IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S172 of 201

BETWEEN:

**KATHERINE STRONG**

Appellant

and

**WOOLWORTHS LIMITED T/AS BIG W ABN 000 014 675**

First Respondent

**CPT MANAGER LTD ABN 054 494 307**

Second Respondent



## APPELLANT'S SUBMISSIONS

**Part I: [certification that the submission is in a form suitable for publication on the internet]**

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

**Part II: [a concise statement of the issues the appellant contends that the appeal presents]**

2. Whether the New South Wales Court of Appeal erred in its finding that causation had not been established by the appellant.

3. Whether the New South Wales Court of Appeal erred in its findings as to causation relating to:

   a. What was available to be found by way of inference in the circumstances;

   b. The correct application of principles governing legal and evidential onus;

   c. The correct interpretation and application of ss.5D and 5E of the *Civil Liability Act* 2002 (NSW) in so far as they may have applied to the case; and

   d. The failure to direct itself as to the proper legal and evidential questions which arose in the case.

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Filed by: Leitch Hassen Dent
Solicitors
Level 12 162 Goulburn Street
Sydney NSW 2000
Tel: (02) 9264 6644
Fax: (02) 9264 6622
Ref: MLB:20070815

**Part III: [certification that the appellant has considered whether any notice should be given in compliance with s.78B of the *Judiciary Act* 1903 (Cth)]**

4. The appellant certifies that it considers that no notice is required under s.78B of the *Judiciary Act* 1983 (Cth).

**Part IV: [citation of reasons of the primary and intermediate court in the case]**

5. The reasons of the New South Wales Court of Appeal have not been reported in an authorised report, and the medium neutral citation is *Woolworths Limited v Strong and CPT Manager Limited* [2010] NSWCA 282. The reasons of the District Court of New South Wales have not been reported in an authorised report, and a medium neutral citation has not been assigned, and the unreported citation is *Strong v CPT Manager Limited and Woolworths Limited t/as Big W*, District Court of New South Wales, Robison DCJ, unreported, 28 August 2009.

**Part V: [narrative statement of facts]**

6. The appellant sustained serious and disabling spinal injuries in a slip and fall incident that occurred on 24 September 2004 at about 12:30pm (Court of Appeal reasons ("CA") [2]). The incident occurred in an area where the first respondent had an exclusive right under its lease at '*Centro Taree Shopping Centre*' to conduct '*sidewalk sales*' at the frontage of its premises (a '*Big W*' shop), within a roughly square area that extended about 11m into otherwise common area and toward a food court (CA [3]). The shopping centre premises contained the first respondent's '*Big W*' shop, a related '*Woolworths*' supermarket, a food court and smaller specialty shops (CA [2]).

7. On the day of the incident the '*sidewalk sale*' had materials that included two large display stands (standing about shoulder high), each with three or four racks containing pot plants for sale (CA [4]). The stands were positioned to create a wide corridor leading to the entrance of the '*Big W*' premises (CA [5]).

8. Approximately four metres from the entrance to the premises the tip of the appellant's right crutch slipped from under her and she fell heavily (CA [6]). The appellant had undergone an amputation above the right knee decades before this incident, but by using crutches she had been able to achieve a high degree of mobility (CA [5]). The appellant had been walking in the corridor created by the plant stands with two friends and because she was actively involved in keeping pot plants she went to look at the plants immediately before her fall (CA [6]). While she was keeping a careful lookout for potential hazards, she had had her attention also partially engaged by the pot plants (CA [42]).

9. The first respondent had no system at all in place for taking precautions to avoid the risk of people slipping and falling in the sidewalk sales area (CA [19]). In that area the first respondent employed a '*people greeter*' – whose duties were to welcome people to the premises, check bags as customers left the premises, say goodbye, and included being constantly vigilant for spillages and the summoning of cleaners if spillages were identified (CA [15]-[17]) – and another worker employed to operate a

cash register for sales and to be vigilant as to the goods displayed in that area (CA [17]).

10. In the common areas of the shopping centre premises – which did not include the '*sidewalk sales*' areas – cleaning services were performed by a cleaning services company. In that company's contract with the shopping centre there was a specification that the premises be maintained so that the '*floors are to be free of any rubbish or spillages*' and a specification that the maximum cleaning rotation time for '*mall/common areas*' was 15 minutes (CA [9] and [11]-[14]).

11. One the day of the incident two cleaners worked (the first cleaner (Ms Walker) – known as the '*day cleaner*': transcript 96.17, in the hours 7.30am to 4.00pm and the second cleaner in the hours 11.00am to 2.00pm), and the second cleaner '*looked after the food court area, the public toilets and, if there was anything that needed to be cleaned up, she was called to do it*' (CA [12]), and there were security people who '*walked around continuously*' who would contact a cleaner by two-way radio if they noticed a spillage (CA [12]). The first cleaner was at lunch (a half hour period: transcript 100.38) at the time of the incident (having gone to lunch at about 12 noon to 12.10pm: transcript 100.38-43), meaning that at the time of incident there was one – not two – cleaners on duty. The second cleaner's duties related to the food court area, public toilets and attending to specific calls for cleaning: transcript 100.25, and the first cleaner duties related to moving constantly through the remainder of the shopping centre premises, assisting in the food court area if required: transcript 101.33-102.40, 123.34-124.8. As is developed below in paragraph 41, these facts were overlooked by the Court of Appeal.

