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Précis Paper

Causation

Queen's Counsel Barry Toomey discusses causation in tort in light of the High Court case of *Strong v Woolworths* (2012) 246 CLR 182.

Discussion Includes

- The decision of the NSW Court of Appeal and the High Court in *Strong v Woolworths* (2012) 246 CLR 182
- The operation of section 5D of the *Civil Liability Act 2002* (NSW)
- The concept of materially contributing cause
- The proper construction of section 140 of the *Evidence Act 1995* (NSW)
- The ramifications of *Strong v Woolworths*

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Causation

1. In this edition of BenchTV, Barry Toomey QC (Barrister) and Ian Benson (Solicitor) presents on the High Court (French CJ; Gummow, Heydon, Crennan and Bell JJ) decision in *Strong v Woolworths* (2012) 246 CLR 182 which considered causation in negligence. Mr Toomey QC was lead counsel for the successful appellant, Ms Strong.

Material Facts of *Strong v Woolworths* (2012) 246 CLR 182

2. The appellant suffered serious spinal injury when she slipped and fell in the sidewalk sales area outside the entrance to a Big W store. The relevant area was under the care and control of the first respondent, Woolworths. Some years prior to the accident, the appellant had her right leg amputated above the knee and she walks with the aid of crutches. On this occasion, the tip of her crutch came into contact with a greasy chip that was lying on the floor of the sidewalk sales area and as a result she fell heavily, suffering a fractured spine with pain that will continue for the rest of her life.

Procedural History

3. The appellant sued Woolworths on the basis that it was negligent to allow, in an area for which they were responsible, a greasy chip to remain on the floor in that it poses a significant threat to members of the public using the area.

4. The appellant was successful at first instance, in the District Court before Robison DCJ. The defendant (respondent in the High Court), Woolworths, admitted that there was no system in place for inspection and cleaning at regular intervals so as to ensure accidents such as this did not occur. Woolworths further conceded that they had a duty to the appellant which they breached by failing to put such a system in place. The parties had agreed that cleaning should have been done at intervals of 15-20 minutes. The question that remained to be determined was whether causation had been established i.e. whether the damage suffered arose from the breach of the duty.

5. On appeal to the Court of Appeal, Woolworths was successful in setting aside the verdict on the basis that causation had not been established. The Court determined that it had not been established, nor could it be established, just when the chip had fallen onto the floor and accordingly the plaintiff was unable to prove that it was at a time when it would have been detected had there been a proper cleaning system in place.

Causation

6. It is common that the plaintiff in slip-and-fall type cases will not know when the spillage occurred whereas the organization responsible for cleaning may or may not know. This raises the difficulty that they must prove that it happened without direct knowledge that it happened at a time when a proper cleaning system would have ensured that it was cleaned up.

7. The plaintiff argued that there had been a period of 4.5 hours since the shopping mall had opened for business prior to the fall. The Court of Appeal (*Woolworths Limited v Strong* [2010] NSWCA 282) found that as the plaintiff could not prove that the chip had been deposited outside of the 15-20 minutes before her fall that her case had failed. The Court based its decision on the following 3 factual findings which indicated the chip was dropped at lunch time:

    i. Chips are a type of food some people eat for lunch [61].
    ii. The appellant's injury occurred at lunchtime [62].
    iii. 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 [68].

8. The relevance of the chip being dropped at lunch time was that if lunch time was said to begin at 12, it was equally likely that the chip was dropped in the period between 12-12:15 and 12:15-12:30, such that the plaintiff could not prove that the lack of adequate cleaning systems was the cause of her damage. To be clear, according to the Court of Appeal's reasoning, the plaintiff needed to prove it was more likely that the chip had been dropped in the period 12-12:15 given a reasonable cleaning system would have removed it, which she was unable to do.

The High Court: *Strong v Woolworths* (2012) 246 CLR 182

9. The High Court determined that each of the factual findings relied upon by the Court of Appeal were either unsupported or of such little weight to justify the conclusion that the chip had been dropped at or about lunch time. For example, noting that chips are often eaten for breakfast or as a snack throughout the day.

10. Given the mall was open for 4.5 hours, the High Court explained that for the plaintiff to succeed in this case, it must be shown that the chip was more likely than not to have been dropped in the time preceding 20 minutes before the accident i.e. between 8am-12:10pm and not 12:10-12:30pm. Given the majority found that it was mere speculation as to the chip

being more likely to have fallen at lunch time rather than earlier, the pure mathematical probabilities indicate the chip was more likely to have fallen in the longer period more than 20 minutes prior to the accident.

11. At [34], the majority stated:

> 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.

12. That is, there was no evidence to suggest that it fell at any particular period within 8am-12:30pm and hence, relying on the fact that there is substantially more time between 8am-12:10pm than between 12:10-12:30pm, it was more likely that the chip was dropped in the period 8am-12:10pm which was more than 20 minutes prior to the accident. As such, were there a reasonable cleaning system, more likely than not, the chip would have been removed and the accident would not have taken place.

