appellant's "evidential burden" argument and the "very slight" evidence argument

46. **Following paragraph cited by:**

Jackson v McDonald's Australia Ltd (26 May 2014) (McColl, Barrett and Ward JJA)

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] .

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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 .

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47. **Following paragraph cited by:**

Lim v Cho (09 July 2018) (Leeming JA at [1]; Sackville AJA at [2]; Emmett AJA at [54])

17. Jones v Dunkel at 319 (Windeyer J); see also Strong v Woolworths (2012) 246 CLR 182; [2012] HCA 5 at [47] , [53] (Heydon J, dissenting but not on this point).

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 nonperformance of the system, and removes witnesses to give testimony as to that performance and non-performance, making slight evidence appropriate and 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".

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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].

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

> "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)

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

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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 BrowneWilkinson VC 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.

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

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52. **Following paragraph cited by:**

XJS World Pty Ltd v Central West Civil Pty Ltd (16 June 2025) (Payne, Kirk and Adamson JJA)
Commissioner of Police, New South Wales Police Force v Zisopoulos (28 September 2020) (Bell P, Macfarlan JA and Wright J)

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.

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

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53. **Following paragraph cited by:**

Lim v Cho (09 July 2018) (Leeming JA at [1]; Sackville AJA at [2]; Emmett AJA at [54])
Saba v Plumb (28 March 2018) (Macfarlan JA at [1]; Sackville AJA at [111]; Emmett AJA at [124])
New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act (16 November 2015) (Beazley P, Macfarlan and Leeming JJA)

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 "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] .

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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 400401 .

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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.

[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.

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 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 *Richard s 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 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.

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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.

[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.

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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."

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.

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[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.

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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 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.

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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.

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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)

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 .

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

[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.

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.

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

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.

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

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] T hat 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 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]

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[82] (1984) 37 SASR 145 at 149.

[83] (1984) 37 SASR 145 at 154.

[84] (1986) 7 NSWLR 241 at 254.

[85] (1984) 37 SASR 145 at 148.

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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 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.

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

The "very slight" evidence argument considered

65. **Following paragraph cited by:**

Geyer v Redeland Pty Limited (14 October 2013) (Beazley P, Ward and Emmett JJA)

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 12.30 pm. 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).

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[90] See [59].

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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 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]

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

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71. For those reasons the following arguments of the appellant, directed respectively to the 11.00 am-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 11.00 am 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 11.00 am 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 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.

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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 *Austr alian Law Journal* 842 at 846.

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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.

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

Other issues concerning the construction of s 5D of the Act

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

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

Orders

79. The appeal should be dismissed with costs.

Cited by:

Warren v District Council of the Lower Eyre Peninsula [2025] SASCA 93 -
State of New South Wales v T2 (by his tutor T1) [2025] NSWCA 165 -
State of New South Wales v T2 (by his tutor T1) [2025] NSWCA 165 -
DGR Global Ltd v P.T. Limited [2025] QCA 122 -
XJS World Pty Ltd v Central West Civil Pty Ltd [2025] NSWCA 133 -
Stanberg v State of New South Wales [2025] NSWCA 127 (06 June 2025) (Mitchelmore and McHugh JJA, Griffiths AJA)

Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19; *Strong v Woolworths Limited* (2012) 246 CLR 182; [2012] HCA 5 ; *Koc is v S E Dickens Pty Ltd* [1998] 3 VR 408, referred to.

Stanberg v State of New South Wales [2025] NSWCA 127 -
Stanberg v State of New South Wales [2025] NSWCA 127 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 (06 May 2025) (Beach and Kennedy JJA; J Forrest AJA)

112. Subsequently, in *Strong* [32] the majority of the High Court observed that the additional route provided by s 52(2) or its analogues to establishing causation appeared to be designed to address two situations in which causation could not be established applying the 'necessary condition' test, namely:

> (a) *Bonnington Castings v Wardlaw* ('*Bonnington*')[33] type cases, which involve 'the cumulative operation of factors in which the contribution of each factor to that harm is unascertainable'; [34] and
>
> (b) *Fairchild* [35] type cases, which involve '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 harm'. [36]

via

[34] *Strong* (2012) 246 CLR 182, 194 [25] (French CJ, Gummow, Crennan and Bell JJ); [2012] HCA 5 .

Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 (06 May 2025) (Beach and Kennedy JJA; J Forrest AJA)

106. The applicant argued that given the facts of this case it was neither appropriate nor in accordance with established principles to engage s 51(2) to bridge the evidentiary gap. This case did not fall within a *Fairchild v Glenhaven Funeral Services Ltd* ('*Fairchild*')[27] type case which the High Court adverted to in *Strong v Woolworths Ltd* ('*Strong*'). [28]

via

[28] (2012) 246 CLR 182 , 194–5 [25] (French CJ, Gummow, Crennan and Bell JJ) ; [2012] HCA 5 ('*Strong*').

Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
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Turner v Norwalk Precast Burial Systems Pty Ltd [2025] VSCA 94 -
Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

58. Immediately after setting out this passage from the judgment of Phillips JA in *Kocis* , her Honour said:

> The worker's fall occurred 90 minutes into a two and a half hour lunch service, at a time when three-fifths of the total service time had elapsed without any periodic inspection at all. Given the high likelihood of spills occurring during that time frame it is probable that

the failure to have any system of inspection throughout this 90 minute time period was a cause of the worker's injury. The causal potency might be increased by evidence as to the frequency of inspection during that time required by a reasonable person in the position of a catering and cleaning contractor, but the absence of any systemic inspection for more than half the entire period of lunch service can readily demonstrate a conclusion that Spotless's negligence is a probable cause of the worker's injury.

This reasoning is sound even though an actual finding of when the soup was spilt cannot be made. The majority in *Strong v Woolworths* referred to the observations of Hayne JA, as he then was, who said:

> In my view it is of the first importance to bear steadily in mind that a plaintiff must prove his or her case on the balance of probabilities and that 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. Thus, a jury may reasonably conclude that the probabilities are that a particular spillage would have been cleaned up by the proper application of a reasonable cleaning regime on the part of the defendant occupier while at the same time acknowledging the possibility (but not probability) that the substance was spilled only a moment before the plaintiff slipped on it. The question of causation is to be resolved by consideration of the probabilities.

I do not accept the submission that *Strong v Woolworths* is distinguishable. Although it concerned the duty owed by an occupier supermarket, its approach as to reasoning on causation in relation to duties owed by those in relation to slipping hazards is applicable to the present facts.

The plaintiff has satisfied me that on the balance of probabilities the negligence of Spotless was a cause of [Mr McGinnes's] injury loss and damage. [24]

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

87. Contrary to the conclusion of the judge, the facts of the present case are relevantly distinguishable from the facts in *Strong* . Specifically:

(1) The plaintiff in *Strong* slipped on a chip on a 'sidewalk sales area' outside a department store in a shopping centre. The sidewalk area was under the control of the store operator. Importantly, the relevant timeframe within which the chip could have been spilt onto the sidewalk area was between 8:00 am and 12:30 pm. [51]

(2) In the High Court, the case was conducted on the basis that reasonable care required the inspection and removal of slipping hazards in areas under the control of Woolworths at intervals of not greater than 20 minutes. [52]

(3) The majority of the High Court,[53] in overturning the conclusion of the New South Wales Court of Appeal on causation, said that there was 'no basis for concluding that chips were more likely to be eaten for lunch than for breakfast or as a snack during the course of the morning'. [54] Thus, it followed that the probability of the chip being dropped at any time between 8:00 am and 12:30 pm on the sidewalk sales area was *uniform* throughout this period of time.

(4) The majority then concluded that the probabilities thus favoured a conclusion that the chip was deposited in the longer period between 8:00 am and 12:10 pm, and not the shorter period between 12:10 pm (the time of the last hypothetical reasonable inspection) and the time of the fall. [55]

via

[55] Ibid 198 [38] .

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420, referred to; *Strong v Woolworths Ltd* (2012) 246 CLR 182 , discussed.

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

82. At the risk of repetition, the critical elements of the judge's reasoning leading to her conclusion that causation was established appear to be as follows:

> (1) The incident 'occurred 90 minutes into a two and a half hour lunch service, at a time when three-fifths of the total service time had elapsed without any periodic inspection at all'. [43]
>
> (2) 'Given the high likelihood of spills occurring during that time frame [90 minutes] it is probable that the failure for having a system of inspection throughout this 90 minute time period was a cause of [Mr McGinnes's] injury'. [44]
>
> (3) 'The causal potency might be increased by evidence as to the frequency of inspection during that time required by a reasonable person in the position of a catering and cleaning contractor, but *the absence of any systemic inspection for more than half the entire period of lunch service can readily demonstrate a conclusion that Spotless's negligence is a probable cause of [Mr McGinnes's] injury*'. [45]
>
> (4) *Strong* is not distinguishable from the present case. Its 'approach as to reasoning on causation in relation to duties owed by those in relation to slipping hazards is applicable to the present facts'. [46]

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

54. In relation to Spotless's submission that it had an appropriate system which involved staff keeping a lookout for slipping hazards, the judge said:

> I have some doubt that, in areas where spillages or other slip hazards are high, incidental observation by cleaning and catering staff while attending to other tasks could be described as a system. It could equally be characterised as an absence of a system as was conceded by Woolworths in the case of *Strong v Woolworths* . Given the small number of Spotless staff in the Dining Hall during meal service there was little opportunity for even incidental inspection. Either way, whether there was no system or the system in place was not an adequate response to the risk, Spotless was in breach of its duty of care. [17]

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

56. Having found for the VWA on the issue of negligence, the judge then turned to the question of whether Spotless's negligence was a cause of Mr McGinnes's injury. In the course of this analysis, the judge made detailed reference to this Court's decision in *Kocis v SE Dickens Pty Ltd* [19] and the High Court's decision in *Strong v Woolworths Ltd* . [20] The judge rejected a submission made by Spotless that she should infer from particular parts of the evidence that the spill had only been present for a short time when the incident occurred, saying that that question depended 'on a number of variables not addressed [in the] evidence which would make it little more than speculation'. [21]

via

[20] (2012) 246 CLR 182 (French CJ, Gummow, Heydon, Crennan and Bell JJ) ('*Strong*').