12. At the time of the appellant's fall she did not see what had caused the fall (CA [20]). After her fall she saw '*a grease mark on the floor where my crutches had just gone down, where my right crutch had slipped*' and she gave evidence that '*the lady that was standing in the door got me the glass of water*' '*the Big W lady*' '*said it looked like a chip*' (CA [20]). After that remark was made to her she specifically looked at the spot where she had fallen, saw a grease mark, but could not see a chip (CA [20]). The '*people greeter*' employee completed documentation on the day of the accident which included ticking a box for '*slip (caused by slipping on substance on floor)*' and writing (in the box marked '*How did the injured person say the incident occurred?*') '*Kath was just walking along and just slipped on a chip on the floor*' (CA [21]). The appellant's friends similarly stated they had observed the presence of a '*stain, a grease stain on the ground*' and that '*there was definitely like a skid mark on the floor and what appeared to me to be a chip*' and that there was a chip at the end of the appellant's crutch (CA [22] and [23]).

13. After the appellant's fall she was assisted to a bench just outside the first respondent's premises where she sat for about 15 minutes and in that time she did not see a cleaner clean anything up (CA [7]). The appellant briefly and unsuccessfully attempted to do her planned shopping at the first respondent's premises and, again, when leaving the first respondent's premises did not see a cleaner cleaning anything up (CA [7]).

14. In the Court of Appeal the first respondent accepted that the appellant had no operative system at all on the day in question for taking precautions to avoid the risk of people slipping and falling in the sidewalk sales area, and it also accepted that the

evidence of the cleaning system that was employed outside that area was available to the Trial Judge to determine what was a reasonable system to apply in the sidewalk sales area. The appeal proceeded on that basis (CA [19]).

15. The Court of Appeal (Campbell JA; Handley AJA and Harrison J agreeing) relevantly held:

a. that the first respondent had breached its duty of care to the appellant (CA [63]); and

b. that the appellant did not establish causation of damage (CA [70]) for the purposes of s.5D(1) of the *Civil Liability Act* 2002 (NSW) (see, for example, CA [45], [51], [52] and [63]).

**Part VI: [argument]**

Construction of s.5D of the *Civil Liability Act* 2002 (NSW)

16. The Court of Appeal found that as the Trial Judge had not considered s.5D of the Act he had not '*decided the case in the way the statute requires*' which meant that as the Trial Judge '*has not addressed the questions the statute requires to be addressed, his conclusion cannot stand*' and the Court of Appeal '*must examine the question of causation of damage for itself*' (CA [52]).

17. In examining the question of causation for itself, the Court of Appeal considered the interpretation and application of s.5D of the Act (CA [44]-[51] and [53]-[54]). It concluded that '*"Material contribution", and notions of increase in risk, have no role to play in section 5D(1)*' (CA [48]).

18. As an issue raised in the interpretation of s.5D of the Act was whether it operated in a way so as to reduce the rights that exist at common law by modifying the legal test for causation, a matter to be considered in its interpretation was whether the language of s.5D of the Act had the requisite clarity of intention: '*It is a well recognised rule in the interpretation of Statutes that an Act will never be construed as taking away an existing right unless its language is reasonably capable of no other construction*': *Sargood Bros v Commonwealth* (1910) 11 CLR 258, 279, per O'Connor J, and '*It must be borne in mind that there is this common law right and that any interference with a common law right cannot be justified except by statute – by express words or necessary implication. If a statute is capable of being interpreted without supposing that it interferes with the common law right, it should be so interpreted*': *Melbourne Corporation v Barry* (1922) 31 CLR 174, 206, per Higgins J, see also D C Pearce and R S Geddes, *Statutory Interpretation in Australia*, 6th Edition, Butterworths, 2006, [5.29], and the authors' statement as to the reasons of McHugh JA in *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284, suggesting that the presumption had – by the frequent statutory modification or abolition of ordinary common law rights – become '*admittedly weak these days*'. While the Court of Appeal recognised that the question for interpretation potentially had that effect, no regard was had to the presumption, and the Court of Appeal consequently approached the question of interpretation without any appropriate regard to the necessity for clarity of intention in the statutory language.

19. The Court of Appeal incorrectly stated that this Court's ultimate conclusion in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, [53], illustrated this operation of s.5D of the Act (CA [51]). The joint reasons in *Adeels Palace* do not have this effect and in fact expressly excluded consideration of the question: *Adeels Palace*, [44] and [45]. In *Adeels Palace*, [43], issue was raised in an postulating sense as to whether s.5D(1) of the Act differed to what was said by Mason CJ in *March v E and MH Stramare Pty Ltd* (1991) 171 CLR 506, 515, with respect to the exclusion of policy considerations in '*resolving causation as an issue of fact*'. Section 5D(1)(b) of the Act incorporates policy considerations: *Adeels Palace*, [42] and [43], but the cogency of the principles of causation discussed by Mason CJ in *March* is not undermined by that difference – if it exists – because policy considerations at common law impacted upon causation either by reference to the questions of duty and breach, because the causation inquiry is always postulated by reference to the breach of duty, and by reference to questions of remoteness, consistent with the retrospective nature of the causation inquiry: *Vairy v Wyong Shire Council* (2005) 223 CLR 422, [124] per Hayne J. However, the discussion by Mason CJ, in any event, suggests that beyond purely factual matters, common sense and experience implicitly accommodate policy or scope of liability matters: see the comments of Mason CJ, 509 (first full paragraph) and 518-519 (last paragraph carrying over).

20. Material contribution is an accepted – and orthodox – component of the '*but for*' common law test of causation. In *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 the House of Lords considered a common law action for damages for pneumoconiosis caused by inhalation of silica dust. The pursuer (plaintiff) had worked with a pneumatic hammer in the vicinity of a swing grinder. Both produced silica dust which he inhaled. Because of technological limitations at the time, there were no reasonable means to control silica dust from the pneumatic hammer, but there were available means to control silica dust from the swing grinders. The effect of the evidence was that the exposure to the silica dust was much greater from the pneumatic hammer than from the swing grinders. The question was whether the pursuer was entitled to recover damages for exposure to the silica dust from the swing grinders.

