IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
GROUP PROCEEDINGS LIST

Not Restricted

S ECI 2020 03402

5 BOROUGHS NY PTY LTD (ACN 632 508 304) Plaintiff

-and-

STATE OF VICTORIA & ORS Defendants
(according to the attached schedule)

JUDGE:	John Dixon J
WHERE HELD:	Melbourne
DATE OF HEARING:	7 June 2022
DATE OF JUDGMENT:	26 August 2022
CASE MAY BE CITED AS:	5 Boroughs NY Pty Ltd v State of Victoria (No. 2)
MEDIUM NEUTRAL CITATION:	[2022] VSC 494

PRACTICE AND PROCEDURE – Application to strike out statement of claim – COVID-19 pandemic – Negligent conduct alleged against State of Victoria in implementing hotel quarantine – Plaintiff claims economic loss consequent on exercise of emergency powers under s 200 of the *Public Health and Wellbeing Act 2008* (Vic) – Group proceeding – Causation – Whether pleading or any part thereof fails to disclose cause of action or may prejudice, embarrass or delay the fair trial of the proceeding, or is otherwise an abuse of the process of the Court – *Wrongs Act 1958* (Vic) s 51(1), (2); *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 23.02(a), (c), (d).

APPEARANCES:	Counsel	Solicitors
For the Plaintiff 5 Boroughs NY Pty Ltd	Ms W Harris QC with Mr A Hochroth and Mr H Whitwell	Quinn Emanuel Urquhart & Sullivan
For the Defendants	Ms R Doyle SC with Mr L Brown and Ms R Amamoo	Herbert Smith Freehills

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HIS HONOUR:

Introduction

1 The plaintiff, 5 Boroughs NY Pty Ltd ('**5 Boroughs**') claims, from the defendants, the State of Victoria and others, damages for economic loss suffered as a result of the stage 3 and 4 lockdown restrictions on economic activity imposed during the second wave of the COVID-19 pandemic. 5 Boroughs is a representative plaintiff and the proceeding is a group proceeding under Part 4A of the *Supreme Court Act 1986* (Vic). It contends that these restrictions were the inevitable result of COVID-19 transmission events at two hotel quarantine sites caused by the negligent failure of the State to implement effective infection prevention and control measures at the sites.

2 The defendants' earlier application for summary judgment was refused.[1] However, pursuant to r 23.02(a) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('**Rules**'), I struck out the whole of the statement of claim with leave to the plaintiff to replead. The plaintiff duly filed a second statement of claim dated 25 March 2022 that I will refer to as the '**2SOC**'.

3 The defendants now apply to strike out paragraphs 28, 79, 99, 135, 136, 149(a), 151, 154(a) and 154(b)(i) of the 2SOC on the basis that they do not disclose a cause of action, or they are scandalous, frivolous or vexatious, or they may prejudice, embarrass or delay the fair trial of the proceeding.

4 The strike out application is put on three grounds:

(a) Ground 1: The plaintiff failed to plead material facts in relation to transmission events rendering paragraphs 79, 99, 135, 136, 149(a) and 154(a) of the 2SOC defective.

(b) Ground 2: The pleading maintains an inconsistency between minimisation of risk and a 'zero transmission' counterfactual exposing additional defects in paragraphs 79, 99, 135, 136, 149(a), 154(a) and 154(b)(i) of the 2SOC.

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1 *5 Boroughs NY Pty Ltd v State of Victoria* [2021] VSC 785 ('**Strike-out judgment**').

(c) Ground 3: By paragraphs 28 and 151, the plaintiff's attempt to plead an alternative causation case in reliance on s 51(2) of the *Wrongs Act 1958* (Vic) is flawed.

5 The application is allowed on ground 3 but is otherwise dismissed.

Applicable principles

6 The parties accepted my summary of the principles applying on a strike-out application as set out in *Wheelahan v City of Casey (No 12)*.[2] I will apply those principles but do not propose to recite them in these reasons.

The plaintiff's pleaded claim

7 The plaintiff sues the defendants in negligence for economic loss caused by the defendants' conduct in implementing hotel quarantine for returned travellers.

8 The relevant elements of the claim are as follows:

(a) The defendants: the Minister for Health and Minister for the Coordination of Health and Human Services: COVID-19 ('**Minister for Health**'), the Minister for the Coordination of Jobs, Precincts and Regions: COVID-19 ('**Minister for Jobs**'), the Secretary, Department of Health and Human Services ('**DHHS**') and the Secretary, Department of Jobs, Precincts and Regions ('**DJPR**').

(b) The group: the plaintiff, and the group members it represents, carried on a retail business as at 1 July 2020, which involved the supply of goods or services in Victoria to members of the public in attendance at their premises ('**Victorian retailers**').

(c) The loss claim: The plaintiff and group members claim to have suffered economic loss sustained because they were prevented from supplying goods or services as a result of the imposition of stage 3 and 4 restrictions, including

[2] [2013] VSC 316, [25]. Referred to with approval by the Court of Appeal in *Uber Australia Pty Ltd v Andrianakis* (2020) 61 VR 580, 599–600 [50].

workplace closures.[3]

(d) The duty of care: The 2nd – 5th defendants owed to the plaintiff and group members a duty to take reasonable care in relation to the implementation of infection prevention and control measures ('**IPC measures**') at quarantine hotels to avoid foreseeable economic loss on the part of the plaintiff and group members.

(e) The standard of care: Each of the 2nd – 5th defendants was required to determine whether their respective departments (DHHS and DJPR) had obtained advice as to IPC measures and, to the extent that advice had not been obtained and/or had not been implemented, procure the implementation of those IPC measures.

(f) The IPC measures are described in paragraph 27 of the 2SOC as necessary in order to prevent or minimise the likelihood and/or risk of transmission of SARS-CoV-2 from returned travellers at quarantine hotels to private security guards, hotel staff or other persons working at those hotels (whom I will collectively refer to as '**workers**'). The IPC measures required that workers use personal protective equipment ('**PPE**') and engage in hand hygiene and social distancing in a certain manner, that they were trained with respect to the same prior to commencing work, and that the implementation of those IPC measures by the workers was supervised and audited so that any 'deficiencies' in such implementation could be rectified.

(g) Paragraph 28 is challenged so I set it out in full.

> At all material times:
>
> (a) a failure to implement one or more of the IPC measures pleaded in paragraph 27 above would increase the likelihood and/or risk of transmission of SARSCoV-2 from returned travellers at quarantine hotels to workers; and
>
> (b) the more substantial the failure, the higher the likelihood and/or risk of such transmission.

[3] Restrictions imposed by means of various directions issued under *Public Health and Wellbeing Act 2008* (Vic) s 200.

(h) The breach of duty: Each of the 2nd – 5th defendants failed to procure the implementation of effective IPC measures at the Rydges and Stamford Plaza hotels. They failed to ask their respective departments whether they had obtained and implemented IPC advice and failed to procure that the IPC advice be implemented.

(i) The plaintiff alleges that, at Rydges prior to 25 May 2020, the workers escorted travellers on fresh air breaks, attended disturbances in rooms, handled travellers' luggage, cleaned certain surfaces (including a lift) and removed bags of rubbish and other items left by travellers. Similar tasks undertaken by the guards at Stamford Plaza are alleged.

(j) In pleading the deficiencies in the IPC measures deployed at each hotel, the plaintiff alleges there was a lack of training (paragraph 58), a lack of or incorrect usage of PPE (paragraph 60), a lack of hand hygiene (paragraph 62), a lack of supervision and auditing (paragraph 63), and the contractors were not provided with IPC advice or received erroneous advice (paragraph 64).

(k) The plaintiff alleges the following breaches of the posited duty of care:

    (i) neither guards nor staff received or undertook training as described in paragraph 27;

    (ii) those workers did not, or did not all, understand the PPE they needed to wear when undertaking a given activity, how to don and doff it correctly, when and how to dispose of or replace it, and hand hygiene;

    (iii) PPE was not used as described in paragraph 27;

    (iv) Guards often did not wear masks during shifts, if they wore gloves, wore porous gloves, never wore gowns or eye protection, were inadequately supplied with PPE and expected to reuse PPE;

    (v) Hand hygiene was not practised as described in paragraph 27;

    (vi) there was no supervision or audit and no correction of deficient practices.

(l) The plaintiff then pleads the transmission events. This is contentious.

Paragraphs 79 (Rydges) and 99 (Stamford) state:

> 79. In the premises, prior to 25 May 2020, SARS-CoV-2 was transmitted from a member or members of the family of four returned travellers detained at Rydges to one or more of the six private security guards and one hotel worker identified in paragraphs 70, 71, 72, 73 and 75 above.
>
> **Particulars**
>
> 1. That SARS-CoV-2 was transmitted from the family of four to one or more of the seven workers identified above is to be inferred from:
>
> A. the combination of epidemiological and genomic data pleaded in paragraphs 70 to 78 above;
>
> B. the tasks performed by those workers at Rydges pleaded in paragraphs 56 and 57 above.
>
> Further particulars may be provided following discovery and expert evidence.
>
> 2. That transmission occurred prior to 25 May 2020 is to be inferred from the fact that 25 May 2020 is the earliest date on which, to the plaintiff's knowledge, workers at Rydges started showing symptoms of COVID-19.
>
> …
>
> 99. In the premises:
>
> (a) prior to 10 June 2020, SARS-CoV-2 was transmitted from the single returned traveller detained at Stamford Plaza identified in paragraph 90 above to one or more of the 26 private security guards identified in paragraph 95(a) above; and
>
> (b) on or shortly after 11 June 2020, SARS-CoV-2 was transmitted from one or both of the returned traveller couple detained at Stamford Plaza identified in paragraph 91 above to one or more of the 26 private security guards identified in paragraph 95(a) above.
>
> **Particulars**
>
> 1. That SARS-CoV-2 was transmitted from the single returned traveller to one or more of the 26 private security guards is to be inferred from:
>
> A. the combination of epidemiological and genomic data pleaded in paragraphs 93 to 98 above; and
>
> B. the tasks performed by private security guards at Stamford Plaza prior to the outbreak, pleaded in

paragraph 80 above.

Further particulars may be provided following discovery and expert evidence.

2. That transmission from the single returned traveller occurred prior to 10 June 2020 is to be inferred from the fact that 10 June 2020 is the earliest date on which, to the plaintiff's knowledge, one of the 26 private security guard guards began to show symptoms of COVID-19 (that date being prior to the date on which the returned traveller couple commenced detention at Stamford Plaza).

   Further particulars may be provided following discovery and expert evidence.

3. That SARS-CoV-2 was transmitted from the returned traveller couple to one or more of the 26 private security guards is to be inferred from:

   A. the combination of epidemiological and genomic data pleaded in paragraphs 93 to 98 above; and

   B. the tasks performed by private security guards at Stamford Plaza prior to the outbreak, pleaded in paragraph 80 above.

   Further particulars may be provided following discovery and expert evidence.

4. That transmission from the returned traveller couple occurred on or shortly after 11 June 2020 is to be inferred from the fact that 11 June 2020 is the earliest date on which one member of that couple started showing symptoms of COVID-19 and from the fact that the returned traveller couple did not commence their detention at Stamford Plaza prior to that date.

(m) In summary, the pleaded case, using Rydges as the example, is that the virus was transmitted from certain returned travellers (the family of four who were diagnosed with COVID-19 between 15 and 18 May 2020) to one or more of the workers (who were diagnosed between 25 May and 4 June 2020), which can be inferred from the combination of (i) epidemiological and genomic data, (ii) the tasks performed generally by workers at each quarantine hotel prior to the outbreak (and inferentially by the guards and hotel worker), and (iii) the general allegations of failings by the 2nd - 5th defendants to inquire of their departments whether they had obtained or implemented IPC advice or procure

them to do so, which is in itself to be inferred because in a general sense the IPC measures alleged at paragraph 27 were not implemented either at all or effectively.

(n) For reasons I will explain in due course, the plaintiff does not allege the material facts of any specific transmission event at a particular time from an identified traveller to an identified worker. Rather, it alleges that there has been transmission from travellers staying at the hotel to workers at the hotel and that at this level of generality the relevant event, transmission from traveller to worker, is adequately pleaded.

(o) Material facts are then pleaded that allege the start of the second wave in Victoria and the making of certain restrictions defined as one or more of the stage 3, stage 4 and regional stage 3 restrictions. Next by reason of one or more of such restrictions the plaintiff and group members suffered economic loss.

(p) Causation: The plaintiff alleges that:

(i) the first wave of infections was subsiding by 11 May 2020 when certain stage 3 restrictions made under the *Public Health and Wellbeing Act 2008* (Vic) ('**PHW Act**') began to be eased.

