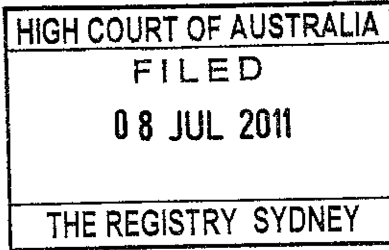
5 IN THE HIGH COURT OF AUSTRALIA
SYDNEY OFFICE OF THE REGISTRY

No. S172 of 2011 ~~S268~~ of 2010

BETWEEN:

KATHERINE STRONG

10 Appellant



and

WOOLWORTHS LIMITED

First Respondent

15 **CPT MANAGER LIMITED**

Second Respondent

APPELLANT'S REPLY

20 1. **Facts:** The "fact" (first respondent's submissions ("1RS"), par 9): *'the particular hazard that the appellant encountered was not one with an approximate equal likelihood of occurrence throughout the day* (CA [66])', is part of the Court of Appeal's erroneous reasoning process, and not a fact established by the evidence before that court. The evidence referred to in the appellant's submissions
25 ("AS", pars 38, 40 and 41) demonstrates that the evidence was contrary to the contended fact, noting that the first respondent does not challenge the evidence referred to in AS, par 38. This means that the Court of Appeal's reliance on the engagement of a second cleaner as providing '*some basis for believing that there was an increased risk of things being dropped in that area during the time period*'
30 (CA [68]) (because there was no other relevant evidence) was unfounded – at the time of the accident there was only one cleaner on duty.

2. The six identified facts set out in 1RS par 10, paraphrase the Court of Appeal's reasoning process at CA [67]. The first respondent says that there was '*no basis for*
35 *inferring*' any of those facts. The appellant says – as developed in AS par 28ff – that relevant inferences were available and should have been drawn as to the existence of those facts, and findings based on those inferences should have been made. The appellant says – in summary – that would have been the correct legal outcome if the Court of Appeal had applied the principles discussed in *Kocis v S E Dickens Pty Ltd*
40 [1998] 3 VR 408 to this case. The facts contended for by the first respondent, and the reasoning process in CA [67], reflect – in essence – the failure to correctly apply those principles. Further, when the principles to be applied are correctly understood, the reasoning process in CA [67] does not in any event provide full support for the position of the first respondent: if facts 10 (ii), (iii), (v) and (vi) are correct, then there
45 was an absence of factual matters that would displace the more confined and broader inquiries identified from the *Kocis* decision, as exemplified in the reasons of McHugh JA in *Brady v Girvan Bros Pty Ltd* (1986) 7 NSWLR 241 at 256 (solid jelly sold by a

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retailer in premises, plaintiff slips on jelly in an '*advanced state of melting although some solid particles remained*') (see AS par 33).

3. The contention that '*the Trial Judge's reliance on the cleaner's report exhibit A tab 11 establishes that the precise area of the fall was inspected or cleaned at 12:10pm*' or '*the Trial Judge failed to resolve the issue*' such that, in either case, '*the appellant cannot assert that the last inspection of the area excluded the "sidewalk sale" area*' (1RS par 13, also pars 11 and 12) is contrary to the finding of the Court of Appeal (CA [13] and [14]) that the cleaner was referring in her report to the '*common area beyond the place where the sidewalk sale was in progress, and the [appellant] fell*' and is contrary to the evidence before the trial court. It is also contrary to the substance of the first respondent's concession in the Court of Appeal (CA [19]) because if the fact now contended for were correct, no occasion arose for the Court of Appeal to adjudicate on the *system* in place when the purpose of the system had, according to the respondent's present argument, been put into effect. Yet the concession was '*that the [respondent] 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*' (CA [19]).

4. **Argument:** The first respondent's contentions as to the construction of the language of s.5D of the *Civil Liability Act* 2002 (NSW) (1RS, pars 15 to 20) carry little weight. The first respondent does not refer to the impact of the use of the indefinite article in the text of s.5D(1)(a) ('*was **a** necessary condition*') (AS, par 24); indeed in 1RS par 17, in setting out the first '*element*' of s.5D (sic, presumably s.5D(1)) it reproduces it as '*(i) necessary condition*', omitting the indefinite article. Having avoided that issue, it relies upon a dictionary definition of '*necessary*' and '*condition*'. The contextual meaning of the adjective and noun separately and the two in combination is modified by whether the definite or indefinite article precedes them. Further, the use of a single dictionary definition is of little utility when the provision under consideration was the subject of specific discussion in the *Ipp Report*, is a provision which was imposed upon an area that is governed by established common law principles and was introduced by the Legislature on the express basis of acceptance of the *Ipp Report* recommendations.

