THE 'PROBABILITY THEORY' IN SLIPPING CASES: BEFORE STRONG v WOOLWORTHS AND BEYOND

Introduction

A vexing question in many a slipping case in shopping centres and other stores is this – when did the spill, on which the plaintiff slipped and fell, happen? Was it a minute or two before, or several hours or even days before, that fateful slip? In the case of the former, how would even a perfect system of inspection and cleaning have prevented the incident? In the latter, how is it not a case of so-called 'gross' negligence?

While 'wand tap' reports,[1] and CCTV cameras, have ameliorated some of the evidentiary problems faced, generally by plaintiffs, in these sorts of cases, too often there remain gaps. In these 'evidential gap' cases, it is often said by defendants to benefit them – 'the plaintiff cannot prove how long the spill was there, ergo she fails', irrespective of any negligence in the cleaning and inspection regime. But, as we shall see, this is exactly where the probability theory, also referred to as probabilistic reasoning, can plug many a gaping causation hole, benefiting not the defendant, but the plaintiff herself.

What is probabilistic reasoning and the 'probability theory'?

It is trite, both at common law and under sections 51 and 52 of the *Wrongs Act 1958* (Vic),[2] that plaintiffs must establish their claims on the balance of probabilities, including "factual causation", [3] that is to say, a more than 50% prospect of establishing a fact or facts in issue to establish each of the elements of the plaintiff's negligence claim. And so, what the plaintiff must do in a slipping case is establish that, on the probabilities, or a more than 50% chance, the substance was on the ground long enough that a defendant, acting reasonably, would likely have identified and removed the substance before the slip and fall.

The application of this basal principle goes further in a slipping case when it comes to identifying the timing of the spill. Is it more likely that the spill happened within five minutes or 60 minutes of a fall? Let us assume there was no evidence of any cleaning an hour before the incident and no evidence

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1 Sensors that staff can tap with a 'wand' as they patrol an area to record their presence.

2 And in other States, their version of the Ipp Reforms e.g. the *Civil Liability Act 2002* (NSW), section 5D(1)(a).

3 That is, that a defendant's "negligence is a necessary condition of the occurrence of the harm". Put more simply, that there is a causal connection between negligence and incident. In *Brady v Girvan Bros*, discussed below, McHugh JA provided a thorough treatise in the area of causation and considered case law that seemed to shift the burden of proof to a defendant in some cases. His Honour held that that approach was wrong, as the High Court majority confirmed in *Strong*, also reviewed below.

to indicate the timing of the spill. All things being equal,[4] it is far more likely that the spill occurred sometime over a 60 minute period than over a five minute period. Thus, on this example, it would be wrong to speculate[5] that the spill more likely occurred five minutes before, than over the 60 minute period before, the incident. It would also be wrong, at least generally speaking, to make no finding at all. On the balance of probabilities test, without more, the spill likely occurred some time within the 60 minute period, not the five.

If any spillages were to be cleaned up, say, every 15 minutes over the 60 minute period, and the evidence is accepted that the spill was likely to be identified on a reasonable inspection, applying probabilistic reasoning, it may well be concluded that a defendant, taking reasonable care, would likely have identified and removed the spill before the incident. This would result in a judgment in favour of the plaintiff, notwithstanding the lacuna of evidence as to when the spill occurred.

How has this "probability theory" been applied by the Courts?

The probability theory did not begin, and nor has it ended, with *Strong v Woolworths*.[6] Let us examine seven cases, the last six in which the theory has been applied to the benefit of the injured plaintiff.

Dulhunty v J B Young[7]

In this mid 1970's case, the High Court rejected a plaintiff's appeal in a claim for damages on the basis that the plaintiff was unable to establish a causal connection between an identified breach of duty of care and injury.

The principal problem for the plaintiff was that he was unable to prove when the grape came onto the floor. The trial judge thought there was some limited evidence of a failure with the system of cleaning in the area of the store, as the grape had not been cleaned up for at least 10 minutes after the fall, suggesting irregular cleaning, but said he was unable to conclude whether that breach was a cause of the injury.

The High Court agreed with the trial judge. It relied on the nature of the grape (it was hard to see), the otherwise clean floor (which might suggest the grape had recently dropped on the floor) and the lack of sales of food in the area (which therefore did not assist the plaintiff on the timing issue). It found that there was no evidence for it to conclude a reasonable system of cleaning and

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4 And in the absence, say, of evidence of increased use in an area shortly before the incident.

5 As this would only be "possible" rather than "probable".

6 (2012) 246 CLR 182.

7 (1975) 7 ALR 409.

inspection would have identified and removed the grape before the fall on the balance of probabilities.

