inactivity was not indifference but an unwillingness to act because of the potential risks of acting based only on the limited information contained in the AFACT notices.

Their honours concluded that the Copyright Act did not impose the obligation to suspend or terminate customer accounts due to the alleged breach of copyright identified by the AFACT notices. Their honours found that the AFACT notices did not provide a reasonable basis for sending warnings to individual customers threatening to suspend or terminate their accounts. Therefore, the conclusion could not be reached that iiNet's inactivity gave rise to an inference that iiNet had authorised their customers' infringement.

Gummow and Hayne JJ also dismissed the appeal. Their honours concluded that an ISP could not be taken to have authorised a primary infringement of copyright merely because it provided facilities making the infringement possible. Their honours also concluded that it was reasonable for iiNet not to act on the incomplete information contained within the AFACT notices.

Endnotes

1. *Copyright Act 1968* (Cth) s 101.
2. *Copyright Act 1968* (Cth) s 86.
3. *Copyright Act 1968* (Cth) s 22(6).
4. *Copyright Act 1968* (Cth) s 22(6A).
5. *Modbury Triangle Shopping Centre Pty Ltd v Anzil* (2000) 205 CLR 254, 264, 270, 292, 299-300; *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 551.
6. *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274, 286-288.

Factual causation under the Civil Liability Act

Adam Hochroth reports on *Strong v Woolworths Limited t/as Big W* (2012) 285 ALR 420; (2012) 86 ALJR 267; [2012] HCA 5

The High Court held that a plaintiff in a slip and fall case could establish factual causation in the absence of direct evidence as to when the slippery substance was deposited. The court discussed the requirements of factual causation under s 5D of the *Civil Liability Act 2002* (NSW).

Facts

The plaintiff/appellant, Kathryn Strong, suffered a serious spinal injury when she slipped and fell in a shopping centre. The centre consisted of a Woolworths store and a Big W store separated by a common area, part of which was operating as a food court. The area where the plaintiff fell was the sidewalk sales area outside a Big W store, and was under the care of the respondent, Woolworths. At the time of the incident, the appellant was on crutches due to a disability. The fall was caused by the tip of her right crutch coming into contact with a greasy chip that was lying on the floor of the sidewalk sales area. The accident occurred at about 12.30pm. It was not in question that on the day of the fall, Woolworths did not have any system in place for the periodic inspection and cleaning of the sidewalk sales area.

Proceedings in the lower courts

The proceedings at first instance were heard in the District Court of New South Wales. The primary judge found Woolworths liable in negligence, but did not separately address causation.

Woolworths did not challenge the finding of negligence on appeal. The only issue was causation. The NSW Court of Appeal found that Ms Strong could not establish that Woolworths' negligence was the cause of her injuries.[1]

First, the court addressed what reasonable care required of Woolworths. There was evidence as to the cleaning system employed by the owner of the mall and the common areas. Its cleaning contract required periodic inspection and cleaning every 15 minutes. The cleaner on duty gave evidence that the area was in fact cleaned every 20 minutes.

The Court of Appeal approached the issue of causation on the basis that reasonable care on Woolworths' part required periodic inspection and cleaning of the sidewalk sales area at 15 minute intervals. On that basis, it held that Ms Strong could not establish that the chip had been deposited on the ground long enough that it would have been detected and removed had such a

system been in place.

There was no direct evidence of when the chip was deposited. Nor was there evidence that the chip had been on the floor for some time (for example, that it was dirty or cold to the touch). The accident occurred at lunchtime and close to the food court. Thus, it could not be concluded on balance of probabilities that the chip had been dropped more than 15 minutes prior to Ms Strong's fall.

The High Court's decision

The majority (French CJ, Gummow, Crennan and Bell JJ) allowed Ms Strong's appeal. Justice Heydon dissented.

The majority found that the appellant could establish that Woolworths' failure to maintain a proper system of cleaning was a necessary condition of her harm, on the basis of probabilistic reasoning akin to that employed in *Shoeys Pty Limited v Allan*[2] and *Kocis v S E Dickens Pty Limited*[3].

The mall had been open since 8.00am. The evidence did not permit a finding of when, in the interval between 8.00am and 12.30pm, the chip was deposited. Reasonable care required inspection and removal of slipping hazards at intervals not greater than 20 minutes. The court reasoned that the probabilities favoured the conclusion that the chip was deposited in the longer period between 8.00am and 12.10pm, not the shorter period between 12.10pm and the time of the fall.

The Court of Appeal had reasoned to the contrary on the basis that the deposit of the chip was not a hazard with equal likelihood of occurrence throughout the day, because, *inter alia*, chips are more likely eaten at lunchtime. The majority rejected this reasoning, finding it speculative.

Causation under the Civil Liability Act

Although not necessary for the outcome of the appeal, the court discussed the requirements of causation under s 5D. Section 5D(1)(a) provides that an element of causation is whether 'the negligence was a necessary condition of the occurrence of the harm'. Ms Strong had submitted that the Court of Appeal incorrectly proceeded on the basis that this provision excludes consideration of factors making a 'material contribution' to the harm suffered by the plaintiff.[4] The court noted that 'material contribution' has come to be used in different ways in the context of causation in tort, including cases where there is a cumulative operation of factors causing harm[5] and where conduct materially increases the risk of harm and scientific knowledge is lacking to prove the cause of harm.[6] The court noted that in accordance with established principles,[7] such cases may be treated as establishing causation under s 5D(2), subject to the normative considerations therein. The court also noted cases of 'causal over-determination' at common law[8] but found it unnecessary to comment on how such cases may be accommodated under s 5D.

The dissent of Heydon J

Justice Heydon, in dissent, considered Ms Strong's submission that the 'evidential burden' on the issue of causation fell on the defendant in the case. His Honour commented that the expression 'evidential burden' has been used in three different senses in the authorities. In the present case, his Honour found, the appellant's argument required her to show that her evidence was strong enough to entitle the trier of fact to find in her favour, in the absence of evidence from the defendant. However, applying considerations flowing from 'the common experience of ordinary life' (a matter on which, his Honour opined, 'appellate courts are not necessarily well equipped to speak'), his Honour found that the appellant had not proved the chip was probably dropped prior to 12.15pm.

Conclusion

The case may be seen as an indication that the High Court is receptive to 'burden shifting' in classes of tort cases where proof of causation is inherently difficult. Left undecided is how s 5D will be applied to causation questions such as material contribution, material increase of risk, and causal over-determination.

Endnotes

1. *Woolworths Limited v Strong* [2010] NSWCA 282.
2. (1991) Aust Tort Reports ¶81-104 (NSW Court of Appeal).
3. [1998] 3 VR 408.
4. See *Zanner v Zanner* [2010] NSWCA 343 at [11] per Allsop P.
5. *Bonnington Castings Limited v Wardlaw* [1956] AC 613.
6. *Fairchild v Glenhaven Funeral Services Limited* [2003] 1 AC 32.
7. *March v E & M H Stramare Pty Limited* (1991) 171 CLR 506 at 514 per Mason CJ.
8. *Amaca Pty Limited v Booth* (2011) 283 ALR 461; (2011) 86 ALJR 172; [2011] HCA 53.