5. The first respondent's approach to construction, and its submissions as to the meaning of the provision, is undermined by the surprising legislative intention it asserts is to be gleaned from the text and context of the Act: '*But the content of the Act read as a whole is plainly directed to modifying common law doctrine adversely to claimants*' (1RS, par 21(ii)). There is no legislative intention correctly discernible that is directed to the modification of common law doctrine adversely to claimants and it would be an extraordinary state of affairs if any court were to begin the interpretation of this Act upon such a tendentious basis.

6. The Act implemented a regime of compartmentalised modification to the common law, and the legislature did so on the basis of the recommendations of the *Ipp Report*. In respect of causation, the *Ipp Report* made recommendations that retained material contribution and increase in risk as aspects of causation (AS, par 27). The first respondent is silent on the *Ipp Report*, and its impact on the Court of Appeal's construction.

5 7. The first respondent's submission (1RS, par 16) that the words *"material contribution ... and increase in risk"* where they appear (twice) in (CA [48]) '*should be understood as if the phrase...were followed by the words 'as such"* begs the response, "Why?" The Judges did not use them and the words could work a substantial modification of the meaning of the words their Honours did use. The judgment must be read
10 according to its terms. This is particularly the case as the first respondent '*accepts that material contribution is an accepted and orthodox component of the common law "but for" test, or more probably a variant of it*' (1RS, par 28). That being the case, if s.5D(1) of the Act is the '*but for*' test (as the High Court accepted it was in *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440 [45]) the first respondent does
15 not address any language of the provision that operates to exclude material contribution from the '*but for*' test for the purposes of s.5D(1) of the Act (see AS, par 26).

8. The first respondent's reference to the reasons of Mason CJ and McHugh J in *March v*
20 *Stramare Pty Limited* (1990) 171 CLR 506 (see, for example, 1RS, par 20, 21(iii) and 23) suggests a misunderstanding of the fact that both their Honours accept that the '*but for*' test comprehends material contribution – as is also accepted by the first respondent (1RS, par 28). Here, the Court of Appeal did not, and without any explanation of its departure from orthodoxy.

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9. The first respondent submits (1RS, par 38) that s.5E of the Act denies appeal to reasoning involving shifting evidential onuses. The appellant says in reply that s.5E of the Act is a reminder that the legal onus of proof always remains on the claimant, but does not effect a change in the law so sweeping as to remove the availability of
30 shifting evidentiary onuses within the forensic contest which assist the court to arrive at just and satisfactory findings having regard to the power of the parties to adduce evidence. The appellant refers the Court to CA [57] where the relevant part of the *Ipp Report* is reproduced. It is apparent from the reiteration of the unqualified phrase '*onus of proof*' that the reference was to the <u>legal</u> onus of proof.

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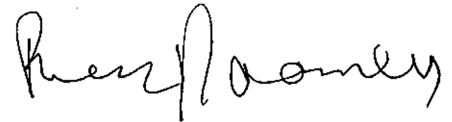
10. In the same area, the passage extracted – and relied upon – by the first respondent from *Condos v Clycut Pty Limited* [2001] NSWCA 200, [68], (1RS, par 36) contains a summary of what constitutes proof by inference on the balance of probabilities, emphasising the nature of what will constitute the balance of probabilities. The first
10 respondent's submissions overlook – and the passage in *Condos* does not undermine – the important matter discussed in *Kocis* – the fact that x may possibly have occurred does not mean that on the balance of probabilities y did not occur (see AS, pars 41 and 31(c)).

15 Dated: 8 July 2011



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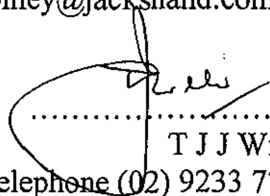

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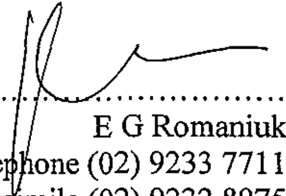

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