As Jacobs J, who sat on the High Court bench for five short years, said:

> *The plaintiff slipped on a white grape which was on a floor of mottled yellowish-brown coloured lino tiles. The floor, except for the presence of the grape, was a clean floor. There was no evidence that the grape had been there for any particular length of time. The trial judge found that it was not common to find or inherently likely to expect dropped grapes or other fruit in that area.*

In a way, although the trial judge found a breach of duty, the answer to the causation quandary was tied up with issues of duty and breach. If the floor had regular spills, a court could more easily find that a regular system of inspection would likely have made a difference to the removal of the spill, for example.

There was no discussion about probabilistic reasoning to fill the causation void. In the end, however, this may not have assisted the plaintiff. If there was a lack of evidence about any usual spillages in the area and a clean floor, and a white grape on a yellowish-brown floor, it would leave real questions – such as (a) whether the grape was there any length of time on the probabilities theory (b) how regularly the area needed cleaning given the lack of food about the place and (c) whether any such clean would have missed the spill anyway, because of the grape's colour vis-à-vis the floor.

Inferentially, at least, this case remains on the tip of most defendant lawyers' tongues in slipping cases today when they seek to deny liability on their clients' behalf. As we will see, however, this could lead a defendant on a misguided trajectory in many a slipping case.

Brady v Girvan Bros[8]

This case was a sort of precursor to the application of the probabilistic reasoning cases that have now taken hold in this area.

In the summer of 1984, the plaintiff slipped and fell on melting jelly on a walkway of the "Minto Mall". The Mall was selling jelly in one of the stores near where the plaintiff slipped. At first instance, the plaintiff failed to establish how long the jelly had been on the ground and therefore failed to show that a reasonable system of cleaning would likely have removed the jelly before the fall. She failed.

The Appellate Court of New South Wales approached the case on inference. Of course, there is nothing unusual in a Court relying on inference to reach a determination and this is commonplace in personal injury litigation where direct evidence is often lacking. Indeed, it is an important principle to bear

[8] (1986) 7 NSWLR 241.

in mind in slipping cases. In one of the most celebrated Australian cases, *Jones v Dunkel*,[9] a wrongful death claim arsing out of a motor vehicle accident, Dixon CJ said this about inferential reasoning and findings of negligence:

> *In an action of negligence for death or personal injuries the plaintiff must fail unless he offers evidence supporting some positive inference implying negligence and there must be an inference which arises as an affirmative conclusion from the circumstances proved in evidence and one which they establish to the reasonable satisfaction of a judicial mind … The law … does not authorise a court to choose between guesses, where the possibilities are not unlimited, on the ground that one guess seems more likely than another or the others. The facts must form a reasonable basis for a definite conclusion affirmatively drawn from the truth of which the tribunal of fact may reasonably be satisfied.* [10]

In *Brady*, the Court used inferential reasoning as follows. First, it determined that the defendant should have had a system of almost constant inspection of the floor, such was the risk to entrants in the Minto Mall slipping and falling on food on the floor of the common areas. Secondly, the evidence at the trial revealed that the defendant did not have a system of almost constant inspection. Thirdly, the Court found that, if such a system was in place, on the probabilities, the jelly would have been found and removed under a constant surveillance system, saving the plaintiff from injury.

On factual causation specifically, McHugh J considered the nature of the jelly as indicating it had been there for enough time for the defendant to have spotted and removed it. President Kirby found that an inference could be drawn that the defendant had failed to have a system of almost constant inspection, such that the spillage had been there long enough for its removal before the incident, without more, that is to say, regardless of the nature of the jelly at the time. Justice Priestly was of the same view as Kirby P.

President Kirby pointed out that, in the absence of such inferential reasoning, many plaintiffs would almost certainly fail in their claims, having no ability to establish, even on the balance of probabilities, how long the spill had been there.[11] This, he found would be an unsatisfactory result and against community expectations, given the nature of the commercial operation. The judges also commented on the high standard of care expected of the occupiers of shopping malls to take care for their entrants, from whom they seek to make a handsome profit. They were, therefore, willing to find for the plaintiff on limited inferential evidence, overturning the trial judge.

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9 (1959) 101 CLR 298 at 304–5.

10 This is quoted in the learned article of R Douglas QC in *Breach of duty and causation of damage – has the onus of proof been discharged?* (2015) 12(1) CL 8.

11 Although in cases requiring "constant" or near constant surveillance of the area of the spill, like this one, plaintiffs may well not fail on causation.

