IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. S172 of 2011

BETWEEN:

KATHRYN STRONG
Appellant

and

WOOLWORTHS LIMITED t/as BIG W
ABN 88 000 014 675
First Respondent

CPT MANAGER LTD
ABN 054 494 307
Second Respondent

RESPONDENT'S SUBMISSIONS

Part I:

1. The respondent certifies that this document is in a form suitable for publication on the internet.

Part II:

2. The respondent accepts that the statement of the issues by the appellant identifies the issues that the appeal presents.

Part III:

Section 78B of the *Judiciary Act 1903*

3. The respondent certifies that it considers that no notice is required under s.78B of the *Judiciary Act* 1903 (Cth).

Part IV:

4. In addition to the facts identified by the appellant, the following material facts inform the reasons and the decision of the Court of Appeal.

5. The item slipped on was a chip (a type of food some people eat for lunch) (CA [62]).

6. The fall occurred quite close to a food court (CA [62]).

7. The fall occurred at lunch time (CA [62]).

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8. Periodical inspections and cleanings were all that reasonable care required; there was no evidence that would justify a conclusion that taking reasonable care, in the present case, required the continuous presence of someone always on the lookout for potentially slippery substances (CA [66]).

9. The particular hazard that the appellant encountered was not one with an approximately equal likelihood of occurrence throughout the day (CA [66]).

10. There was no basis for inferring:

(i) that the chip had been on the ground for long enough for it to be detected and removed;

(ii) what was the physical appearance of the chip;

(iii) the frequency and concentration of visitors to the area;

(iv) the probability of how soon before the fall the chip was dropped;

(v) whether the "grease stain":

(a) oozed from the chip as it lay on the ground;

(b) fell with the chip; or

(c) was squeezed out as the crusher compressed and moved it;

(vi) the temperature of the chip (CA [67]).

11. In her Chronology on page 2 line 14 the appellant asserts: "12:10 pm - Last inspection of area by first cleaner, but not the "*sidewalk sale*" area (transcript 100.4 – 101.5). That reference is to the evidence of the appellant's witness, Mrs Walker, in chief; she was cross-examined on the point, particularly between transcript 105.40 to 112.37. Much of that cross-examination was directed to exhibit A tab 11, the cleaner's report of the incident completed by Mrs Walker on the day of the appellant's fall. At page 9.8 of his judgement the trial Judge records reliance on the cleaner's report to establish the exact time when the area was last cleaned or inspected.

12. In context, he accepts that contemporary business record as accurate and reliable. At page 11.3 of his judgement, the trial Judge deals with the evidence given orally by Mrs Walker; his treatment of that oral evidence appears to be directed principally to the issue of occupation and control of the area in which the appellant fell, and not a resolution of the question of whether or not Mrs Walker inspected or cleaned that precise area at 12:10 pm.

13. The respondent contends that:

(i) The trial Judge's reliance on the cleaner's report exhibit A tab 11 establishes that the precise area of the fall **was** inspected or cleaned at 12:10 pm; or

(ii) The trial Judge failed to resolve the issue.

In either case, the appellant cannot assert that the last inspection of the area excluded the "*sidewalk sale*" area.

Part V:

Applicable statutes

14. The appellant's statement of applicable statutes and regulations is not accepted: the whole of the *Civil Liability Act* 2002 is applicable. A copy of the Act as at 24 September 2004 will be provided when it has been verified as accurate. The *Civil Liability Act* 2002 has been frequently amended. A schedule of the amendments will also be provided when verified.

Part VI:

Argument

15. The construction given to s.5D of the *Civil Liability Act* 2002 by the Court of Appeal is correct; that is made plain by the words "*It may well be...in any particular case*" in para 48 of the reasons of judgement of the Court of Appeal.

16. That sentence makes it clear that "material contribution and...increase in the risk" when appearing in paragraph 48 should be understood as if the phrase, which appears twice, were followed by the words "**as such**".

17. The language of s.5D is precise and unambiguous: two, and only two, "elements" are identified:

(i) necessary condition; and

(ii) appropriateness of scope.

18. The primary meaning of "*necessary*", according to the Macquarie Dictionary, is "*that cannot be dispensed with*".

19. Given the context in which it appears in s.5D(1), the relevant meaning of "*condition*", according to the Macquarie Dictionary, is "*a circumstance indispensable to some result; a pre-requisite; that on which something else is contingent*".

