

## DUTY OF CARE, BREACH AND CAUSATION UNDER THE CIVIL LIABILITY ACT (SECTIONS 5B, 5C, 5D)

*“In cases where the Civil Liability Act applies, it is important that a trial judge refers to its provisions to ensure adherence to the Act is apparent to an appellant court however the absence of such reference is insufficient on its own to establish a decision is erroneous. It will suffice if it is apparent that the judge has addressed and determined the issues that the Civil Liability Act requires to be addressed” (Laresu Pty Limited v Clark (2010) NSWCA 180 [42]).*

It is similarly important that relevant provisions of the Act be incorporated into pleadings and that any submissions follow the wording of the Act. Hence the motto *“start with the statute”*.

Sections 5B and 5C occur in division 2 of the Act under the heading duty of care.

It has been held that this heading is misleading and that the section clearly deals with breach rather than duty (**Harmer v Hare** (2011) NSWCA 229).

It is now agreed that the section embodies Mason J’s formulation in **Wyong Shire Council v Shirt** (1980) 146 CLR 40 at 47-48.

### **Section 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.

Recent cases have attempted to place limits on foreseeability (see Calinan J in **Koehler v Serebos (Australia) Limited** (2005) 222 CLR 44 at [54-55]). There are constant reminders from the court that hindsight should not be used when assessing whether a risk was foreseeable.

The primary source of the Civil Liability Act was the review of the law negligence final report, September 2002 (“the IPP Report”).

According to the IPP report the purpose of Section 5B(2) was to give statutory force to the factors set out in it so that courts would focus directly on the issue of “*whether it would be reasonable to require precautions to be taken against a particular risk*” and to avoid merging the concepts of foreseeability of risk with the conclusion that a reasonable person would have taken precautions against it (para 7.5 to 7.18).

When drafting pleadings it is now advisable to refer in the Statement of Claim to the section and to identify the risk of harm the defendant should have taken precautions against.

This is particularly so if the case is going to be case managed in the Supreme Court.

*“To address the questions and considerations in Section 5B, it is necessary to formulate a plaintiff’s claim in a way which takes account of the precautions which it is alleged should have been taken and identifies the risk or risks of harm which the plaintiff alleges eventuated and to which those precautions should have been directed”* (**Garzo v Liverpool/Campbelltown Christian School** (2012) NSWCA 151).

Despite some earlier authority to the contrary it now appears that the risk of harm for the purposes of the application of Section 5B need not be defined narrowly.

In the case of **Garzo** the plaintiff was injured when she slipped on a painted

pedestrian crossing. The trial judge had defined the risk of harm as:

*“The risk of a person, such as the plaintiff, when using the particular pedestrian crossing by walking normally, in its then condition, slipping on the painted surface and suffering personal injury”.*

The Court of Appeal held that the risk could be identified as:

*“That of a person slipping on the painted surface of the crossing and thereby suffering an injury”.*

It is advisable to take care when formulating the risk of harm. In the matter of **Garzo** the trial judge’s erroneous and narrow formulation led to him incorrectly finding that the risk was not foreseeable.

Foreseeability involves not only what a person knew but what they ought to have known. In the case of **Garzo** it was held by the Court of Appeal that the defendants ought to have known that paint used to mark out sporting fields might not be suitable to mark out a pedestrian crossing even though they had no actual knowledge and had made no enquiries.

The next question the section requires to be determined is whether or not a risk was insignificant.

*“... according to the IPP report, the phrase “not insignificant” was intended to indicate a risk that is of a higher probability than is indicated by the phrased “not farfetched and fanciful” but not so high as to be indicated by a phrase such as “substantial” or “significant risk”.” (Garzo para 150)*

There are some suggestions in the cases that a risk will be “not insignificant” if a reasonable person would not have realised that the injuries suffered would be serious (**Bader v Jelic** (2011) NSWCA 255). The trial judge in **Garzo** made a finding that it would be “far more likely that people would suffer minor injuries” as part of his determination of whether or not the risk was “not insignificant”. The Court of Appeal overturned the trial judge’s findings with respect to whether the risk was not insignificant by focusing on the fact that the risk of an injury occurring as a matter of common sense was more than farfetched or fanciful. The court made no specific

comment about the relevance of the likelihood that only minor injuries would occur. Traditionally this issue was looked at as part of a balancing exercise. That is a risk would be not insignificant if there was even a small probability that a serious injury would occur or if there was a reasonable probability that a relatively minor injury may occur.

The next question which must be asked under the section is was there a failure to take reasonable precautions (Section 5B(1)(c)). This requires consideration to be given to the matters set out in Section 5B(2).