Rose v Abbey Orchard[12]

Probabilistic reasoning took centre stage in this 1987 case, decided only a year after *Brady*.

The plaintiff slipped and fell in oil at around 3pm in a main thoroughfare of a carpark. The defendant's system was to clean thoroughly the carpark over night and have regular inspections every 20 minutes until 2.30pm, after which, somewhat inexplicably, there would be irregular inspections until close that night. There was no evidence about what inspections occurred on the day of the incident.

The Court accepted that an appropriate system of inspection during operating hours was every 20 minutes. This inspection regime lies in stark contrast to *Brady*.

On the evidence, the Court concluded that, on the day in question, there was probably no inspection of the area where the plaintiff fell for an hour before the incident. This, the Court found, was in breach of the duty to take reasonable care for persons using the carpark.

The New South Wales Court of Appeal, overturning the trial judge on this point, used probabilistic reasoning to determine that the failure to inspect the carpark in the hour before the incident was a cause of the plaintiff's fall. It concluded that, if the spill likely occurred in the hour before the incident, then the 20 minute inspection regime should have occurred twice before the incident. The Court found that it was far more likely that the spill occurred before one or both inspections should have occurred than after the two inspections should have occurred.

Therefore, the Court used probabilistic reasoning to determine that the failure to inspect the carpark in the hour before the incident was a cause of the plaintiff's fall.

The plaintiff ultimately succeeded in her claim.

Kocis v S E Dickens[13]

In this slipping case, endorsed by the majority in *Strong*, Hayne JA explained the operation of, and applied, what he called, 'the probability theory'.

The case itself concerned a plaintiff slipping in liquid in an aisle of a supermarket. The evidence was that the supermarket had a system of inspecting aisles around every half an hour, but that, on the day in question, that system had not been operating. In fact, the evidence was that the aisle

12 [1987] Aust Torts Reports ¶80-121.
13 [1998] 3 VR 408.

had not been inspected in the hour to 1.5 hours before the incident, on the store's opening at 8.30am. The incident occurred at around 10am.

The trial judge directed the jury to return a verdict for the defendant on the basis that there was no evidence the usual system of inspection, if employed, would likely have picked up the spill, because there was no evidence when the spill occurred.

While counsel for the plaintiff accepted that a half hourly inspection regime was appropriate for the supermarket, the Appellate Court said that it was a matter for the jury to determine on all the evidence what system of inspection should have been employed and whether, using the probability theory, this would likely have removed the spill.

Before coming to that conclusion, Hayne JA gave a most useful example of the operation of the 'probability theory' in another context, thus:

> *Let it be assumed that a reasonable occupier of certain premises would inspect the premises for spillages once each hour. Let it further be assumed that the evidence demonstrates that the occupier made no inspection of the premises at all on the day on which the plaintiff slipped and fell eight 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.*

His Honour distinguished the High Court case of *Dulhunty*, the first case reviewed in this paper, on the basis that that case stood for no general proposition on factual causation, but rather was the result of a fact specific scenario. In that case, the reader will recall that the floor on which the plaintiff slipped was otherwise clean, the grape was difficult to detect, and there was no evidence that spillages in that thoroughfare were common. Here, the evidence was otherwise.

Determining that it was open to the jury to decide, on the balance of probabilities, that the spillage occurred any time between 8.30am and 10am and that a reasonable system of inspection may have identified and removed the spill, a new trial was ordered.

Justice Ormiston also pointed out that questions, such as when the inspection regime ought to have taken place, and whether that would have prevented the incident, was not to be "resolved by mathematical probabilities, by reference to any supposed or ideal timetable", but by applying reasonable standards to the balance of probabilities test. By extension, just because a defendant may have a system of inspection and cleaning in place, that does not mean that that system is necessarily to be accepted as a reasonable system, a matter to be decided by the tribunal of fact, weighing all the

evidence and applying a standard of reasonableness. In this respect, evidence of industry standards, or expert evidence, may assist the Court determine what is reasonable.

Shoeys Pty Limited v Allan[14]

Here, the plaintiff slipped and fell on a vegetable leaf in a 'fruit and veg' store. In a two-to-one decision, the majority upheld the trial judge's findings against the defendant.

First, the majority accepted that the plaintiff had established a breach of duty of care. Justice Hadley noted that the onus was on the plaintiff to establish negligence. However, the judge pointed out that this could be achieved on "slight" evidence to tip the scales of justice, in circumstances where there was an evidentiary onus on the defendant to lead evidence within its power about its system of inspection.[15] The sole witness for the defendant did not give evidence of implementing a system of regular inspection herself, and was otherwise occupied by various duties, and there were other witnesses who could have given evidence on the system, but who were not called. On that basis, in his leading judgment, Hadley JA had little difficulty in concluding that there was a breach of duty of care.