20. A necessary condition, therefore, as a matter of language, must be one that has a degree of importance or potency beyond mere sufficiency (cf Mason

CJ in *March v Stramare Pty Limited* (1990) 171 CLR 506 at 509.5) and must be of a quality or character beyond a criterion which has "*an important role to play*" (cf Mason CJ in *March* at 515.9).

21. That the phrase "*necessary condition*" bears the meaning derived from propositions 16, 17 and 18 immediately above is confirmed by the following considerations:

(i) The structure of the Act – in *State of New South Wales v Ibbett* (2005) 65 NSWLR 168) commencing at paragraph 6, Spigleman CJ observed that "*the respective Parts of the Act deal with distinct matters*" which in that case was relevant to the proper construction of the word "*injury*", the subject matter of that part of his Honour's judgement. That consideration, and conceptually the other considerations to which he made reference, is of significance in the proper construction of section 5D(1).

Section 5D is found in Part 1A "Negligence"; for the purpose of that Part of the Act, "*negligence*" is defined to mean "*failure to exercise reasonable care and skill*" (s.5).

The 8 Divisions of the Part deal with a wide variety of subjects in many of which breach of duty plays a part to one degree or another.

Section 5D appears in Division 3 which deals with Causation and s.5D itself is headed "General Principles", and provides, in the first instance, for the bifurcation of factual causation and scope of liability, and then for the exceptional case (2), for a particular rule relating to warning cases (3) and then in (4) directs attention to the manner in which scope of liability (provided for in subsection (1)(b)) is to be determined.

Without more, it is plain that Part 1A Division 3 is intended to effect change, to one degree or another.

Part 6 of the Act deals with "Intoxication" and, as can be seen from s.50(1), a causal element is essential to the operation of the subsection, but (2) & (3) prescribe a particular and specific causal regime that, at least, is likely to be different from, but informed by, the general principles prescribed in s.5D.

Section 49, in particular, should be noticed – it embraces the notion of increase in risk, albeit in the context of duty and standard of care.

In Part 8, dealing with "Good Samaritans", s.58(2) declares a subject specific causal regime ("*significantly impaired by reason of*").

In s.54A, and in s.54, which are to be found in Part 7 "Self-Defence and Recovery by Criminals", the notion of material contribution is specifically provided for, or noticed.

(ii) The purpose of the Act:

The long title of the *Civil Liability Act* 2002, by itself, does little to assist in identifying the purpose of the Act – it is entitled "An Act to make provision in relation to the recovery of damages for death or personal injury caused by the fault of a person; to amend the *Legal Profession Act* 1987 in relation to costs in civil claims; and for other purposes." [Assented to 18 June 2002] But the content of the Act read as a whole is plainly directed to modifying common law doctrine adversely to claimants.

The long title of the *Civil Liability "Personal Responsibility" Act* (the second tranche of the "reforms", containing significant amendments to the Act) is of considerably more assistance – it is entitled "An Act to amend the Civil *Liability Act* 2002 and other Acts to effect further civil liability reforms; and for other purposes." [Assented to 28 November 2002]

The conclusion dictated by the purpose of the Act is that of reshaping, sharpening and focusing the test relevant to a finding of causation (the only matter relevant in the present proceedings) and doing so in a way and to an extent that denies the legislation the character of "*beneficial legislation*".

The long title of those two Acts, the crafting of the Act, in Parts and Divisions, in some cases of general application and in other cases of particular application, some particular applications identifying specific causal regimes (see in particular s.58(2)), and some particular applications identifying the notions of material contribution and increase in the risk, and the use of the phrase "*necessary condition*" in s.5D reinforces the conclusion that significant change to causal reasoning was intended by Parliament.

The plain and unambiguous intent is to deprecate the "*commonsense*" conception of causation and to require the development of principles that, to the extent possible, given the nature of the enquiry (the allocation of responsibility), are susceptible of reduction to a satisfactory formula (cf Mason CJ in *March v Stramare Pty Limited* (1990) 171 CLR 586 @ 515.8).

(iii) The competing views in *March's* case – and the adoption by the legislature of that which was propounded by McHugh J –

Mason CJ, at page 515.5 and following, in *March* identified, but deprecated, the subdivision of the issue of causation into two questions – that of causation in fact to be determined by the application of the "*but for*" test, and a further question of whether a defendant is in law responsible for the damage which his or her negligence has played some part in producing. That approach, he found, "*places rather too much weight on the 'but for' test to the exclusion of the common sense approach*," and "*implies that value*

judgement has, or should have, no part to play in resolving causation as an issue of fact".

