condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.' See also B Madden and T Cockburn, 'Establishing Causation in difficult cases: Can material contribution bridge the gap?' (2011) 105 *Precedent*, p.24. **23** Discussed above at note 16 and accompanying text. **24** [2010] NSWCA 343, [66]. **25** *Ibid*, at [79]-[83]. **26** (2008) 236 CLR 510; [2008] HCA 40, [17]. **27** [2010] NSWCA 343, [69]. See also [80]. **28** *Ibid*, at [80]. **29** *Ibid*. **30** *Ibid*, at [12] (Allsop P). **31** *Ibid*, at [81]. See also [12]. **32** (2008) 236 CLR 510; [2008] HCA 40, [3]-[4], [19]-[20], [53]-[55]. **33** *Tucker v Tucker* [1956] SASR 297; *McHale v Watson* [1966] HCA 13, (1966) 115 CLR 199, 205, 208, 234.

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Slip and fall on school ground

Garzo v Liverpool/Campbelltown Christian School Ltd & Anor [2011] NSWSC 292

By Joshua Dale

In the recent case, *Garzo v Liverpool/Campbelltown Christian School Ltd & Anor*,[1] at issue was the liability of the school and its maintenance contractor to a pedestrian who fell on school grounds.

The plaintiff sued in respect of 'the quite serious' injuries she suffered[2] when she fell walking across a carpark pedestrian crossing. It was raining on the day of injury, albeit only lightly, and it was alleged that unsuitable non-slip paint had been used.

Garling J's comments on the proper way to plead a breach of duty were from the outset interesting. His Honour affirmed that a proper pleading of the *Civil Liability Act* 2002 (NSW), s5B(1)(a), involves the clear articulation of the 'risk of harm', including the allegations made whereby that risk was foreseeable or whether a defendant should have known of such risk.[3] The question to be asked is 'Was the defendant obliged to take precautions?'

In considering CLA s5B(1)(a), his Honour emphasised that the knowledge of the parties concerned, whether actual or constructive, must be determined with the knowledge as at the date of the alleged negligence. His Honour warned of the use of hindsight in determining actual or constructive knowledge, with specific reference to the weight to be placed on expert evidence. Garling J affirmed, "It would be wrong to take into account [the results of expert reports] when considering whether either of the defendants ought to have known of the relevant risk of harm." His Honour had regard to conclusions drawn from expert evidence – in particular, that the pedestrian crossing was 'of a typical kind regularly seen' and that large numbers of people of various ages and motor skills use it – that no issues had been recorded or pleaded.[4] Therefore, no evidence had been presented indicating that the risk of harm was one that the defendants 'ought to have' known about. The risk was not foreseeable so neither the school or the contractor could be negligent.[5] Subsequently, Garling J found that the plaintiff had slipped on a damp painted surface, but otherwise found against the plaintiff on every issue.

Looking to s5B(1)(b), Garling J rejected the submission posed by the plaintiff that the risk of harm was 'not insignificant'.[6] His Honour had regard to factors such as the extensive usage of the crossing from a variety of people of different ages, in varying weather conditions, and the fact that pedestrian crossings are 'commonly encountered in the course of daily life'. His Honour concluded that a pedestrian is capable of 'adjusting their gait' to cope with differences in slippery conditions, and that with no obvious defect to the crossing being identified, the risk was so small that within the meaning of s5B(1)(b) it could not be said to be 'not insignificant'.

His Honour did not accept that there had been any breach of the duty to take 'reasonable precautions' under s5B(1)(c).[7] He preferred evidence that there was adequate friction in the painted surface, preferring the defendant's expert evidence in this regard. It was held that the slip resistance of the pedestrian crossing was satisfactory for a 'normal stride and pace'.[8]

In regards to causation, his Honour found that while the crossing was wet from a light drizzle, there was nothing out of the ordinary about the painted crossing and said that 'except for the exceptional cases determined under s5D(2), it is now well established that factual causation is to be determined by the "but for" test in all cases'.[9]

However, his Honour explored how to prove that a 'particular harm' has been caused by the offending negligence or breach of duty. Garling J said that in order to establish factual causation under CLA s5D(1)(a), a plaintiff would need to establish that a breach of duty 'was a necessary condition' in the cause of any physical injuries. His Honour pondered the idea that if the crossing was 'very slippery',[10] then it would be possible to find that if the friction of the paint was inadequately low, in those circumstances it could have played a role in the cause of the fall. However, he could not reconcile that view with the other evidence in this case. >>

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

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

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

With special thanks to Andrew Morrison SC.

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

Woolworths Ltd v Strong [2010] NSWCA 282

By Ian Newbrun

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

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

THE FACTS

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

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

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

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