As to the factual causation issue, assuming, without deciding, that the shop should have inspected the floor at 30 minute intervals, taking reasonable care, and there being no evidence of any such inspections on the day in question from opening to the afternoon when the incident occurred, Hadley JA accepted causation was established, employing probabilistic reasoning on the timing of the leaf falling on the floor.

Strong v Woolworths[16]

Finally, in 2012, the issue of factual causation in slipping cases made its way again to the High Court. It was here that the High Court, by majority, for the first time recognised and applied probabilistic reasoning in slipping cases.

Ms Strong was walking outside a Big W store, in a sidewalk sales area leading to a food court, over which Woolworths was occupier. Walking with crutches, Ms Strong's crutch went onto a greasy potato chip,[17] causing her to slip and fall. She succeeded at first instance, but the NSW Court of Appeal overturned the judgment, finding for Woolworths.

By the time of the ultimate appeal, the only issue in the case was causation.

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14 [1991] Aust Torts Reports ¶81-104.

15 A concept Heydon J discussed in his dissenting opinion in *Strong v Woolworths*, below.

16 See Note 6.

17 Or grease from the chip, this was unclear.

The incident happened at about 12.30pm. A contract required inspections every 15 minutes and a witness recorded in an incident report that the inspection was to occur in the area once every 20 minutes. The Court of Appeal concluded that the area did not need constant inspection, unlike in *Brady*, but that 15 or 20 minute inspections of that area was reasonable. The Court also concluded, because of the state of the evidence, that that system was not employed at the time of the incident. Moreover, there was no issue that an inspection would likely have identified the chip in question and removed it.

The issue, then, turned on when the chip was deposited on the floor and whether a system of 20 minute inspections would, on the balance of probabilities, have removed the chip.

The Court of Appeal said that there was no basis to find that the chip was deposited long enough on the ground before the incident for it to be inspected and removed. It relied, in particular, on the timing of the incident, being lunch time, when it said it was likely that hot chips would be bought, increasing the prospects of the chip being deposited on the floor shortly before the incident. It also noted that there was no evidence that the chip was cold or dirty which would indicate it had been there for some time.

The Court of Appeal also relied on the fact that a second cleaner was supposed to be working the hours of 11am and 2pm, meaning that an inference could be drawn that the chip was more likely to have fallen at lunch time.

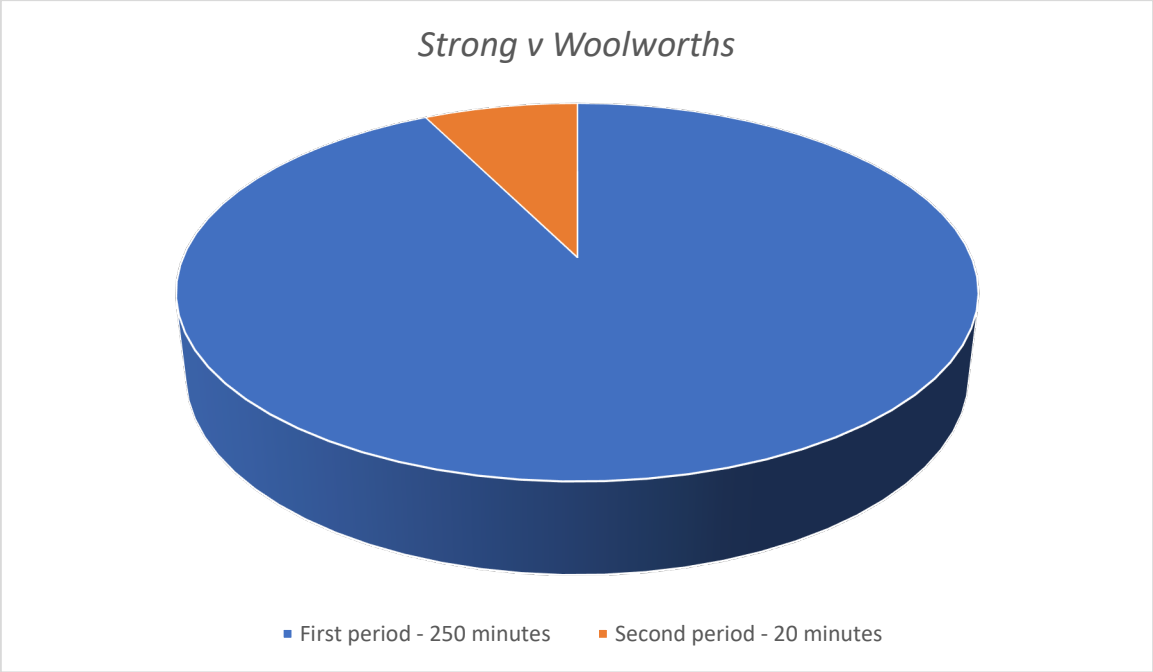
The High Court majority was critical of the Court of Appeal's conclusions. It noted that there was no evidence that the area had been inspected in the four-and-a-half hours of operation that day and before the incident. It also found that the timing of the incident did not make it more likely the chip had been deposited around lunch time, in the absence of any evidence about the selling of hot chips from opening time - for breakfast, morning tea or lunch. Further, it said that the additional cleaner did not necessarily lead to an inference that spills were more likely at that time, noting one cleaner took a lunch break during the period and that the contract did not provide for additional inspection rotations over the lunch period.