(ii) the relevant period of conduct in the operation of the quarantine hotels was in mid-May 2020.

(iii) because the relevant defendants did not take the steps pleaded – to seek advice, implement, supervise and audit the prudent IPC measures – it, and group members, suffered economic loss.

(iv) the defendants' breach of duty caused the workers to operate the quarantine hotels and interact with the infected travellers in the manner generally alleged. Such matters are alleged at a general level, i.e. what the workers did not do.

(v) by 18 June 2020, in respect of Rydges, COVID-19 cases in eight workers and nine household or social contacts of those workers had been epidemiologically linked to the family of four travellers and genomic sequencing reports for 14 of the 17 cases established a cluster of the travellers and each of the infected workers and contacts.

(vi) There is a like pattern of allegations in respect of the Stamford Plaza, and by 13 July 2020, COVID-19 cases in 26 workers, a nurse, and 19 household or social contacts of those workers had been epidemiologically linked to infected travellers and genomic sequencing reports for 35 of the 46 cases established that there were two transmission networks from different travellers and that all cases clustered with one or the other of these networks.

(vii) Immediately thereafter, there was an upward trend in community infections that was acknowledged as related by genomic sequencing to the failures in the quarantine hotel program earlier alleged. The second wave had begun. The failure in the proper operation of the quarantine hotels program was a necessary condition for the second wave.

(viii) The immediate cause of the economic loss suffered by the plaintiff was the imposition of stage 3 and stage 4 restrictions by directions made under the PHW Act, which were consequent upon the second wave of widespread community infection.

(q) The plaintiff pleads factual causation, but not by alleging that the pleaded breaches were a necessary condition of transmission at each of the Rydges and Stamford hotels that form the first link in its causation chain. Instead, it alleges that, had the defendants conducted themselves prudently to the appropriate standard, transmission at each hotel would not have occurred. It is plainly alleging a counterfactual. The paragraphs pleading these allegations are challenged. They state:

135. In respect of each of the Minister for Health, the Minister for Jobs, the Secretary of DHHS, and the Secretary of DJPR, had the relevant defendant procured the implementation by DHHS or DJPR (as the case may be) of IPC measures of the kind pleaded in paragraph 27 above:

(a) at Rydges, prior to the transmission of SARS-CoV-2 from returned travellers to workers at that hotel pleaded in paragraph 79;

(b) at Stamford Plaza, prior to the transmission of SARS-CoV-2 from returned travellers to workers at that hotel pleaded in paragraph 99;

that transmission at those hotels would not have occurred.

Particulars

The lack of IPC measures of the kind pleaded in paragraph 27 above at each of Rydges and Stamford Plaza substantially increased the risk of transmission of SARS-CoV-2 from returned travellers to workers at those hotels and led to the actual transmission pleaded in paragraphs 89 and 99 above.

136. In the premises, in respect of each of the Minister for Health, the Minister for Jobs, the Secretary of DHHS, and the Secretary of DJPR, but for the relevant defendant's breaches of the duty of care, the transmission of SARS-CoV-2 from returned travellers to workers at Rydges pleaded in paragraph 79, and the transmission of SARS-CoV-2 from returned travellers to workers at Stamford Plaza pleaded in paragraph 99, would not have occurred.

(r) Next, the plaintiffs step through the causal sequence to the suffering of economic loss when restrictions are introduced under the PHW Act, pleading that the workers transmitted the virus to the community where it spread, which steps of transmission would not have occurred but for the transmission from the infected travellers to the workers.

(s) The plaintiff pleads that genomic sequencing of thousands of community cases as at 18 August 2020 showed clustering of about 75%[4] of community infections with the cases from the quarantine hotels, and only four cases that were unrelated to the outbreaks at Rydges and Stamford Plaza, which cases did not

[4] 3,597 cases clustered genomically with cases from Rydges; 110 clustered genomically with cases from Stamford Plaza – out of a total of 4,981 cases.

transmit SARS-CoV-2 to anyone else. The plaintiff pleads that inter-community transmission, the second wave, would therefore not have occurred but for the transmission events alleged to have occurred at the quarantine hotels. The final step is that the plaintiff alleges that, but for the second wave, the stage 3 and 4 restrictions would not have been imposed and the plaintiff would not have suffered economic loss.

(t) In paragraphs 149 and 150, the plaintiff again pleads factual causation, spelling out that it relies on s 51(1)(a) of the *Wrongs Act*. These paragraphs are also challenged. The plaintiff pleads that in the (unidentified) premises, the breach of duty alleged – failure to procure the ICP measures – was a necessary condition of the plaintiff suffering economic loss by the steps summarised in paragraph 149, where it alleges that if there had been no breach:

(i) Transmission from traveller to worker would not have occurred;

(ii) Transmission by those workers to other members of the Victorian community would not have occurred;

(iii) Transmission constituting a significant second wave of increased new daily COVID-19 cases in Victoria would not have occurred;

(iv) The Chief Health Officer and persons authorised by the Chief Health Officer[5] would not have exercised emergency powers under s 200 of the PHW Act, in response to the outbreak of COVID-19, resulting in the issuing of various directions that restricted movement and activity in Victoria.

(u) Paragraph 154 is also challenged. It repeats the allegations making up the counterfactual as just described, but identifies it as what would have happened:

> In respect of each of the Minister for Health, the Minister for Jobs, the Secretary of DHHS, and the Secretary of DJPR, had the relevant defendant not breached the duty of care, and had therefore procured the

[5] Authorised pursuant to the *Public Health and Wellbeing Act 2008* (Vic) s 199.

implementation at Rydges and Stamford Plaza of IPC measures of the kind pleaded in paragraph 27 above:

(a) SARS-CoV-2 would not have been transmitted from a returned traveller detained at a quarantine hotel to a worker at a quarantine hotel;

(b) in turn:

(i) a worker at a quarantine hotel would not have transmitted SARS-CoV-2 to another member of the Victorian community;

(ii) there would not have been on-transmission amongst the Victorian community;

(iii) 'stage 3' or greater restrictions would not have been imposed; and

(iv) the plaintiff and Group Members would not have suffered the loss pleaded in paragraphs 104(d), 109(d), 114(e), 118(f), and 133 above.

(v) The plaintiff provided further particulars of this paragraph that identified, in circularity, paragraphs 134-6 as the material facts relied on to support paragraph 154. Further the plaintiff expressly confirmed that it relies on a 'zero transmission' counterfactual.

> … then, on the balance of probabilities, no transmission of SARS-CoV-2 from a returned traveller to one or more workers at each of Rydges and Stamford Plaza would have occurred.

(w) Alternative causation: Finally, to follow the submissions, the alternative causation claim under s 51(2) must be noted. It is pleaded in paragraphs 151 which is also challenged by the defendants in this application. The plaintiff alleges that the breaches of duty on which the plaintiff relies materially increased the risk that the group members would suffer economic loss.

> Alternatively, if, contrary to paragraph 150 above, in respect of each of Minister for Health, the Minister for Jobs, the Secretary of DHHS, and the Secretary of DJPR, the breach of duty by the relevant defendant was not a necessary condition of the occurrence of the economic loss suffered by the plaintiff and Group Members within the meaning of s 51(1)(a) of the *Wrongs Act 1958* (Vic), the breaches of duty by the relevant defendant:
>
> (a) materially increased the risk that the plaintiff and Group members would suffer the loss pleaded in paragraphs 104(d), 109(d), 114(e), 118(f), and 133 above; and

(b) should be taken to establish factual causation pursuant to s 51(2) of the *Wrongs Act 1958* (Vic).

Ground 1

The defendants' submissions

9 The defendants submitted that the particular paragraphs identified above at [4(a)] be struck out pursuant to r 23.02 of the Rules because:

(a) those paragraphs do not sufficiently identify the material facts in relation to the transmission events which are essential to establish causation. As a result, the pleading does not disclose a cause of action; and/or

(b) those paragraphs simply plead a conclusion as to causation without pleading the material facts said to give rise to the causal connection and are, in that sense, embarrassing; and/or

(c) the deficiencies identified would cause the defendants substantial prejudice if required to respond to those paragraphs in their current form.

10 The defendants contended that the plaintiff had not adhered to the requirement emphasised in the Strike-out judgment, that it plead the material facts constituting specific transmission events, what I described as a failure to allege any mechanism of transmission, whether by allegations of incidents, or by express identification of a path of inferential reasoning. The defendants complained that they are left to join the dots.

11 The consequences of pleading broad allegations was that the 2SOC did not plead any material facts showing how any alleged breach of the standard of care is said to have caused the transmissions of SARS-CoV-2 as alleged at paragraphs 79 and 99, such that but for the breach, the transmission would not have occurred. The defendants accepted that it was permissible to rely on inferential reasoning, but submitted that the point of causal connection between breach and harm, cannot be left to a confluence of increase of risk and damage within the scope of risk created by the breach.[6] On the

[6] Citing *Munday v St Vincent's Hospital* [2021] VSCA 170, [38]; *Minister for the Environment (Cth) v Sharma* (2022) 400 ALR 203, 293 [312] ('***Sharma***').

basis of the allegations pleaded in the 2SOC, an inference on the balance of probabilities cannot be drawn that the defendants' conduct created or increased the risk of the injury that in fact occurred and *that* risk had eventuated.[7]

12 The defendants submitted that the 2SOC did just that. It alleges a transmission from returned travellers to workers that occurred in circumstances where none or close to none of the IPC measures described in paragraph 27 had been implemented and it alleged at paragraph 28 that the greater the extent of failure to implement those measures, the greater risk of transmission from returned travellers to workers. The pleading then invites the inference on the balance of probabilities that transmission would not have occurred had the defendants complied with the posited duty of care.

13 The defendants submitted that the vice in the way in which the plaintiff put its case was that it was not tied to any particular transmission event during which it alleged that some aspect of the applicable standard of care was either negligently not implemented at all, or was implemented, but in a negligent manner. The required inferential reasoning was at large and at an impermissible level of abstraction.

14 The defendants submitted that *Roads and Traffic Authority v Royal* (***'Royal'***)[8] illustrated that a plaintiff cannot reason from a failure on the part of a defendant to reduce an identifiable risk to a conclusion of liability. Without facts to enable a positive finding as to the existence of a specific state of affairs about transmission, the plaintiff's claim could not 'pass from the realm of conjecture into the realm of inference'. In *Royal*, Gummow, Heydon and Hayne JJ observed that even if it could be said that the Authority's breach of duty materially contributed to the occurrence of '*an* accident' by creating a heightened risk of accidents, 'it made no contribution to the occurrence of *this* accident'.[9] The crash had nothing to do with the problem identified by the breach of duty. Kiefel J identified the question to be whether it (the Authority's negligent

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7 See *Seltsam Pty Ltd v McGuinness* (2000) 49 NSWLR 262, 279 [107] (***'Seltsam'***) (emphasis in original), referring to *Chappel v Hart* (1998) 195 CLR 232, 244–5 [27] (McHugh J (in dissent)) (***'Hart'***); *Sharma* (2022) 400 ALR 203, 411 [874]. See also in *Sharma*, where it was said that the issue was whether '*one* substance that can cause injury *did* cause injury': at 294 [318], citing *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111, 136 [68] (emphasis in original).

8 (2008) 82 ALJR 870, 878 [31] (***'Royal'***).

9 Ibid 876–7 [25]-[26].

failure) *did* cause or materially contribute to the injury actually suffered and it was not sufficient to suggest that there was a statistical possibility of an accident at the intersection because it was not the best design.

15 The defendants submitted that the pleading was not assisted by *Betts v Whittingslowe* ('***Betts***')[10] or by *Strong v Woolworths* ('***Strong***')[11] considered later in these reasons. They submitted that each of those cases confirmed that the correct approach to inferential causation reasoning required that the loss be shown to have been suffered because of the negligent failure to discharge the applicable standard of care. It was insufficient to couple a breach of duty with an accident of the kind that might be caused by such a breach to justify an inference that in fact the accident was so caused.

16 In *Strong* it was accepted that the chip on the floor caused the plaintiff to slip. The onus that the plaintiff bore was to demonstrate why the chip was there. By analogy, the plaintiff's reliance on genomic sequencing to supply evidence that the same strain of the virus was detected in returned travellers and workers does not make out its claim. It must show that same strain of the virus carried by returned travellers was detected in the workers because of a transmission event or events during hotel quarantine, caused by a negligent failure to implement IPC measures or the negligent manner of implementation of IPC measures. Otherwise, the transmission could have been caused by non-negligent conduct and not be actionable.