21. Lord Reid stated, 621: '*The medical evidence was that pneumoconiosis is caused by a gradual accumulation in the lungs of minute particles of silica inhaled over a period of years. That means, I think, that the disease is caused by the whole of the noxious material inhaled and, if that material comes from two sources, it cannot be wholly attributed to material from one source or the other. I am in agreement with much of the Lord President's opinion in this case, but I cannot agree that the question is which was the most probable source of the Respondent's disease, the dust from the pneumatic hammers or the dust from the swing grinders. It appears to me that the source of his disease was the dust from both sources, and the real question is whether the dust from the swing grinders materially contributed to the disease. What is a material contribution must be a question of degree. A contribution which comes within the exception de minimis non curat lex is not material, but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material.*' (Emphasis added)

22. Lord Keith stated, 626-627: *On these facts I think the pursuer has proved enough to associate his illness with the fault of the defenders, or at least to establish a prima facie presumption to that effect. The case for the defenders depends on the fact that the pursuer, as a steel dresser, engaged over the whole period of eight years in operating a pneumatic hammer on steel castings, was exposed much more immediately and in a much greater measure to silica dust released from these castings. I am prepared to agree, as did all the judges in the Court below, that the main source of silica dust inhaled by the pursuer came from this operation, a cause for which it is agreed the defenders were in no way to blame. It was accordingly maintained for the defenders that the pursuer must show that the dust released by their negligence from the swing grinders had contributed materially to the dangerous dust inhaled by the pursuer. As there was no evidence to show the proportions of the dust emanating from the various sources in the dressing shop inhaled by the pursuer his case, it was said, must fail. The pursuer has, however, in my opinion, proved enough to support the inference that the fault of the defenders has materially contributed to his illness. During the whole period of his employment he has been exposed to a polluted atmosphere for which the defenders are in part to blame. The disease is a disease of gradual incidence. Small though the contribution of pollution may be for which the defenders are to blame, it was continuous over a long period. In cumulo it must have been substantial, though it might remain small in proportion. It was the atmosphere inhaled by the pursuer that caused his illness and it is impossible, in my opinion, to resolve the components of that atmosphere into particles caused by the fault of the defenders and particles not caused by the fault of the defenders, as if they were separate and independent factors in his illness. Prima facie the particles inhaled are acting cumulatively, and I think the natural inference is that had it not been for the cumulative effect the pursuer would not have developed pneumoconiosis when he did and might not have developed it at all. The inference, of course, would have been different if it could be shown that the pursuer could not have inhaled any particles given off from the swing grinding operations, or that the particles negligently released from the swing grinding operations were released at intervals so infrequent, or in quantities so insignificant even if taken cumulatively, as to make it unreasonable to regard them as a material contributing cause of the pursuer's disease. But that, in my opinion, the defenders are unable to show. On the whole evidence I consider that the pursuer has discharged the onus that is upon him of showing that the defenders' fault was a material contributing cause of his illness.'* (Emphasis added)

23. Lord Reid's statement, 621, that the real question was whether the dust from the swing grinders '*materially contributed to the disease*' is, it is submitted, to be taken as equivalent to Lord Keith's description, 627, of the onus on the pursuer '*of showing that the defenders' fault was a material contributing cause of his illness*'. The phrase underlined demonstrates the causal connection of the material contribution. It materially contributes to the illness, therefore it is "a cause": if it did not materially contribute, it could not be a cause. Interpreted in that way, the decision in *Bonnington Castings* was clearly arrived at by applying the '*but for*' test. Since it was decided in 1956, *Bonnington Castings* has been accepted as a foundation stone of the law of causation: see, for example, *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515, per Mason CJ and *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307, 311, per Mason P.

24. The Court of Appeal's interpretation of s.5D(1) of the Act was premised on the incorrect legal conclusion that the '*but for*' test of factual causation did not include material contribution, although the words used in s.5D(1)(a) of the Act were inclusive – '*that the negligence was a necessary condition of the occurrence of the harm*'. It is submitted that the Court of Appeal has given effect to the sub-section as if the relevant words were '*the sole necessary condition of the occurrence of the harm*'. If that interpretation were correct it would exclude any case in which there were multiple causes and would emasculate the Act, although the words actually used in the Act strongly convey the inclusion in any particular case of multiple '*necessary condition*'.

25. The Court of Appeal's reasoning (CA [48] and [[49]) must rest on the text of s.5D of the Act being so confined in scope that it does not permit notions of material contribution or increase in risk. For the obvious reason that the *Review of the Law of Negligence* (September 2002) (the '*Ipp Report*'), from which the sub-section was derived, did not intend that outcome (as discussed below), language to that effect does not appear, nor is it capable of being implied.

26. The judgment does not include any appropriate analysis of the operative words and clauses in s.5D(1)(a) of the Act and of the words '*a determination that negligence caused particular harm*' in the opening words of s.5D(1) of the Act, but makes a bald statement to the effect that those words exclude the operation of material contribution and notions of increase in risk (CA [48]). This was a necessary matter for consideration: if it is accepted that the '*but for*' common law test for causation does not exclude cases of material contribution (as to which see generally *Bonnington,* supra, and Mason CJ in *March*, 514ff) what is there in the statutory test which does? A change in the law of such importance and effect is not, on the accepted rules of statutory interpretation, to be read into the statute without the legislature having made its intention quite plain. There is nothing here which does so.