Thus, in their Honours' view, the evidence did not permit a finding about when, during the period 8am to 12.30pm, the chip more likely fell to the floor. Accordingly, using probabilistic reasoning, the chip was more likely to have fallen in the period of 8am to 12.10pm (when the last inspection should have occurred) rather than between 12.10pm and the time of the incident at 12.30pm (in which case an adequate cleaning system would have made no difference to the fall). In the words of the majority:

> *Reasonable care required inspection and removal of slipping hazards at intervals not greater than twenty minutes in the sidewalk sales area, which was adjacent to the food court. The evidence did not permit a finding of when,*

> *in the interval between 8 am and 12.30 pm, the chip came to be deposited in that area. In these circumstances, it was an error for the Court of Appeal to hold that it could not be concluded that the chip had been on the ground for long enough for it to be detected and removed by the operation of a reasonable cleaning system. The probabilities favoured the conclusion that the chip was deposited in the longer period between 8 am and 12.10 pm and not the shorter period between 12.10 pm and the time of the fall.*

Diagrammatically, one can see immediately why a Court might reason that the spill occurred in the longer period 8am to 12.10pm (the 'first period'), around 92.6% of that timeframe, than the shorter period, 12.10pm to 12.30pm (the 'second period'), about an 7.4% window of that timeframe. It was therefore 12.5 times more likely to occur during the first period than the second, when based on time alone, a ratio of 25:2. Needless to say, there are many other factors apart from time, such as the nature of the spill or area, in these slip and fall cases, but the timing of the last clean is a key factor in determining the issue of when the spillage likely occurred, as this case shows.



The plaintiff therefore succeeded.

Justice Heydon was the sole dissenter. His Honour, in a riveting and learned decision on discharging the burden of proof, reviewed the law on the shifting of onuses, evidential and legal. This was the result of the plaintiff relying on the "very slight" evidentiary rule in seeking to establish her case, which the Court had applied in *Shoeys'* case, for example.[18] The plaintiff also relied on the shifting of an evidential onus on a party who possesses knowledge of a thing having an evidential onus to lead evidence on that issue or risk failing,

[18] Which, in effect, returns to the burden of proof on inference issue addressed earlier in this paper.

so long as the plaintiff established a *prima facie* case, sometimes on even "slight" evidence. This is commonly known as the *Blatch v Archer*[19] rule. The plaintiff sought to invoke this rule to argue that it was the defendant who had an evidential burden to lead evidence on causation.

On these issues, Heydon J found that neither party was in any better position than the other to produce evidence on causation and thus neither the "slight evidence rule" nor the shifting evidential onus assisted the plaintiff on causation. His Honour also quoted Dixon J, as his Honour then was, that, when one comes to determine causation, the Court must feel an actual persuasion of the proof of a fact, not simply a mechanical comparison of probabilities, in coming to a conclusion on causation.[20] In effect, it seemed that his Honour was criticising the majority's probabilistic reasoning, which does have an air of artificiality about it.

In coming to this conclusion, his Honour considered the words of Dixon CJ in *Hampton Court Ltd v Crooks*,[21] an old slipping case at a hotel. There, the plaintiff was unable to establish the nature of a greasy spillage in a "retiring room" or how it got there and how long it had been there, and the jury's determination in the plaintiff's favour was upended. Again, there was no mention of probabilistic reasoning and the Court effectively found that, unless the plaintiff could lead some evidence that the area needed constant inspection or some evidence that the spill had been there for some time, she must fail. The plaintiff sought to draw an inference of negligence on the basis that she did not have the power to lead evidence about the spillage itself before the incident. The Chief Justice considered the burden of proof issues and the 'slight evidence' rule to draw an inference of negligence, and said:

> *…the jury might reasonably find the cause of the plaintiff's injuries to be the presence on the floor of a wet substance of a greasy nature covering an area of eighteen inches by two or three inches,* [but] *I do not think that proof of this fact was enough to enable the jury to infer negligence on the part of the defendant: proof was necessary of some additional circumstances tending, for example, to raise a probability of its having been there long enough to be seen if reasonable supervision were practised, or to show that so many people were likely to use the lavatory in the preceding hour that closer control was called for, or that the dropping of some such substance was common or inherently likely to occur. But very little might have been enough. For the case is one where the facts can hardly be within the knowledge of the plaintiff and, at all events so far as concerns the care and control of the premises and the precautions taken, must be peculiarly within the knowledge of the defendant…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 weighted according to the power of the party to produce it, in accordance with the often repeated observation of Lord Mansfield in Blatch v. Archer…*

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19 (1774) 1 Cowp 63 at 65 [98 ER 969 at 970].

20 Citing another great case of *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 361.

21 [1957] HCA 28; (1957) 97 CLR 367.

The ultimate burden of proof was on the plaintiff, in *Strong*, as it is in all such cases. The only evidence that might have been relied on by the plaintiff in *Strong* to discharge that onus was "circumstantial inferences" of the sort described by Dixon CJ, and which, in Heydon J's view, did not assist the plaintiff. His Honour seemed to accept the Court of Appeal's reasoning that it was reasonably likely the chip had just been dropped shortly before the fall, it being lunch time, and certainly no more likely it had been dropped more than 15-20 minutes before the incident to have prevented the incident. His Honour also relied on human experience, sometimes referred to as 'judicial notice', that chips are more readily eaten at lunch time. But that was not to find that the defendant had proved when the chip fell on the balance of probabilities, as it had no onus. The plaintiff had to establish the chip more likely fell in the period before the last supposed clean. In his Honour's view, the plaintiff did not do that and her reliance on the "probability theory" was rendered unconvincing. In concluding his reasons for dissent, his Honour said:[22]

> *Thus the* [defendant] *must succeed. Its success is not entirely satisfactory, but it flows simply from the location of the legal (ie persuasive) burden of proof and the inherent difficulty which a plaintiff in a slipping case faces where the standard of care calls only for periodical inspections, not constant vigilance. It cannot be said that the* [defendant], *who had no proper system of caring for the appellant's safety, is in a better position than if it had had a proper system in place – only that its position is no worse.*

While looking at the case on many fronts, Justice Heydon made no mention of policy grounds, such as community expectations of commercial entities, referred to cases like *Brady*, which lend weight to approaching the case more on probabilistic reasoning, than on legal strictures on proof.

Sbaglia v Epping Cinemas[23] ("the popcorn case")

For whatever reasons, few courts[24] have so far applied *Strong v Woolworths* probabilistic reasoning. However, the County Court of Victoria in 2019 applied *Strong's ratio decidendi* in *Sbaglia*.

The facts went like this. Ms Sbaglia approached a candy bar to purchase movie tickets when she slipped on a slippery substance on the floor, probably popcorn. The incident was caught on CCTV footage, and showed a messy

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22 At [212].

23 [2019] VCC 1289.

24 At least in causes. One exception is *Argo Managing Agency Ltd v Al Kammessy* [2018] NSWCA 176, where it was accepted that the spillage was present when the cleaner walked past it based on the probability theory, but that case turned on whether the cleaner had committed a causal act of negligence in his inspection. In a two to one decision, the Court found that the cleaner had done a reasonable inspection in circumstances where it was difficult to detect the presence of water on the tiled floor, with no expert evidence to suggest otherwise.

floor, but the defendant had not retained the footage before the incident to show when the slippery substance might have been deposited on the floor, nor when the floor was last inspected and cleaned before the incident.

The evidence included an answer to an interrogatory of the defendant that it could not say what cleaning and inspection had occurred within around two and a half hours before the incident. Another answer said that the Defendant was supposed to have a system of constant monitoring of the area, and immediate cleaning in the event of a spill.

While the defendant sought to submit that the spillage might well have occurred shortly before the incident, the evidence tended against that.

On that basis, the Court accepted that, on the balance of probabilities, the spill occurred within a few hours before the incident, not shortly before the incident, and that a system of proper inspection and cleaning would likely have removed the spillage. Probabilistic reasoning was employed to full effect.

