# SUPREME COURT OF QUEENSLAND

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| CITATION: | *Gratrax Pty Ltd v T D & C Pty Ltd* [2013] QCA 385 |
| PARTIES: | **GRATRAX PTY LTD**<br>ACN 010 526 824<br>(appellant)<br>**v**<br>**T D & C PTY LTD**<br>ACN 005 929 402<br>(respondent) |
| FILE NO/S: | Appeal No 4107 of 2013<br>DC No 3774 of 2009 |
| DIVISION: | Court of Appeal |
| PROCEEDING: | General Civil Appeal |
| ORIGINATING COURT: | District Court at Brisbane |
| DELIVERED ON: | 17 December 2013 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 29 August 2013 |
| JUDGES: | Fraser and Morrison JJA and Margaret Wilson J<br>Separate reasons for judgment of each member of the Court, each concurring as to the order made |
| ORDER: | **Appeal dismissed with costs.** |
| CATCHWORDS: | TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – where the appellant retained the respondent to design a road – where the respondent's design specified the wrong class of materials to be used in connection with the construction of the road – where the trial judge found the respondent failed to exercise proper care and skill – where the appellant was required to undertake testing and approval of the material and pavement prior to commencing work – where the appellant proceeded to lay the pavement without obtaining the appropriate testing, inspection and approval – where the trial judge concluded that the factual causation test in s 11(1)(a) of the *Civil Liability Act* 2003 (Qld) ('the Act') was satisfied but that the appellant's actions in prematurely laying the pavement meant that the scope of liability test in s 11(1)(b) of the Act was not satisfied – where the respondent was found to be liable only for the additional costs the appellant would have sustained as a result of the respondent's negligence if it had not prematurely commenced construction – whether the trial judge erred in approaching the question of |

causation – whether the appellant's intervening act or decision was a more immediate cause of its loss than the respondent's breach

TORTS – NEGLIGENCE – CONTRIBUTORY NEGLIGENCE – GENERALLY – where, although it was not necessary to make such a finding, the trial judge found that the appellant failed to take reasonable care in prematurely commencing work – where the trial judge did not otherwise make any apportionment to account for the appellant's contributory negligence – whether the trial judge erred in failing to carry out the assessment of damages to take account of the appellant's contributory negligence

*Civil Liability Act* 2003 (Qld), s 7(5), s 11(1), s 11(1)(b)
*Law Reform Act* 1995 (Qld), s 10(1)

*Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420; [2009] HCA 48, cited
*Gratrax Pty Ltd v T D & C Pty Ltd* [2013] QDC 63, related
*Hirst v Nominal Defendant* [2005] 2 Qd R 133; [2005] QCA 65, considered
*Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613; [2013] HCA 10, considered
*Mallesons Stephen Jaques v Trenorth Ltd* [1999] 1 VR 727; [1998] VSCA 58, cited
*Medlin v The State Government Insurance Commission* (1995) 182 CLR 1; [1995] HCA 5, considered
*Tabet v Gett* (2010) 240 CLR 537; [2010] HCA 12, cited
*Travel Compensation Fund v Tambree (t/as R Tambree & Associates)* (2005) 224 CLR 627; [2005] HCA 69, cited
*Wallace v Kam* (2013) 87 ALJR 648; [2013] HCA 19, applied

COUNSEL: J W Peden for the appellant
R S Ashton for the respondent

SOLICITORS: Crouch and Lyndon for the appellant
Thynne and Macartney for the respondent

[1] **FRASER JA:** The appellant sued the respondent in the District Court for damages for breach of contract or negligence in respect of engineering services which the respondent provided to the appellant in 2007. Judgment was given in the appellant's favour for $12,901, including interest. In this appeal the appellant contends that judgment should instead be entered in its favour for $81,668.40.

[2] The grounds of appeal challenge the trial judge's approach to causation and contributory negligence. Consideration of those grounds of appeal requires reference to the facts found by the trial judge.