27. Further, the Court of Appeal's interpretation and application of s.5D of Act is substantially at odds with the thrust of the *Review of the Law of Negligence* (September 2002) (the '*Ipp Report*'). Recommendation 29, particularly Recommendations 29(b)(i) and 29(d), compel the conclusion that the authors saw s.5D factual causation as including material contribution where '*negligence played a part in bringing about the harm*' and that '*in appropriate cases, proof that negligence materially contributed to the harm or the risk of harm may be treated as sufficient to establish factual causation even though the but for test is not satisfied*'. The Court of Appeal referred to the Review (CA [56]-[59]) in respect of a different matter and recorded (CA [58]) that in his Second Reading Speech the Minister, Mr Carr, said: '*We have adopted the approach in the Ipp Report to the duty of care and causation*' (emphasis added). It is clear that the Court of Appeal's interpretation of s.5D is incorrect.

Findings, inferences and onus

28. Where, in a case such as the present, a defendant has no system of cleaning and inspection in place, and there is no direct evidence as to when the debris came on to the floor, the question of causation necessarily involves whether, in all the circumstances, an inference will be drawn on the probabilities and a finding made that the absence of a reasonable system of cleaning and inspection caused a plaintiff's fall.

In '*spillage*' cases where this evidential question arises it has been answered without any reversal of the legal onus of proof by a *confined inquiry* (appellant's description) as to whether the mathematical probabilities are that the contaminant was present prior to the last reasonable cleaning interval (described as '*probability theory*'), or by a *broad inquiry* (appellant's description) less focussed upon the mathematics and more directed to causation as a common sense and experience inquiry, which seeks to avoid some of the potential pitfalls of the doubtful precision that the mathematics of probability theory can present.

29. Whilst there may be sound reason for a reversal of the legal onus in a situation where a defendant has no system of cleaning and inspection in place, or it is not being performed at the time of the incident – including the highly commercial nature of the modern business of retail supermarkets and the setup of the premises designed to capture attention to displayed product – s.5E of the *Civil Liability Act* 2002 (NSW) imposes the legal onus on a Plaintiff.

30. The correct approach to findings by inference to resolve the causation question arises in the context of the serious '*incongruity*' identified by Mahoney JA some twenty years ago in *Shoeys Pty Ltd v Allen* (1991) Australia Torts Reports ¶81-104: '*In the present case, the defendant's submission has something of incongruity about it: it suggests, in effect, that had the defendant had a better system of monitoring, it might not have prevented the accident and, accordingly, it is not liable because it had none. But that, of course, does not meet the conceptual difficultly which the argument poses*': 68,940, and: '*I do not think that the principle of causality puts a defendant who has no proper system for caring for a plaintiff's safety in a better position than if he had had a proper system in place*': 68,941: see also comments to a similar effect by Megaw LJ some thirty five years ago in *Ward v Tesco Stores Ltd* [1976] 1 All ER 219, 223.G-J.

31. In *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408 the various '*slippage*' cases concerning the approach to causation were collected. Hayne JA (as his Honour then was) discussed the principles to be applied in the confined inquiry, and commented as follows:

    a. The principles are not '*some special principle of law that is to be applied in slipping cases*' and the question of causation is a question of fact: 432, also 433.

    b. '*... 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*': 430, and the '*question of causation is to be resolved by consideration of the probabilities*': 430.

    c. Dealing with probabilities, as distinct from non-probabilities, '*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*': 430; '*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*': 430.

d. As to what may be resolved by the consideration of the probabilities, a '*probability theory*' approach: 430-431, could be discerned from the decision of the New South Wales Court of Appeal (Hope, Samuels and McHugh JJA) in *Rose v Abbey Orchard Property Investment Pty Ltd* (1987) Australia Torts Reports ¶80-122. The joint reasons in *Rose* stated: '*In many, if not most, "spillage" cases the plaintiff will fail to prove a causal connection between breach and damage unless he establishes how long the substance had been on the premises. But in some cases it may be possible to establish on the probabilities that a proper system would have eliminated the risk of injury even though it is not possible to determine how long the substance had been present*': *Rose*, 68,929. The joint reasons in *Rose* held that in circumstances where a reasonable system required inspection intervals of not more than 20 minutes, while the oil which caused the injury may have come on to the floor at any time in the hour before the accident, the 40 minute period between the last inspection and 2.50pm compared to the 20 minute period between 2.50pm and the time of the accident meant, '*we think, that as a matter of probability the oil was spilled before 2.50pm and not after that time. To so find is not to engage in speculation but to make a finding in accordance with probability theory*': 68,929.

e. Hayne JA observed of the probability theory that '*where there is nothing pointing to a particular time as the time of the occurrence, the longer the time under consideration, the more likely it is that the spillage occurred during that time than in a different, shorter period*': 432, and set out an example where the probabilities supported a finding of causation: a reasonable system required inspection intervals of not more than 60 minutes, on the day of the accident there was no inspection, the accident occurred 8 hours after the premises opened for business, '*If that is all that is known, it is of course possible that the substance upon which the plaintiff fell was dropped one minute or 59 minutes before the fall occurred but what are the probabilities? In my view it is open on those facts to conclude that it is more probable that the spillage occurred in the first seven hours of trading than it is that it occurred in the last hour. It would follow that had a proper system of inspection been implemented, it is more probable than not that the spillage would have been detected and removed. Implicit in the example I have given is that there is no basis for concluding that the spillage is more likely to have occurred at one particular time (or at some particular times) rather than others*': 432.