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 (28 March 2025) (Beach and Kennedy JJA; J Forrest AJA)

71. In essence, it appeared to be the position of the parties that, in the circumstances of this case, the ultimate result (that is, the determination of the issues of breach of duty and causation) would be the same whether one adopted a traditional common law approach or whether one applied the relevant statutory provisions contained in Part X of the *Wrongs Act* . We note, however, that in *Adeels Palace Pty Ltd v Moubarak* ,[32] a case dealing with a cognate provision, s 5D(1) of the *Civil Liability Act 2002* (NSW) , the High Court said:

> It is not necessary to examine whether or to what extent the approach to causation described in *March v Stramare* might lead to a conclusion about factual causation different from the conclusion that should be reached by applying s 5D(1) . It is sufficient to observe that, in cases where the *Civil Liability Act* or equivalent statutes are engaged, it is the applicable statutory provision that must be applied. [33]

via

[33] *Adeels* (2009) 239 CLR 420, 440 [44] . See also *Strong* (2012) 246 CLR 182, 190–1 [18]–[19] .

Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 -
Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 -
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Spotless Facility Services Pty Ltd v Victorian WorkCover Authority [2025] VSCA 50 -
Kmart Australia Limited v Marmara [2024] NSWCA 249 (21 October 2024) (Kirk and McHugh JJA, Griffiths AJA)

181. As noted above, after saying at J[53] that "the issue of causation is essentially a medical one," the primary judge returned to causation at J[90], where her Honour quoted s 5D in full. Her Honour then said at J[91]: "The causation issue here is quite narrow." Her Honour went on to address aspects of the medical evidence, and found at J[92] that the falling boxes had caused a pre-existing but asymptomatic degenerative condition to become symptomatic. Her Honour concluded, "The defendants' breach of duty of care leading to the injury was thus a necessary condition of the occurrence of the harm for the purpose of s 5D : *Strong v Woolworths Ltd* (2012) 246 CLR 182 ."

Kmart Australia Limited v Marmara [2024] NSWCA 249 (21 October 2024) (Kirk and McHugh JJA, Griffiths AJA)

180. Kmart submitted in writing that on the issue of causation the primary judge did not engage in any analysis of whether the negligence was a necessary condition of the occurrence of the harm as required by s 5D . Kmart said that determining whether the appellant's negligent conduct caused the harm sustained required a counterfactual assessment as to whether the reasonable precautions identified would, applying the "but for" test, have altered the outcome, citing *Strong v Woolworths Ltd* (2012) 246 CLR 182 at 190 [18] ; [2012] HCA 5 and *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* (2022) 273 CLR 457 at 487-488 [101]; [2022] HCA 11.

Kmart Australia Limited v Marmara [2024] NSWCA 249 -
Kmart Australia Limited v Marmara [2024] NSWCA 249 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

Strong v Woolworths Ltd [2012] HCA 5 ; (2012) 246 CLR 182

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Griffin v Brisbane City Council [2024] QCA 157 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)

Gould v Vaggelas [1984] HCA 68; (1984) 157 CLR 215; *Amaca Pty Ltd v Booth* [2011] HCA 53; (2011) 246 CLR 36; *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 ; *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613; *Wallace v Kam* [2013] HCA 19; (2013) 250 CLR 375, followed.

Value Constructions Pty Ltd v Badra [2024] NSWCA 181 (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)

6. Ground 3 can be dispatched immediately. The nub of the point was captured in Value's written submissions in reply where it was argued that it was the actions taken on behalf of MMM, rather than the actions of Value, which were "the proximate cause of the harm". That is not the relevant legal test for causation in negligence. The issue under s 5D of the *Civil Liability Act 2002* (NSW) (**CLA**) is relevantly whether the negligence was a necessary condition of the occurrence of the harm. That notion has been taken to include where the tortfeasor's negligence materially contributed to the harm even if there were other conjunctive causes, just as under the previous common law: *Amaca Pty Ltd v Booth* [2011] HCA 53; (2011) 246 CLR 36 at [70] ; *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [20]-[30] . It is necessary only that the relevant act or omission play some part in contributing to the loss, even if minor: *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [45] ; *Gould v Vaggelas* [1984] HCA 68; (1984) 157 CLR 215 at 236. It does not require that the cause be characterised as "proximate": note eg *Wallace v Kam* [2013] HCA 19; (2013) 250 CLR 375 at [11] . Here, if Value was negligent in the manner found by the primary judge then there can be no doubt that its negligence was a materially contributing cause of Mr Badra's injuries. Value made a vague suggestion in its written submissions that an issue "perhaps" arose as to scope of liability under s 5D(1)(b) , but the argument was not developed and has no apparent merit.

Gomez v Woolworths Group Limited [2024] NSWCA 121 -
Gomez v Woolworths Group Limited [2024] NSWCA 121 -
Gomez v Woolworths Group Limited [2024] NSWCA 121 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 (26 March 2024) (Emerton P; Niall and Kennedy JJA)

136. In *Strong v Woolworths Ltd* ,[120] French CJ, Gummow, Crennan and Bell JJ confirmed that the identically worded NSW provision [121] was a statutory statement of the 'but for' test of causation: the plaintiff must establish that it would not have suffered the particular harm but for the defendant's negligence. [122] Their Honours referred to the earlier High Court decision of *Adeels Palace Pty Ltd v Moubarak* ,[123] in which French CJ, Gummow, Hayne, Heydon and Crennan JJ discussed the approach to be taken when considering the question of causation. [124] Having regard to the distinct elements of factual causation and scope of liability, their Honours said:

> Dividing the issue of causation in this way expresses the relevant questions in a way that may differ from what was said by Mason CJ, in *March v E and MH Stramare Pty Ltd*, to be the common law's approach to causation. The references in *March v Stramare* to causation being 'ultimately a matter of common sense' were evidently intended to disapprove the proposition 'that value judgment has, or should have, no part to play in resolving causation as an issue of fact'. By contrast, [the equivalent provision to s 51 of the *Wrongs Act*] treats factual causation and scope of liability as separate and distinct issues. [125]

via

[122] *Strong* (n 120) 190 [18].

Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Davie v Manuel [2024] WASCA 21 -
Davie v Manuel [2024] WASCA 21 -
Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)

70. Although the joint judgment used the double negative, the point can be made positively: s 9A imposes a more stringent causal requirement than that involved in the causal requirement in the first limb of s 4(a) . That understanding is implicit in the joint judgment. It is consistent with the Attorney's reference to the "weaker test" in s 4 in his second reading speech. And it reflects a deeper point. The causal standard for the "arising out of employment" notion in workers compensation legislation has long been accepted to involve consideration of whether the employment "caused, or to some material extent contributed to, the injury": *Nunan* at 124. That is relevantly the same approach as taken at common law for tort: see eg ***March v E & M H Stramare** Pty Ltd* [1991] HCA 12; (1991) 171 CLR 506 at 514 per Mason CJ. There are various aspects to the notion of "material contribution": note *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [21]-[25] . One role that it plays was explained in *Amaca Pty Ltd v **Booth*** [2011] HCA 53; (2011) 246 CLR 36 at [70] per Gummow, Hayne and Crennan JJ and in ***Hunt & Hunt** Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 at [45] per French CJ, Hayne and Kiefel JJ. To quote the latter (citations omitted):

> The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct. It is enough for liability that a wrongdoer's conduct be one cause. The relevant enquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss.

Hinrichsen v The King [2023] SASCA 111 -
Buljat v Coles Supermarkets Australia Pty Ltd [2022] ACTCA 71 (16 December 2022) (Elkaim, Mossop and Kennett JJ)

39. *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 involved a disabled person who was using crutches slipping and falling on what had been a hot chip or grease deposited by such a chip in a "sidewalk sales area" outside a department store in a shopping centre. So far as the sidewalk sales area was concerned, it was part of the duties of a "people greeter" to keep an eye out for spillages in that area. There was no system in place on the day of the incident for the periodic inspection and necessary cleaning of the sidewalk sales area. The evidence established that the common area adjacent to the sidewalk sales area was cleaned every 20 minutes. The principal issue so far as the High Court was concerned was how long the chip had been on the ground before the slip occurred. In addressing that issue, the court said (at [38]) that reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes in the sidewalk sales area. That statement must be seen to have been made in the context of the evidence that this was the inspection and cleaning regime in place in adjoining areas. It was, therefore, clearly anchored in the evidence available in the case before it.

Buljat v Coles Supermarkets Australia Pty Ltd [2022] ACTCA 71 (16 December 2022) (Elkaim, Mossop and Kennett JJ)

54. The appellant relied upon the approach to causation adopted in *Strong* which picked up the approach adopted by Hayne JA in *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408. In that case (at 430) Hayne JA said:

> In my view it is of the first importance to bear steadily in mind that a plaintiff must prove his or her case on the balance of probabilities and that 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. Thus, the jury may reasonably conclude that the probabilities are that a particular spillage would have been cleaned up by the proper application of a reasonable cleaning regime on the part of the defendant occupier while at the same time acknowledging the possibility (but not probability) that the substance was spilled only a moment before the plaintiff slipped on it. The question of causation is to be resolved by consideration of the probabilities.