**The trial judge's findings**

[3] The only finding of fact which the appellant challenged concerns the appellant's experience in building roads. The appellant had been engaged in developing property, including constructing buildings and doing road works, for more than

a decade before the events which gave rise to this litigation. Mr Haggar, a licensed builder, managed the appellant. The trial judge made the following findings about Mr Haggar:[1]

> "He has 40 years' experience building roads, including as a contractor working for the Gold Coast City Council ... He has had experience with around 100 roads or similar types of construction … This work has been done through the plaintiff since 1980, and prior to that through another company."

The appellant submitted that this overstated Mr Haggar's relevant experience, but the statements are virtually direct quotes from Mr Haggar's own evidence.

[4] Otherwise the facts found by the trial judge were not challenged. The appellant constructed a road in connection with the development of a parcel of land at Yatala. The appellant retained the respondent to design the road to the specifications of the Gold Coast City Council in accordance with the conditions of the subdivisional approval issued to the appellant by the council. The road was to be constructed in four layers: the "sub-grade", the "sub-base", the "base course", and the top course (which was typically asphalt). The respondent's design specified class 3 material for the sub-base and class 2 material for the base course. That was wrong because the council specifications required class 2 material for the sub-base and class 1A material for the base course.

[5] The trial judge found that, by specifying class 3 material instead of class 2 material for the sub-base and class 2 material instead of class 1A material for the base course, the respondent failed to exercise the skill and care that was usual amongst engineers practising their profession.[2] The appellant sustained loss in buying and laying class 3 material in the sub-base and class 2 material in the base course before a council inspector stopped the work. But for the respondent's incorrect specifications of class 2 and class 3 material the appellant would not have laid any of that material and therefore would not have thrown away the cost of doing so.[3] The total amount of the appellant's loss was $91,668.40. None of this is in issue.

[6] The trial judge made the following further findings which bear directly upon the causation issues in the appeal. The design drawings included notes requiring that: fill material be "rated at least CBR 15" (a reference to a test for density known as "California Bearing Ratio"); "[a]ll compaction to be subjected to testing in accordance with the relevant Australian Standards and Gold Coast City Council requirements"; and "[m]inimum depth of courses to pavements are detailed on typical sections. Actual pavement depths are to be determined following soaked CBR tests on subgrade".[4] The conditions of the council's approval, the council's guidelines, and usual road building practice all required the appellant to take the following steps: after the sub-grade had been placed and compacted the testing specified by the council ("soaked CBR testing") should be done to determine the strength of the sub-grade; when the test results were available those results, together with the pavement design, should be lodged with the council for approval; and the construction of the pavement could proceed only after the council inspected the sub-grade and approved the pavement design.[5]

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1 [2013] QDC 63 at [2].
2 [2013] QDC 63 at [8], [30].
3 [2013] QDC 63 at [39].
4 [2013] QDC 63 at [5].
5 [2013] QDC 63 at [14], [78].

[7] The trial judge rejected Mr Haggar's evidence that he was unaware of the requirement that actual pavement depths should be determined only after the soaked CBR tests of the sub-grade. The trial judge instead accepted the evidence of the appellant's engineer, Mr Rebibou, that he had told Mr Haggar about the testing and inspection requirements in the council guidelines and that Mr Haggar had replied (incorrectly) that he had already obtained the CBR tests and had a pavement design;[6] during the work, the council inspector more than once asked the appellant's engineer, Mr Rebibou, if Mr Haggar had lodged the pavement design and the engineer had replied that Mr Haggar had said that he had done that already and that he had done the CBR test; and on one occasion this conversation occurred in the presence of Mr Haggar.[7]

[8] The trial judge found that "as a matter of a commonsense and experience the plaintiff's proceeding to lay the pavement without obtaining the appropriate testing, inspection by the Council inspector and approval of the pavement design was not something which in the ordinary course of things was likely to occur if the defendant was negligent in the identification of the grades of material to be used to the base and sub-base…";[8] so much of the appellant's loss which was incurred after the sub-grade had been constructed "was brought about by the plaintiff's own decision to proceed to lay the pavement"[9] and was not contributed to by the respondent's specification of the incorrect grades of material.[10]

[9] The trial judge concluded that the respondent was liable only for the additional costs to which the appellant would reasonably have been put by the respondent's negligence if the appellant had not commenced laying the pavement prematurely before the necessary testing, inspection, and pavement design approval by the council. The trial judge assessed the total of those additional costs as $8,747 which, with the addition of interest of $4,154, led to the judgment sum of $12,901. (That amount of $8,747 may be contrasted with the total amount of the appellant's loss of $91,668.40.)

