COMMON SENSE causation in SLIP-AND-FALL CASES

By Travis Schultz

The issue of causation in slip-and-fall cases is not uniquely difficult in claims against public authorities, but is an element of the tort of negligence that is frequently problematic for plaintiffs whose misfortune has arisen out of them stepping on a foreign substance, wherever it may be.

While the content of a duty of care may vary according to the circumstances of occupation, the causation problem is one that has to be tackled head on by all plaintiffs in slip-and-fall cases, irrespective of whether their fall occurred in a shopping centre, a private home or a public place.

Since the *Civil Liability Act* in its various forms was introduced across all Australian states, there have been differing views on the extent to which it alters the common law tests of causation. Initially, most of us thought it would raise the high jump bar even higher for plaintiffs in slip-and-fall cases, but the decisions of Australian Courts since 2002 have collectively shown mixed results.

A recent decision of the High Court in *Strong v Woolworths Limited*[1] has given some very real guidance on the issue and would suggest that determining causation in slip-and-fall cases ought to be done by the simple application of common sense.

THE CASES

Historically, claims by plaintiffs who have slipped and fallen on a foreign substance have met with varying success. Usually, unsuccessful claims fail because of an inability to establish causation. Some examples of decisions in recent years include:

- *Ragnelli v David Jones (Adelaide) Pty Ltd* [2004] SASC 393 (2 December 2004) – where the plaintiff slipped on a clear oily liquid on the landing between two flights of stairs in a David Jones department store which was often used by people going to and from the food hall area. The plaintiff was unsuccessful at trial but succeeded on appeal, as the system of inspection in which one cleaner inspected the stairs only four times in the course of the day was found to be inadequate. Doyle CJ thought that hourly inspections were required at a minimum, whereas Gray J thought that something close to continuous observation was required, perhaps as often as every few minutes.
- *Cairns v Woolworths Limited & Ors* [2005] ACTSC 95 (30 September 2005) – where the plaintiff succeeded in a claim arising out of her slipping on potato chips in the common area of a shopping centre. The trial judge found that a system of inspection by cleaners once every 30 minutes, with a longer gap at the time of cleaner's lunch breaks, was inadequate. It was thought that if there had been a system of inspection every 15 minutes then, on the balance of probabilities, the spillage would probably have been detected in time to avoid the plaintiff's fall.
- *Timberland Property Holdings Pty Ltd v Julie Bundy* [2005] NSWCA 419 (30 November 2005) – where the plaintiff had slipped and fallen on an oil and grease patch on the concrete floor of a multi-level car park. The plaintiff succeeded at first instance and an appeal was dismissed as, on the evidence, the oil or grease had probably been present for some period of time.
- *Gaskel v Denkas Building Services Pty Ltd & Ors* [2006] NSWSC 232 (23 June 2006) – where the plaintiff slipped and fell on a pool of water in a toilet in the defendant's building, but failed to establish a breach of duty or causation, as there was a reasonable cleaning system in place and no prior complaints.
- *Kook v Caftor Pty Ltd t/as Mooseheads Bar & Cafe* [2007] ACTSC 1 (29 January 2007) – where the plaintiff succeeded after slipping and falling on some broken glass on a nightclub dance floor. The dance floor was inspected every 15 minutes but this was thought to be inadequate given that the patrons were encouraged to buy alcoholic drinks which were often taken to the dance floor, such that reasonable care required a much shorter timeframe of inspection, if not constant observation.
- *Gardner v Haltuli Pty Ltd* [2007] QSC 149 (20 June 2007) – where the plaintiff slipped on a diesel fuel spill on the concrete forecourt of service station but failed in his claim as the system of inspection – on arrival of the employee in the morning and up to a further four to five times during each shift – was found to be reasonable.
- *Verela v Harris Farm Markets Pennant Hills Pty Ltd* [2008] NSWDC 116 (18 July 2008) – where the plaintiff succeeded in a claim after slipping on crushed grapes in a fruit and vegetable market. The system of inspection by cleaners required rotations every 15 minutes but the court wasn't satisfied that their system was being carried out as the fact that the grapes were crushed suggested that they had been there for some time and trodden on by other customers.

>>

> The majority took the view that the fact that the fall occurred around lunch time did not, of itself, provide a basis for concluding that the chip had only recently been dropped on the floor.