32. In *Kocis*, Ormiston and Phillips JJA discussed matters relevant to the broader inquiry:

a. Ormiston JA said, applying the test set out in *Medlin v State Government Insurance Commission* (1995) 182 CLR 1, 6 per Deane, Dawson, Toohey and Gaudron JJ: '*For the purposes of the law of negligence, the question whether the requisite causal connection exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of common sense and experience*', stated: '*It was therefore a question whether the failure to have in force on the morning in question a suitable means of detecting dangerous spillages and of ensuring that they were cleaned up was more probably than not a cause of the injury to*

*the appellant resulting from her slipping on the Pine-O-Clean in an aisle of the respondent's supermarket. This is not to be resolved by mathematical probabilities nor by reference to any supposed or ideal timetable whereby it might be assumed that the supervisor and the boy with the scissors broom might inspect or pass over the particular point where the Pine-O-Clean lay. Unless the cleaning system was actuated with precision at each point of the supermarket by some mechanical or computerised contraption, a thing inherently unlikely at the time of the accident, then the test must be broadly stated and resolved by the jury without regard to any supposed ideal timetable*': 410.

b. Phillips JA, (as he then was) applying the '*but for*' test for the purposes of his analysis: 418, noted that: '*The respondent's contention on this appeal is that in such cases [where the critical question is whether the necessary causal link is not established in the absence of any evidence of how long the substance occasioning the plaintiff's fall was lying on the floor before the accident] the absence of such evidence in itself precludes a plaintiff's succeeding because the plaintiff has then not established that had the defendant taken all reasonable measures for the safety of its customers the accident would not have occurred. It is only to put the same thing in other words, to speak in terms of "but for": has the plaintiff nonetheless established that the accident would not have occurred but for the defendant's negligence?*': 418. *'In either case, the plaintiff's case may be the stronger according to the number of periodic inspections that in the opinion of the jury should have occurred if the defendant had not been neglectful of reasonable precautions for the safety of its customers, but the timing of the last regular inspection for spillage (which should have been, but which was not, carried out) will not bear directly upon the issue of causation, at least where the negligence consists of more than one such neglect and failure. Unless the negligence itself consists of nothing more than that one omission, there is no need – or indeed justification, it seems to me – for posing the question of causation by reference to that last and latest inspection only. If the negligence lies in the defendant's failure to inspect and clean over a number of hours or perhaps even days, the question is whether that neglect – and not something less than that – was more probably than not a cause of the plaintiff's injury'*: 419.

c. Phillips JA noted that this broader enquiry was consistent with the reasons of Mahoney JA in *Shoey's*, 68,940, *Brown v Target Australia Pty Limited* (1984) 37 SASR 145, the reasons of Priestley JA in *Brady v Girvan Bros Pty Limited* (1986) 7 NSWLR 241 and Zelling AJ in *Drakos v Woolworths (SA) Limited* (1991) 56 SASR 431, 453, and continued: *'A jury properly instructed would have had no problem with causation in this case. Here you have a busy supermarket. It has a high incidence of slippery substances on the floor. It is only cleaned professionally at the beginning of each day. Detection of spillages occurring during the day is left to the observation and action of the supervisor and the staff. As the judge observed, what was everybody's responsibility was nobody's responsibility. It is an obvious inference from that state of affairs that a spillage might remain undetected and not removed for a long enough time to be causative of a plaintiff's injury such as occurred in this case'*, noting that this approach was *'entirely consistent with the question of*

*causation being approached as essentially a question of fact to be answered by reference to common sense and experience, the approach approved in March and recently confirmed in Medlin v State Government Insurance Commission (1995) 182 CLR 1 at 6'.*

d. Phillips JA, in considering the probability theory approach discussed in *Rose*, stated: *'That having been said, I confess to finding some difficulty in seeing how it was more probable than not that the spillage in question occurred before 2.50pm. It may be that because 60 minutes is three times as long as 20 minutes an oil spill was more likely to occur within the space of one hour than within the space of 20 minutes – although even that inference depends upon an assumption that the conditions affecting spillages, such as traffic use, remain constant. But if that inference can be drawn, it says nothing, to my mind, about the time at which any particular oil spill actually occurred, whether on the balance of probabilities or otherwise. Beyond the mere passage of time, there was nothing in the evidence to make it more probable that the oil on which the plaintiff slipped was in fact spilled before 2.50pm, rather than after it. But why was it necessary to resolve that question? It would surely have been sufficient – and therefore appropriate, with respect – to have posed the question of causation more directly, as I have suggested, with reference to the defendant's negligence, which was in failing to carry out any inspection for an hour, not just 20 minutes. Suffice it for present purposes to say that the answer to that question need not have depended upon determining whether the oil was spilt before or after 2.50pm'*: 424.

33. Because the answer to the causation inquiry is a question of fact in each case, aspects of, or application of, the more confined and broader inquiries will apply depending on the facts of the case, and items (a), (b) and (c) of paragraph 31 above – from the reasons of Hayne JA – outlined in respect of the more confined approach have equal force to those outlined in respect of the broader approach. Because of the factual nature of the inquiry, either approach may be displaced where there is evidence that is capable of safely informing the Court of the probabilities, as exemplified by the reasons of McHugh JA (as his Honour then was) in *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 241, 256 (solid jelly sold by a retailer in the premises, plaintiff slips on jelly in an '*advanced state of melting although some solid particles remained*'). In this case, the Court of Appeal made reference to the absence of evidence concerning the temperature of the chip, and other similar matters, (CA [67]), but that type of evidence – if it was available and if it was of a kind that a Court could safely act on – would be relevant only to the question of whether the more confined or broader inquiries should be displaced in favour of that type of evidence; it would not necessarily be decisive on the question of causation.

34. As the fact finding process – because of the absence of direct evidence – is by way of inference, the absence of any system of inspection or cleaning, or its non-performance at times relevant to the incident, will impact upon the appropriateness of an inference, and may permit the inference to be more comfortably drawn. Mahoney JA described the general approach to findings by inference, albeit in a *Jones v Dunkel* context, in *Fabre v Arenales* (1992) 27 NSWLR 437, 444.C-445.G, making the point that a finding by inference involves a two stage process: first, whether the inference can be drawn, and, second, whether it should be: 444.D, noting that matters such as

illogicality, irrationality, being unsupportable in fact or being otherwise unacceptable were relevant: 444.D. In a '*spillage*' case a relevant inference as to causation can be drawn, and in respect of a plaintiff's claim that causation should be established by inference, the issue is whether, in all of the circumstances otherwise proved, it should be.