**The trial judge's analysis of the causation issue**

[10] The appellant's case on appeal was that its recoverable loss was the whole amount of $91,668.40, that amount should have been reduced by $10,000 on account of its contributory negligence, and the appellant therefore should have judgment for $81,668.40 upon its claim. This case requires reference to s 11 of the *Civil Liability Act* 2003 (Qld) and the trial judge's reasons upon the issue of causation.

[11] Section 11 of the *Civil Liability Act* 2003 (Qld) relevantly provides:

> "(1) A decision that a breach of duty caused particular harm comprises the following elements—
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> (a) the breach of duty was a necessary condition of the occurrence of the harm (***factual causation***);
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> (b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused (***scope of liability***).

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6 [2013] QDC 63 at [12], [15], [20]-[23], [26].
7 [2013] QDC 63 at [15].
8 [2013] QDC 63 at [65].
9 [2013] QDC 63 at [76].
10 [2013] QDC 63 at [77].

…

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty."

[12] The trial judge found that the factual causation test was satisfied because, if the respondent had specified the correct classes of material on its plan, the appellant would not have laid the pavement with the incorrect classes of material. The trial judge's decision that the respondent was liable only for the additional costs to which the appellant would reasonably have been put if the appellant had not commenced laying the pavement prematurely resulted from a conclusion that the scope of liability test in s 11(1)(b) was not satisfied in relation to the balance of the appellant's loss.

[13] The trial judge referred to authority concerning the effect of intervening acts or decisions of a claimant upon the claimant's entitlement to recover damages, including the following passage in *Medlin v The State Government Insurance Commission*:[11]

> "For the purposes of the law of negligence, the question whether the requisite causal connexion exists between a particular breach of duty and particular loss or damage is essentially one of fact to be resolved, on the probabilities, as a matter of commonsense and experience. And that remains so in a case such as the present where the question of the existence of the requisite causal connexion is complicated by the intervention of some act or decision of the plaintiff or a third party which constitutes a more immediate cause of the loss or damage. In such a case, the 'but for' test, while retaining an important role as a negative criterion which will commonly (but not always) exclude causation if not satisfied, is inadequate as a comprehensive positive test. If, in such a case, it can be seen that the necessary causal connexion would exist if the intervening act or decision be disregarded, the question of causation may often be conveniently expressed in terms of whether the intrusion of that act or decision has had the effect of breaking the chain of causation which would otherwise have existed between the breach of duty and the particular loss or damage. The ultimate question must, however, always be whether, notwithstanding the intervention of the subsequent decision, the defendant's wrongful act or omission is, as between the plaintiff and the defendant and as a matter of commonsense and experience, properly to be seen as having caused the relevant loss or damage. Indeed, in some cases, it may be potentially misleading to pose the question of causation in terms of whether an intervening act or decision has interrupted or broken a chain of causation which would otherwise have existed. An example of such a case is where the negligent act or omission was itself a direct or indirect contributing cause of the intervening act or decision. It will be seen that, on the plaintiff's evidence, the present was such a case."

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[11] (1995) 182 CLR 1 at 6-7 (Deane, Dawson, Toohey and Gaudron JJ). I have omitted footnotes.

[14] The trial judge observed that in the present case the original negligent act or omission was not a direct or indirect contributing cause of the appellant's intervening act or decision:[12]

> "… The intervening act or decision was the plaintiff's decision to begin laying the pavement without first doing soaked [CBR] testing, arranging for the Council inspection and obtaining the final pavement design approval from the Council … that decision was not in any way caused directly or indirectly by the error of the defendant."