Buljat v Coles Supermarkets Australia Pty Ltd [2022] ACTCA 71 -
Potter v Gympie Regional Council [2022] QCA 255 -
Potter v Gympie Regional Council [2022] QCA 255 -
Russell v Carpenter [2022] NSWCA 252 (08 December 2022) (Meagher, Gleeson and Kirk JJA)

54. That finding manifests error on its face. Pursuant to s 5D(1)(a) of the CLA it was necessary for the respondent to establish that the negligence was a necessary condition of the occurrence of the harm (leaving aside any exceptional case addressed under s 5D(2)). This is a statutory statement of the "but for" test: *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5 at [18] . Under s 5E the respondent bore the onus of proving any fact relevant to the issue of causation. That the precaution of providing a handrail *could* have assisted in minimising the risk of harm does not establish on the balance of probabilities that it *would* have done so; that is to say, it does not establish that but for the absence of a handrail the injury would not have occurred. The possibility of a different result is not enough: *Derrick v Cheung* [2001] HCA 48; (2001) 181 ALR 301 at [13] .

Russell v Carpenter [2022] NSWCA 252 -
Amaca Pty Limited (Under NSW Administered Winding Up) v Roseanne Cleary as the Legal Personal Representative of the Estate of the Late Fortunato (aka Frank) Gatt [2022] NSWCA 151 -
Greenslade v Hiew [2022] WASCA 47 (04 May 2022) (Murphy JA, Beech JA, Vaughan JA)

Strong v Woolworths Ltd [2012] HCA 5 ; (2012) 246 CLR 182

Greenslade v Hiew [2022] WASCA 47 (04 May 2022) (Murphy JA, Beech JA, Vaughan JA)

75. In our view, there is nothing about the linear crack photograph or the evidence of its significance which would suggest that the judge's reasons were inadequate in relation to the matters in primary decision [49], [93] and [112]. The judge made and explained his findings by reference to the evidence, including by reference to the linear crack photograph evidence. There is no challenge to the findings of fact. In particular, there is no ground alleging that the judge erred in finding, in effect, that the linear crack was not observable before the ceiling collapse, when he ought to have found that it was. Whilst counsel for Mr Greenslade contended, with reference to ***Strong v Woolworths Ltd*** , [114] that it should be inferred that the linear crack predated the collapse , [115] and that the effect of Mr Jones' evidence was that the linear crack had been there for some considerable time,[116] those questions would only arise had there been a challenge to the findings of fact. These matters would need to be evaluated in the context of the evidence as a whole, including the judge's findings as to the reliability of Mrs Hiew's evidence and the unreliability of Mr Greenslade's evidence, and the relevant principles of appellate restraint in that regard. [117] They do not arise on ground 1(a) of this appeal.

Greenslade v Hiew [2022] WASCA 47 -
Greenslade v Hiew [2022] WASCA 47 -
Rayney v The State of Western Australia [No 4] [2022] WASCA 44 -
Rayney v The State of Western Australia [No 4] [2022] WASCA 44 -
Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 (06 April 2022) (Kiefel CJ, Keane, Gordon, Edelman and Gleeson JJ)

101. A negligent action will be a "necessary condition" of the occurrence of harm if, "but for" the negligence, the harm would not have occurred. As French CJ, Gummow, Crennan and Bell JJ said in *Strong v Woolworths Ltd* [116] , "[t]he determination of factual causation under s 5D(1)(a) is a statutory statement of the 'but for' test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence". In this assessment, notions of "common sense" have no place [117] . Not only do those notions have no foothold in the text of s 5D , but it has been repeatedly said in this Court that "it is doubtful whether there is any 'common sense' notion of causation which can provide a useful, still less universal, legal norm"[118]. The task of adjudication requires transparent reasoning, not consideration of whether a judge's "sense" of a result might be common with that of others.

Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd [2022] HCA 11 (06 April 2022) (Kiefel CJ, Keane, Gordon, Edelman and Gleeson JJ)

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via

[116] (2012) 246 CLR 182 at 190 [18] (footnote omitted).

Minister for the Environment v Sharma [2022] FCAFC 35 (15 March 2022) (Allsop CJ; Beach and Wheelahan JJ)

880. There are many academic works where problems associated with this fourth scenario have been considered, including by reference to North American authority: see, Hart and Honoré, *Causation in the Law* (2nd ed) at 225-235; Stapleton, *Factual Causation* [2010] Federal Law Review 467; Stapleton, *Unnecessary Causes* (2013) 129 LQR 39; Stapleton, *An 'Extended But-For' Test for the Causal Relation in the Law of Obligations* (2015) 35 OJLS 697. Elements of the fourth scenario were also referred to in *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1; [2021] AC 649 at [183]-[185] (Lord Hamblen and Lord Leggatt). The academic works propose answers to many hypothetical problems that arise in connection with the fourth scenario, but the High Court has not ventured into that territory: see, *Strong v Woolworths Ltd* at [29] , fn (58).

Minister for the Environment v Sharma [2022] FCAFC 35 -
Kone Elevators Pty Ltd v Shipton [2021] ACTCA 33 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 (08 September 2021) (Basten, Meagher and Leeming JJA)

Civil Liability Act 2003 (Qld) ss 11, 31(1)(a) , applied; *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5 , referred to.

Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206 -
Jfit Holdings Pty Ltd t/as New Dimensions Health and Fitness v Powell [2021] NSWCA 137 -
C & F Nominees Mortgage Securities Ltd v Karbotli [2021] VSCA 134 -
Robertson v State of Queensland & Anor [2021] QCA 92 -
Ethicon Sarl v Gill [2021] FCAFC 29 -
Xie v The Queen [2021] NSWCCA 1 -
Commissioner of Police, New South Wales Police Force v Zisopoulos [2020] NSWCA 236 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
Owners of Strata Plan No 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liquidation) [2020] NSWCA 199 (31 August 2020) (Gleeson and McCallum JJA, Emmett AJA)

19. See Strong v Woolworths Limited (2012) 246 CLR 182 at 191–192 ; [2012] HCA 5 at [20] (French CJ, Gummow, Crennan and Bell JJ) .

Owners of Strata Plan No 30791 v Southern Cross Constructions (ACT) Pty Ltd (in liquidation) [2020] NSWCA 199 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Lewis v Australian Capital Territory [2020] HCA 26 -
Brocklands Pty Ltd v Tasmanian Networks Pty Ltd [2020] TASFC 4 -
Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 (25 February 2020) (Macfarlan and White JJA, Simpson AJA)

Strong v Woolworths Limited (2012) 246 CLR 182; [2012] HCA 5 , applied.

Charter Hall Real Estate Management Services (NSW) Pty Limited v State of New South Wales [2020] NSWCA 26 -
Auimatagi v Australian Building and Construction Commissioner [2018] FCAFC 191 (13 November 2018) (Allsop CJ, Collier and Rangiah JJ)

96. The appellants submitted that this latter passage of their Honours was referrable to s 19(2) since it can be seen as part of the definition of "industrial action" rather than as a proviso. With respect, this is to elevate form over the substance of the true task of ascertaining the intended operation. The subject matters of all of s 19(2)(a) , (b) and (c) are, to a greater or lesser degree, within the knowledge of the person in question: the employee for (a) and (c) and the employer for (b). The Full Court in *Adams v Director of the Fair Work Building Industry Inspectorate* [2017] FCAFC 228; 351 ALR 379 discussed the question of burden and onus in relation to s 19. The Court (North, Dowsett and Rares JJ) accepted the submissions of the parties that there was an evidential onus upon the party concerned to raise the issues in s 19 (2)(a) or (b) or (c), but ultimately it was for the party propounding that fact of industrial action to prove it. The nature of that evidential burden from a civil penalty case was discussed by the Court at 351 ALR 412-414 [106]-[110]. We would adopt that approach. It is sufficient to cite [110]:

> We understand the above extract from *Cross* to state that in a civil trial, a defendant will satisfy the evidential onus if there is sufficient evidence from which the tribunal of fact could (not would) infer the matter asserted by the defendant, whether it be a positive or negative assertion. However the appellants, in their submissions in reply at para 5, submit that in order to discharge the evidential burden, they had only to raise a reasonable possibility that their actions had been authorized. Authority for this proposition is said to be found in the judgment of Heydon J in *Strong v Woolworths* Ltd (2012) 246 CLR 182; 285 ALR 420; [2012] HCA 5 at [51]–[52] , where his Honour cited *Jayasena v R* [1970] AC 618 at 624 ; [170] 1 All ER 219 (*Jayasena*). Although, in *Jayasena* , there is reference to the evidential burden requiring, "enough evidence to suggest a reasonable possibility", that was in the context of criminal proceedings. We do not understand Heydon J to have adopted that test for application in civil proceedings. At [52] his Honour cited the test, in the case of a defendant, as requiring that there be sufficient evidence to prevent the issue being withdrawn from the tribunal of fact. As we have said, such withdrawal would only occur if there was insufficient evidence upon which the tribunal of fact could base a finding in favour of the party bearing the evidential onus. In this regard we refer again to *Falconer* at CLR 61; ALR 566.

Hunold v Twinn [2018] QCA 308 -
Argo Managing Agency Ltd v Al Kammessy [2018] NSWCA 176 -
Inghams Enterprises Pty Ltd v Tat [2018] QCA 182 (03 August 2018) (Gotterson and Morrison JJA and Bond J)

50. The applicant was justifiably critical of the paucity of his Honour's reasons on this critical issue. There was no engagement with the statutory provisions, which require an approach to causation different to that which is the subject of the common law: see *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [18]-[27] , cited in a similar context by Jackson J in *Stokes v House With No Steps* [2016] QSC 79 at [142] and see also *The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103 at [38]-[41] . Nor was there any engagement with the evidence of the individuals who had been approached. Finally, there was no engagement with the applicant's argument at trial that, on the evidence, the proper conclusion was that the respondent had not proved the injury to her would have been avoided had the alleged negligence not occurred. Although his Honour plainly rejected that argument, he did not explain why. The failure to provide adequate reasons is an error of law: see *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at [57] .

