

# General Insurance Alert

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## A chip, a slip and causation in negligence – the law of probabilities

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### Introduction

On 7 March 2012, the High Court upheld an appeal from the NSW Court of Appeal by Kathryn Strong in her claim for damages against Woolworths Limited (**Woolworths**)<sup>1</sup> in finding, by majority, that, on the balance of probabilities, Woolworths' negligence caused Ms Strong's injuries.

The NSW Court of Appeal decision was canvassed in our 2011 Insurance Year in Review (**IYIR**) publication and provided some welcome relief to occupiers and their insurers. It raised the bar for a plaintiff to establish a causal connection between a defendant's breach of duty and the plaintiff's injury.

The High Court has now further clarified the steps the Court must take when considering causation under section 5D of the **Civil Liability Act 2002 (NSW) (CLA)**.

### Brief Summary of the Facts

Woolworths operated a supermarket and a Big W store at the Centro Taree Shopping Centre. Ms Strong walked with the aid of crutches as a result of an above-the-knee amputation decades earlier.

On 24 September 2004, Woolworths held a "sidewalk sale" in an area in front of the Big W store. Ms Strong was walking around the "sidewalk sale" when the tip of her crutch slipped on a hot chip (or on oil from the chip) and she fell.

The centre manager engaged contract cleaners to conduct cleaning rotations in intervals of no more than 15 minutes. However, these cleaners were not required to clean the area within the "sidewalk sale". Woolworths was responsible for cleaning that area, but other than requiring Big W employees to keep a lookout for spillages, Woolworths had no cleaning system in place.

At first instance, Woolworths was found liable in negligence to Ms Strong and she was awarded damages in the sum of \$580,299.12. The claim against the centre manager was dismissed.

Woolworths' appealed to the Court of Appeal which held that Ms Strong had failed to establish that Woolworths' negligence was the cause of her injury. Detailed consideration was given to section 5D of the CLA and the factors the Court will consider when making out "factual causation" pursuant to that section. As there was no basis on which to conclude that the chip had been on the ground for a period long enough for it to have been detected by a reasonable cleaning system, causation was not established pursuant to section 5D and the District Court's judgment against Woolworths was set aside.

1 **Strong v Woolworths Ltd [2012] HCA 5**

## The High Court's Decision

Ms Strong's appeal to the High Court was upheld by a majority of 4<sup>2</sup> to 1<sup>3</sup>. The High Court held that factual causation required a plaintiff to prove that the defendant's negligence was a "*necessary condition of the occurrence of the particular harm*" pursuant to section 5D(1)(a).

Woolworths submitted that it was necessary for Ms Strong to point to some evidence which would permit an inference to be made as to when the chip was deposited on the floor. The High Court rejected this submission and held that a plaintiff could overcome the evidentiary burden by employing a probabilistic reasoning of when the chip came to be on the ground.

The majority stated that 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 majority held that the evidence did not permit a finding of when the chip had been deposited on the ground between:

- + when the stands of the "*sidewalk sale*" were put in place at 8.00am; and
- + when the accident occurred at 12.30pm.

Against that background, and in the absence of evidence as to an adequate cleaning regime, the High Court held that 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*".

The High Court concluded, on the balance of probabilities, that it could be deduced that the chip was left on the floor for a sufficient time for it to be detected had an adequate cleaning regime been in operation. Accordingly, it was decided that Woolworths' negligent failure to implement a system of periodic inspection was a necessary condition of Ms Strong's harm.

## Implications

Where an insured has breached its duty of care, liability insurers' focus often shifts to the question of causation. The High Court's decision reinstates the lower evidentiary threshold for plaintiffs to overcome the question of causation.

In determining factual causation under section 5D of the CLA, liability insurers should now consider whether, on the balance of probabilities, and "*but for*" its insured's breach, the plaintiff would have suffered harm? If the answer is yes, then the insured will escape liability.

Whilst the defence strategy of any claim will turn on the facts of that case, in slip and fall cases in particular, it is now critical for occupiers of commercial premises to be in a position to prove the adequacy of their cleaning regime and adduce evidence that the area of the plaintiff's fall was being inspected at intervals of not greater than 20 minutes. For underwriters of commercial premises, the case highlights the importance of assessing the risk with reference to the adequacy of the insured's cleaning regime and system for maintaining detailed records of its cleaning schedules/rosters to counter a slip and fall claim.

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2 French CJ, Gummow, Crennan and Bell JJ

3 Heydon J

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