At page 516.9, he deprecated the "*but for*" test "*applied as an exclusive criterion of causation*" notwithstanding his earlier recognition at page 515.9 that as a negative criterion that test was of importance.

All of the other judges, other than McHugh J, adopted the approach favoured by Mason CJ, some with, and some without, further comment.

At page 533.8 and following, after exposing the "*commonsense*" approach as involving "*invitations to use subjective, unexpressed and undefined extralegal values to determine legal liability*", McHugh J propounded that the "*but for*" test should be an "*exclusive test of causation*" – plainly his Honour, in context, was contending for a test of "*causation in fact*", so much being made clear by the non-exclusive exception referred to on page 534 in the first full sentence and following.

His Honour favoured remoteness as the proper and principled approach where "*policy factors* (can be) *articulated and examined*" (see page 535.4)

The structure of s.5D, and the structure of the Act as a whole, providing as it does for circumstance specific causal regimes in some instances, plainly demonstrates that the logic and reasoning of McHugh J (at least in substance) has been preferred by the legislature to that Mason CJ and the judges in agreement with him.

The comments of Allsop P in *Zanner v Zanner* ([2010] NSWCA 343) at para 5, for the reasons he there states, support the proposition contended for; the reasons for judgement in *Adeels Palace Pty Limited v Moubarak* (2009) 239 CLR 420 at paragraphs 41 to 57 inclusive support the proposition contended for.

22. The submission at paragraph 18 of the submissions for the appellant is inapposite; it is accepted, however, that the presumption against alteration of common law doctrines is a relevant consideration: it is dealt with by Pearce & Geddes, *Statutory Interpretations Australia*, 6th Ed., Butterworths 206, at [5.24].

23. For the reasons given in paragraph 19(iii) above, the legislature has expressed "*its intention with irresistible clearness*" (see *Potter v Minahan* (1908) 7 CLR 277 per O'Connor J at 304).

In particular, the bifurcation by the Parliament of the test for causation, deprecated by Mason CJ in *March* at 515.5 but propounded by McHugh J in *March* at 534.2, together with the strength of the phrase "*necessary*

condition" and the rejection of any notion of onus-shifting by s.5E requires that outcome.

24. The failure of the Court of Appeal, relied on by the appellant, to notice the relevant presumption is explained by the fact that the Court of Appeal plainly saw that the language of s.5D(1) in its context in the Act was unambiguous, and meant what it said. See paragraph 48, and in particular the first two sentences. In paragraph 48 and following, it is clear that the Court of Appeal carefully analysed the language and structure of the section in its context and, implicitly, having regard to its evident purpose. The proposition in paragraph 19 of the appellant's submissions that the Court of Appeal misunderstood *Adeels Palace* is unsustainable.

25. It is submitted that a proper understanding of paragraphs 41 to 52 of *Adeels Palace* demonstrates that the Court was there only concerned with an analysis of s.5D(1)(a) – that is, "*factual causation*".

26. Because "*factual causation*", as required by s.5D(1)(a), was ***not*** established in *Adeels Palace*, there was no occasion to examine the "*scope of liability*" requirement in s.5D(1)(b).

27. It was not contended by the appellant in this case in the Court of Appeal that the case was "*exceptional*" and there was no occasion for Campbell JA, therefore, to look at s.5D(2). (CA [46])

28. Material contribution, the respondent accepts, is an accepted and orthodox component of the common law "*but for*" test, or more properly a variant of it. But it has no application to this case; this is a case of a single, individual breach and the notion of material contribution is logically irrelevant. In any event, as made clear above, paragraph 48 of the reasons for judgment of the Court of Appeal do ***not*** exclude consideration of the notions that inform material contribution; it is material contribution "***as such***" that is eschewed; the plain words of s.5D require identification of the breach (negligence), identification of the ***particular*** harm and then the determination of a relevant connection between the breach and the particular harm by the identification or characterisation of the breach as a "*necessary condition*" of the occurrence (in the sense of happening) of that harm.

    And because the two elements of the determination are cumulative, failure at the "*necessary condition*" stage directs attention not to s.5D(1)(b) but to s.5D(2), as the Court demonstrated in *Adeels Palace* (see paragraph 54 ff).