Section 5D of the *Civil Liability Act 2002* (NSW)

13. 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). Among the appellant's grounds of appeal was the contention that the Court of Appeal had adopted an unduly restrictive interpretation of s 5D.

> **SECTION 5D:**
> ***General principles***
>
> *(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").*
>
> ...

14. The section requires that the negligence "was a necessary condition of the occurrence of the harm." Mr Toomey QC notes that there is some confusion as to whether the 'but for' test is all that is required for the test under s 5D(1)(a). In particular, a cause which is merely a contributing cause rather than the sole cause would have grounded a claim under the common law.

15. 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."

16. The High Court determined that the Court of Appeal's reasons should not be read as confining the operation of s 5D in the way suggested by the appellant. 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. In any event, the issue raised by the appeal did not turn on the Court of Appeal's analysis of proof of factual causation under the statute. In issue was 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.

17. The High Court determined that given the clear preponderance of mathematical probability, they were entitled to find that such a causal link was established between the lack of adequate cleaning systems and the injury suffered.

<u>The History of Causation Prior to *Strong*</u>

18. The majority's reliance on probabilistic reasoning at [34] was drawn from Hayne J's judgment in *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408:

> 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.

19. As has already been said, 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. That conclusion was based on a consideration of three circumstances which the High Court disapproved of. Hence, probabilistic reasoning was applied, there being no basis for concluding that the spill was likely to have occurred at some particular time rather than any other time.

Section 140 of the *Evidence Act 1995* (NSW)

20. Mr Toomey QC argues that the most interesting aspect of the decision in *Strong* is its interaction with s 140 of the *Evidence Act 1995* (NSW).

> **SECTION 140:**
> ***Civil proceedings: standard of proof***
>
> *(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.*
> *(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:*
> *(a) the nature of the cause of action or defence, and*
> *(b) the nature of the subject-matter of the proceeding, and*
> *(c) the gravity of the matters alleged.*

21. The question of what the "balance of probabilities" means is a great unanswered question. In *Briginshaw v Briginshaw* (1938) 60 CLR 336, Dixon J stated, prior to the *Evidence Act* (1995), that in a civil proceedings it was necessary that a judge felt an "*actual persuasion"* in order to satisfy the balance of probabilities test. Odgers (2014) argues that, in accordance with the intention clearly put by the Law Reform Commission which drafted the legislation, the provision in the Act does not require any sort of belief in the mind of the judge and all that is required is what is written: a satisfaction of proof on the balance of probabilities.

22. The judgments of the court in *Strong* did not address the question. However, if what is required is an "actual persuasion", which Mr Toomey QC considers to be analogous to a "subjective belief", then in cases such as *Strong* the plaintiff can never succeed because the plaintiff solely relies upon time probability. The High Court explicitly stated that it had not been proved when the chip dropped. As a result, how can it be that the majority justices could be said to have been actually persuaded of causation when the facts cannot be proved by direct evidence. Mr Toomey QC states that it seems "to be anomalous" to talk about an actual persuasion in cases such as this and hopes the High Court will clarify the relevant standard given its importance in deciding circumstantial cases.

Implications

23. The decision in *Strong*, was particularly significant because the High Court illustrated the importance of probabilistic reasoning. This clarification of the use of a purely mathematical application of probabilities is particularly important in contexts such as this given there is virtually no evidence as to when the spillage actually occurred. Without such an approach,

plaintiffs in slip-and-fall cases would be unlikely to recover without actual proof of when the spillage occurred. Nevertheless, it is important to note that sole reliance on mathematical probabilities may only be justified in circumstances where there is no evidence for concluding that the relevant circumstance (the spill) was likely to have occurred at some particular time rather than any other time.

24. Furthermore, Mr Toomey QC notes that "it is a tribute to the Australian legal system, that a case involving someone without power or influence and nothing but a citizen's right and who suffers damage not by the loss of a huge block of stock in a large corporation nor millions of dollars in a contractual proceeding, but who suffers only personal injury, can have her case heard by the highest court in the land and determined according to law."

BIOGRAPHY

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Barry was admitted to the bar in 1967 and was appointed as Queen's Counsel in 1980. He is admitted to practice in Papua New Guinea. He specialises in criminal, personal injury and insurance law. He has appeared in many cases which have helped shape the Australian law, including Vocisano v Vocisano (1974 – whether counsel for an insurer can impugn their nominal party's evidence), Corporate Affairs Commission v Yuill (1991 – rights of persons being examined under Corporations Law to claim self-incrimination privilege), Habib v Commonwealth of Australia – multiple cases (2008-2009 – liability of Commonwealth for torts committed by other sovereign powers against Australian citizens outside Australia), Adeels Palace v Moubarak (2009 – limits of Modbury Triangle principle; interpretation of Civil Liability Act s5D), Dasreef v Hawchar (2011 – admissibility of expert evidence under s79 of the Uniform Evidence Act); and Strong v Woolworths (2012 – application of Probability Theory to evidence in "slip and fall" cases).

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Benchmark Link

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