35. Because in this case a *Jones v Dunkel* inference was not available – there was no system and therefore no witness to be called as to the performance of the system – a primary focus in principle as to whether an inference should be drawn is that implicit in the statements by Jordan CJ in *De Gioia v Darling Island Stevedoring & Lighterage Company Ltd* (1941) 42 SR(NSW) 1, 4, albeit in the setting of the sufficiency of evidence in a jury trial in respect of a *Jones v Dunkel* type inference, that in appropriate circumstances (in *De Gioia* where some of the facts essential to a plaintiff's case are peculiarly within the knowledge of a defendant and it is in the nature of things difficult for a plaintiff to produce evidence of them) '*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*', and similarly, to the same effect, that of Dixon CJ in *Hampton Court Limited v Crooks* (1957) 97 CLR 367, 371: '*But 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.*' In this case the appropriate circumstances include that the absence of a system of inspection and cleaning removes resort to the documents recording the performance and non-performance of the system, and removes witnesses to give testimony as to that performance and non-performance, making slight evidence appropriate and sufficient. Further, it is consistent with the long standing approach of the common law that '*all 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*': *Blatch v Archer* (1774) 98 ER 969, 970 per Lord Mansfield, cited by Gleeson CJ in *Swain v Waverly Municipal Council* (2005) 220 CLR 517, [17], and valuable in avoiding the incongruity identified by Mahoney JA in *Shoeys Pty Ltd v Allen* (1991) Australia Torts Reports ¶81-104, discussed above. Hence, an inference as to causation being established is available in this type of case, and may be drawn when the evidence that underlies the inference sought is slight, or very slight.

36. While it has been suggested that the English Court of Appeal were '*apparently prepared to reverse the onus of proof*' in *Ward v Tesco Stores Limited* [1976] 1 All ER 219: C Sapideen and P Vines (editors), *Fleming's The Law of Torts*, 10th Edition, Lawbook Company, 2011, [22.90], Lawton LJ in *Ward* spoke only to matters concerning the evidential onus that, on the facts, arose in respect of the defendant supermarket: 222.E, which reflected the approach of Erle CJ in *Scott v The London and St Katherine Docks* Company (1865) 3 H&C 596, 691, cited by Lawton LJ, and the same approach was adopted by Megaw LJ in *Ward*: 224.C-D. The *Ward* decision in respect of the evidential burden, was followed by the Full Court of the Supreme Court of South Australia in *Brown v Target Australia* (1984) 37 SASR 145, but was rejected by McHugh JA in *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 251, 251.D-252.C, who also questions the reasoning in *Brown*: 254.B. Because of the

consistency in principle with the matters referred to above, the *Ward* decision in so far as it establishes that in appropriate circumstances the evidential onus shifts to a Defendant in cases of this character should be accepted, but care does need to be had to the fact that matters of breach of duty discussed in cases such as *Ward* and *Brady* predate the decision of this Court in *Australian Safeway Stores Pty Ltd v Zalunza* (1987) 162 CLR 479, and any inquiry as to causation must be framed by reference to the breach of duty demonstrated. Further, the matters referred to above in respect of inferences and slight evidence substantively accommodate the shift of the evidential onus to a defendant. Because the proceedings were before a Judge alone, the evidential onus that shifts to a defendant in this type of case is that characterised by Wigmore as the '*risk of non-persuasion*': J D Heydon, *Cross on Evidence*, 7th Australian Edition, Butterworths, 2004, [7015].

37. In the present case – as developed below – causation may be established by application of either the more confined or broader approach. Where there is no system in place and a plaintiff establishes that a reasonable system required intervals of no more than $x$ minutes, the appellant submits that the effect may be that the evidential onus shifts to a defendant to show that had the reasonable system been operating the plaintiff's accident would still have occurred. Absent a defendant meeting that evidential onus the Court can (not must) draw the inference that the defendant's failure to enforce the reasonable system caused the plaintiff's fall.

38. Once the law is properly applied it is plain that factual causation was established. The sidewalk sale was in place from 8:00am and the incident occurred at 12:30pm. 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 (CA [13], transcript 100.38-43), so that a single cleaner was performing those duties. The cleaning intervals were at 15-minute or 20-minute intervals (the cleaning contract provided for 15-minute intervals, but the practice was to clean every 20 minutes (CA [9] and [14]). 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 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 (as was the effect of the evidence in *Hampton Court Ltd v Crooks* (1957) 97 CLR 367, 375).

39. In the absence of such evidence the 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).

40. The Court of Appeal's analysis of fact (CA [66]-[69]) does not – and could not – properly give rise to its factual conclusions (CA [66]): *'That gives rise to the possibility that, even if periodical inspections and cleaning had been carried out, with the minimum frequency required for the [first respondent] to be taking reasonable care, that she fell between the last such inspection and the time the [appellant] encountered it. The present is not a case in which one can infer that if the steps involved in taking reasonable care had been taken, the Plaintiff's harm was more likely than not to have not arisen. In this case, the particular hazard that the [appellant] encountered was not one with an approximate equal likelihood of occurrence throughout the day. She slipped on a chip near a food court at lunch time, and the reasonableness of the cleaning system depends on the range of items that is foreseeable might be dropped rather than just on the particular hazard a particular Plaintiff encountered. Because of those aspects of the facts, I am not prepared to draw that inference'*. Even if a weighting were allowed for the half hour before the appellant's fall, the probabilities still favour liability. The food court had, after all, been open for four and a half hours when the fall happened.