Inghams Enterprises Pty Ltd v Tat [2018] QCA 182 (03 August 2018) (Gotterson and Morrison JJA and Bond J)
Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5 , cited

Lim v Cho [2018] NSWCA 145 (09 July 2018) (Leeming JA at [1]; Sackville AJA at [2]; Emmett AJA at [54])

17. Jones v Dunkel at 319 (Windeyer J); see also Strong v Woolworths (2012) 246 CLR 182; [2012] HCA 5 at [47] , [53] (Heydon J, dissenting but not on this point).

Lim v Cho [2018] NSWCA 145 -
MONASH UNIVERSITY Applicant and SHEILA SAVAGE First Respondent and PROGRAMMED MAINTENANCE SERVICES LTD Second Respondent [2018] VSCA 156 -
Day v Woolworths Group Limited [2018] QCA 105 (01 June 2018) (Sofronoff P and Morrison JA and Atkinson J)

37. Paragraph 20(l) alleged a failure on the part of the first defendant to implement a system of inspection in accordance with a particular regime identified in an earlier case, *Strong v Woolworths Ltd* (2012) 246 CLR 182. In paragraph 20(j) the appellant has already pleaded the first defendant's failure to implement a proper system of inspection, sweeping and cleaning. In *Strong v Woolworths* there was a finding of fact about the time interval between successive inspections of a supermarket floor to constitute a reasonable step to prevent accidents. That finding of fact in a different case set neither a legal precedent nor an industry standard. An allegation about a finding in that the case is therefore irrelevant and raises a false issue and the paragraph was rightly struck out.

Day v Woolworths Group Limited [2018] QCA 105 -
Saba v Plumb [2018] NSWCA 60 -
Adams v Director of the Fair Work Building Industry Inspectorate [2017] FCAFC 228 (22 December 2017) (North, Dowsett and Rares JJ)

110. We understand the above extract from *Cross* to state that in a civil trial, a defendant will satisfy the evidential onus if there is sufficient evidence from which the tribunal of fact could (not would) infer the matter asserted by the defendant, whether it be a positive or negative assertion. However the appellants, in their submissions in reply at para 5, submit that in order to discharge the evidential burden, they had only to raise a reasonable possibility that their actions had been authorized. Authority for this proposition is said to be found in the judgment of Heydon J in *Strong v Woolworths Ltd* (2012) 285 ALR 420 at [51][52] , where his Honour cited *Jayasena v The Queen* [1970] AC 618 at 624. Although, in *Jayasena* , there is reference to the evidential burden requiring, "enough evidence to suggest a reasonable possibility", that was in the context of criminal proceedings. We do not understand Heydon J to have adopted that test for application in civil proceedings. At [52] his Honour cited the test, in the case of a defendant, as requiring that there be sufficient evidence to prevent the issue being withdrawn from the tribunal of fact. As we have said, such withdrawal would only occur if there was insufficient evidence upon which the tribunal of fact could base a finding in favour of the party bearing the evidential onus. In this regard we refer again to *Falc oner* at 61.

Sutherland Shire Council v Safar [2017] NSWCA 203 (15 December 2017) (Macfarlan and White JJA, Harrison J)

8. So far as causation is concerned, in my view the appellant's negligence was a necessary condition of the accident and it is appropriate for the scope of the appellant's liability to extend to the harm caused to the respondent (s 5D(1)). Applying the balance of probabilities test stated in *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5 at [34] , it should be concluded that the likelihood is that the respondent's injury would have been avoided if the precautions had been taken. The following considerations are relevant in this regard.

Sutherland Shire Council v Safar [2017] NSWCA 203 -
Sutherland Shire Council v Safar [2017] NSWCA 203 -
Sutherland Shire Council v Safar [2017] NSWCA 203 -
Sutherland Shire Council v Safar [2017] NSWCA 203 -

Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 (26 October 2017) (Kourakis CJ; Peek and Nicholson JJ)

99. In *Strong v Woolworths Ltd* , [60] French CJ, Gummow, Crennan and Bell JJ considered the nature of Woolworths Ltd's duty of care as occupier in the context of a slip and fall case. The plurality noted: [61]

> Woolworths' negligence lay in its failure to employ a system for the periodic inspection and cleaning of the sidewalk sales area ... 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.

Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Stringer & or v Westfield Shopping Centre Management Co (SA) Pty Ltd [2017] SASCFC 138 -
Robinson v The Owners of Reflections Waterfront Apartments West Tower Strata Plan 58085 [2017] WASCA 190 -
Circular Head Fencing Pty Ltd v Motor Accidents Insurance Board [2017] TASFC 6 (30 August 2017) (Blow CJ, Pearce and Brett JJ)

77. It is now well established that the effect of s 13(1)(a) of the *Civil Liability Act* is that in order to establish factual causation, the appropriate test is the "but for" test. (See *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48, 239 CLR 420; *Strong v Woolworths Ltd* [2012] HCA 5, 246 CLR 182 .) In the circumstances of this case, it was therefore necessary for the MAIB to prove against each appellant that, but for the failure of that appellant to take steps to secure the gate against the escape of cattle in a manner consistent with that of a reasonable person in the position of the appellant in question, the cattle would not have escaped on the night in question. Given that her Honour found that the relevant breach on the part of each appellant related to the use of a gudgeon pin with recessed thread, the finding which was necessary was that, had that pin not been used, but some other means used to secure the gate, the cattle would not have escaped.

Circular Head Fencing Pty Ltd v Motor Accidents Insurance Board [2017] TASFC 6 -
Circular Head Fencing Pty Ltd v Motor Accidents Insurance Board [2017] TASFC 6 -
Woolworths Ltd v McQuillan [2017] NSWCA 202 -
Davies v Nilsen [2017] VSCA 202 (11 August 2017) (Osborn, Beach JJA and Keogh AJA)

53. Having dealt with the evidence of the applicant and her mother, the judge then turned to the question of causation. In describing the applicable legal principles, the judge conducted a detailed analysis of relevant authority including *Watts v Rake* ,[30] *Purkess v Crittenden* ,[31] *I.C.A.N.Z. v Murphy* ,[32] *Malec v J C Hutton Pty Ltd* ,[33] *March v E & M H Stramare Pty Ltd* ,[34] *Seltsam Pty Ltd v Ghaleb* ,[35] *Strong v Woolworths Ltd* , [36] *Wallace v Kam* ,[37] and *Smith v Gellibrand Support Services Inc*. [38]

Davies v Nilsen [2017] VSCA 202 -
Berhane v Woolworths Ltd [2017] QCA 166 -
Berhane v Woolworths Ltd [2017] QCA 166 -
Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 (31 May 2017) (Meagher, Gleeson and Payne JJA)

168. The appellant's supplementary written submissions were directed to the first counterfactual (that Mrs Smith would not have allowed the appellant to go out with his friends). Reference was made to *Strong v Woolworths Ltd* at [32] , *State of New South Wales v Mikhael* at [94] , and *Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12 for the proposition that the appellant need only

establish the probable course of events had the omission not occurred and that the appellant could rely upon likely inferences from proved facts.

Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 (31 May 2017) (Meagher, Gleeson and Payne JJA)

97. Second, it is necessary to consider the probable course of events had the omission (breach of duty) not occurred: *Strong v Woolworths Ltd* (2012) 246 CLR 182; [2012] HCA 5 (French CJ, Gummow, Crennan and Bell JJ) .

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 (26 May 2017) (Morrison and McMurdo JJA and Bond J,)

39. These provisions, such as that considered in *Strong v Woolworths* and s 305D of the WCR Act , were enacted upon the recommendations in the Final Report of the *Review of the Law of Negligence* published in 2002, the so-called Ipp Report. As was discussed in *Strong v Woolworths* ,[7] the Ipp Report instanced two categories of cases which would not pass the "but for" test of causation and for which special legislative provision should be made. The first category was said to be exemplified by *Bonnington Castings Ltd v Wardlaw* . [8] It was in the description of that category of case that the majority in *Strong v Woolworths* referred to cases which involve "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". [9] The majority in *Strong* summarised that decision as follows: [10]

> "In *Bonnington Castings Ltd v Wardlaw* , 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. The swing grinders had contributed a quote of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease."
>
> (footnotes omitted)

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 (26 May 2017) (Morrison and McMurdo JJA and Bond J,)

39. These provisions, such as that considered in *Strong v Woolworths* and s 305D of the WCR Act , were enacted upon the recommendations in the Final Report of the *Review of the Law of Negligence* published in 2002, the so-called Ipp Report. As was discussed in *Strong v Woolworths* , [7] the Ipp Report instanced two categories of cases which would not pass the "but for" test of causation and for which special legislative provision should be made. The first category was said to be exemplified by *Bonnington Castings Ltd v Wardlaw* . [8] It was in the description of that category of case that the majority in *Strong v Woolworths* referred to cases which involve "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". [9] The majority in *Strong* summarised that decision as follows: [10]

> "In *Bonnington Castings Ltd v Wardlaw* , 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. The swing grinders had contributed a quote of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease."
>
> (footnotes omitted)

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 (26 May 2017) (Morrison and McMurdo JJA and Bond J,)

41. Consequently, the trial judge's categorisation of the case, which used the description in *Strong* of the facts in *Bonnington Castings* , did not answer the question of factual causation under s 305D(1)(a) . The trial judge had to decide whether the appellant's breaches of duty were "*necessary* to complete a set of conditions that [were] jointly sufficient to account for the occurrence of the harm". [14]

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 (26 May 2017) (Morrison and McMurdo JJA and Bond J,)

39. These provisions, such as that considered in *Strong v Woolworths* and s 305D of the WCR Act , were enacted upon the recommendations in the Final Report of the *Review of the Law of Negligence* published in 2002, the so-called Ipp Report. As was discussed in *Strong v Woolworths* ,[7] the Ipp Report instanced two categories of cases which would not pass the "but for" test of causation and for which special legislative provision should be made. The first category was said to be exemplified by *Bonnington Castings Ltd v Wardlaw* . [8] It was in the description of that category of case that the majority in *Strong v Woolworths* referred to cases which involve "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". [9] The majority in *Strong* summarised that decision as follows: [10]

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>
> (footnotes omitted)

via

[10] Ibid at 193 [23] .