17 Further, *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* ('***Tapp***')[12] was not analogous. There the critical issue was why the horse fell and whether it was because the deterioration of the arena surface presented a substantially increased risk of falls beyond what was acceptable in a dangerous activity. The High Court found that there was sufficient evidence about the condition of the surface to permit the inference of causation. In this claim, the first critical issue is how and why did the workers contract the virus, but the plaintiff makes no allegation of fact that confronts this issue. The nexus between a worker who contracted the virus, the circumstances

10 (1945) 71 CLR 637 ('***Betts***').
11 (2012) 246 CLR 182 ('***Strong***').
12 (2022) 96 ALJR 337 ('***Tapp***').

of contact or interaction between the worker and the travellers, the performance or non-performance of any of the tasks in implementation of the IPC measures pleaded in paragraph 27 vis-a-vis the family of returned travellers that provided the material allegation of the transmission mechanism, is not alleged.

18 The defendants submitted that the failure to plead the material facts in relation to the transmission events will have negative consequences for the conduct of the proceeding. It deprives the defendants of the opportunity to prepare a defence which is confined to establishing that such breach of the duty of care (if established) did not cause *that* transmission or, put another way, that there were non-negligent explanations for transmission. More broadly, there is real embarrassment in attempting a properly responsive pleading that appropriately confines the issues for trial. The deficiencies in the pleading will force a 'roving inquiry' into the manner in which all IPC activities that are alleged to be prudently needed were either not undertaken or engaged in negligently during the relevant period and whether and when transmission events might have occurred or were caused by such matters. An unstated number of counterfactuals are left alive that may be raised at trial for determination and will be posited in the absence of specifically identified and particularised transmission events. Determining which, and how, the 'relevant' defendant was aware of deficiencies in systems and procedures, meets imprecision in the vagueness of the plaintiff's allegations. The defendants include Ministers and Secretaries of their respective departments who will have directed, or failed to direct, particular public servants in relation to matters identified by reference to the alleged IPC measures. Such persons remain unidentified, which also contributes imprecision to the counterfactual of what a prudent defendant ought and might have done to discharge the applicable standard of care.

19 Counsel for the defendants submitted that the plaintiff should plead specific details about the interactions between the returned travellers and the hotel workers that it says caused the transmission of the virus. The transmission 'events' do not require naming the individuals involved, but they should set out a window of time when,

taking Rydges as an example, the family were likely to have been contagious and that the guards working there at the time took them on a break, attended their room, accompanied them in a lift without a mask on, or had some contact with them which exposure constituted the transmission event or a set of possible events, that the guard in question failed to implement some specific features of the pleaded IPC measures and then that guard tested positive in the relevant incubation period. The absent material fact, they say, is the specific exposure event. It is not enough to allege that guards generally escorted the returned travellers, without ever saying that one of them actually did in this case. As a result, the defendants cannot marshal a defence which shows that, for example, IPC measures were adequately taken on those particular occasions.

20 Counsel for the defendants contended that the plaintiff's pleading is the equivalent of claiming damages for medical negligence, or arising from an inherently dangerous campdrafting competition (like *Tapp*), or from a car accident, but failing to plead the circumstances of the actual surgery, the sporting event where the horse fell, or the collision, respectively. The plaintiff's pleading is the equivalent of claiming in a medical negligence claim that, generally, doctors in that hospital do this sort of operation, and probably did perform a surgery on the day. That would be pleading at an unacceptable level of abstraction and would be absent the relevant material facts.

21 Cases like *Strong*, the defendants argued, used inferential reasoning based on clear and more focused facts. The facts narrowed the scope of the enquiry to a window of time in which the chip must have been dropped, and importantly it was clear that a chip was indeed dropped and caused the plaintiff to slip, allowing the defendant to understand the case they have to meet and adduce evidence in an attempt to refute the pleaded counterfactual. The scale of inferential reasoning required in this case, the defendants contended, is incomparable to *Strong*. It requires an inference from an undisclosed number of possible interactions, over an unmanageable period of time, between a large number of possible people. Ultimately, the defendants will be unable to show that there was a non-negligent spread of Covid-19 if the plaintiff does not

identify the transmission event.

The plaintiff's submissions

22 The plaintiff noted that the defendants' first ground sought to impugn the first step in the causal chain that it alleged. It noted that its primary case was that the loss suffered by the plaintiff and group members would not have occurred but for the defendants' negligence and that the first step concerned the transmission events that occurred at Rydges and Stamford Plaza between return travellers and workers.

23 The plaintiff reframed the defendants' first ground to be more precisely put as whether the plaintiff has pleaded material facts sufficient to establish on the balance of probabilities that, but for the defendants' negligence, the returned traveller to worker transmission at the two hotels would not have occurred.

24 The plaintiff cited *Bradshaw v McEwans Pty Ltd* ('***Bradshaw***')[13] in support of the contention that where direct proof is not available it will be enough if the circumstances appearing in the evidence give rise to a reasonable and definite inference established on the balance of probabilities. Such a conclusion may fall short of certainty but is not to be regarded as mere conjecture or surmise. The plaintiff cited a line of authority following on from *Bradshaw* that, it contended, demonstrated that its pleading was sufficient.[14] I will return to these cases in due course.

25 The principle for which the plaintiff contended was that causation may be proved by inference on the balance of probabilities and the plaintiff may not be required to prove the specific mechanism by which the damage complained of was caused. It is a necessary corollary of the well-established principle that factual causation may be established by inference, and that the plaintiff is not required to establish the specific mechanism by which one event caused another event.

26 The plaintiff drew my attention to the way in which the duty of care is pleaded,

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13 (1951) 217 ALR 1 ('***Bradshaw***').

14 *Betts* (1945) 71 CLR 637; *Strong* (2012) 246 CLR 182, 196-7 [34]; *Kocis v SE Dickens Pty Ltd* (1998) 3 VR 408, 430, 432 ('***Kocis***'); *Seltsam* (2000) 49 NSWLR 262, 276 [91]; *East Metropolitan Health Service v Ellis* [2020] WASCA 147, [281] ('***Ellis***').

requiring each of the natural person defendants to ask his or her department whether it had obtained and implemented the advice of an IPC expert and, if not, to procure that his or her department take those steps. Had the defendant discharged the duty of care by procuring that their departments so act, they would have appreciated the inadequate IPC standards at Rydges and Stamford Plaza and procured the immediate implementation of the pleaded IPC measures. Had they done so, transmission of the virus from returned travellers to workers would not have occurred. The pleaded IPC measures are an exhaustive and precise list, which, if implemented at the two hotels, would have prevented transmission from returned travellers to workers. Further, the greater the extent of any failure by the defendants to implement the pleaded IPC measures, the greater the risk of transmission of the virus at the quarantine hotels.

27 The plaintiff noted the material allegations in relation to the transmission event at Rydges to be as follows:

(a) the virus was transmitted from the family of four returned travellers identified in the pleading at paragraphs 67 to 69 to one or more of seven workers at that hotel, comprising the six security guards and one hotel worker identified in the pleading at paragraphs 70, 71, 72, 73 and 75 (paragraph 79);

(b) that transmission occurred prior to 25 May 2020 (paragraph 79);

(c) the six security guards all worked for Unified Security (paragraph 43);

(d) the one hotel staff member worked for the operator of Rydges (paragraph 70);

(e) the precise dates on which those six security guards started showing symptoms of COVID-19 or returned a positive test were those pleaded in paragraphs 70, 71, 72, 73 and 75;

(f) the precise date on which the hotel staff member started showing symptoms of COVID-19 was 25 May 2020;

(g) the tasks performed at Rydges by the six security guards prior to 25 May 2020

included those pleaded in paragraph 56, namely:

(i) escorting returned travellers on 'fresh air' breaks outside their rooms;

(ii) attending disturbances created by returned travellers in their rooms;

(iii) handling the luggage of returned travellers upon their arrival at the hotel; and

(iv) cleaning surfaces at the hotel, including door handles;

that is, tasks of a kind which were apt to expose the guards to infection if travellers were infected;

(h) the tasks performed by the hotel staff member at Rydges prior to 25 May 2020 included those pleaded in paragraph 57, namely:

(i) cleaning surfaces at the hotel, including a lift used by returned travellers; and

(ii) removing bags of rubbish and other items left by returned travellers outside their rooms;

(i) the extent of IPC training, PPE usage and supervision and auditing of the seven workers, prior to 25 May 2020, was that pleaded in detail at paragraphs 58 to 63 in terms which engage directly with the benchmark IPC measures pleaded at paragraph 27.

28 Similarly the plaintiff pointed to the allegations of material fact in relation to the transmission events at Stamford Plaza that follow the same template.

29 The plaintiff emphasised that its allegations closely tracked the specific IPC measures pleaded and outlined the departures from those measures at the two hotels revealing that the plaintiff alleges that none or close to none of the IPC measures was implemented with respect to guards and hotel staff. The extent of the breach was such as to increase the risk of transmission as the plaintiff had earlier pleaded.

30 The plaintiff submitted by reference to this analysis that its pleading is far from bereft of material facts going to the transmission events and the nexus between those events, the defendants' negligence and the plaintiff's loss. Rather, the defendants have widely understated the material facts supporting the necessary inferences.

31 However, the plaintiff conceded two limitations on what it could presently plead on the redacted material made available to it as to the transmission events. It could not say whether the virus was transmitted to one or more than one member of the relevant subset of guards and workers and could not identify the specific mode of transmission. Acknowledging that further particulars may be provided following discovery and expert evidence, the plaintiff submitted that it does not matter for the purpose of establishing causation on the balance of probabilities that a specific mechanism of transmission on an identified occasion from one person to another remained unidentified.

32 The plaintiff submitted that the material facts that it has pleaded, if proved at trial, would enable the court to find on the balance of probabilities that had the duty of care been discharged and the IPC measures implemented, the transmission from the returned travellers to one or more of the workers would not have occurred. It submitted that finding was open on proof of the five matters that it had pleaded, being:

(a) the virus was transmitted from the family of four to one or more of the six Unified Security guards and member of the staff of the operator of Rydges;

(b) the virus was transmitted prior to 25 May 2020;

(c) prior to that period, none or close to none of the IPC measures in paragraph 27 had been implemented in respect of Unified Security guards and the staff of the operator of Rydges;

(d) the implementation of IPC measures of the kind described in paragraph 27 was necessary in order to prevent or minimise the likelihood or risk of transmission

from returned travellers to workers; and

(e) the greater the extent of the failure to implement the paragraph 27 measures, the greater the risk of transmission from returned traveller to worker.

That conclusion could be reached on the balance of probabilities notwithstanding that the court could not make a finding as to the specific mode of transmission or the specific workers to whom the virus was transmitted.

33 It was significant, the plaintiff submitted, that what the defendants ultimately sought were further particulars which the plaintiff was presently unable to provide but, more significantly, was not required to provide.[15] The plaintiff has given the best particulars that it can on the information presently available to it and the pleading meets the function of stating with sufficient clarity the case that must be met to provide procedural fairness and to define the issues for determination.[16]

34 Further, the plaintiff submitted that it was premature to assess the significance of the pleaded material facts on the question of causation in the absence of all the evidence that will be led at trial, particularly where the defendants seeks a summary determination that the plaintiff's allegations are incapable of sustaining its alleged link between the defendants' negligence and the instances of transmission of the virus that occurred at the two hotels.[17]

35 Although the plaintiff contended these submissions were sufficient to dispose of ground 1, it addressed specifically a number of the defendants' submissions. In substance, the plaintiff contended that its allegations were sufficiently tied to particular transmission events – identified by place, time, and the roles and activities of those involved – such that the material facts it pleaded demonstrated how any of the alleged breaches of the standard of care caused the transmissions at each hotel and supporting a probable inference that but for the breach the transmission would not

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15 Citing *Street v Luna Park Sydney Pty Ltd* [2006] NSWSC 533, [15]-[16]; *Keshi Pty Ltd v Firefly Press (Australia) Pty Ltd* (2008) 246 ALR 166, 170 [31].

16 *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279, 286.

17 Citing *Fernandez v Tubemakers of Australia Ltd* (1975) 2 NSWLR 190, 197 ('***Fernandez***'); *Seltsam* (2000) 49 NSWLR 262, 275 [83].

have occurred. It was erroneous to suggest that the defendants were left 'to join the dots'.

36 The plaintiff submitted that the more probable inference to be drawn from the circumstances, that will be sufficiently established by its allegations when proved at trial, if left unexplained, will be that the injury arose from the defendants' negligence. The plaintiff is able to allege that the virus was transmitted from returned travellers to one or more of a pool of workers, just as in *Strong* the plaintiff established that her fall was caused by a greasy chip. The necessary inference is whether the implementation of the specific IPC measures would have prevented the transmission, just as in *Strong* it was necessary to infer whether an adequate cleaning system would have prevented the fall.