29. Paragraph 19(i) of these submissions identifies sections in the Act in which the notion of material contribution is expressly recognised; there can be no suggestion that material contribution as such is foreign to the Act. The assertion in paragraph 24 of the appellant's submissions that the effect of the Court of Appeal's decision is to interpret the words in the sense of "*the sole necessary condition*" is stated but not demonstrated.

30. The assertion that the judgment does not include any appropriate analysis of words and notions, as asserted in paragraph 26 of the appellant's

submissions, only has to be stated to be rejected. The judgment of Campbell JA does exactly what the submission denies.

31. The "Ipp Report" is relevant only to identify the purpose, formerly the vice, to be addressed – there is no relevant ambiguity; there is no need to confirm the construction of words of such clarity and precision as are contained in s.5D. Particularly is that so against the background of *March's* case and the obvious preference of the legislature for the bifurcated approach contended for by McHugh J, or a variant of it.

32. In any event, whatever construction is given to s.5D the appellant's case fails for want of evidence, or for want of factual inferential findings based on the evidence, that discharge or satisfy the onus of proof cast on the appellant by s.5E.

33. The response to the appellant's submission on "Findings, Inferences and Onus" (commencing at paragraph 28 of those submissions) can be dealt with briefly:

(i) The Court of Appeal recognised that the question of causation depended upon whether it was open to draw an inference, and if so whether in the facts of the particular case an inference should be drawn.

(ii) The factual elements identified in paragraphs 4 to 10 above caused the judges of the Court of Appeal to find themselves unable to draw the inference. It should be noted that Handley AJA, who joined in the decision appealed from, wrote a detailed judgment in *Shoeys Pty Limited v Allen* (1991) Aust T Rep 81-104; he found the inference available in that case, as a matter of fact, but in this case not. And the "*incongruity*" referred to in paragraph 30 of the appellant's submission attends neither the respondent's case here nor in the Court of Appeal, nor is it to be identifiable in the reasons of the Court of Appeal.

(iii) *Kocis v SE Dickens Pty Limited* [1988] 3 VR 408 does not assist the appellant; this is not a case in which the respondent answers the appellant's case by saying there is another possibility open; this is a case in which the respondent asserts, the Court of Appeal found, and this Court should also find, that all the appellant has done is establish a physical cause (a chip on the ground) but has failed to call evidence sufficient to connect that physical cause to the breach so as to satisfy the requirements of s.5D(1)(a) so as to achieve the statutory imperative of "*factual causation*". It is the appellant who, in this case, points to possibilities; but an absence of evidence precludes her from raising the relevant possibility to the level of probability (the onus being on her) so as to prove the connection between breach and particular harm required by s.5D(1)(a).

34. *Kocis*, in the last sentence extracted by the appellant in paragraph 31 of her submissions, recognises that the application of what the appellant calls

"*probability theory*" is dependent on the factual circumstances, which were carefully examined by the Court of Appeal adversely to the appellant.

35. Appeals to a broader, or alternatively more confined, enquiry miss the point; what has to be satisfied is the statutory test of "*necessary condition*" and the appellant failed to call evidence sufficient to satisfy the statutory test of "*necessary condition*"; the Court of Appeal found that such factual material as was available to inform the enquiry tended against, not in favour of, the appellant and the Court of Appeal was entitled to so find as a matter of fact.

36. At paragraph 34 of her submissions, in the last sentence, the appellant appears to propound a proposition that in a "*spillage*" case, an inference as to causation "*can be drawn*"; if that is meant to assert that there is some special rule relating to spillage cases, it is self-evidently wrong as noticed by Hayne J in *Kocis* case; whether an inference can be drawn depends on an analysis of the facts proved in the evidence – and the sufficiency of those facts to discriminate between conjecture and proof. Whether it should be drawn depends on whether or not the facts so proved persuade the trier of facts that one of the possibilities preponderates, by however little, so that the Court is not left struggling with possibilities of equal degrees of probability. The "*should*" proposition is a factual judgment determined on all the evidence. In *Condos v Clycut Pty Limited* [2009] NSWCA 200, the Court of Appeal synthesised the principles to be deduced from the leading cases on inference drawing at paragraph 68. The respondent adopts that synthesis by way of submission:

> "*In order for the appellant to succeed against either or both respondents, he had to adduce evidence supporting a positive inference implying negligence on their part, an inference which arose as an affirmative conclusion from the evidence and one established to the reasonable satisfaction of a judicial mind. The evidence had to rise above the level of conjecture, could not be based on possibilities but had to be established as a matter of probability, and had to do more than give rise to conflicting inferences of equal degrees of probability: Bradshaw v McEwans Pty Ltd (1951) 217 ALR 1 (at 5); Luxton v Vines [1952] HCA 19; (1952) 85 CLR 352 (at 359 - 360) per Dixon, Fullagar and Kitto JJ; Jones v Dunkel (at 304 – 305) per Dixon CJ; (at 310) per Menzies J, (at 318 – 319) per Windeyer J; Girlock (Sales) Pty Ltd v Hurrell [1982] HCA 15; (1982) 149 CLR 155 (at 161–2) per Stephen J, (at 168) per Mason J; Anikin v Sierra [2004] HCA 64; 79 ALJR 452 (at [45] – [46]) per Gleeson CJ, Gummow, Kirby and Hayne JJ. It was necessary that "according to the course of common experience the more probable inference from the circumstances that sufficiently appear by evidence or admission, left unexplained, should be that the injury arose from the defendant's negligence. By more probable is meant no more than that upon a balance of probabilities such an inference might reasonably be considered to have some greater degree of likelihood": Holloway v McFeeters [1956] HCA 25; (1956) 94 CLR 470 (at 480 – 481) per Williams, Webb and Taylor JJ. A court is entitled to draw inferences*

from "slim circumstantial facts that exist so long as that goes beyond speculation": Progressive Recycling Pty Limited v Eversham [2003] NSWCA 268; (2003) 40 MVR 141 (at [7]) per Young CJ in Eq (with whom Ipp JA and Davies AJA agreed). The inference must be available and be considered to be more probable than other possibilities: Jackson v Lithgow City Council [2008] NSWCA 312 (at [12]) per Allsop P (Basten JA and Grove J agreeing)."

37. The appellant's appeal to *Blatch v Archer* (1774) 98 ER 969 at 970 is unsupported by any factual analysis of how it applies in the circumstances of this case – it should be put to one side.

38. In paragraph 36 of her submissions, the appellant rehearses cases involving shifting evidential onuses; s.5E denies appeal to that type of reasoning: the Ipp Report is available at least (the respondent would say, at most) to identify the purpose informing the legislation – at paragraph 57 of its reasons for judgment, the Court of Appeal extracts the relevant portions of the Report – and identifies onus-shifting and "*gap jumping*" as the heresy to be eradicated by s.5E.

39. The onus-shifting submissions of the appellant should be rejected.

40. In paragraph 38, the appellant submits "*there is no permissible basis for the conclusion that the debris had come onto the floor in the 10 or 20 minute intervals immediately preceding the appellant's fall*". That submission entirely misses the point: the finding in paragraph 66 of the Court of Appeal, which is unchallenged, that periodical inspections and cleanings were all that reasonable care required, necessarily required the plaintiff to call ***some*** evidence that the dangerous article had been on the floor for a time sufficient for it to be located and removed by the application of a reasonable system of inspection and cleaning. That she failed to do for the reasons given in the penultimate sentence of paragraph 66 of the reasons of the Court of Appeal which recognises that she might have been able to prove her case by inference, but called insufficient evidence to enable the inference to be drawn. The submission made in paragraph 38 by the appellant reverses the onus of proof. It should be rejected.

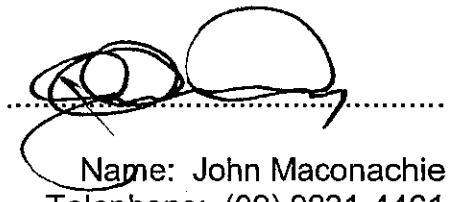
41. The submissions made in paragraphs 40, 41, 42 and 43 should be rejected. They are answered completely by reference to s.5E – the appellant failed to call evidence sufficient to elevate the possibility of breach being connected to cause in the manner dictated by s.5D(1)(a); it is not open to her to take out of context statements by Campbell JA analysing the dearth of evidence provided by the appellant and then assert, expressly or implicitly, that it was a "*finding*" unsupported by evidence, which the appellant asserts but does not establish "*would have been within* (the respondent's) *knowledge and not the appellant's*".

42. The "*maybe*" in paragraph 70 of the reasons of Campbell JA, adopted by Handley AJA and Harrison J, is the equivalent of the "*might*" in paragraph 57 of this Court's judgment in *Adeels Palace*.

43. The case can, and should, be disposed of on the basis of an insufficiency of evidence.

44. The appeal should be dismissed with costs.

Dated 1 July 2011



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