41. However, there are a number of serious errors within the Court of Appeal's analysis (CA [66]). First, there was no evidence that could support the finding that '*the particular hazard that the [appellant] encountered was not one with an approximate equal likelihood of occurrence throughout the day*'; no such evidence was adduced by the first or second respondents, although it would have been within their knowledge and not the appellant's. Second, the fact that only one cleaner was on duty at lunchtime (paragraph 38 above) does not permit the conclusion of differential likelihood at lunchtime. Third, the '*possibility*' referred to by Campbell JA is not an answer – for the reasons explained by Hayne JA in *Kocis v S E Dickens Pty Ltd* [1998] 3 VR 408, 430 (paragraph 31(c) above) – to the probabilities, but it was specifically treated as such. The Court of Appeal's treatment of that '*possibility*' in that manner is only explicable – other than from a failure to apply the fundamental principle identified by Hayne JA – on the basis that multiple necessary conditions were regarded by the Court of Appeal as excluded by the Act by reason of the reading of s.5D(1) of the Act contended for in paragraphs 24ff above.

42. The Court of Appeal discussed a list of evidential matters: the physical appearance of the chip, the chip's state of cleanliness, the sales parameters of the food court, spontaneously oozing substances from the chip, the temperature of the chip and whether the chip had been compressed by the crutch (CA [67]). None of those matters was determinative and many were not probative; they were the type of matters that could have displaced the more confined and broader inquiries as to causation in the sense exemplified by the reasons of McHugh JA in *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 241, 256 – see paragraph 33 above.

43. In this case, and in the absence of that type of evidence, the probative matters in the case relating to causation were the absence of any system of cleaning at all as that permitted debris to remain on the floor over extended periods, the lack of forensic controversy as to the fact that the appellant's fall was caused by the debris on the floor and the fact that the incident occurred at a time of day which meant that if adequate

cleaning services had been in place they would have been performed on many occasions prior to the appellant's fall. The Court of Appeal was incorrect in finding that the appellant had not discharged her legal and evidential onus in respect of causation.

**Part VII: [applicable statutes]**

44. Attached is a copy of Part 1A of the *Civil Liability Act* 2002 (NSW). As at 24 September 2004 each of the provisions in Part 1A applied. Since 24 September 2004, Part 1A has not been amended.

**Part VIII: [orders]**

45. The appellant seeks the following orders:

a. The appellant's appeal be allowed.

b. The Orders of the New South Wales Court of Appeal made on 2 November 2010 be set aside.

c. An order that the first respondent's appeal to the New South Wales Court of Appeal be dismissed with costs.

d. The first respondent pay the costs of the application for special leave to appeal and the appeal.

e. Such further or other Orders as this Honourable Court deems fit.

Dated: 10 June 2011

.....
Barry Toomey QC
(btoomey@jackshand.com.au)
Telephone (02) 9233 7711
Facsimile (02) 9232 8975

.....
T J J Willis
Telephone (02) 9233 7711
Facsimile (02) 9232 8975

.....
E G Romaniuk
Telephone (02) 9233 7711
Facsimile (02) 9232 8975
Counsel for the Appellant

# Part 1A Negligence

## Division 1 Preliminary

### 5 Definitions

In this Part:

***harm*** means harm of any kind, including the following:

(a) personal injury or death,

(b) damage to property,

(c) economic loss.

***negligence*** means failure to exercise reasonable care and skill.

***personal injury*** includes:

(a) pre-natal injury, and

(b) impairment of a person's physical or mental condition, and

(c) disease.

### 5A Application of Part

(1) This Part 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.

(2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

## Division 2 Duty of care

### 5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the person's position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

### 5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

## Division 3 Causation

### 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***).

(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.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For 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.

### 5E Onus of proof

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.

## Division 4 Assumption of risk

### 5F Meaning of "obvious risk"

(1) For the purposes of this Division, an ***obvious risk*** to a person who suffers harm is a risk that, in the circumstances, would have been obvious to a reasonable person in the position of that person.

(2) Obvious risks include risks that are patent or a matter of common knowledge.

(3) A risk of something occurring can be an obvious risk even though it has a low probability of occurring.

(4) A risk can be an obvious risk even if the risk (or a condition or circumstance that gives rise to the risk) is not prominent, conspicuous or physically observable.

### 5G Injured persons presumed to be aware of obvious risks

(1) In determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.

(2) For the purposes of this section, a person is aware of a risk if the person is aware of the type or kind of risk, even if the person is not aware of the precise nature, extent or manner of occurrence of the risk.

### 5H No proactive duty to warn of obvious risk

(1) A person (***the defendant***) does not owe a duty of care to another person (***the plaintiff***) to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:

(a) the plaintiff has requested advice or information about the risk from the defendant, or

(b) the defendant is required by a written law to warn the plaintiff of the risk, or

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

### 5I No liability for materialisation of inherent risk

(1) A person is not liable in negligence for harm suffered by another person as a result of the materialisation of an inherent risk.

(2) An ***inherent risk*** is a risk of something occurring that cannot be avoided by the exercise of reasonable care and skill.

(3) This section does not operate to exclude liability in connection with a duty to warn of a risk.

## Division 5 Recreational activities

### 5J Application of Division

(1) This Division applies only in respect of liability in negligence for harm to a person (***the plaintiff***) resulting from a recreational activity engaged in by the plaintiff.

(2) This Division does not limit the operation of Division 4 in respect of a recreational activity.