37 Further developing the submission, the plaintiff explained that the breach was failing to take advice on appropriate IPC measure and then to ensure that those measures were implemented, in order to eliminate or minimise the risk of transmission. The wholesale failure to ensure these measures were implemented, coupled with the tasks that security guards were required to undertake, together with the fact that a transmission event must have taken place during a particular window because that same strain of the virus made its way from returned travellers into the community, is a sufficient inferential path of reasoning for causation. The material fact is the fact that transmission did occur between, for example, particular returning travellers and one or more guards. The plaintiff's burden is to show that the defendants' negligence caused that transmission on the balance of probabilities. If the plaintiff fails to lead evidence to support that material fact, then it will fail. If the defendants lead evidence sufficient to negative or displace the inferences that the plaintiff seeks to draw, then it will fail. But the pleading itself is not defective.

Ground 2

The defendants' submissions

38 The defendants submitted that the particular paragraphs identified above at [4(b)] should be struck out pursuant to r 23.02 of the Rules because the plaintiff has failed to

make clear its counterfactual case. The impugned paragraphs, when read together, advance a 'zero transmission' counterfactual, which is inconsistent with the plaintiff's case advanced elsewhere in the 2SOC that prudent discharge of the duty of care would have minimised the likelihood and/or risk of transmission of the virus. Also inconsistent with the zero transmission counterfactual, is the excision from the allegations of transmission at the hotels to and by two nurses who worked at the hotels.

39 The 2SOC defines the 'workers' at the quarantine hotels to include 'other persons', a reference that incorporates two nurses whose viral infection was epidemiologically linked to returned travellers, as was the infection of household or social contacts of those two nurses.

40 The pleading is embarrassing because the nurse transmissions are excluded from the transmissions at each hotel that are the subject of the duty of care. On the plaintiff's pleaded case the nurse transmissions would have occurred even had the defendants discharged the applicable standard of care. Such allegations are inconsistent with the allegations in paragraphs 154(a) and (b). How the circumstances of the nurse transmissions are to be explained is not clear on the face of the 2SOC.

41 This specific example underscores the broader defect in the pleading arising from the plaintiff's purported embrace of a 'zero transmission' counterfactual. It is inherent in the allegations of what constitutes prudent IPC measures that the defendants might discharge the applicable standard of care by minimising the risk of transmission of the virus. The defendants are left to speculate as to the way in which the zero transmission counterfactual is consistent with the alleged standard of care.

The plaintiff's submissions

42 The plaintiff did not accept any obligation to prove a 'zero transmission counterfactual.' Rather, the plaintiff:

(a) accepted that it must plead and prove factual causation as set out in the pleadings, being the steps in the causal chain that it alleges;

(b) contended that proving each of those steps without more will establish liability in negligence;

(c) submitted that if the defendants wish to contend that the plaintiff would have suffered part or all of the loss in any event because, even in the absence of their negligence, some other transmission event or events would have occurred leading to the virus escaping quarantine, that is a matter for the defendants to plead and prove.[18]

43 The plaintiff submitted that its pleaded causation case was factual causation, which was consistent with s 51(1) of the *Wrongs Act,* which governed causation in this case.

44 Alternatively, if the plaintiff bore an onus to prove that it would not have suffered economic loss at some later point, independently of the defendants' negligence, the pleading embraced that counterfactual. A true 'zero transmission counterfactual' required that had the defendants discharged their duty, not only would the transmission that in fact occurred not have occurred but no other transmission would have occurred. In other words, the plaintiff submitted that it will demonstrate on the balance of probabilities that, but for the defendants' negligence, no transmission event would have occurred; but that, even if it does not positively establish a zero transmission counterfactual, the evidence will support a conclusion under s 51(1)(a) of the *Wrongs Act* that the defendants' negligence was a necessary condition of the harm that actually occurred.

45 Because the inference of causation is determined on the balance of probabilities, there is no inconsistency between the zero transmission counterfactual and acceptance of the proposition that is not possible to say that no risk of transmission at all would have subsisted if the duty of care had been discharged.[19]

46 In response to what the defendants described as the problem of the two nurses, the plaintiff contended that its pleading distinguishes between three relevant layers of

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18 *Tapp* (2022) 96 ALJR 337.
19 *Bradshaw* (1951) 217 ALR 1; *Kocis* (1998) 3 VR 408.

transmission.

(a) Transmission from infected returned travellers to workers at the hotels;

(b) Transmission from those infected workers at the hotels to other members of the Victorian community;

(c) The widespread on-transmission within the Victorian community constituting the second wave.

47 The pleaded IPC measures were directed to preventing transmission at the first layer of transmission. The plaintiff is not presently aware of any matters that provide a basis for it to allege that the two nurses contracted the virus from returned travellers. The inference is open that they contracted the virus in other ways, for example, from other workers.

Ground 3

The defendants' submissions

48 The defendants submitted that an alternative causation case in reliance on s 51(2) of the *Wrongs Act* (paragraphs 28 and 151 of the 2SOC) left the defendants to speculate about how the asserted breaches of duty of care have materially increased the risk that, at a point further along the plaintiff's postulated chain of causation, the group members might suffer economic loss.

49 Section 51(2) states:

> In determining in an appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish 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.

50 The defendants submitted that:

(a) The plaintiff primarily articulated the factual causation case under s 51(1) of the *Wrongs Act*, that is, had the IPC measures of the kind pleaded been

implemented transmission at the hotels would not have occurred.

(b) Despite a passing reference to increased risk in the pleadings, the plaintiff's traditional factual causation allegation relied on the alleged failure to implement the IPC measures, which it contends actually caused the transmissions.

(c) The plaintiff also alleges increased likelihood or increased risk of transmission. A failure to implement one or more of the IPC measures would increase the likelihood and/or risk of transmission from returned travellers to workers, further alleging that 'the more substantial the failure, the higher the likelihood and/or risk of such transmission'.

(d) In this context, the plaintiff alleges that the defendants' breaches of duty 'materially increased the risk' that economic loss would be suffered. The defendants contended that this allegation was not founded on the failure to implement the benchmark IPC measures and all that such failure gave rise to was an increased risk of the transmission of the virus by reason of the magnification principle asserted in paragraph 28 [see 8(c)]. The result is an allegation at a high level of generality that the alleged breaches of duty materially increased the risk that the group members would suffer economic loss. The defendants contended that for an alternative plea of causation by reference to s 51(2) this reasoning was too abstract.

(e) Relying on *Powney v Kerang and District Health* ('***Powney***'),[20] the defendants contended that the plaintiff cannot avoid its obligation to prove factual causation by relying on s 51(2) without identifying how it will be put at trial that the state of scientific or medical knowledge makes it impossible to prove the precise cause of the transmission of the virus. Put another way, the plaintiff failed to allege why this is an appropriate case in which to relieve the plaintiff of the burden of demonstrating factual causation.

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20 (2014) 43 VR 506, 523 [82] ('***Powney***').

The plaintiff's submissions

51 The plaintiff recognised that its primary causation case was factual causation pursuant to s 51(1)(a) of the *Wrongs Act* – the defendants' negligence was a necessary condition of the loss. However, the plaintiff contended that it was entitled to invoke s 51(2) to plead an alternative case that factual causation should be taken to be established pursuant to that subsection. The plaintiff's pleading that the greater the extent of breach the greater the risk of transmission, while a relevant circumstantial allegation to establish factual causation, can also be invoked to support its reliance on a s 51(2) alternative causation case theory. That paragraph is not objectionable because the greater the extent to which the plaintiff establishes that the prudent IPC measures were not implemented, the stronger will be the inferential case that the pleaded transmission events would not have occurred had those measures been implemented.

52 The criticisms of the plaintiff's allegation of a 'material increase in risk of loss' rather than 'a material increase in risk of transmission' are misplaced. That allegation puts the defendants on notice that, as a secondary case, the plaintiff relies on an alternative species of causation, using precisely the term used by the High Court in *Strong*. The defendants' submission fails to recognise that the plaintiff relies on the same material facts to support a 'material increase in risk' test of causation as are relied on to support a 'necessary condition of the loss' test of causation. That reliance is unobjectionable.

53 Accordingly, the plaintiff has clearly indicated in the pleading its reliance on s 51(2) in the alternative, should its reliance on s 51(1)(a) fail, and the pleading is not subject to the criticism in *Powney*.

The cases

54 I will start with the cases dealing with inferential proof of causation at common law prior to the enactment of the s 51 of the *Wrongs Act*.

55 In *Betts*,[21] the plaintiff, a fourteen year old boy was injured operating a power press with a fitted safety guard. There was no evidence acceptable to the trial judge as to how the accident happened and the trial court proceeded on the basis of the least

21 (1945) 71 CLR 637.

improbable explanation. Dixon J, in an oft-quoted passage, observed:

> It is not necessary to inquire whether their Lordships meant more than that the 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, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty. In the circumstances of this case that proposition is enough. For, in my opinion, the facts warrant no other inference inconsistent with liability on the part of the defendant.[22]

56 *Bradshaw* concerned the death of a cyclist, apparently in a collision with a van admittedly driven by an employee of the defendant. The evidence before the jury was circumstantial, and the defendant submitted that the accident was unexplained. The court said:

> Of course as far as logical consistency goes many hypotheses may be put which the evidence does not exclude positively. But this is a civil and not a criminal case. We are concerned with probabilities, not with possibilities. The difference between the criminal standard of proof in its application to circumstantial evidence and the civil is that in the former the facts must be such as to exclude reasonable hypotheses consistent with innocence while the latter you need only circumstances raising a more probable inference in favour of what is alleged. In questions of this sort where direct proof is not available it is enough in the circumstances appearing in the evidence give rise to a reasonable and definite inference: they must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. But if circumstances are proved in which it is reasonable to find a balance of probabilities in favour of the conclusion sought then though the conclusion may fall short of certainty it is not to be regarded as a mere conjecture or surmise.[23]

57 In *Fernandez v Tubemakers of Australia Ltd* (‘***Fernandez***’),[24] the issue was whether a work injury was causally related to a condition known as Dupuytren’s contracture. A plastic surgeon gave evidence that the condition could be caused by the injury, without giving aetiological detail. The jury’s verdict in favour of the plaintiff was upheld. Glass JA observed:

> The issue of causation involves a question of fact upon which opinion evidence, provided it is expert, is receivable. But a finding of causal connection may be open without any medical evidence at all to support it: or when the expert evidence does not rise above the opinion that a causal connection is possible. The evidence will be sufficient if, but only if, the materials offered

22 Ibid 649.
23 *Bradshaw* (1951) 217 ALR 1, 5 (citations omitted).
24 (1975) 2 NSWLR 190.

justify an inference of probable connection. This is the only principle of law.[25]

58 The High Court in *Chappel v Hart*[26] considered whether a doctor's negligent failure to advise the plaintiff of the risk of physical injury in proposed surgery materially contributed to the injury. The specialist had performed the surgery with due care, but he negligently failed to warn the plaintiff of a particular possibility of injury that actually eventuated, the plaintiff having asked about possible risks. Although the surgery was ultimately necessary, the plaintiff would have delayed it and then engaged the most experienced surgeon in the field to perform it.

59 In holding that the doctor's negligent failure did materially contribute to the injury, Gaudron and Kirby JJ reasoned that the degree of risk would have been reduced if the operation had been performed by the most experienced surgeon available. Gummow J reasoned that the causal link was that the patient had specifically asked the doctor about the risk in question and would not have undergone the operation in his hands if he had given the necessary warning. McHugh and Hayne JJ, dissenting, concluded that the plaintiff had failed to prove that any alternative course open to her would have reduced the inherent chance of perforation and ensuing infection and physical damage.

60 The plaintiff drew attention to Gummow J's observations about the undesirability of allowing 'decisive weight to hypothetical and problematic considerations of what could have happened ... in conditions of great variability.'[27] Gummow J rejected the doctor's attempt to take into account speculative matters, which, if relevant, only applied to the assessment of damages, and so disrupted the principles governing causation. In the present context, the plaintiff alleges that the defendants' failure to implement prudent IPC measures can establish that the defendants' negligence was a necessary condition of the plaintiff's loss, but that consequence cannot be defeated by the defendants contending that the same or equivalent loss *might* have been suffered anyway and that the contrary has not been proved by the plaintiff.

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25 Ibid 197 (citations omitted).
26 (1998) 195 CLR 232.
27 Ibid 262 [81].