Again these subsections are similar to the familiar test set out in **Wyong Shire Council v Shirt**. Subsection (c) relates to the burden of taking precautions. Traditionally this has been looked at as a question of the cost of taking precautions to meet the harm. Thus if the precautions are inexpensive it was generally considered that a reasonable person would take them.

*“However, there is nothing in the words of the section, nor in the common law principles which stand behind Section 5B, that requires this provision to be confined to the economic burden of taking any particular precaution. In a given case, Section 5B(2)(c) may require consideration to be given to the burden of taking precautions to avoid a risk of harm. Such consideration may extend to factors such as time or distance or communication. It may be that a precaution, for some reason, would be difficult to implement. Depending on the circumstances of a particular case consideration may need to be given to less tangible burdens, such as privacy concerns ...”* (**State of New South Wales v Mikhael** (2012) NSWCA 388 [70-77]).

In that case the issue was said to be whether there were privacy concerns that would prevent teachers at a school from passing on information about the anger management problems of a particular student. On the facts of that case the Court of Appeal held that such considerations did not mean that precautions should not have been taken to avoid the risk of harm.

A duty of care *“imposes an obligation to exercise reasonable care, it does not impose a duty to prevent potentially harmful conduct”* (**RTA v Dederer** at 18).

*“In considering the precautions that a reasonable person should have taken to*

*guard against the relevant risk of harm, Section 5B(2)(c) requires “the burden of taking precautions to avoid the risk of harm” to be considered. The fact that precautions could have been taken with only minimal expense is a factor in favour of the respondent’s case however it is not of great significance in a case such as this where the probability of the harm occurring and the likelihood of the harm being serious are very low” (Shaw v Thomas (2010) NSWCA 164 [60].*

The other factor mentioned in Section 5B(2) is *“the social utility of the activity that creates the risk of harm”*. As pointed out by Ipp JA in **Waverley Council v Ferreria** this paragraph *“simply gives expression to the idea that some activities are more worth taking risks for than others”*.

A surprising number of things have been argued to have social utility. It has been suggested, for example, that personal fitness trainers are involved in activities which involve social utility. The Court of Appeal held that the use of a medicine ball in an exercise does not of itself have any relevant social utility (**Wilson v Nilepac Pty Limited T/as Vision Personal Training Crows Nest** (2011) NSWCA 63). Of more general use was the comment that:

*“The social utility of the relevant activity is but one factor which Section 5B(2) requires to be taken into account in determining whether a reasonable person would have taken the necessary precautions against the relevant risk of harm”. As the chapeau to the subsection makes clear, each of the four sub paragraphs is to be considered “amongst other relevant things”. There is nothing in the IPP report which recommends Section 5B or in the text of the legislation which suggests that the standard of reasonable care required the taking of few precautions against an acknowledged risk of harm simply because the activity which created that risk had some social utility” (para 130).*

## **Section 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.

There is very little case law on this section although it has been held that a failure to specifically refer to it did not mean that a primary judge had failed to properly apply the Act (**Telstra Corporation v Bisley** (2005) NSWCA 128). In that case Telstra was held liable for having a pit lid which could be easily removed. It was argued on appeal that the trial judge should have placed weight on the fact that Telstra owned many pit lids and he had failed to do this as he had not specifically mentioned it in his judgment. The appeal was dismissed.

### **Overview of Sections 5B and 5C**

As noted above it is now relatively settled that the Sections 5B and 5C relate to questions of breach of duty rather than duty of care. When drafting pleadings it is appropriate to refer to the section, to identify the risk of harm, to state that the risk is one of which the defendant knew or ought to have known, to plead why the risk was not insignificant and what precautions a reasonable person would have taken in the circumstances. Traditionally the question of reasonable precautions would have been thought of as a matter of evidence.

On the question of whether or not a duty exists the IPP report and the Civil Liability Act do not appear to seek to make any changes to the common law. To find whether a duty exists it will therefore be necessary to look at the general “*neighbour test*” as set out in **Donoghue v Stevenson** (1932) A.C. 562 at 580:

*“... the rule that you are to love your neighbour becomes in law you must not injure your neighbour; and the lawyers question, who is my neighbour? receives a restricted reply ... the answer seems to be – persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being affected when I am directing my mind to the acts or omission which are called in question”.*

The notion of proximity was for a period thought to be important but is now thought to be unhelpful. The question of whether or not a duty is owed is most often ventilated in cases against the Crown in its various guises. The existence or not of duty is a troubled topic which is outside the Civil Liability Act and the scope of this paper.

### **Division 3 causation**

#### **Section 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 proceedings relating to liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation.