### 5K Definitions

In this Division:

***dangerous recreational activity*** means a recreational activity that involves a significant risk of physical harm.

***obvious risk*** has the same meaning as it has in Division 4.

***recreational activity*** includes:

(a) any sport (whether or not the sport is an organised activity), and

(b) any pursuit or activity engaged in for enjoyment, relaxation or leisure, and

(c) any pursuit or activity engaged in at a place (such as a beach, park or other public open space) where people ordinarily engage in sport or in any pursuit or activity for enjoyment, relaxation or leisure.

### 5L No liability for harm suffered from obvious risks of dangerous recreational activities

(1) A person (***the defendant***) is not liable in negligence for harm suffered by another person (***the plaintiff***) as a result of the materialisation of an obvious risk of a dangerous recreational activity engaged in by the plaintiff.

(2) This section applies whether or not the plaintiff was aware of the risk.

### 5M No duty of care for recreational activity where risk warning

(1) A person (***the defendant***) does not owe a duty of care to another person who engages in a recreational activity (***the plaintiff***) to take care in respect of a risk of the activity if the risk was the subject of a risk warning to the plaintiff.

(2) If the person who suffers harm is an incapable person, the defendant may rely on a risk warning only if:

(a) the incapable person was under the control of or accompanied by another person (who is not an incapable person and not the defendant) and the risk was the subject of a risk warning to that other person, or

(b) the risk was the subject of a risk warning to a parent of the incapable person (whether or not the incapable person was under the control of or accompanied by the parent).

(3) For the purposes of subsections (1) and (2), a risk warning to a person in relation to a recreational activity is a warning that is given in a manner that is reasonably likely to result in people being warned of the risk before engaging in the recreational activity. The defendant is not required to establish that the person received or understood the warning or was capable of receiving or understanding the warning.

(4) A risk warning can be given orally or in writing (including by means of a sign or otherwise).

(5) A risk warning need not be specific to the particular risk and can be a general warning of risks that include the particular risk concerned (so long as the risk warning warns of the general nature of the particular risk).

(6) A defendant is not entitled to rely on a risk warning unless it is given by or on behalf of the defendant or by or on behalf of the occupier of the place where the recreational activity is engaged in.

(7) A defendant is not entitled to rely on a risk warning if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or

Commonwealth that establishes specific practices or procedures for the protection of personal safety.

(8) A defendant is not entitled to rely on a risk warning to a person to the extent that the warning was contradicted by any representation as to risk made by or on behalf of the defendant to the person.

(9) A defendant is not entitled to rely on a risk warning if the plaintiff was required to engage in the recreational activity by the defendant.

(10) The fact that a risk is the subject of a risk warning does not of itself mean:

(a) that the risk is not an obvious or inherent risk of an activity, or

(b) that a person who gives the risk warning owes a duty of care to a person who engages in an activity to take precautions to avoid the risk of harm from the activity.

(11) This section does not limit or otherwise affect the effect of a risk warning in respect of a risk of an activity that is not a recreational activity.

(12) In this section:

***incapable person*** means a person who, because of the person's young age or a physical or mental disability, lacks the capacity to understand the risk warning.

***parent*** of an incapable person means any person (not being an incapable person) having parental responsibility for the incapable person.

### 5N Waiver of contractual duty of care for recreational activities

(1) Despite any other written or unwritten law, a term of a contract for the supply of recreation services may exclude, restrict or modify any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(2) Nothing in the written law of New South Wales renders such a term of a contract void or unenforceable or authorises any court to refuse to enforce the term, to declare the term void or to vary the term.

(3) A term of a contract for the supply of recreation services that is to the effect that a person to whom recreation services are supplied under the contract engages in any recreational activity concerned at his or her own risk operates to exclude any liability to which this Division applies that results from breach of an express or implied warranty that the services will be rendered with reasonable care and skill.

(4) In this section, ***recreation services*** means services supplied to a person for the purposes of, in connection with or incidental to the pursuit by the person of any recreational activity.

(5) This section applies in respect of a contract for the supply of services entered into before or after the commencement of this section but does not apply in respect of a breach of warranty that occurred before that commencement.

(6) This section does not apply if it is established (on the balance of probabilities) that the harm concerned resulted from a contravention of a provision of a written law of the State or Commonwealth that establishes specific practices or procedures for the protection of personal safety.

## Division 6 Professional negligence

### 5O Standard of care for professionals

(1) A person practising a profession (***a professional***) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

### 5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.

## Division 7 Non-delegable duties and vicarious liability

### 5Q Liability based on non-delegable duty

(1) The extent of liability in tort of a person (***the defendant***) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task delegated or otherwise entrusted

to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.

(2) This section applies to an action in tort whether or not it is an action in negligence, despite anything to the contrary in section 5A.

## Division 8 Contributory negligence

### 5R Standard of contributory negligence

(1) The principles that are applicable in determining whether a person has been negligent also apply in determining whether the person who suffered harm has been contributorily negligent in failing to take precautions against the risk of that harm.

(2) For that purpose:

(a) the standard of care required of the person who suffered harm is that of a reasonable person in the position of that person, and

(b) the matter is to be determined on the basis of what that person knew or ought to have known at the time.

### 5S Contributory negligence can defeat claim

In determining the extent of a reduction in damages by reason of contributory negligence, a court may determine a reduction of 100% if the court thinks it just and equitable to do so, with the result that the claim for damages is defeated.

### 5T Contributory negligence—claims under the Compensation to Relatives Act 1897

(1) In a claim for damages brought under the *Compensation to Relatives Act 1897*, the court is entitled to have regard to the contributory negligence of the deceased person.

(2) Section 13 of the *Law Reform (Miscellaneous Provisions) Act 1965* does not apply so as to prevent the reduction of damages by the contributory negligence of a deceased person in respect of a claim for damages brought under the *Compensation to Relatives Act 1897*.

### 6–8 (Repealed)