61 A passage in the dissenting judgment of McHugh J must also be noted as it has subsequently been referred to with approval.[28] In the context of evidence of increase in risk, McHugh J, noting that 'increases' in this context includes 'creates', said:

> 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 contribute to that injury occurring. If, however, the defendant's conduct does not increase the risk of injury to the plaintiff, the defendant cannot be said to have materially contributed to the injury suffered by the plaintiff.[29]

62 *Kocis v S E Dickens Pty Ltd* ('***Kocis***')[30] was a supermarket slipping case. The supermarket's system of checking for spillages every 30 minutes had not been in operation for about 90 minutes before the accident. It was not established when the spillage occurred, save that it was more than 5 minutes before the accident. The trial judge directed the jury that the plaintiff could not prove that the defendant's failure to inspect at least every five or six minutes was a failure to take reasonable care. Ordering a retrial, the Court of Appeal held that in a slipping case where breach of duty of care is established, it is not essential for the plaintiff to prove precisely when the spillage occurred. A failure to check for spillages in the hour to hour and a half before the accident was a breach of its duty of care. It was open to the jury to find that the defendant's system, had it operated, would more probably than not have detected the spillage and thus avoided the accident.

63 Hayne JA stated:

> In my view it is of the first importance to bear steadfastly in mind that a plaintiff must prove his or her case on the balance of probabilities and that it is no answer to the question whether something has been demonstrated as being more probable than not to say that there is another possibility open. Thus, a jury may reasonably conclude that the probabilities are that a particular spillage would have been cleaned up by the proper application of a reasonable cleaning regime on the part of the defendant occupier while at the same time acknowledging the possibility (but not probability) that the substance was spilled only a moment before the plaintiff slipped on it. The question of causation is to be resolved by consideration of the probabilities.[31]

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28 *Naxakis v Western General Hospital* (1999) 73 ALJR 782, 787 [31], 806 [127].
29 *Hart* (1998) 195 CLR 232, 244-5 [27].
30 [1998] 3 VR 408.
31 Ibid 430.

64 In *Seltsam Pty Ltd v McGuiness* (‘***Seltsam***’),[32] an asbestos exposure case where the question was whether exposure to asbestos caused renal cell carcinoma, the New South Wales Court of Appeal assessed the role of evidence of possibility, including epidemiological studies, as circumstantial evidence. Spiegelman CJ stated that:

> Evidence of possibility, including expert evidence of possibility expressed in opinion form and evidence of possibility from epidemiological research or other statistical indicators, is admissible and must be weighed in the balance with other factors, when determining whether or not, on the balance of probabilities, an inference of causation in a specific case could or should be drawn. Where, however, the whole of the evidence does not rise above the level of possibility, either alone or cumulatively, such an inference is not open to be drawn.
>
> The common law test of balance of probabilities is not satisfied by evidence which fails to do more than establish a possibility.[33]

65 The Chief Justice approved of the statement of Glass JA in *Fernandez*, set out above, as a correct statement of the law, noting that:

> It is often difficult to distinguish between permissible inference and conjecture. Characterisation of a reasoning process as one or the other occurs on a continuum in which there is no bright line division. Nevertheless, the distinction exists.[34]

66 The Chief Justice noted that causation, like any other fact can be established by a process of inference which combines primary facts like ‘strands in a cable’ rather than ‘links in a chain’. The test is whether, on the basis of the primary facts, it is reasonable to draw the inference. Evidence of possibility, including epidemiological studies, should be regarded as circumstantial evidence which may, alone or in combination with other evidence, establish causation in a specific case. Epidemiological evidence that suggested some increase in risk is both evidence and a conclusion that are circumstantial facts which may be taken into account as strands in the cable for the purpose of drawing the inference that the particular exposure caused or materially contributed to the injury in the specific case.[35]

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32 (2000) 49 NSWLR 262.
33 Ibid 274-5 [79]-[80].
34 Ibid 275 [84].
35 Ibid 276 [87]-[92].

67 Significantly for present purposes, Spiegelman CJ concluded:

> There is a tension between the suggestion that any increased risk is sufficient to constitute a 'material contribution', and the clear line of authority that a mere possibility is not sufficient to establish causation for legal purposes. The latter is too well-established to be qualified by the former. The reconciliation between the two kinds of references is to be found in the fact that, as in *Chappel v Hart* and in the cases that suggest the former, the actual risk had materialised. The 'possibility' or 'risk' that X might cause Y had in fact eventuated, not in the sense that X happened and Y had also happened, but that it was undisputed that Y had happened because of X.[36]

68 *Royal*,[37] noted earlier, involved a motor vehicle accident. The appellant was held by the Court of Appeal to be in causal breach of its duty of care to the plaintiff by reference to design faults in the intersection. In the High Court, the majority held that even if, as found by the majority in the Court of Appeal, it could be said that the appellant's breach of duty did materially contribute to the occurrence of an accident by creating a heightened risk, due to the obscuring effect of one vehicle on another in an adjoining lane, it made no contribution to the occurrence of the instant collision, as it was clear from the evidence that the respondent's vehicle was not, in fact, obscured.

69 At this point, the terms of s 51 of the *Wrongs Act* can be noted:

> **51 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 appropriate case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be taken to establish 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.
>
> **52 Burden of proof**
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> In determining liability for negligence, the plaintiff always bears the burden of proving, on the balance of probabilities, any fact relevant to the issue of

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36 Ibid 280 [119].
37 (2008) 82 ALJR 870.

causation.

70 *Strong*[38] is another slipping case. The plaintiff's fall was caused by a greasy chip on the floor. Approving the observations of Hayne JA in *Kocis* set out earlier, the High Court held that it was incumbent on the plaintiff to prove that it was more probable than not that the defendant's negligence was a necessary condition of her fall, in that if the defendant had not been negligent, the plaintiff would not have fallen and been injured. That onus could be discharged by consideration of the probabilities in circumstances in which the evidence did not establish the precise facts about the deposit of the chip. It was no answer to the question of whether something had been demonstrated as being more probable than not to say that another possibility was open.

71 Factual causation under s 5D(1) of the *Civil Liability Act 2002* (NSW), (the equivalent of s 51(1)(a)) is a statutory statement of the common law test of whether the plaintiff would not have suffered the particular harm but for the defendant's negligence. Where more than one set of conditions is necessary for the occurrence of particular harm, a defendant's negligent act or omission which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of harm will meet the test of factual causation. Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may be accepted as establishing factual causation.

72 The majority stated:

> The appellant was required to 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 for the periodic inspection and cleaning of the sidewalk sales 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 sales area 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.
>
> …

38 (2012) 246 CLR 182.

> Woolworths' submission that it was necessary for the appellant to point to some evidence permitting an inference to be drawn concerning when the chip was deposited must be rejected. It was incumbent on the appellant to prove that it was more probable than not that Woolworths' negligence was a necessary condition of her fall, but this onus could be discharged by consideration of the probabilities in circumstances in which the evidence did not establish when the chip was deposited. The point was illustrated by Hayne JA (as he then was) in *Kocis*. His Honour posited a case in which reasonable care required the occupier of premises to carry out inspections at hourly intervals. Assume that no inspection is made on the day the plaintiff slips on a spill eight hours after the premises opened for trading. If there is no basis for concluding that the spill is likely to have occurred at some particular time rather than any other time, the probability is that that the spill occurred in the first seven hours of trading and not in the hour preceding the plaintiff's fall. As Hayne JA observed, a plaintiff must prove his or her case on the balance of probabilities and it is no answer to the question whether something has been demonstrated as being more probable than not to say that there is another possibility open. The determination of the question turns on consideration of the probabilities.[39]

73 The majority noted the discussion in the Ipp Report of cases in which an 'evidentiary gap' precludes the finding of factual causation on a 'but for' analysis. The court noted that the Ipp Report instanced two category of such cases:

(a) A cumulative operation of factors in the occurrence of the total harm in circumstances in which the contribution of each factor to that harm is unascertainable;[40]

(b) Negligent conduct that materially increases the risk of harm in circumstances in which the state of scientific or medical knowledge makes it impossible to prove the cause for the plaintiff's harm.[41]

74 The majority then observed:

> Section 5D(2) makes special provision for cases in which factual causation cannot be established on a 'but for' analysis. The provision permits a finding of causation in exceptional cases, notwithstanding that the defendant's negligence cannot be established as a necessary condition of the occurrence of the harm. Whether negligent conduct resulting in a material increase in risk may be said to admit of proof of causation in accordance with established principles under the common law of Australia has not been considered by this Court. Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence

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39 Ibid 196-7 [32], [34] (citations omitted).

40 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 ('***Bonnington***').

41 *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 ('***Fairchild***').

> may, in accordance with established principles, be accepted as establishing factual causation, subject to the normative considerations to which s 5D(2) requires that attention be directed.[42]

75 In *Powney*[43] the Victorian Court of Appeal considered the operation of s 51 of the *Wrongs Act* in the context of causation of injury following medical treatment. Although the plaintiff's claim was run before the jury on the basis of factual causation under s 51(1)(a), at the conclusion of the evidence, the plaintiff made 'an unheralded submission' that the jury should consider the application of s 51(2). This submission was rejected. The jury found for the defendant and the plaintiff appealed.

76 The Court of Appeal acknowledge that s 51(2) of the Act was a recognition by the legislator that in certain cases the 'but for' test for factual causation may produce anomalous or unjust results and a court may, in an appropriate case, bridge the evidentiary gap.[44] That said, the case before the jury – where there was one alleged tortious act and no question of multiple causes or unknown aetiology of the alleged damage – was not an appropriate case for the normative attribution of responsibility to a defendant.[45] The Court of Appeal added that if s 51(2) of the Act was to be relied on as providing the appropriate causal link between a negligent act and attributing responsibility for the alleged consequential harm to the defendant, the basis of the claim should be set out in the pleadings.[46]

77 In *East Metropolitan Health Service v Ellis* ('***Ellis***')[47] an inference of factual causation at trial was drawn to support a finding that negligence in the management of a child's birth caused his developmental and cognitive impairment. Causation was to be determined in accordance with the statutory tests in the Western Australian equivalent of s 51 of the *Wrongs Act*.[48]

78 The trial judge found that in the absence of identified negligent conduct by the

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42 *Strong* (2012) 246 CLR 182, 194 [26] (citations omitted).
43 (2014) 43 VR 506.
44 Ibid 523 [83].
45 Ibid 526 [99].
46 Ibid 525 [96].
47 [2020] WASCA 147.
48 *Civil Liability Act 2002* (WA) s 5C.

obstetrician during a prolonged and difficult birth, the child would either have been safely delivered by the use of instruments or at a later point safely delivered by caesarean section. In either case the plaintiff would not have suffered the periods of perinatal asphyxia that resulted in his injuries and impairments. Many grounds of appeal relied on passages in the primary reasons that referred to 'possibilities'. At trial and on appeal the defendant construed the plaintiff's case as: 'that the perinatal asphyxia caused hypoxic ischaemic encephalopathy ('**HIE**'), and that the stage 2 HIE in turn caused the cognitive dysfunction, cognitive difficulties and other developmental issues'.[49] The plaintiff's case, as the trial judge recognised, was that the developmental and cognitive impairments experienced by the plaintiff arose from a combination of the HIE and traumatic brain injury.[50]

79 The primary judge concluded that the plaintiff's developmental and cognitive impairments were more likely than not to be sequelae of his birth injuries, which were caused by the defendant's fault. The primary judge summarised the reasoning behind this finding in some detail, adding that even if he were wrong in his conclusion as to factual causation, the reasons he had set out were more than ample to support a reasonable and definite inference that the defendant's fault materially contributed to the plaintiff's developmental and cognitive impairments for the purposes of the s 51(2) equivalent. The judge stated that a finding of material contribution is sufficient reason to impose on the defendant responsibility for both the respondent's birth injuries and developmental and cognitive impairments.

80 The Court of Appeal analysed the cases relevant to establishing causation as a question of fact. Citing *March v E & MH Stramare,*[51] the Court of Appeal noted that:

> … the law's concern, in relation to causation, is with the attribution, in a particular case, of a causal connection between an identified negligent act or omission (or other wrong) and a given occurrence. In the context of the present case, for example, the question was whether, on the balance of probabilities, the identified negligence (for which the appellant was responsible) was the cause of the respondent's given (or known) Developmental and Cognitive

49 *Ellis* [2020] WASCA 147, [212].
50 Ibid [367].
51 (1991) 171 CLR 506, 509.