[15] The alleged intervening event in *Medlin* was that plaintiff's decision to retire early from an academic position. The trial judge referred to another passage in *Medlin* in which it was observed that the relevant question was not whether that plaintiff's decision to retire was not reasonable "but whether, in the context of what was reasonable between the plaintiff and the defendant in determining the defendant's liability in damages, the premature termination of the plaintiff's employment was the product of the plaintiff's loss of earning capacity notwithstanding that it was brought about by his own decision to accept voluntary retirement."[13] The trial judge therefore rejected a submission for the appellant that the question was whether the appellant's conduct had been unreasonable and held that the question was instead whether it was reasonable to treat the appellant's decision to commence laying the pavement when it did as being reasonable as between the appellant and the respondent in the context of determining the respondent's liability for damages for its negligence.[14]

[16] The trial judge went on to refer to other decisions, including *Mallesons Stephen Jaques v Trenorth Ltd*,[15] in which a plaintiff's own fraud in taking advantage of an opportunity created by the defendant's negligence was held either to be the true cause of the plaintiff's loss or a supervening act which broke the chain of causation between the defendant's negligence and the plaintiff's loss. The trial judge observed of the present case that "as a matter of commonsense and experience",[16] the appellant's conduct in proceeding to lay the pavement without the appropriate testing, council inspection, and council approval was not something which in the ordinary course of things was likely to occur as a result of the respondent's negligence in the specification of the grades of material for the base course and sub-base, but that the appellant's supervening act, not being fraudulent, was inherently less likely to break the chain of causation.

[17] The trial judge referred to the application of *Medlin* in the following passage in *Hirst v Nominal Defendant*:[17]

> "The reasoning in *Medlin* confirms the propositions that voluntary or deliberate or unusual conduct on the part of a plaintiff does not necessarily sever the causal nexus so as to relieve a negligent defendant from liability for loss suffered by a plaintiff; and that it is

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12 [2013] QDC 63 at [46].
13 (1995) 182 CLR 1 at 11.
14 [2013] QDC 63 at [49].
15 [1999] 1 VR 727.
16 A reference to the passage quoted from *Medlin*.
17 [2005] 2 Qd R 133 at [29] (Keane JA). The trial judge also observed that the same approach was adopted in *Blaxter v Commonwealth of Australia* [2008] NSWCA 87 and *Burns v Pearce* [2010] WASCA 214.

> necessary to have regard to the extent to which the plaintiff's voluntary conduct has been constrained by the defendant's misconduct, and then to ask whether as between plaintiff and defendant it was reasonable of the plaintiff to make the choice which was the immediate cause of the loss. [These propositions] recognise that there may be a point at which it is possible to say that it is not reasonable as between the plaintiff and defendant that the defendant is responsible for the voluntary conduct of the plaintiff, e.g. because the choice made by the plaintiff may be so unexpected a response to the defendant's conduct that the defendant should not bear any of the consequences of that decision, it cannot be said that this point was reached in this case."

[18] The trial judge discussed other decisions, including *Tabet v Gett*,[18] and *Travel Compensation Fund v Tambree*,[19] and remarked that it was not clear whether s 11 of the *Civil Liability Act* 2003 was an exhaustive statement of the law relating to causation to the point of excluding other rules such as the effect of a supervening event but "because of the width of subsection (4), the factors which on the authorities were at common law regarded as relevant to determining whether a supervening act or decision broke the chain of causation could be accommodated in the statutory scope of liability aspect of causation."[20] After observing that "[f]or practical purposes what matters is that the legislation does not so far as I can see impose a different test for assessing the significance of a supervening act or decision",[21] the trial judge went on to consider and apply the "factual causation" test and the "scope of liability" test.

[19] As I mentioned earlier, the trial judge found that the statutory factual causation test was satisfied. As to the statutory scope of liability test, the trial judge considered that the resolution of the causation issue turned on the application of the tests laid down by the High Court in *Medlin* as expounded further by the Court of Appeal in *Hirst*.[22] It was necessary to consider whether, in the context of what was reasonable between the appellant and the respondent in determining the respondent's liability in damages, the appellant's premature laying of the pavement was the product of the respondent's incorrect design even though it was brought about by the appellant's own decision to proceed to lay the pavement; in that respect it was relevant to consider the extent to which the appellant's voluntary conduct had been constrained by the respondent's negligence and whether the appellant's choice was so unexpected a response to the respondent's negligence that the respondent should not bear the consequences of the appellant's choice.[23]