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 -
The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 -
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The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 -
Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation [2017] FCAFC 62 -
Ralston v Jurisich [2017] NSWCA 63 -
Toll Pty Ltd v Harradine [2016] NSWCA 374 -
Day v Woolworths Ltd [2016] QCA 337 (14 December 2016) (Margaret McMurdo P and Philippides JA and Jackson J,)

98. The first respondent's answer to those questions was:

> "Questions 9 & 10 It is well established that there will be hazards on the floor of a retail store from time to time, as discussed by the High Court in *Australian Safeway Stores v Zaluzna* (1987) 162 CLR 479. This was reinforced by the High Court most recently in *Strong v Woolworths* (2012) HCA 5 . Therefore, the existence of the shallots, the nature of its packaging and the configuration of the shopping trolley is not directly relevant to either the circumstances of or reasons for the incident."

Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 (13 December 2016) (Murrell CJ, Burns and Gilmour JJ)
Strong v Woolworths Ltd [2012] HCA 5; 246 CLR 182
Sullivan Ltd v Moody

Gary Nigel Roberts v Westpac Banking Corporation [2016] ACTCA 68 -
Thomas v Trades and Labour Hire Pty Ltd (in liq) [2016] QCA 332 (09 December 2016) (Morrison and Philippides JJA and Flanagan J,)
Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5 , cited

Thomas v Trades and Labour Hire Pty Ltd (in liq) [2016] QCA 332 (09 December 2016) (Morrison and Philippides JJA and Flanagan J,)

85. There was also no dispute with the appellant's submissions that the following steps were required to be undertaken in determining the content of the duty of care, whether the duty of care was breached and whether the breach of that duty caused or contributed to the injury:

> 1. The existence of a duty of care owed by an employer to an employee is an established category of case. It amounts to "no more than the obligation to take reasonable care to avoid exposing the employee to an unnecessary risk of injury". [102]
>
> 2. Foreseeability of risk of injury in the context of breach of duty is determined by inquiring whether it 'was reasonably foreseeable as a possibility

that the kind of carelessness charged against the defendant might cause damage of some kind to the plaintiff's person or property". [103] The requirement of foreseeability that "some kind" of damage was foreseeable is an "undemanding" [104] test and the risk must not be far-fetched or fanciful. [105]

3. The employer is bound to have regard to a risk that an injury may occur because of inattention or misjudgement by the employee in performing his or her allotted task. [106] In giving content to the words of generality in the employer's duty and in determining whether a breach of it was foreseeable and, if foreseeable, involved so small a risk that the employer was justified in disregarding it, the employer's obligation extends to establishing, maintaining and enforcing a safe system of work and includes a duty to take account of the employee's negligence, inadvertence and carelessness in carrying out their work. [107]

4. In determining causation, the Court must consider the alleged breach of duty and, if the breach of duty is an omission, determine whether the plaintiff would have acted differently had the omission not occurred. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred. [108] As Gotterson JA observed in *Wolters v University of the Sunshine Coast* : [109]

"As noted, in *Sabatino*, Mason P reminded, as Gaudron J had pointed out in *Benne tt v Minister of Community Welfare*, that in cases of negligence by omission, a finding of liability is necessarily based upon a hypothetical inquiry, Here, as principle required, the primary judge set about such an inquiry. It was into whether the incident (and hence injury) would have been avoided if the respondent had discharged its duty of care by taking appropriate action to reprimand and counsel Mr Bradley. That the incident occurred is a historical fact. Whether it would have been avoided is not, of itself, a fact. It is a conclusion with respect to the likelihood that the incident would have been avoided had the duty been discharged. The objective of the inquiry undertaken by the primary judge was to assess the likelihood of that.

The frame of reference for such an inquiry is set by reference to that which the duty of care required have been done. The inquiry is undertaken by assessing all relevant facts and circumstances from which a conclusion is then drawn as to the likelihood that the performance of that which the duty required have been done, would have avoided the incident.

The integrity of the inquiry is therefore dependent upon both a precise articulation of what it is that the duty of care required and an appraisal of all relevant facts and circumstances in order to assess likelihood. A failure to articulate the former or to undertake the latter risks a miscarriage of the inquiry and a resultant lack of legitimacy in the ultimate conclusion drawn from it."

via

[108] *Strong v Woolworths Ltd* (2012) 246 CLR 182 at [32] per French CJ, Gummow, Crennan and Bell JJ .

Chen v State of New South Wales (No 2) [2016] NSWCA 292 -
Boateng v Dharamdas [2016] NSWCA 183 -
Nepean Blue Mountains Local Health District v Starkey [2016] NSWCA 114 -
Carangelo v State of New South Wales [2016] NSWCA 126 -
Biggs v George [2016] NSWCA 113 -
ALDI Foods Pty Ltd v Young [2016] NSWCA 109 (13 May 2016) (Meagher and Simpson JJA, Adamson J)

179. The only act or omission which contributed to the respondent's losing her balance was Mr Tidmarsh's act of parking the pallet jack across the side lane between the counters. Had the act of parking the pallet jack been negligent, then the requirement for factual causation would have been fulfilled: s 5D(1)(a) . The test in s 5D(1)(a) is no more than the "but for" test: *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] . However, I do not consider this act to have been negligent for the reasons given above.

Chu v Russell [2016] TASFC 1 -
Chu v Russell [2016] TASFC 1 -
Nightingale v Blacktown City Council [2015] NSWCA 423 (23 December 2015) (Beazley P, Basten, Macfarlan, Meagher and Simpson JJA)

7. This raises a difficult question as to the proper construction and application of s 45 where there are two possible causes of a person's injury, the first being the negligent carrying out of roadworks, which does not fall within the protection afforded by s 45(1) ; and the second being a failure to carry out roadworks of which it had no knowledge. For the purposes of causation, the existence of a non-negligent cause does not preclude a plaintiff succeeding if there is also a negligent cause of the harm suffered: *Strong v Woolworths* [2012] HCA 5; 246 CLR 182 .

Nightingale v Blacktown City Council [2015] NSWCA 423 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Hornsby Shire Council v Viscardi [2015] NSWCA 417 (22 December 2015) (Beazley P, Gleeson and Simpson JJA)

Civil Liability Act 2002 (NSW), s 5D ; *Strong v Woolworths* [2012] HCA 5; 246 CLR 182 ; *Zanner v Zanner* [2010] NSWCA 343; 79 NSWLR 702

Hornsby Shire Council v Viscardi [2015] NSWCA 417 (22 December 2015) (Beazley P, Gleeson and Simpson JJA)

19. That other causes contributed to the respondent's injury did not preclude a finding of liability against the appellant: *Strong v Woolworths* [2012] HCA 5; 246 CLR 182 ; *Zanner v Zanner* [2010] NSWCA 343; 79 NSWLR 702. Further, no evidence was advanced by the Council as to the impact of ageing on the bitumen patch.

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2015] NSWCA 349 (16 November 2015) (Beazley P, Macfarlan and Leeming JJA)

76. NSWALC submitted that none of the senses of "evidential burden" used by Heydon J in *Strong v Woolworths Ltd* involved the drawing of adverse inferences from a failure to provide evidence. That submission appears to confuse two distinct ideas. It is not suggested that an *adverse* inference, in the sense associated with *Jones v Dunkel* (1959) 101 CLR 298, is to be drawn from the failure by a claimant Land Council to adduce evidence. However, it seems that the submission regards as an "adverse inference" any inference on the ultimate question which leads to a conclusion which is unfavourable to the claimant Land Council. That is not the sense in which the term "adverse inference" is used in this area.

New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2015] NSWCA 349 -
New South Wales Aboriginal Land Council v Minister Administering the Crown Lands Act [2015] NSWCA 349 -
Huebner v The Nominal Defendant [2015] NSWCA 333 -
Fuller-Lyons v New South Wales [2015] HCA 31 -
Fuller-Lyons v New South Wales [2015] HCA 31 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Anwar v Mondello Farms Pty Ltd [2015] SASCFC 109 -
Chong v CC Containers Pty Ltd [2015] VSCA 137 -
Borazio v State of Victoria [2015] VSCA 131 (05 June 2015) (Tate, Osborn & McLeish JJA)

4. However, I do agree with his Honour, for the reasons he gives, that, in any event, the judge in fact applied the correct standard.[6] That is, the judge did not apply the test in the manner in which he had erroneously formulated it. Rather, he applied the appropriate civil standard to arrive at the conclusion that any injury from which the appellant was suffering at the time of the hearing of his application was not caused by his use of the equipment belt during his period of employment with Victoria Police. This is apparent especially from the judge's finding that it was 'more likely' [7] that the discomfort the appellant suffered as a result of wearing the equipment belt [8] was 'muscular and not discal' [9] and that there were other hypotheses that could '*equally* be implicated in the causation of the disc injury'. [10] The appellant thus did not satisfy the judge that it was 'more probable than not' [11] that there was a

causal connection between the appellant's use of the equipment belt and his disc injury.

via

[11] *Strong v Woolworths Ltd* (2012) 246 CLR 182, 196 [34] ; see *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408, 410, 420, 430.