> Impairments.
>
> To be clear: the question in the present was not whether, in general, negligence of the kind that occurred in the present case is more or less likely to give rise to the kind of Developmental and Cognitive Impairments suffered by the respondent.[52]

81 Considering possibilities, particularly when arising on statistical correlations, the Court of Appeal said:

> In this regard, it is clear, and there can be no doubt, that mere proof by a plaintiff of the possibility that a defendant's breach caused the plaintiff to suffer harm is insufficient. The court must be satisfied that it is more probable than not that the defendant's breach caused the relevant harm; it is not sufficient to conclude that the breach may have been a cause of the harm.
>
> At the same time, it is also well-established that causation may be proved by inference. If direct proof is not available, an inference of causation may be drawn if the circumstantial evidence is sufficiently strong and coherent to support a definite inference to that effect. Before such an inference can be drawn, there must be more than two conflicting inferences of equal probability.
>
> The drawing of an inference has been described as 'an exercise of the ordinary powers of human reason in the light of human experience'. A court must, of course, avoid conjecture, but the distinction between permissible inference and conjecture occurs on a continuum in which there is no bright line division.[53]

82 Drawing on what Dixon J said in *Adelaide Stevedore Co Ltd v Forst*,[54] the defendant contended that a plaintiff is required to prove by expert evidence the mechanism by which a breach, or its immediate consequence, caused the damage claimed by the plaintiff, at least if there is expert evidence suggesting a lack of association. The Court of Appeal rejected this submission. Properly understood, the authorities require a trial court to consider, and reason by reference to, the expert evidence that has been adduced. Those cases do not require a plaintiff to prove, or a trial judge to find, by reference to expert evidence, the specific mechanism by which one event caused another event. The Court of Appeal considered that this approach was reflected in *Seltsam*, discussed earlier.[55]

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52 *Ellis* [2020] WASCA 147, [255]-[256].
53 Ibid [263]-[265] (citations omitted).
54 (1940) 64 CLR 538, 569; approved by the plurality in *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, 61-2 [69].
55 *Ellis* [2020] WASCA 147, [268]-[273].

83 The Court of Appeal identified the following propositions:[56]

(a) A court may draw an inference of causation notwithstanding that, in a particular case, expert witnesses do not express an opinion that the damage was caused by the relevant breach.[57]

(b) An inference of causation maybe drawn without medical evidence to support it, or when the expert evidence does not rise above the opinion that a causal connection is possible if, but only if, the materials as a whole justify an inference of probable connection.[58]

(c) In circumstances where the aetiology is uncertain, or subject to significant scientific dispute, the courts are not thereby disabled from making decisions as to causation on the balance of probabilities.[59]

(d) The sequence of events can be called in aid of drawing an inference which, according to expert opinion, is open. Thus, other circumstances may 'unite to warrant a conclusion that what the medical evidence established as a possible cause was the probable cause'.[60]

(e) Evidence of possibility, including epidemiological studies, can be regarded as circumstantial evidence which may, alone or in combination with other evidence, establish causation in a specific case. As in any circumstantial case, an inference as to the probabilities may be drawn from a number of pieces of particular evidence, each piece of which does not itself rise above the level of possibility.[61]

(f) Causation, like any other factor to be established by a process of inference, may be established by a process that combines primary facts like strands in a cable rather than links in a chain. With respect to the former, as long as the ultimate

56 Ibid [272]-[281].
57 *Seltsam* (2000) 49 NSWLR 262, 286 [142]-[144].
58 Ibid 275 [83], approving *Fernandez* (1975) 2 NSWLR 190.
59 *Seltsam* (2000) 49 NSWLR 262, 277 [94]; *EMI (Australia) Ltd v BES* [1970] 2 NSWR 238, 242.
60 *Tubemakers of Australia v Fernandez* (1976) 50 ALJR 720, 721, 725.
61 *Seltsam* (2000) 49 NSWLR 262, 841-2 [78], [79], 276 [89], 278 [98].

inference is reached to the required standard, it is not necessary for an intermediate fact to be established to the legal standard.[62]

84 The recent decision of the Court of Appeal in *Munday v St Vincent's Hospital* ('***Munday***'),[63] illustrated the application of principle in the context of whether a want of training in the proper use of an implement permitted an inference of causation. The plaintiff, a nurse, was injured when using a slide board to transfer a patient from a commode chair to the patient's bed. One question was what the hospital would have done had reasonable care been exercised and whether that action would have averted the loss or damage suffered by the plaintiff. The Court of Appeal, by majority, concluded that the trial judge correctly declined to draw an inference of causation because on the evidence no court could reach any view about what any training in the use of the particular slide board might have entailed. This gap could not be overcome by resort to common sense or common knowledge.

85 The Full Federal Court in *Minister for the Environment (Cth) v Sharma* ('***Sharma***'),[64] overturned the primary judge's decision that the Minister for the Environment owed a duty of care to the plaintiffs when exercising power under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Relevantly for present purposes, Allsop CJ observed:

> The question, at least at the point of causal connection between breach and harm, cannot be left to a confluence of increase of risk and damage within the scope of risk created by the breach. The House of Lords in *Bonnington* overturned *Vyner*, which had on one view provided for the onus of proof to shift to the defendant if a breach of a safety provision were proved and the worker was injured in a way that could result from such a breach. In *Betts v Whittingslowe*, Dixon J said it was not necessary to inquire whether the Court in *Vyner* meant any more than that an inference of fact would be available in the circumstances of a breach and an injury within the scope of the risk provided for by the duty or statutory provision. Justice Dixon in *Betts* used the conjunction of breach of duty and harm that might be thereby caused as part of a process of drawing an inference. That is how *Vyner* has been understood. There are dicta in the High Court, however, that deal with the shifting of the evidential onus to a defendant in such circumstances.[65]

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62 Ibid 276 [91]. See also *Seeley International Pty Ltd v Jeffrey* [2013] VSCA 288, [45]-[47].
63 [2021] VSCA 17.
64 (2022) 400 ALR 203.
65 Ibid 293 [312]-[313] (citations omitted).

86 The Chief Justice then analysed the relationship between breach and causation and between causing an increase in risk, material contribution to harm, and onus of proof. The Chief Justice concluded that until the High Court says otherwise, causing an increase in the risk of harm occurring does not amount of itself to causing or materially contributing to the harm.[66] It is not for an intermediate appellate court to say that to establish liability conduct increasing the risk of global warming may be sufficient to prove a causal connection between that conduct and consequent harm, noting that the question before the court was not that of causation but rather whether a duty of care was owed.

87 The most recent decision cited to me was that of the High Court in *Tapp*,[67] the facts of which bear no resemblance to the present case and which raised different issues. The plaintiff was a competitor in an inherently dangerous recreational activity known as campdrafting. She was injured when her horse fell on a deteriorating arena surface. Relevantly, organisers were warned about the increasing deterioration and consequent risk but did not call off the competition.

88 The issues in the appeal may be noted for analogous application to the present application. The first issue was whether in the context of s 5B of the *Civil Liability Act 2002* (NSW) (equivalent to s 48 of the *Wrongs Act*), the risk of damage was characterised for the purposes of breach of duty at an artificial level of generality. Section 5B(1) provides that a person is not negligent in failing to take precautions against a risk of harm unless the risk was foreseeable, not insignificant and in the circumstances a reasonable person in the person's position would have taken those precautions. The Court found that this required the correct identification of the relevant risk of injury because only then can it be determined what a reasonable response to that risk would be. A defendant cannot avoid liability by characterising a risk at an artificially low level of generality, that is, with too much specificity. In other words, it is not necessary for the plaintiff to show that the precise manner in which

66 *St George Club Ltd v Hines* (1961) 35 ALJR 106, 107. Cf *McGhee v National Coal Board* [1973] 1 WLR 1.
67 (2022) 96 ALJR 337.

their injuries were sustained was reasonably foreseeable.[68]

89 On the other hand, the trial judge characterised the risk at too high a level of generality, i.e. as the risk of falling and being injured.[69] The plaintiff was not required to identify the risk by reference to the precise manner in which her injuries were sustained; it was not necessary to identify the way in which the surface had deteriorated, for example.[70] However, the risk should be characterised consistently with the essential facts that establish it for the purposes of breach of duty,[71] namely the substantially elevated risk of physical injury by falling from a horse that slipped by reason of the deterioration of the surface of the arena.[72]

90 The second issue was that s 5L, which has no analogue in Victoria, relieved liability in negligence for harm suffered by a plaintiff as a result of the materialisation of an obvious risk of a dangerous recreational activity. The majority concluded that the risk with which s 5L is concerned is the same risk as that with which s 5B is concerned.[73]

91 The majority concluded that a reasonable person in the position of the defendant would have taken the immediate precaution of stopping the event in response to the substantially elevated risk of contestants being injured from falling from a horse that slipped on the deteriorating surface of the arena.[74] A reasonable person in the plaintiff's position, who was preparing herself and her horse to compete immediately prior being called into the competition, would have relied on the defendant for that assessment.[75] The defendant's contention that there was insufficient evidence of the deterioration of the arena surface failed as there was sufficient evidence to draw an inference about its condition.[76]

92 The plaintiff submitted that the majority considered that the issue of whether the fall

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68 Ibid 357-8 [106]-[108].
69 Ibid 360-1 [121]-[122].
70 Ibid.
71 Ibid 361 [122].
72 Ibid 136 [125].
73 Ibid 359 [116].
74 Ibid 361 [126]-[127].
75 Ibid 365-6 [151]-[155].
76 Ibid 362 [134].

would have occurred in any event was a matter to be taken up by the Bushman's Association and, consistently, the defendants could not contend that the action can be defeated by the allegation that the same or equivalent loss might have been suffered anyway.[77]

93 The defendants contended that the assessment of the appropriate counterfactual in *Tapp* was not analogous with this case. The plaintiff does not plead the material facts in relation to the transmission events from the family to the guards, taking the example of Rydges. The conduct of the guards who were infected by the family is not correlated with the negligent failures of the defendants to implement IPC measures as pleaded to permit a finding that because of the negligent failure to implement IPC measures on that occasion, the virus was transmitted from the family to a guard or hotel worker by their conduct. Without those material facts being exposed by the pleading, the defendants are denied the opportunity to allege that there were non-negligent explanations for the transmission from the family to a guard or hotel worker.

Analysis

Ground 1

94 For present purposes, I apply the following principles derived from these authorities.

(a) The issue of causation involves questions of fact. It is always incumbent on the plaintiff to prove facts relevant to the issue of causation.

(b) The plaintiff is required to plead material allegations sufficient when proved at trial to establish on the balance of probabilities that the defendants' negligence was a necessary condition of the plaintiff's harm.

(c) Where direct material facts are not alleged it will be sufficient if, in the circumstances identifiable by what has been pleaded, a reasonable and definite inference of causation is open.

(d) Expert opinion evidence is receivable, but not necessary. A finding of causal

[77] Ibid 364-5 [146]-[149].

connection between breach and loss may be open without any expert evidence at all to support it or when the expert evidence does not rise above the opinion that a causal connection is possible.

(e) If the plaintiff alleges material facts that support the inference that defendants' wrongful act or omission resulted in an increased risk of injury to the plaintiff, and that risk eventuates, the plaintiff's allegations can support an inference that the defendants' conduct has materially contributed to the injury that the plaintiff suffered whether or not other factors also contributed to that injury occurring. That is so provided that the allegations warrant no other inference inconsistent with liability on the part of the defendants. Put another way, the allegations must do more than give rise to conflicting inferences of equal degrees of probability so that the choice between them is mere matter of conjecture. At the strike-out stage, an allegation that supports an inference of causation cannot be defeated by the defendants contending that a possible alternate cause has not been answered by the pleading.

(f) Allegations in the pleading of material facts said to demonstrate an increased risk of harm will not, of themselves, be sufficient to constitute a material contribution to the claimed injury, but may be pleaded as a contribution to a circumstantial case.

(g) Allegations of possibility, including allegations particularised by refence to expert opinion of possibility such as epidemiological research or other statistical indicators, are relevant when determining whether the pleading raises an arguable claim for an inference of causation to be drawn. Such allegations are of circumstantial evidence which may, alone or in combination with other evidence, for example the sequence of events, establish causation in a specific case. Allegations of circumstantial matters may be taken into account like strands in a cable for the purpose of drawing the causal inference, notwithstanding that any particular material fact could not at trial rise above the level of a possibility. On a pleading strike out the defendants must satisfy

the court that on the allegations pleaded as a whole, the causal inference cannot rise above the level of possibility. That is, considering the pleaded allegations cumulatively, the causal inference is not open to be drawn.

(h) Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its occurrence may be accepted as establishing factual causation.

(i) Where more than one set of conditions is necessary for the occurrence of particular harm, allegations of the defendants' negligent acts or omissions that are necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of harm, will meet the test of factual causation.