To quote Judge Bourke:[25]

> *I am satisfied in the present case, that had a system as described in Answer to Interrogatory 1 been in operation on the said date, it is likely the popcorn on the floor would have been detected and removed before the plaintiff approached the sales counter.*
>
> *In the absence of any evidence of cleaning occurring between 14:00 and the time of time of the incident* [that is, in the preceding two and a half hours]*, to accept the spillage occurred just prior thereto … is speculative and not open on the balance of probabilities.*

It followed that the plaintiff succeeded.

If one were reckoning whether the incident more likely occurred in, say, the five minutes before the incident, or in the balance of the two-and-a-half hour period, diagrammatically, one would need to choose between these two timeframes, highlighting the ease with which a Court might conclude the longer period is the more likely in the absence of evidence of any cleaning and inspection in the whole of the period. Again, this is only based on time alone, not on other factors, such as how busy the area was or when the item was more likely to have dropped on the floor, *et cetera*, but it is a compelling factor in many cases and a useful starting point for plaintiffs.

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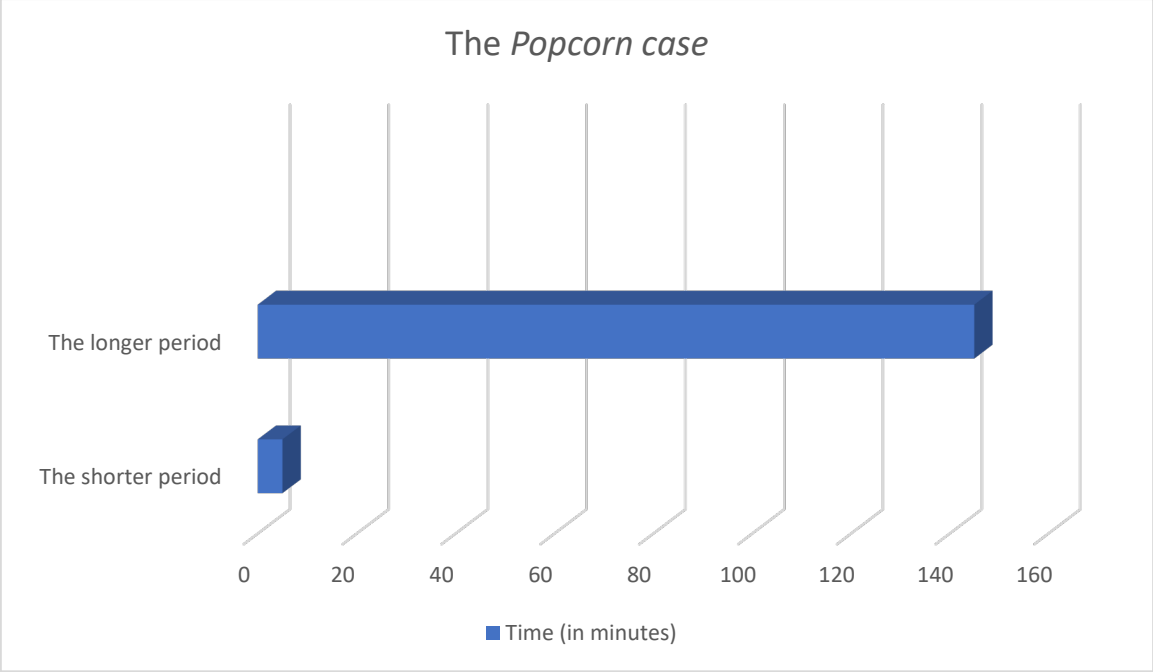
25 At [197]-[198].



'Clean as you go systems'

Finally, one should say something about 'clean as you go' systems, often employed by large organisations, mostly supermarkets, and relied on by them to deny plaintiffs' claims. Such systems generally provide that all staff must clean up spills they see on the floor as they work, usually without any formal inspections or cleaners working 'on the ground' during trading hours.

Two cases illustrate how the Court might grapple with such cases when it comes to probabilistic reasoning.

In *Prasad v Woolworths Limited*,[26] the plaintiff slipped and fell on detergent on an aisle of a Woolworths' store. There were no dedicated cleaners, but the staff of the store were working to the 'clean as you go' system. Under that system, if the staff saw a spillage, they needed to clean it up. But the policy did not require staff to inspect floors for spills specifically. There was no evidence led about the employing of the 'clean as you go' system on the date of the incident, and an incident report did not record the previous inspection and cleaning of the aisle. In the absence of any evidence about the use of the system on the day of the incident, the District Court of NSW judge found a breach of duty of care. Using the probability theory, the judge also accepted that the spillage was more likely there in the hours before the incident rather than some short time before the fall, such that a reasonable cleaning system would have removed the spill, if employed.

26 [2017] NSWDC 79.