### What does all that mean?

In pre CLA times causation was understood to be satisfied if the defendant's conduct had materially contributed to the plaintiff suffering an injury.

As stated by Dixon J in **Betts v Whittingsloe** (1945) CLR 637 at 649:

*“Breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, if in fact the accident did occur according to the act or omission amounting to the breach”.* (Cited by **Gaudron J in Chappel v Hart** (1998) 195 CLR 232).

Or as stated by McHugh at para 27:

*“Before the defendant will be held responsible for the plaintiff's injury the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury. In the absence of a statute or undertaking to the contrary, therefore, it would seem logical to hold a person causally liable for a wrongful act or omission only when it increases the risk of injury to another person. If a wrongful act or omission results in an increased risk of injury to*

*the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring".*

The question is whether Section 5D of the Civil Liability Act changed the common law test of causation. The wording of the section bears some similarity to the words used by the High Court in **March v Stramare E&M H Pty Limited** (1991) 171 CLR 506.

Mason CJ:

*"Commentators subdivide the issue of causation in a given case into two questions: the question of causation in fact – to be determined by the application of the but for test – and a further question whether a defendant is in law responsible for the damage which his or her negligence has played some part in producing ... it is said that, in determining this second question, considerations of policy have a prominent part to play, as do accepted value judgments ... however this approach to the issue of causation places rather too much weight on the "but for" test to the exclusion of the "common sense" approach which the common law has always favoured and implies, or seems to imply, that value judgment has, or should have, no part to play in resolving causation as an issue of fact ..."* (para 19).

And

*"As a matter of both logic and common sense, it makes no sense to regard the negligence of the plaintiff or a third party as a supervening cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or third party and that injury occurs in the ordinary course of things. In such a situation, the defendant's negligence satisfies the "but for" test and is properly to be regarded as a cause of the consequence because there is no reasoning common sense, logical policy for refusing to so regard it".*

The judgement of McHugh J made reference to the "scope of the risk" test and how it enabled relevant policy factors to be articulated and justified in a way which was not

possible by simply applying common sense notions (para 25). Thus:

*“When a defendant has a duty to a plaintiff to prevent the occurrence of damage of a kind which occurred and the defendant’s breach of duty was a cause of that damage, the damage will be held to be within the scope of the risk which the defendant was required to avoid unless the plaintiff sustained the damage intentionally (or, perhaps, recklessly) or the damage occurred in a manner which could not reasonably be foreseen in a general way”* (para 27).

For some years it was argued by some that Section 5D precluded there being more than one cause of an injury. The decision of the Court of Appeal in **Woolworths Limited v Strong** (2010) NSWCA 282 at [48] was said to preclude a finding of causation based on material contribution. This matter was considered by the High Court (**Strong v Woolworths** (2012) HCA 5).

The case of **Strong** involved a plaintiff who had suffered serious spinal injuries when she fell at a shopping centre which was under the care and control of Woolworths. The plaintiff had been successful at trial but the Court of Appeal had overturned that finding and entered a verdict for the defendant. The appeal concerned the difficulty in slipping cases of establishing a causal connection between the absence of an adequate cleaning system and an injury when it was not known when the slippery substance was deposited on the floor.

In the High Court the majority judgment dealt with the issue of causation under the Civil Liability Act in paragraphs 17 to 39 and held that the appellant was required to do no more than...

*“prove on the balance of probabilities that Woolworths’ negligence was a necessary condition of her harm. Woolworths’ negligence lay in its failure to employ a system of periodic inspection of the sidewalk area. Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred. Here, the appellant was required to prove that, had a system of periodic inspection and cleaning of the sidewalk areas been employed on the day of her fall, it is likely that the chip would have been detected and removed before she approached the entrance to Big W”* (para 32).

The court held however...

*“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 evidence did not permit a finding of when, in the interval between 8am and 12.30pm 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 8am and 12.10pm and not in the shorter period between 12.10pm and the time of the fall”.*

On the basis of this judgment it would appear that the test of causation under Section 5D was not significantly different than the test under the common law and in the absence of direct evidence could be satisfied by an examination of the competing probabilities. This finding was reached despite the terms of Section 5E.

Three recent cases of the Court of Appeal show that the issue of causation remains something of a problem child.

In **Garzo v Liverpool/Campbelltown Christian School** (2012) NSWCA 151 the court referred to the decision of **Woolworths v Strong** but concluded that causation in that case was not established because it would involve speculation to find that the cause of Mrs Garzo’s slip was the application of the slippery paint some 4 months before her fall (paras 175 to 188).