(j) If s 51(2) of the Act is to be relied on as providing the appropriate causal link between a negligent act and attributing responsibility for the alleged consequential harm to the defendant, the basis of the claim should be set out in the pleadings.

95 The debate between the parties on the application appeared to distinguish between transmission events and the mechanism of transmission. In this context, the analysis in *Tapp* is helpful by analogous application. Transmission can be specified with differing degrees of particularity descending from what the plaintiff alleges, namely a transmission event inferred from the opportunity for contact when an infected traveller transmits the virus to those persons with whom they are most likely to have contact, such as workers in the hotels. On the pleadings as they currently stand, the transmission events are that the workers were infected because they were negligently exposed to infected travellers. Descending down the scale of generality, the defendants contended that transmission must necessarily be pleaded by reference to a mechanism more particularly related to the alleged negligent conduct. An even greater level of particularity could be imagined where the plaintiff alleged that transmission occurred during a specifically identifiable period of contact (meaning a short period, not a week) in which the worker had failed to implement necessary IPC

measures in a specifically identified way through inadequate specification, training, or supervision by the defendants.

96 In *Tapp*, the plaintiff was not required, by reference to the precise manner in which her injuries were sustained, to identify the risk of harm that was increased by negligent conduct. The High Court considered that risk should be characterised consistently with the essential facts that establish the risk for the purposes of breach of duty and not by reference to what the defendant could or should hypothetically have done. To say that the relevant risk was the risk of falling was too general; it was too specific to say the risk was the precise manner in which the ground was deteriorated and how it would cause the horse to fall and injure the plaintiff. The relevant risk was a substantially elevated risk of physical injury by falling from a horse that slipped by reason of the deterioration of the surface of the arena. The relevant risk must be characterised at the same level of generality when assessing causation.[78]

97 I am satisfied that the defendants' contentions, if accepted, would require a greater degree of specificity in the plaintiff's pleading of transmission than is necessary, having regard to the requirement of consistency between duty, breach and causation. I do not agree that all that the 2SOC does is couple a breach of duty with an accident of the kind that might be caused by such a breach to justify an inference that in fact the accident was so caused.

98 The defendants submitted that in the earlier Strike-out judgment I was critical of the lack of specificity in the alleged standard of care, because its content sat at an abstract level. In the Strike-out judgment I noted the plaintiff's failure to plead the material facts constituting specific transmission events, what I described as a failure to allege any mechanism of transmission, whether by allegations of incidents, or by express identification of a path of inferential reasoning. I observed that in the context of allegations in the earlier pleading that problematically used phrases such as 'effective measures' when alleging the required standard of care, that the plaintiff had not alleged any specific mechanism of transmission that might give colour to the content

78 *Tapp* (2022) 96 ALJR 337, 359 [112].

of that standard.

99 That observation was directed at the disguised content of the standard of care, as then pleaded. While a more specific pleading of transmission will add a desirable focus to the trial and is to be strongly encouraged, it is not necessary. It may be impossible for the plaintiff to now identify precisely the mechanism of transmission, such as, for example, that traveller A who was clearly symptomatic was in close contact with worker B for an identified period of time following which worker B failed to adopt the prudent protocol, through the negligence of the defendants, when removing PPE in the presence of workers C and D, who were infected. On the other hand the plaintiff may be able to allege that worker B negligently failed to wear PPE at all when spending an identified period of time with the symptomatic traveller A. I will return to this issue of particulars of transmission events later in these reasons.

100 I expressly left open that the plaintiff might identify a path of inferential reasoning that established that breach caused loss if direct evidence was not available.

101 For present purposes, the thrust of the defendants' contentions goes further. They contend, correctly, that the failure of the defendants to implement a proper protocol for IPC measures is not linked to any specific or identified conduct by a worker that is alleged to be a necessary condition for transmission, even alleged, as it is, at a level of generality. Thus, the pleading does not identify sufficient strands of material facts to admit, on the balance of probabilities, an inference (a cable) that the conduct of the defendants was a necessary condition for the transmission as the first link in the causal chain.[79]

102 The plaintiff invites me to reject this contention, submitting it has pleaded with sufficient particularity the defendants' lack of implementation and supervision of prudent protocols, see above at [8(h) – (j)], and that what followed was that the workers did not discharge their duties at the quarantine hotels in a manner that

[79] To avoid confusion in the metaphors being adopted, the allegations of causation are clearly 'links in a chain'. Each event is distinct from but connected to the next. However, the material facts identifying a path of reasoning to a probable inference in respect of any one link in that causal chain are better imagined as strands in the cable of inferential reasoning.

implemented an appropriate IPC protocol, see above at [8(k)].

103 Given that the nature of the duty of care and of the conduct in breach of it has been alleged at a systemic level and not on the basis of individual interaction, the observations of the majority in *Tapp* seem apposite. The defendants cannot avoid liability by contending that the plaintiff must plead a mechanism of transmission with too much specificity. It is plainly permissible for transmission, identified at the appropriate level of particularity/generality to be alleged by reference to a path of inferential reasoning and that identification of the specific mechanism of transmission of individual instances of infection may not be necessary.

104 While I said in the Strike-out judgment, based as it was on the former pleading as a whole, that the plaintiff must plead the mode or mechanism of transmission, or the material facts from which an inference of transmission could properly be made, I did not stipulate what degree of specification was appropriate in the context of the plaintiff's case for either approach in the sense illuminated by the discussion in *Tapp*.

105 It can be seen that it is at the level of the specific mechanism of transmission that many of the defendants' submissions attacking the manner of pleading causation are directed. Putting aside for one moment my concerns about the form of the pleading of causation, the plaintiff's allegations can establish on the balance of probabilities that the defendant's negligence was a necessary condition of the plaintiff's harm.

106 From the defendants' perspective, more specific allegations present them with the opportunity to allege that specific conduct in breach cannot be shown to have been a necessary condition of the occurrence of the loss. It is premature to assess that proposition. I was not persuaded by the defendants' submission that they are deprived of the opportunity of preparing their best defence by the want of particularity surrounding transmission and causation. The defendants have not persuaded me that on the allegations pleaded as a whole, the causal inference cannot rise above the level of possibility.

107 Having regard to different types of specific transmission events that the prudent IPC

measures (particularised in paragraph 27) were designed to meet, it is clear that there are myriad ways in which specific transmission might occur from one individual to another. In my view the plaintiff is correct when it submits that the relevant material fact to be pleaded is the fact of transmission, not the fact of the specific transmission mechanism between identifiable individuals on identifiable occasions referable to particular identifiable failures in the application of prudent IPC measures.

108 I am satisfied that the 2SOC does specify transmission at an appropriate level of particularity having regard to the way in which the claim is structured overall. The necessity to plead a specific mechanism of transmission does not necessarily arise. It is permissible for the pleading to allege that causation will be established by a path of inferential reasoning and I am satisfied that a sufficient path of reasoning is exposed.

109 The plaintiff's case is that the defendants were negligent in failing to take advice on appropriate IPC measures and then in failing to ensure that appropriate IPC measures were implemented and supervised. The plaintiff alleges that the IPC measures particularised in paragraph 27 of its pleading are the measures that a prudent defendant ought to have taken in order to eliminate or minimise the risk of transmission. The plaintiff alleges that there was a wholesale failure by the defendants with respect to IPC practices at the two hotels, which is alleged by direct engagement with the particular IPC measure [see above at 8(j) for example]. This allegation can make a significant contribution to an inferential reasoning process that the breach of duty, having regard to the particularity at which each element of the tort is alleged, materially contributed to an event of transmission between travellers and workers.

110 There are further material allegations that contribute strands to the cable of inferential reasoning. I refer to the allegations:

(a) that COVID-19 was present in each hotel by reason of the travellers being infected and serving out a quarantine period;

(b) that there are various ways, both direct and indirect, in which the virus can be transmitted;

(c) of the benchmark IPC measures that would be advised to a prudent defendant by qualified experts;

(d) about the tasks that the security guards were required to undertake and the manner in which those tasks ought to be defined by prudent IPC measures, whether that be in the handling of PPE, or personal hygiene, or cleaning protocols, for example;

(e) that the workers performed specific tasks or activities in the hotels relating to contact between workers and travellers or with surfaces used by travellers;

(f) as already noted, that there was a wholesale failure by the defendants with respect to IPC practices at the two hotels;

(g) that the greater the departure from prudent standards, the greater the prospect of materialisation of the risk of transmission of infection, in the sense that there are multiple, rather than a single, pathways for a specific transmission mechanism;

(h) that the virus was transmitted from a traveller to a worker [see above at 8(l)];

(i) that transmission occurred between particular dates identified by reference to the arrival of the travellers and the infection of the workers;

(j) that the scientific/epidemiological evidence and the genomic sequencing of the virus strain will show the presence of a genomic cluster of which the travellers and the workers were members; that it was the same strain of the virus in each of the travellers and the workers and their subsequent infected contacts and ultimately into the community.

111 I am satisfied that the pleaded allegations are circumstantial evidence that supports an inference at trial that the same strain of the virus carried by returned travellers was detected in the workers because of a transmission event or events during quarantine caused by a negligent failure to implement IPC measures or the negligent manner of

implementation of IPC measures.

112 That said, I return to the manner of pleading adopted to lay out the inferential path of reasoning in support of the allegation of the chain of factual causation, which I find unsatisfactory. My concern arises from the use of the expression 'in the premises' and starts at paragraph 135.

(a) The material fact pleaded at paragraph 135 is the counterfactual, but the particulars are not particulars of that material fact. Repeating the general proposition about the efficacy of the prudent IPC measures pleaded in paragraph 27, and the causal conclusion that breach substantially increased risk and 'led to the actual transmission' pleaded, does not identify how the plaintiff contends that but for the breach of duty no transmission would have occurred. It seems the plaintiff may be seeking to plead, in summary, the 'but for' conclusion.

(b) What is meant by the confusing general reference in paragraph 136 – in the premises – to perhaps the preceding 135 paragraphs of the 2SOC is unclear (as is the content of that phrase where it also appears in later paragraphs). If it is a reference to paragraph 135, it seems that paragraph 136 simply repeats paragraph 135. Perhaps what ought to be pleaded in paragraph 135, is that in the premises (identified by cross referencing to the individual paragraphs pleading a material fact of breach of the alleged standard of care in the operation of the quarantine hotels) the lack of prudent IPC measures materially contributed to the conduct of the workers in the operation of the quarantine hotels and that the conduct of the workers materially contributed to the actual transmissions alleged. It is not for the defendants or the court to speculate as to the intended meaning of the pleading in identifying the path of inferential reasoning intended to establish factual causation.

(c) As I have explained, the plaintiff has set out how the court will be invited to infer that transmission occurred. The plaintiff may be proposing that the

allegations set out earlier in the pleading suffice for an inference to be drawn on the balance of probabilities that the breach alleged was a necessary condition for the occurrence of the first link in the causal chain leading to the loss claimed. There is a distinction between alleging what might have happened had a prudent defendant observed the standard of care and alleging how the conduct of the quarantine process was a necessary condition for each link in the causal chain to the loss.

(d) The counterfactual, which is 'zero transmission' and not 'minimised transmission', is pleaded again at paragraph 154, which seems to confirm that the plaintiff intended to plead the path to inferential factual causation in paragraphs 135-6.

(e) Paragraph 149 pleads, by reference to unidentified premises, the links in the causation chain from breach to loss but does not do so by alleging what the plaintiff must prove actually happened, although such matters might be thought to be alleged earlier in the pleading. The reader should not be left to speculate as to what those premises are. The paragraph is embarrassingly confusing because it looks backwards through a zero transmission counterfactual perspective. It does not identify the material facts that the plaintiff alleges did occur that will make out the conclusion that breach was a necessary condition for loss. Perhaps those facts are identified 'in the premises'.

(f) It must be that the plaintiff is alleging that, as pleaded earlier, each of those steps occurred because the defendants breached the duty of care in the ways alleged and consequently the breach of duty was a necessary condition of the restrictions which led to the closure of the group members' businesses or a decrease in demand for their goods and services which caused them economic loss. This could be plainly stated by clearly identifying the premises from which the conclusion flows by cross-referencing to the specific allegations alleged to found the probable inference of a causal chain, reframing the steps that follow as positive consequences of the alleged breach of duty, which I understand to

be the plaintiff's case. Paragraph 149 is embarrassingly ambiguous but capable of being repleaded.

(g) Replacing the expression 'in the premises' with properly considered cross-referencing to other allegations made in the pleading may be sufficient to overcome this ambiguity and identify with sufficient precision the material facts that are alleged to support the causal inference the plaintiff wishes to allege. Precisely how that is achieved is a matter for the plaintiff's advisers.