In contrast, and a few months later, a different District Court judge, in *Razzak v Coles Supermarkets Australia Pty Limited*,[27] found for the supermarket. Here, the plaintiff slipped on vegetable matter (probably grapes) on the floor of the 'fruit and veg' area. The area had a number of mats down to stop slips and falls, but where the plaintiff slipped there was no mat. The judge accepted the evidence of the general practice of four staff members, who were working at the time, about the 'clean as you go' system, which involved spot checking the area very frequently. The judge found that this was a satisfactory system in the absence of expert evidence that this system was not satisfactory or to industry standards in a busy supermarket. Those witnesses could not say what inspections or cleaning they did before the incident, perhaps unsurprisingly given the elapse of time,[28] but the judge accepted that they were truthful witnesses who implemented the system of inspection and cleaning when they worked.

Based on the regular inspections generally done by the staff members, the judge also found that the grape was probably on the floor for no longer than 10 minutes, distinguishing this case from *Strong* on the basis that inspections would likely have occurred until shortly before the incident.

These findings are somewhat surprising given the evidence of missing details in the incident report about any previous cleaning and inspections of the area, and missing CCTV footage that should have been retained to show what had occurred that day,[29] in addition to evidence of seven pages of slip and fall incidents in the year before the incident, including six other slip and/or falls on vegetable matter in the area, not on mats on the floor. Such evidence might suggest that such a 'clean as you go' system was not working reasonably. It might also lead to an inference that it would be unlikely that these falls were happening within 10 minute windows between each spot check and clean, assisting the plaintiff's case that her fall unlikely occurred in such a timeframe accepted by the judge. But it appears the decision was not appealed.

Each case must turn on its facts, but these two cases reveal the importance of evidence of what occurred or likely occurred before the incident with cleaning and inspections when it comes to applying the probability theory espoused in *Strong*.

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27 [2017] NSWDC 183.

28 The incident happened a few years before the trial.

29 The evidence was that the CCTV should have been retained for 21 days and, during that time, the Plaintiff obtained the incident report, which referred to CCTV footage. It was probably open to the judge to draw an adverse inference about the missing details in the incident report and CCTV footage under the *Jones v Dunkel* (1959) 101 CLR 298 principles that (a) the missing evidence would not have assisted the Defendant and (b) more readily accept other evidence that supported the Plaintiff's case. In Victoria, see also Part III, Division 9, of the *Evidence (Miscellaneous Provisions) Act 1958* (Vic).

Summary

The above cases go to illustrate the general power of probabilistic reasoning in slipping cases for plaintiffs where the timing of the spillage before incident is unknown. The longer the period where there is no evidence of an inspection or clean before the incident, the more likely the plaintiff will succeed.

Indeed, in cases where:

1. a defendant acting reasonably should have had a system of regular cleaning and inspections of the relevant area in the lead up to a fall;

2. that defendant can lead no, or no compelling, evidence that such a system was being implemented in the lead up to a fall; and

3. the plaintiff can establish the spill would likely have been picked up and removed by a reasonable system of inspection,

the plaintiff should succeed, using probabilistic reasoning, establishing that the spill had occurred long enough before the incident for such a system to have removed the spill.

Practitioners acting for either side in these sorts of slipping cases must ensure that they gather evidence before trial about:

1. what system of inspection and cleaning was supposed to be operating at the site of the incident at the time, and why;

2. what inspections and cleaning occurred in the period before the incident;

3. how busy the area was at and before the incident;

4. what evidence there is about the timing of the spillage, including its appearance or when and where it may have been purchased;

5. evidence of any other falls or spillages in the area that might affect a Court's assessment of the need for a certain system of cleaning and inspection;

6. whether the spillage would likely have been identified if a reasonable system was in place.

Consideration should also be given to obtaining expert or other evidence about industry standards in respect of inspections and cleaning of the relevant area.[30]

To sum up. If the Court were to accept, at one end of the spectrum, that a system of constant inspection should have been in place and was not, the timing of the spillage would be wholly or mostly redundant, and a plaintiff should succeed, as in *Brady*. At the other extreme, if the Court accepted that a once a day or night inspection or clean were sufficient, the defendant might be well placed to succeed, regardless of probabilistic reasoning on the timing of the spill. As for those cases in between, they might well turn on *Strong* and the probability theory.

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[30] As well as expert evidence regarding the nature of the inspection itself, and whether a reasonable inspection by a cleaner ought to have identified the spill, even though the plaintiff did not and hence slipped and fell. On this point, see *Argo Managing Agency Ltd v Al Kammessy* [2018] NSWCA 176.