The case of **Wallace v Kam** (2012) NSWCA 82 where a plaintiff had suffered nerve damage following surgery to his spine. The plaintiff had not been warned of this risk. The trial judge had concluded that the plaintiff did not establish he would have declined the surgery if he had been so warned. His appeal was dismissed.

*“One of the risks, a number of which Mr Wallace should have been warned came home. Mr Wallace was in one sense entitled to make his decision on the basis of complete information. That said, the approach to the enquiry under Section 5D(1)(b) should reflect the underlying legal aims of the duty and the rule of responsibility: that is, to protect the patient by holding the doctor responsible for any harm that may result from material inherent risks*

*that were not the subject of warning. The duty and rule of responsibility are not to protect the patient from the risk of an uninformed decision; they are not to protect the integrity of the decision ... they are to protect the patient from harm from material inherent risks that are unacceptable to him or her”.*

**State of New South Wales v Mikhael (2012) NSWCA 338.**

In that case a student was injured when assaulted by another student. The school was aware that the student could become violent on the smallest provocation but had not passed that information on to the student’s classroom teacher. It was held:

*“In this case, in order to prove causation, the respondent was required to establish what Miss Edgar should have done that would have prevented the harm to the respondent. In other words the question of factual causation under Section 5D(1)(a) involved the determination of the probable course of events had Miss Edgar been informed of T’s propensity to violent response if minimally provoked. The respondent, as the plaintiff, bore the onus of establishing this probable course of events (see Section 5D(5)).*

*As the concern at this point is with factual causation, the respondent was required to establish some underpinning factual circumstance that either of itself, or by inferential reasoning, enabled the court to find that “but for” the negligent omission, the harm to the respondent would not have happened”.*

The court had found that there had been a breach of duty in not passing on the information and the trial judge had found that the plaintiff had lingered in the classroom because he was afraid of T but the teacher had not understood why he was staying back. It was held:

*“In the absence of any other evidence on causation, Ms Edgar was the appropriate person to give evidence as to the hypothetical circumstance with which the respondent’s case was required to deal. It was imperative for the respondent to ascertain from Miss Edgar what she would have done, given that the appellant had failed to take the precaution which constituted the appellant’s breach of duty. As I indicated, Miss Edgar had been forthcoming with her cross examination as to what information should have been provided to her. It was her evidence that essentially grounded my findings as to*

*breach. As an experienced teacher, she would know the likely outcome of steps that the respondent contended should have been taken. However, she was not asked and the court is not entitled to speculate as to what her evidence may have been”.*

The appeal was allowed and the verdict in favour of the plaintiff was set aside on the basis that causation had not been proven.

In **Indigo Mist Pty Ltd v Palmer** [2012] NSWCA 239 Hoben JA noted that Strong made it clear that Section 5D did not preclude there being more than one cause of an injury. The judge explained:

“In slipping cases there have been traditionally two types of responses to a risk of injury. The first is to prevent, or minimise, the chances of the slippery substances getting onto the floor. The second has been to accept the inevitability of a slippery substance coming onto the floor but then to institute a system to rapidly detect and remove the substance. The latter approach is that which is usually followed in the case of supermarkets.

In that case a patron slipped on a spilt drink. The court held that a possible response of a reasonable occupier would have been to use sign and hotel staff supervision to prohibit patrons from carrying drinks between floors and thus reduce the risk of injury. The plaintiff was not required to adduce evidence of what the appropriate warning signs would be nor that the taking of such action would have prevented her fall (para’s 94 – 105)”.

This case establishes that a causal link can be established based on an occupier’s omission to take relevantly available steps to reduce the risk of slippery substances getting onto the floor.

See *Azar v Kathirgamalingan* [2012] NSWCA 429.

## **OVERVIEW OF SECTION 5D AND 5E**

An application for special leave to appeal in the matter of Garzo was dismissed and

it seemed that causation will remain an issue of where the line is drawn between reasoning on the probabilities which is allowable and mere speculation which is not.

Section 5D(1) establishes a two pronged test, the second prong involves policy issues and thus value judgements made by the Judge hearing the case or the appeal.

Section 5D(1)(a) shows that the “but for” test of causation remains the test for factual causation in all but the undefined group of “exceptional cases” contemplated by Section 5D(2).

Section 5(3) is obviously an attempt to articulate that the test should be an objective one but the exemption of statements against interests means that it is subjective with respect to such statements.

Section 5(4) highlights the importance of policy issues so parties should attempt to articulate the policy reasons that support their contentions.

Section 5E states the obvious and has been held not to change the pre-existing law (**Woolworths v Strong** [2010] NSWCA 282 at [59]). A plaintiff can discharge the onus by showing on the balance of probabilities that an inference arises.

**Sharron Norton**

**Frederick Jordan Chambers**