Central Darling Shire Council v Greeney [2015] NSWCA 51 -
BHP Billiton Ltd v Dunning [2015] NSWCA 55 (11 March 2015) (Basten, Macfarlan and Meagher JJA)

108. Similarly, in *Strong v Woolworths Ltd* , [95] the appellant was held to be able to discharge her onus of proof that a particular event occurred by relying on evidence of the probabilities of it having occurred, in circumstances in which there was no evidence which established the precise facts about it.

via

[95] [2012] HCA 5 ; 246 CLR 182 at [34] .

BHP Billiton Ltd v Dunning [2015] NSWCA 55 -
Prepaid Services Pty Ltd v Atradius Credit Insurance NV [2014] NSWCA 440 (19 December 2014) (Macfarlan and Meagher JJA, Sackville AJA)

53. The term "evidentiary burden" or "evidential burden" may be used in a number of different senses. In *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 , Heydon J described the sense relevant to the present case as follows:

> "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 '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'" (citation omitted).

Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Electro Optic Systems Pty Ltd v State of New South Wales [2014] ACTCA 45 -
Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

82. In *Strong* [44] , the High Court again examined this provision. The majority[45] observed that this additional route to establishing causation appeared to be designed to address two situations in which causation could not be established applying the 'necessary condition' test, namely:[46]

> (s) *Bonnington Castings [47]* type cases, which involve 'the cumulative operation of factors in which the contribution of each factor to that harm is unascertainable'; [48] and
>
> (t) *Fairchild [49]* type cases, which involve '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 harm'. [50]

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

86. And in *Strong* , the court said:

> 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. *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, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requir es that attention be directed*. [52]

And subsequently:

> The determination of factual causation under s 5D(1)(a) is a statutory statement of the 'but for' test of causation: 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, 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.* [53]

via

[52] (2012) 246 CLR 182 , 194 [26] (citations omitted) (emphasis added); also cited in *Settlement Group v Purcell Partners* [2013] VSCA 370, [100] (Dixon AJA).

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

70. The High Court examined the cognate provisions of the New South Wales legislation, ss 5D and 5E of the *Civil Liability Act 2002* (NSW) , in *Adeels Palace Pty Ltd v Moubarak, [30] Strong v Woolworths Ltd* [31] and *Wallace v Kam* . [32]

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

70. The High Court examined the cognate provisions of the New South Wales legislation, ss 5D and 5E of the *Civil Liability Act 2002* (NSW) , in *Adeels Palace Pty Ltd v Moubarak, [30] Strong v Woolworths Ltd* [31] and *Wallace v Kam* . [32]

via

[31] *Strong v Woolworths Ltd* (2012) 246 CLR 182 (' *Strong*').

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

77. However, s 51(1)(b) mandates a different approach. The High Court in *Strong* said:

> 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'). The authors of the Ipp Report acknowledged their debt to Professor Stapleton's analysis in this respect. *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.* [40]

Powney v Kerang and District Health [2014] VSCA 221 -
Powney v Kerang and District Health [2014] VSCA 221 -
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Powney v Kerang and District Health [2014] VSCA 221 -
Curtis v Harden Shire Council [2014] NSWCA 314 (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

331. The appellants contended that, where the precise cause of the accident was unknown, the driver being deceased and there being no eyewitnesses, the trial judge was required to determine whether the negligence of the respondent was "a necessary condition of the appellants' harm by the process of probabilistic reasoning adopted in *Shoeys Pty Ltd v Allan"* [1991] Aust Torts Rep ¶81-104, relied on in *Woolworths Ltd v Strong* [2010] NSWCA 282 at [60] and referred to without dissent by the High Court in *Strong v Woolworths Ltd* at [30] . That premise may be accepted: the proposition that the trial judge did not in fact adopt such an approach should be rejected.

Curtis v Harden Shire Council [2014] NSWCA 314 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
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Curtis v Harden Shire Council [2014] NSWCA 314 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Nominal Defendant v Bacon [2014] NSWCA 275 (21 August 2014) (McColl, Macfarlan and Ward JJA)

31. At common law, "when separate and independent acts of negligence on the part of two or more persons ... directly contributed to cause injury and damage to another, the person injured [could] recover damages from any one of the wrongdoers, or from all of them" (*Grant v Sun Shipping Co Ltd* [1948] AC 549 at 563 ; *Bennett v Minister of Community Welfare* [1992] HCA 27; 176 CLR 408 at 429 per McHugh J). Thus "each sufficient condition [was] treated as an independent cause of the plaintiff's injury" (*Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] and [28] ; *March v E & MH Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506 at 534). The "but for" test did not adequately deal with such cases of separate and sufficient causes (*March v Stramare* at 516 and 523) and was not therefore applied at common law in them.

Nominal Defendant v Bacon [2014] NSWCA 275 (21 August 2014) (McColl, Macfarlan and Ward JJA)

15. The task involved in s 5D(1)(a) ("factual causation") is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm: *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 at [15] per French CJ, Crennan, Kiefel, Gageler and Keane JJ) approving Allsop P in *Wallace v Kam* [2012] NSWCA 82; (2012) Aust Torts Reports ¶82-101 (at [4]). The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [55]) per French CJ, Gummow, Hayne, Heydon and Crennan JJ; *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Nominal Defendant v Bacon [2014] NSWCA 275 -
Nominal Defendant v Bacon [2014] NSWCA 275 -
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

Adeels Palace Pty Ltd v Moubarak [2009] HCA 48; 239 CLR 420; *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 ; applied.

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

104. In exceptional cases, in determining whether negligence that cannot be established as a necessary condition of the occurrence of the harm (that is, cases in which the "but for" test cannot be satisfied), should be accepted as establishing factual causation, the court is to consider whether or not and why responsibility for the harm should be imposed on the negligent party: CL Act s 5D(2) . The potential scope for the operation of 5D(2) was considered in *Strong v Woolworths Ltd* at [25]-[26] .

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

103. The effect of s 5D(1)(a) is that factual causation is to be determined by the "but for" test: "but for the negligent act or omission, would the harm have occurred?": *Adeels Palace* at [45] ; *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] (*per curiam*). The test requires the Court to determine whether, if the defendant had not breached its duty of care, the harm complained of would have been prevented. The test is not satisfied merely by showing that taking the steps the plaintiff alleges should have been taken might have made a difference: *Adeels Palace* at [50] . The plaintiff must show that it is more probable than not that, if the defendant had taken reasonable care, the harm would have been prevented: *Adeels Palace* at [53] . However, if the defendant's negligent act or omission is necessary to complete a set of conditions jointly sufficient to account for the occurrence of the harm, the test of factual causation will be satisfied: *Strong v Woolworths Ltd* at [20] .

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 -
Langmaid v Dobsons Vegetable Machinery Pty Ltd [2014] TASFC 6 (04 July 2014) (Blow CJ, Porter and Pearce JJ)

141. As to causation, the law does not insist on the need to demonstrate the mechanism of loss or damage "to a fine degree": *Duma v Mader International Pty Ltd* [2013] VSCA 23 per Neave JA at [3] . See also *Strong v Woolworths Ltd* (above) at 196 , [34] , and *Kuhl v Zurich Financial Services Australia Pty Ltd* (2011) 243 CLR 361 per French CJ and Gummow J at 381 – 382 [53] – [54] .

Langmaid v Dobsons Vegetable Machinery Pty Ltd [2014] TASFC 6 -
Langmaid v Dobsons Vegetable Machinery Pty Ltd [2014] TASFC 6 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Jackson v McDonald's Australia Ltd [2014] NSWCA 162 -
Warth v Lafsky [2014] NSWCA 94 (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

59. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred: *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ. Causation is "approached by applying common sense to the facts of the particular case": *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 623 (at [43]) per French CJ, Hayne and Kiefel JJ. If factual causation is established, the plaintiff must also establish that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused ("scope of liability"): s 5D(1)(b) *Civil Liability Act* . The appellant did not contend that there was any reason why his liability should not so extend if factual causation was established.

Warth v Lafsky [2014] NSWCA 94 (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

58. In order to establish that any breach of duty on the appellant's part caused his harm, the respondent had to establish "factual causation" in accordance with s 5D(1)(a) of the *Civil Liability Act* , that is to say that the appellant's negligence was a necessary condition of the occurrence of that harm. That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E ": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the

application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Minister Administering the Crown Lands Act v New South Wales Aboriginal Land Council [2014] NSWCA 69 -
Reid v Target Australia Pty Ltd [2014] NSWCA 60 -
Reid v Target Australia Pty Ltd [2014] NSWCA 60 -
Reid v Target Australia Pty Ltd [2014] NSWCA 60 -
Cornelius v Global Medical Solutions Australia Pty Ltd [2014] NSWCA 65 -
AV8 Air Charter Pty Limited v Sydney Helicopters Pty Limited [2014] NSWCA 46 -
Lucantonio v Stichter [2014] NSWCA 5 (06 February 2014) (McColl, Basten and Barrett JJA)

80. Such determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E" (*Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14])) and is approached by applying common sense to those facts: *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 (at [43] ; [56]) per French CJ, Hayne and Kiefel JJ. It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]). "Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred": *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ.

Lucantonio v Stichter [2014] NSWCA 5 (06 February 2014) (McColl, Basten and Barrett JJA)

79. In order to establish that any breach of duty on the respondent's part caused the appellant harm, the appellant had to establish that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a), *Civil Liability Act 2002* . That required the appellant establishing that the respondent's negligence was a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18] , [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.

Salkeld v Cocca [2013] SASCFC 138 -
Salkeld v Cocca [2013] SASCFC 138 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 (17 December 2013) (Maxwell P, Redlich JA and Dixon AJA)

100. In *Strong* , [35] the plurality observed:

> 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. 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, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed.

The plurality noted that the 'scope of liability' consideration (s 51(1)(b)) presented little difficulty, it not being in contention that, if the plaintiff proved factual causation, it was appropriate that the scope of the defendant's liability extended to the harm that she suffered.