113 The defendants' substantive challenge to the pleading on ground 1 is rejected. For the reasons just explained, I will strike out paragraphs 136, 138, 139, 143, 145, 146, 148, 149, 150, 153, 155 because of the use of the non-specific phrase,[80] with leave to replead specific cross referencing, if appropriate, in substitution for that phrase.

Ground 2

114 The defendants' challenge by this ground was essentially directed at the same paragraphs as were challenged by ground 1. The focus of this ground is on an apparent contradiction in the counterfactual that is said to be embarrassing. A 'zero transmission' counterfactual, they submitted, is by definition inconsistent with the plaintiff's case advanced elsewhere in the 2SOC that prudent discharge of the duty of care would have minimised the likelihood and/or risk of transmission of the virus.

115 The following aspects of the pleading refer to minimising rather than eliminating risk:

(a) In paragraph 25, the plaintiff pleads that the detention of the travellers in hotel quarantine was 'reasonably necessary for the purpose of eliminating or reducing a serious risk to public health'.

(b) In paragraph 27, the plaintiff pleads that it was necessary to implement IPC measures 'in order to prevent or minimise the likelihood and/or risk of transmission'.

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80 The phrase is also used in paragraphs 40, 59, 63(c), 79, 82, 87(c), 99 and 158, which use might be reconsidered although I do not propose to strike those paragraphs out.

(c) In paragraph 37, the plaintiff when addressing the knowledge of the defendants refers to measures that were 'apt to prevent or minimise the likelihood …'

(d) In paragraph 40, the plaintiff pleads that the duty of care required that the defendants inquire whether advice had been obtained on what, if any, IPC measures needed to be implemented to minimise the risk of transmission.

116 Each of these allegations may raise the assumption that there may be a level of non-negligent transmission of the virus. In the Strike-out judgment I said at [222]:

> What the plaintiff needs to identify is whether it alleges the likely outcome is that there would have been zero transmission events, no second wave, and therefore no restrictions. This may be difficult, possibly fanciful, with COVID-19, but that, if raised, will be an issue for trial. Alternatively, as noted above in other contexts, the plaintiff must explain if it contends some transmission events may have occurred from prudently operated hotel quarantine but would not have led to economic loss for Victorian retailers. If there would still have been some harm if the standard of care were met, the plaintiff must explain how a material causation or material risk case could be run in circumstances where only one case can lead to exponential growth in cases and an outbreak, which triggers a lockdown.

117 The use of language in the pleading that might be said to be inconsistent with the plaintiff's zero transmission case was only identified where the plaintiff was alleging material facts going to establishing the existence of a duty of care. Both my earlier remarks and the defendants' contentions are directed to the issue of causation. I am not satisfied that there is any inconsistency likely to cause ambiguity or embarrassment.

118 As noted above, the plaintiff's further particulars make it clear that it relies on a zero transmission counterfactual. It contends that it will be sufficient for it to establish at trial on the balance of probabilities that the defendants' negligence caused the loss in fact suffered. That suffices to establish a sufficient allegation of a cause of action. Consistently with the principles I earlier extracted from the authorities, if the defendants wish to deny the plaintiff's entitlement to relief on the basis that the loss would have occurred in any event, that is a matter for the defendants to plead and prove. Should the defendants do so, it will be open to the plaintiff to further contend

that, had the duty been complied with, no transmission event liable to cause equivalent harm to the plaintiff would, on the balance of probabilities, have occurred.

119 References to the two nurses do not assist the defendants in establishing this ground of challenge. The fact that two nurses were part of the cluster does not impugn the manner in which the plaintiff has pleaded causation.

120 The challenge to the pleading on ground 2 is rejected.

Ground 3

121 The plaintiff's primary causation case is based on factual causation pursuant to s 51(1)(a) of the *Wrongs Act:* that the defendants' negligence was a necessary condition of the plaintiff sustaining economic loss. However, the plaintiff contended that it was entitled to invoke s 51(2) to plead an alternative causation case. An alternative claim, even an inconsistent alternative may be pleaded.

122 The ground requires a careful analysis of the pleading. Section 51(2) cannot be used to save a failed attempt to establish what is properly a case of factual causation pursuant to s 51(1).[81] That is not the evidentiary gap referred to in the Ipp Report. As noted earlier, and in the Strike-out judgment, two situations have been identified in the cases where s 51(2) has application.

123 Secondly, as *Powney* makes clear, if s 51(2) is to be relied on as providing the appropriate causal link between a negligent act and attributing responsibility for the alleged consequential harm to the defendant, the basis of the claim should be set out in the pleadings.[82]

124 What is pleaded is that, in the alternative, the defendants' breach of duty materially increased the risk that the plaintiff and Group members would suffer economic loss and that this material increase in risk should be taken to establish causation pursuant to s 51(2). Material increase in risk is pleaded as a matter supporting an inference of factual causation pursuant to s 51(1). As an allegation of a strand of circumstantial

81 *Powney* (2014) 43 VR 506, 525 [96].
82 Ibid 526 [100].

evidence, that is permissible ([94(h)] above). The defendants sought particulars of the material facts constituting this material increase in risk. The plaintiff's further particulars referenced the allegations in paragraphs 27, 28, 43, 47, 56, 57, 58 to 66, 80, 81 to 89 and 134 of the 2SOC, the substance of which is set out above. In doing so, the plaintiff is identifying the same material facts that support the allegation of s 51(1) causation as applicable to establishing s 51(2) causation.

125 The defendants' negligence can be established, according to the plaintiff, as a necessary condition of it suffering economic loss by reference to these allegations. At the same time the plaintiff alleges, inconsistently, that because negligence cannot be established as a necessary condition of the occurrence of the harm, this is an appropriate case, in accordance with established principles, for a normative evaluation of causation.

126 Section 51(2) allows for a finding of causation where negligent conduct materially contributed to harm or the risk of harm but cannot be shown to be a necessary condition for the occurrence of the harm. First, the pleading does not identify why negligence cannot be established as a necessary condition of the occurrence of the harm. It cannot be simply that it will have failed to prove factual causation. Secondly, such attribution is to be done 'in accordance with established principles'. Accordingly, whether, and when, s 51(2) applies is dependent on whether, and to what extent, established principles countenance departure from factual causation.[83] The pleading does not identify why this is an appropriate case to apply s 51(2). Nor does it set out material facts upon which the court could evaluate whether and why responsibility for the harm should be imposed on the defendants or otherwise identify why 'established principles' are applicable in the circumstances of the case.

127 There is not, for example, any allegation that the circumstances fall into either the *Bonnington*[84] type of case, in which harm results from the cumulative operation of two or more factors, where the relative contribution of such factors to the total harm

83 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 443 [54]-[57].
84 [1956] AC 613.

suffered cannot possibly be determined; or into the *Fairchild*[85] type of case, in which scientific evidence could not determine at what point the plaintiff contracted mesothelioma after successive exposures to asbestos. It may be accepted that the categories of cases where material contribution to risk in the absence of necessary condition are not exhaustively defined by reference to these two categories, but the pleading does not identify any parameters for recognition of those or any other category.

128 The only matter raised by the pleading is that the plaintiff has failed to establish s 51(1) causation. That is not sufficient to identify the scope of a normative inquiry at trial that will require the court to exercise a value judgment. Put another way, the pleading does not identify why nothing more than a material increase in risk of loss linked to negligent conduct, otherwise than as a necessary condition for its occurrence, will be sufficient to establish causation. The plaintiff has not identified why this case is, to borrow a phrase from *Powney*, quite out of the ordinary or, using the statutory language, an 'appropriate case' for causation to be determined pursuant to s 51(2).

129 The challenge to paragraph 151 by ground 3 succeeds. I will strike out paragraph 151 and the particulars provided of it by Annexure A to the plaintiff's solicitor's letter of 31 May 2022. The defendants contended that paragraph 28 also be struck out as part of the allegation of alternative causation under s 51(2). I do not accept that construction of the 2SOC. Paragraph 28 is an allegation that is material to the strands of inferential reasoning supporting the claim of s 51(1) factual causation.

Addendum

130 During argument, I raised a question why the plaintiff was not able to provide particulars of the interactions between travellers and workers and the specific contexts arising from such interactions in which the conduct of the defendants affected the risk of transmission in those particular circumstances. I was informed that on the one hand, the plaintiff had not sought specific information about the individual travellers, the infected workers, and the circumstances of their interactions by way of

85 [2003] 1 AC 32.

preliminary discovery. I understand that the plaintiff has largely drawn from the report of the Coate enquiry in formulating its claim.

131 While I am satisfied that the plaintiff has sufficiently identified and pleaded material allegations on which to seek an inference of a causal link at trial sufficient to permit the pleading to stand, it is evident that the overarching purpose in civil litigation will more likely be achieved were the plaintiff able to provide particulars of specific events, if identifiable from the actors involved in them, that add colour to its more general allegations. I accept that the plaintiff is not presently in a position to give such particulars and it is clear from the 2SOC that it intends to do so, if possible, following discovery and the preparation of expert evidence. For reasons canvassed during the hearing, I consider that the plaintiff should provide the best particulars that it can in order to confine the scope of the court's inquiry at trial.

132 However, there is an issue whether the plaintiff will ever be entitled to such information because confidentiality about such matters may be protected under s 130 of the *Evidence Act 2008* (Vic), presumably on the basis that disclosure in evidence would prejudice the proper functioning of government, or in other ways. While I can imagine that there are ways in which the contact tracing system and other aspects of public health management may not function effectively absent confidentiality, counsel was not in a position to develop any argument on this issue and none were invited.

133 I was informed that the matter had been considered by Keogh J in *Secretary to the Department of Health v Victoria Workcover Authority and Another (No 2)*.[86] Although I was informed that this was a restricted judgment, that is not correct. In the context of an investigation into suspected contraventions of the *Occupational Health & Safety Act 2004* (Vic), the Victorian Workcover Authority ('**VWA**') issued notices to the Department of Health and Human Services requiring that it provide information and produce documents. The department refused to disclose contact tracing information and documents sought by the VWA where doing so would breach the undertakings of confidentiality it had given in these circumstances. However, the VWA withdrew

86 [2021] VSC 776.

the notices and stated that it would not prosecute the department for any failure to comply with them.

134 Although in the circumstances, the department pressed the court to determine the status of contact tracing information, there was no real controversy capable of being determined by declaratory relief. Keogh J concluded that any declaration made by the court would necessarily be advisory and therefore impermissible and refused the relief sought.

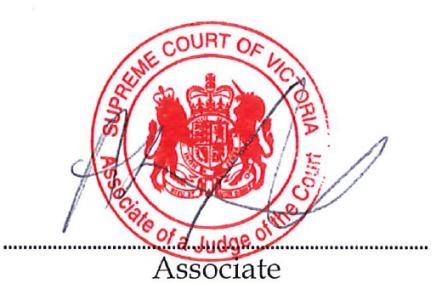
135 The question appears to me to remain unresolved although Keogh J made a number of useful obiter observations about the confidentiality of contact tracing information and its relationship to the public interest.

136 As a like question may well arise in this proceeding either in respect of an entitlement to inspect discovered documents, or an objection to documents produced in response to a non-party subpoena or in some other context, I will say no more about it. While there may be some truth in the defendants' suggestion that the court must necessarily conduct a wider ranging or roving enquiry because of the generality of the allegations in the 2SOC, that consequence might be ameliorated by the process of discovery and the provision of more detailed particulars. From that perspective, it is in the interests of the proper administration of justice that the plaintiff have access to further information. Where the balance lies is a matter for another occasion.

CERTIFICATE

I certify that this and the 58 preceding pages are a true copy of the reasons for judgment of the Honourable Justice John Dixon of the Supreme Court of Victoria delivered on 26 August 2022.

DATED this 26th day of August 2022.



Associate

SCHEDULE OF PARTIES

S ECI 2020 03402

BETWEEN:

5 BOROUGHS NY PTY LTD (ACN 632 508 304)	Plaintiff
-and-	
STATE OF VICTORIA	First Defendant
MINISTER FOR HEALTH AND MINISTER FOR THE COORDINATION OF HEALTH AND HUMAN SERVICES: COVID-19	Second Defendant
MINISTER FOR THE COORDINATION OF JOBS, PRECINCTS AND REGIONS: COVID-19	Third Defendant
SECRETARY, DEPARTMENT OF HEALTH AND HUMAN SERVICES	Fourth Defendant
SECRETARY, DEPARTMENT OF JOBS, PRECINCTS AND REGIONS	Fifth Defendant