- *Wynn Tresidder Management v Barkho* [2009] NSWCA 149 (16 June 2009) – the plaintiff succeeded after slipping and falling on a spill of water that had leaked from a roof and onto a carpeted ramp at the defendant's shopping centre. The problem with the leak was known to centre management and the cleaning contractors had placed three warning signs around the area and mopped the floor area every 20 minutes or so. The cleaning contractors were found to have discharged their duty of care, but the shopping centre was found to have been negligent as it should have barricaded the area when the leak was discovered.
- *Alzawy v CPT Custodian Pty Ltd* [2009] NSWDC 304 (30 October 2009) – the plaintiff was carrying her baby while walking through a shopping centre when she slipped on an orange-red coloured sauce substance and fell. Her claim failed because the cleaning system provided for 15 minute rotations of cleaners and there was no objective evidence that the spillage had been in existence for a significant period of time and causation could not be established.
- *Maynard v Airlite Cleaning Pty Ltd* [2011] WADC 32 (2 March 2011) – the plaintiff failed in her claim brought after she was injured when she slipped on a pool of water in a shopping centre. The evidence suggested that a cleaner had inspected the area only two or three minutes before the fall.
- *Davies v George Thomas Hotels Pty Ltd* [2010] NSWDC 55 (21 April 2010) – the plaintiff slipped on water that had been leaking from a toilet pan in a bathroom in the Bradbury Inn Hotel. The plaintiff succeeded as the trial judge thought that the occupier could have instituted an emergency cleaning system or put signage in place.
- *Caldwell v Coles Supermarkets Pty Ltd* [2010] NSWDC 136 (11 June 2010) – the plaintiff was a truck driver who slipped and fell on a patch of oil and grease on a Coles loading dock and was successful in his claim.
- *Arabi v Glad Cleaning Service Pty Ltd* [2010] NSWCA 208 (23 August 2010) – the plaintiff had slipped and fallen on a pedestrian ramp at the Bankstown Centro Shopping Centre. The system of cleaning required inspections at intervals of about 20 minutes subject to variations of up to 10 minutes either way. The plaintiff's claim was dismissed as causation could not be proven in those circumstances, and an appeal to the New South Wales Court of Appeal was dismissed.
- *Comitogianni v Sydney Flower Market & Ors* [2010] NSWDC 215 (1 October 2010) – the plaintiff's claim succeeded when she slipped and fell on a flower on wet concrete at a flower market. Liability was established because of the absence of cleaners during peak periods (before 8 o'clock in the morning) and because there was evidence that cleaners were rarely seen on the floor and were presumably cleaning infrequently.
- *Jajieh v Woolworths Ltd* [2010] NSWDC 239 (26 October 2010) – the plaintiff succeeded when she slipped and fell on water on floor tiles in a Big W store. The water had been reported to staff at least twice before the plaintiff's fall. The first complaint was at least 20 minutes before her fall and liability was established.
- *Wakeling v Coles Group Limited UI* [2011] NSWDC 20 (4 April 2011) – the plaintiff succeeded after slipping on water on the floor of the defendant's supermarket which, on a rainy day, had been brought in by wet shopping trolleys.
- *Lowe v AMP Capital Investors Limited & Ors* [2011] QDC 267 (28 October 2011) – where the plaintiff slipped and fell on a liquid on the terrazzo floor of a shopping centre. The plaintiff succeeded as the trial judge accepted that the floor had not been inspected in the one hour and 12 minutes before the plaintiff's fall, despite the cleaning contract requiring inspections at least every 26 minutes.

As it is the plaintiff who bears the onus of establishing their case on the balance of probabilities, where direct evidence is not available to demonstrate how long a substance has been on the floor, generally speaking, causation can be established only by identifying a deficiency in the system of inspection. Until the High Court handed down its decision in *Strong*, the views of the New South Wales Court of Appeal were such that even a lengthy period of time without inspection of the relevant area was inadequate for a plaintiff to prove causation if it could not be concluded that the offending substance was more likely than not to have been there for longer than a reasonable period.

THE *STRONG* DECISION

On 24 November 2004, the plaintiff, Mrs Strong, was walking through the Centro Taree Shopping Centre. She approached the entrance of a Big W store operated by Woolworths, which was conducting a 'sidewalk sale' in a common area of the shopping centre. Woolworths had erected plant stands outside of their Big W store which formed a corridor leading to the store's entry. There was a food court area adjacent to the Big W store. The plaintiff, who walked with the assistance of crutches, brought the tip of her crutch into contact with a potato chip or some grease from the chip and her crutch slipped out from under her, causing her to fall. Big W had no system in place to inspect the sidewalk sale area from the time that the store opened and the cleaners engaged by the shopping centre did not consider the sidewalk sale area to be one which

they were responsible to inspect. The trial judge (Robison J) had found that Big W did not have a reasonable system in place to ensure that slip-and-trip hazards were identified and removed and the plaintiff succeeded. Woolworths appealed from that decision solely on the basis of causation.