99. The High Court returned to the requirements of the statutory test for causation in *Strong v Woolworths Limited & Anor.* [29] There is, at least in the circumstances of this case, no relevant distinction between s 5D of the *Civil Liability Act 2002* (NSW) and s 51 of the *Wrongs Act 1958* (Vic) . [30] Transposed to the context of the Victorian statute, *Strong [31]* is authority for the following seven propositions about the operation of the statutory causation test.

> (a) Division 3 of Part X of the *Wrongs Act* 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.
>
> (b) 'Negligence', for the purpose of Part X, means failure to exercise reasonable care. [32]
>
> (c) Section 52 provides that, 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.
>
> (d) The determination of factual causation under s 51(1)(a) is a statutory statement of the 'but for' test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence.

I pause to note that in *Strong* [33] the plurality commented:

> While the value of that test as a negative criterion of causation has long been recognised, 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. 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 ... Ipp Report. 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 ... If the [plaintiff] can prove factual causation, it is not in contention that it is appropriate that the scope of [the defendant's] 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.

> (e) Under the statute, factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm. A necessary condition is a condition that must be present for the occurrence of the harm.
>
> (f) 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 51(1)(a) . In such a case, the defendant's conduct may be described as contributing to

> the occurrence of the harm. It is not necessary that the defendant's negligence be the sole necessary condition of the occurrence of the harm.
>
> (g) Section 51(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 an appropriate case, [34] notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm.

via

[31] [2012] HCA 5 , [17]–[30] .

Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 (17 December 2013) (Maxwell P, Redlich JA and Dixon AJA)

99. The High Court returned to the requirements of the statutory test for causation in *Strong v Woolworths Limited & Anor.* [29] There is, at least in the circumstances of this case, no relevant distinction between s 5D of the *Civil Liability Act 2002* (NSW) and s 51 of the *Wrongs Act 1958* (Vic) . [30] Transposed to the context of the Victorian statute, *Strong [31]* is authority for the following seven propositions about the operation of the statutory causation test.

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I pause to note that in *Strong* [33] the plurality commented:

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(g) Section 51(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 an appropriate case, [34] notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm.

Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Settlement Group Pty Ltd v Purcell Partners [2013] VSCA 370 -
Takla v Nasr [2013] NSWCA 435 (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1)(a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -
Geyer v Redeland Pty Limited [2013] NSWCA 338 (14 October 2013) (Beazley P, Ward and Emmett JJA)

58. This submission either failed to adequately grasp the principles that govern the requirements of proof in a particular case: see *Strong v Woolworths* at [47]-[60] per Heydon J , or alternatively, reflected a belief in the strength of the appellant's evidence, unmitigated by a consideration of the strength of Redeland's evidence. There may well have been aspects of both of these matters involved in the submission. This was not a case where material evidence was peculiarly within the defendant's knowledge: *Strong v Woolworths* at [65] . In a case of that type, a plaintiff may succeed by adducing slight evidence. The defendant then

faces a tactical decision as to whether to adduce evidence to explain the plaintiff's evidence: *De Gioia v Darling Island Stevedoring & Lighterage Company Ltd* (1941) 42 SR (NSW) 1 at 4 ; *Blatch v Archer* (1774) 1 Cowp 63; 98 ER 969 at 970 ; *Hampton Court Ltd v Crooks* [1957] HCA 28; 97 CLR 367. Rather, this was a case where both the appellant and Redeland adduced evidence of the likelihood of a person on the stairs being a member of the catering staff.

Geyer v Redeland Pty Limited [2013] NSWCA 338 -
Geyer v Redeland Pty Limited [2013] NSWCA 338 -
Geyer v Redeland Pty Limited [2013] NSWCA 338 -
Geyer v Redeland Pty Limited [2013] NSWCA 338 -
Oyston v St Patrick's College (No 2) [2013] NSWCA 310 (23 September 2013) (Macfarlan and Barrett JJA, Tobias AJA)

62. The appellant submitted that, had the College's policy been implemented, as this Court found in the May judgment that it should have been, the probable course of events that would have ensued (see *Strong v Woolworths* [2012] HCA 5; (2012) 246 CLR 182 at [32] (per French CJ, Gummow, Crennan and Bell JJ)) was that disciplinary action against the major perpetrators of the bullying of the appellant would have deterred those students and other potential bullies. Consequently, the bullying of the appellant would have ceased. What was lacking in the College's attempts to deter bullying was the reinforcement of its stance by action; a firm message needed to be sent. By contrast, the College's failure to implement the policy condoned bullying and sent the wrong message to those students inclined towards such behaviour.

Paul v Cooke [2013] NSWCA 311 -
Coles Supermarkets Australia Pty Ltd v Meneghello [2013] NSWCA 264 (15 August 2013) (Barrett, Ward and Emmett JJA)

35. It was necessary for the respondent to show at trial that the negligence of the appellant was indispensable to occurrence of her injury or, putting it another way, that such negligence had to be present for the occurrence of the harm that befell her. These are formulations found in *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [20] and [44]), a case involving facts similar to those of this case, save that it was not in contest that the slip had occurred through contact with greasy material on the floor.

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

198. Ms Norton submits that it is obvious that, had the ramp been cleaned more often, then on the balance of probabilities Mr Pender would not have slipped. However, as made clear in *Strong v Woolworths Ltd* , at [32] , in such a case what must be considered is the likelihood that the injury would have been avoided had a particular system been in place.

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

191. Ms Norton points to the evidence that, from time to time, the Council cleaned the ramp and that there were (or was an expectation in the maintenance reports that there would be) three-monthly maintenance reviews. It was submitted that this evidence showed the requirements of a reasonable cleaning and maintenance system, i.e., on a three-monthly basis. Ms Norton referred to *Strong v Woolworths Ltd* at [14] in this regard.

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

77. The effect of s 5D(1) and s 5E is that the respondent had to prove that if there had been a proper system of water blasting the ramp, that system would have removed whatever caused the slipperiness in the area where he fell prior to his accident: *Dulhunty v J B Young Ltd* (1975)

50 ALJR 150 (at [151]) per Jacobs J; *Strong v Woolworths Ltd* (at [4]); *Timberland Property Holdings Pty Ltd v Bundy* [2005] NSWCA 419 (at [37]) per Basten JA (Handley JA and Hunt AJA agreeing).

Conclusion

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

94. The primary judge accepted (at [24]) that the condition of the ramp becoming slippery was one that developed over time. As I have said, this was not a case where the presence of a slippery surface bespoke negligence. Her Honour did not, however, address the question whether the respondent had established that it was unreasonable for the appellant not to have cleaned the ramp prior to the time he slipped. There was no evidence as to the time period which might be involved in the dry area of the ramp developing a degree of slipperiness which required cleaning. The mere fact that he slipped did not, as her Honour appears to have assumed, answer that question: see generally the discussion in the plurality's reasons in *Strong v Woolworths Ltd* .

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

73. The effect of s 5D(1) is that "the 'but for' test [of causation] is now to be ... a necessary test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2) ": *Adeels Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ. The s 5D(1)(a) element of factual causation requires proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm, that is to say, a condition that must be present for the occurrence of the harm: *Strong v Woolworths Ltd* (at [20]) per French CJ, Gummow, Crennan and Bell JJ; (at [44]) per Heydon J.

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

97. Finally, in my view, the appellant's submission that the respondent failed to establish that any breach of duty on its part caused his injury should be accepted. The respondent was required to prove on the balance of probabilities that the appellant's negligence was a necessary condition of his harm. The appellant's alleged negligence was a failure to have a regular system of water blasting the ramp to prevent it being slippery. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred: *Strong v Woolworths Ltd* (at [32]). The mere presence (had it been established) of a dry slippery surface on the ramp was not sufficient to establish causation: *Hampton Court Ltd v Crooks* [1957] HCA 28; (1957) 97 CLR 367 (at 371) per Dixon CJ. For the reasons I have given in respect of the lack of evidence concerning the ramp developing a degree of slipperiness requiring cleaning, the evidence did not support the conclusion that, had the appellant had a system of regularly water blasting the ramp it would not have been slippery on the day he fell: see *Garzo* (at [170]). This was not a case where the probabilities assist in reaching that conclusion: *Strong v Woolworths Ltd* (at [34]).

Shoalhaven City Council v Pender [2013] NSWCA 210 (10 July 2013) (McColl, Barrett and Ward JJA)

162. Section 5D(1)(a) requires proof that "but for" the negligence, Mr Pender would not have slipped and fallen suffering the injuries that he did (see *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 at [20]). This focuses attention on how and why it was that Mr Pender fell.

Shoalhaven City Council v Pender [2013] NSWCA 210 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -
Shoalhaven City Council v Pender [2013] NSWCA 210 -

King v Western Sydney Local Health Network [2013] NSWCA 162 (14 June 2013) (Basten, Hoeben and Ward JJA)

145. The appellant did not explain how the analysis of material contribution in *Strong v Woolworths Ltd* assisted her case. As I read the analysis of the plurality, there are real difficulties in applying the "but for" test to the concept of "increase in risk". The reference to and analysis at [24] - [27] of *Bonnington Castings Ltd v Wardlaw* (1956) UKHL 1; (1956) AC 613 illustrates the difficulty. Far from assisting the appellant's submission, the analysis in *Strong v Woolworths* of "increase in risk" in the context of a "material contribution to harm" is strongly suggestive that in most of those cases, the "but for" test will not be satisfied and that recourse will have to be had to s 5D(2) CLA .

King v Western Sydney Local Health Network [2013] NSWCA 162 (14 June 2013) (Basten, Hoeben and Ward JJA)

108. In order to assess the appellant's summation of the evidence, it is necessary to have regard to the purpose which the appellant sought to achieve by adducing expert evidence. As was stated in *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 :

"18 The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence...

...

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."