The New South Wales Court of Appeal (Campbell JA, with whom Handley AJA and Harrison J agreed) found that, after having regard to Section 5E of the *Civil Liability Act* 2002 (NSW), the plaintiff had failed to establish on the balance of probabilities that Woolworths' failure to have in place a reasonable system of inspection and cleaning had caused her fall. In coming to its conclusion, the Court of Appeal observed that the plaintiff's fall had happened at about lunch time and 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 system of cleaning. The Court of Appeal thought that there was nothing about the physical appearance of the chip (that is, that it was dirty or cold) that could lead to the inference that it had been there for a long period of time and no evidence to enable a court to conclude that it was more likely than not that the chip had not been dropped shortly before the plaintiff's fall. The Court of Appeal thought that given that chips are not normally eaten in the morning, as the fall occurred at around lunch time, the lengthy period of time without inspection of the sidewalk sale area did not establish causation.

In the High Court, the majority (French CJ, Gummow, Crennan and Bell JJ) thought that a determination of the question of causation turned on a 'consideration of the probabilities'.[2] The majority observed:

> '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. "Negligence", for the purpose of Pt 1A, means the failure to exercise reasonable care and skill. 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 s5D. 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."
>
> The determination of factual causation under s5D(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.'

The majority took the view that the fact that the fall occurred at around lunch time did not, of itself, provide a basis for concluding that the chip had only recently been dropped on the floor. The majority were attracted to the idea that a reasonable system of inspection required inspections at least every 20 minutes and that, accordingly, the far greater period of time between when the Centre opened and 12.10 pm (20 minutes before the plaintiff's fall) made it far more likely that the chip had been deposited in that period, than in the much shorter period of 20 minutes leading up to the plaintiff's fall. The Court concluded:

> '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 >>

As the plaintiff bears the onus of establishing their case on the balance of probabilities, where direct evidence is not available ... generally speaking, causation can be established only by identifying a deficiency in the system of inspection.

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". 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.

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. 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.'

While some might quibble with the High Court's rejection of the notion that hot chips cannot be eaten prior to lunch time (as Heydon J did in his dissenting judgment), it's difficult to fault the High Court's logic that causation can be established on the basis of the probabilities established by timeframes.

CAUSATION SINCE *STRONG*

Although the High Court's decision was only handed down in March, by April this year, the temporal approach to causation was already being referred to as 'the *Strong* approach'."[3] In *Nudd v State of Queensland*,[4] McGill J in the Queensland District Court was called upon to determine a claim brought by a prisoner against the state of Queensland. The plaintiff had slipped on a small patch of water in the common area of his unit block at the Sir David Longland Correctional Centre. Another inmate was the designated 'cleaner' (and was paid a small fee for doing so) and prison officers were required to carry out regular patrols through the unit, although it was not suggested that those officers had received specific instructions to look out for spillages.

McGill J was 'not persuaded that as a general proposition, the defendants' duty of care required it to make an inspection specifically of the floor in the unit at hourly intervals in order to guard against the risk of contamination which would produce a risk of slipping and falling'.[5] His Honour went on to observe, however, that the plaintiff had mobility issues as he was using crutches as a result of having had surgery and a hospitalisation only 12 days earlier. His Honour determined that, 'Accordingly, in my opinion the content of duty of care owed to an individual with the mobility restrictions that the plaintiff had was higher than to the typical prisoner with no particular mobility restrictions'.[6] As a result, His Honour found that given that spillages in the area were foreseeable, there was an obligation to have some periodic inspections specifically of the floor. His Honour determined that even a small quantity of water on the floor could have been seen by someone who was specifically looking for it.

Given that the plaintiff's fall occurred at about 1:30pm, it meant that the area had been occupied by prisoners for about six hours (as they were allowed out of their cells at 6.00am). Consequently, His Honour thought that, 'On the approach in *Strong*, it is more probable than not that the inspection would have detected the water and hence prevented the fall and the plaintiff's injury. Hence, so long as reasonable care required a system of inspection of the kind referred to earlier at least every two hours, factual causation has been satisfied.'[7]

CONCLUSION

Public authorities and the occupiers of commercial premises are not strangers to being defendants to claims for damages as a result of injuries suffered in slip-and-fall accidents. While the plaintiff always bears the onus of establishing all elements of the tort of negligence, at least insofar as causation is concerned, the High Court's approach suggests that a very commonsense approach will be taken. It would seem that the *Civil Liability Acts* in their various forms in all Australian states have made little or no difference to the outcome of considerations of causation in public liability matters of this type. ■

Notes: **1** [2012] HCA 5 (7 March 2012). **2** At [34.]
3 *Nudd v State of Queensland* [2012] QDC 64 (23 April 2012) at [39].
4 *Ibid*. **5** *Ibid* at [27]. **6** *Ibid* at [29]. **7** *Ibid* at [39].

Travis Schultz *is a managing partner of Schultz Toomey Obrien Lawyers in Kawana, Queensland.* **PHONE** *(07) 5413 8900* **EMAIL** *tschultz@stolaw.com.au.*