King v Western Sydney Local Health Network [2013] NSWCA 162 (14 June 2013) (Basten, Hoeben and Ward JJA)

153. Despite senior counsel for the appellant expressly eschewing any reliance upon s 5D(2) CLA at trial, the appellant sought to rely upon the section in the appeal. This occurred in oral submissions at AT35.28. The submission was that if it be said that the *Chappel v Hart* approach does not fall within s 5D(1) , this would give rise to an "exceptional case" such as would come within s 5D(2) . That submission was not further developed. In that regard, the appellant did no more than to make a general reference to the discussion by the plurality in *Strong v Woolworths Ltd* at [22] - [29] .

King v Western Sydney Local Health Network [2013] NSWCA 162 (14 June 2013) (Basten, Hoeben and Ward JJA)

145. The appellant did not explain how the analysis of material contribution in *Strong v Woolworths Ltd* assisted her case. As I read the analysis of the plurality, there are real difficulties in applying the "but for" test to the concept of "increase in risk". The reference to and analysis at [24] - [27] of *Bonnington Castings Ltd v Wardlaw* (1956) UKHL 1; (1956) AC 613 illustrates the difficulty. Far from assisting the appellant's submission, the analysis in *Strong v*

Woolworths of "increase in risk" in the context of a "material contribution to harm" is strongly suggestive that in most of those cases, the "but for" test will not be satisfied and that recourse will have to be had to s 5D(2) CLA .

King v Western Sydney Local Health Network [2013] NSWCA 162 -
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Baden Cranes Pty Ltd v Smith [2013] NSWCA 136 -
Baden Cranes Pty Ltd v Smith [2013] NSWCA 136 -
Wallace v Kam [2013] HCA 19 -
Varipatis v Almario [2013] NSWCA 76 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 -
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd [2013] HCA 10 -
CSR Timber Products Pty Ltd v Weathertex Pty Ltd [2013] NSWCA 49 -
Perisher Blue Pty Limited v Harris [2013] NSWCA 38 (27 February 2013) (Beazley JA at [1]; Sackville AJA at [2]; Young AJA at [30])

18. In New South Wales, the question of causation is now governed by ss 5D and 5E of the CL Act : *Adeels Palace* at [41] . In both High Court cases that have considered the question of causation under s 5D(1)(a) of the CL Act , the approach has been to inquire what probably would have occurred had the negligent party taken the action a reasonable person would have taken to avoid or minimise the risk. In *Adeels Palace* , the question was whether, had a function centre engaged security staff (the failure to do so constituting the breach of duty found by the trial Judge), the plaintiffs would not have been shot by an enraged participant in a violent fight that took place on the premises. In *Strong v Woolworths* , the plaintiff was injured when she slipped on a potato chip left on the floor near a food court. The negligence consisted of the failure to institute a proper system of periodic inspection of the premises. According to the High Court, the question on the issue of causation was whether, if the occupier had such a system in place on the day of the accident, it was likely that the errant chip would have been detected and removed before the plaintiff slipped on it and injured herself.

Perisher Blue Pty Limited v Harris [2013] NSWCA 38 -
Perisher Blue Pty Limited v Harris [2013] NSWCA 38 -
Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 (08 February 2013) (Basten and Meagher JJA, Davies J)

36. Not all cases lend themselves to a finding as to prevention of harm; in many cases, the evidence will only allow a finding as to reduction in risk. Because the standard of proof involves the balance of probabilities, a finding that the harm would probably not have happened is sufficient. On a probabilistic analysis, it is not necessary to prevent the risk arising (and thus guarantee safety): often reasonable precautions will merely reduce the risk. In *Adeels Palace* the fact that the shooting occurred led to an assessment of conduct which would have deterred or prevented entry of the gunman to the premises. The present case is analogous, although the question revolves around the exit of the person who was the direct cause of the harm from the premises. The analogy arises because in neither case was the presence of the victim in any way affected by the conduct of the person who caused the harm or the putative negligence of the defendant. Further, in each case the risk of injury was caused by the unpredictable (and criminal) conduct of the third party. The circumstances thus differ from those in which the risk of harm is directly created by the alleged negligence of the defendant, with no third party intervention: cf *Strong v Woolworths Ltd* [2012] HCA 5; 86 ALJR 267 .

Lesandu Blacktown Pty Ltd v Gonzalez [2013] NSWCA 8 -
Azar v Kathirgamalingan [2012] NSWCA 429 -
Azar v Kathirgamalingan [2012] NSWCA 429 -

Idameneo (No 123) Pty Ltd v Gross [2012] NSWCA 423 (14 December 2012) (McColl, Hoeben and Ward JJA)

71. The most recent statement of principle in relation to s 5D is in *Strong v Woolworths Ltd* [2012] HCA 5; 86 ALJR 267 where the majority said:

"18 The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: 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, 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."

Idameneo (No 123) Pty Ltd v Gross [2012] NSWCA 423 (14 December 2012) (McColl, Hoeben and Ward JJA)

76. It was, of course, entirely correct and indeed necessary for the primary judge to determine causation on a hypothetical basis. It is difficult to see how else the analysis required by the "but for" test could occur in circumstances where what is being relied upon is an omission to do something. *Strong* accepted that this was so at [32] where the plurality said:

"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."

Idameneo (No 123) Pty Ltd v Gross [2012] NSWCA 423 -
Idameneo (No 123) Pty Ltd v Gross [2012] NSWCA 423 -
Coregas Pty Ltd v Penford Australia Pty Ltd [2012] NSWCA 350 (01 November 2012) (Meagher JA at [1], Hoeben JA at [2], Bergin CJ in EQ at [137])

125. The most recent statement of principle in relation to s 5D is in *Strong v Woolworths Ltd* [2012] HCA 5; 86 ALJR 267 where the plurality said:

> "18 The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: 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, 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."

Coregas Pty Ltd v Penford Australia Pty Ltd [2012] NSWCA 350 -
Coregas Pty Ltd v Penford Australia Pty Ltd [2012] NSWCA 350 -
Jones Lang LaSalle (NSW) Pty Ltd v Taouk [2012] NSWCA 342 (24 October 2012) (McColl and Meagher JJA, Sackville AJA)

63. That being the position, the probability is that the spillage commenced between 8.00pm and 10.00pm rather than after 10.00pm and before about 10.45pm: *Strong v Woolworths Ltd* [2012]

HCA 5; 86 ALJR 267 at [34] ; *Kocis v SE Dickens Pty Ltd* [1998] 3 VR 408; *Rose v Abbey Orchard Property Investments Pty Limited* (1987) Aust Torts Reports 80-121 at 68,928. It follows that the primary judge's conclusion that a system which required inspections at least once every hour would have prevented Mr Taouk's accident was justified on the evidence.

Conclusion in relation to JLL's appeal

State of New South Wales v Mikhael [2012] NSWCA 338 -
State of New South Wales v Mikhael [2012] NSWCA 338 -
State of Queensland v Nudd [2012] QCA 281 (19 October 2012) (Holmes and Fraser JJA and Atkinson J,)

9. One issue about factual causation at the trial concerned the difficulty of proof when it was not known how or when the relevant water came to be on the floor. The primary judge resolved that issue in favour of the respondent by applying a methodology approved by the plurality in *Strong v Woolworths Ltd (t/as Big W)* : [10]

> "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 chip was deposited. The point was illustrated by Hayne JA (as he then was) in *Kocis v SE Dickens Pty Ltd*. 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. 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. The determination of the question turns on consideration of the probabilities."

State of Queensland v Nudd [2012] QCA 281 -
State of Queensland v Nudd [2012] QCA 281 -
R v Khazaal [2012] HCA 26 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 (09 August 2012) (Beazley, Macfarlan and Hoeben JJA)

91. The most recent statement of principle in relation to s 5D is in *Strong v Woolworths Ltd t/as Big W* [2012] HCA 5; 86 ALJR 267 where the plurality said:

> "18The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: 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, 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."

Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 -
Indigo Mist Pty Ltd v Palmer [2012] NSWCA 196 -
Pritchard v DJZ Constructions Pty Ltd [2012] NSWCA 196 (28 June 2012) (Bathurst CJ, Whealy and Barrett JJA)

293. As required by the statute, factual causation required proof that the defendant's negligence was a necessary condition of the occurrence of the particular harm: *Strong v Woolworths Ltd* [2012] HCA 5, at [18]-[20] . 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: s 5E . The determination of factual causation under s 5D(1)(a) is a statutory statement of the *"but for"* test of causation: *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; 239 CLR 420 at 443, [55] .

Garzo v Liverpool/Campbelltown Christian School [2012] NSWCA 151 -
Garzo v Liverpool/Campbelltown Christian School [2012] NSWCA 151 -
Australian Securities and Investments Commission v Hellicar [2012] HCA 17 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 (04 April 2012) (Allsop P, Basten and Meagher JJA)

49. The requirement for such counterfactual satisfaction of the but for test was one of the matters that Mason CJ rejected in *March v Stramare,* that Gummow J, Hayne J and Crennan J can be taken to have rejected in *Amaca v Booth* at [70] and that French CJ, Gummow J, Crennan J and Bell J rejected in *Strong v Woolworths* at [26]-[28] .

Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Allianz Australia Ltd v Sim [2012] NSWCA 68 -
Nominal Defendant v Rooskov [2012] NSWCA 43 (20 March 2012)

146. After judgment had been reserved in this matter the High Court delivered its decision in ***Strong v Woolworths Ltd*** [2012] HCA 5 . As ***Strong*** turned on the construction and application of the principles for causation in s 5D ***Civil Liability Act*** the parties were given the opportunity to make any additional submissions that they wished that arose from the High Court decision. However, neither of them submitted that the High Court decision made any difference to the argument that had been presented.

Nominal Defendant v Rooskov [2012] NSWCA 43 -
Nominal Defendant v Rooskov [2012] NSWCA 43 -