[20] The trial judge concluded that the respondent's incorrect specification of the grades of the material had not contributed to the appellant's decision to proceed to lay the pavement without first obtaining the results of the soaked CBR tests on the sub-grade, having the sub-grade inspected by the council, and obtaining the council's approval of the final pavement design as required both by the conditions of approval and by usual industry practice.[24] This was not merely a case of failing

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18 (2010) 240 CLR 537 at [111]-[112] (Kiefel J, with whom Crennan J agreed).
19 (2005) 224 CLR 627 at [46] (Gummow and Hayne JJ) and at [81] (Callinan J).
20 [2013] QDC 63 at [74].
21 [2013] QDC 63 at [74].
22 [2013] QDC 63 at [75].
23 [2013] QDC 63 at [76].
24 [2013] QDC 63 at [77].

to take ordinary prudence or to fulfil a duty to take reasonable care in one's own financial interests, and nor was it a case merely of a breach of local authority guidelines; the construction of the road was under the local authority's control and it required the appellant not to engage in the conduct in which it had engaged. The appellant's conduct was not as serious as fraud but was more serious than a mere failure to take reasonable care.[25] It was not "appropriate that the defendant's liability in damages for its negligence should be greater than it would otherwise have been because the plaintiff did the wrong thing, in circumstances where there was nothing in the defendant's conduct which caused the plaintiff to do the wrong thing … [by its] … laying of the pavement prematurely".[26]

**The grounds of appeal**

[21] The appellant relied upon three grounds of appeal. The first two grounds challenge the trial judge's approach to causation.

> **Ground 1: The learned trial judge erred in law by approaching the question of causation by means of a two part analysis, being a statutory factual causation test and scope of liability test (Reasons at [70] - [79] and particularly at [74] - [75]), as opposed to an enquiry whether the particular contravention was a cause in the sense that it materially contributed to the loss (as set out in *Hunt* & *Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* [2013] HCA l0 at [45] - [57]).**
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> **Ground 2: Having adopted the incorrect approach, the learned trial judge [then] erred in failing to find that the defendant's conduct was a cause of all of the plaintiff's loss, which the trial judge found to be $91,668.40.**

[22] The appellant argued that the trial judge should not have approached the issue of causation by reference to the two part test derived from s 11(1) of the *Civil Liability Act* 2003; the trial judge erred by "separating out the value judgment and without … identifying a principle upon which there should be a break [in the chain of causation]".[27] The argument was advanced on the expressed premise that s 11(1) is a provision "relating to apportionment of liability as between concurrent tortfeasors" or "concurrent wrongdoers".[28] That assumption explains the appellant's further submission that the correct approach is that which was set out in *Hunt & Hunt Lawyers (a Firm) v Mitchell Morgan Nominees Pty Ltd*:[29]

> "The law's recognition that concurrent and successive tortious acts may each be a cause of a plaintiff's loss or damage is reflected in the proposition that a plaintiff must establish that his or her loss or damage is "caused or materially contributed to" by a defendant's wrongful conduct. It is enough for liability that a wrongdoer's conduct be one cause. The relevant inquiry is whether the particular contravention was a cause, in the sense that it materially contributed to the loss. Material contribution has been said to require only that the act or omission of a wrongdoer play some part in contributing to the loss."

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25 [2013] QDC 63 at [78].
26 [2013] QDC 63 at [79].
27 Transcript of argument, 1-26.
28 Appellant's outline of argument, para 13 and para 18.
29 (2013) 247 CLR 613 at [45] (French CJ, Hayne and Kiefel JJ). I have omitted footnotes.

[23] The assumption underlying the appellant's argument is incorrect. This case does not involve concurrent tortfeasors or wrongdoers. Rather, it concerns the effect upon the necessary causal connection between breach of duty and a claimant's loss of a supervening act or decision of the claimant which is a more immediate cause of the claimant's loss than the wrongdoer's breach of duty. As the passage from *Medlin* which was quoted by the trial judge indicates, this is a well recognised aspect of the causation issue. The approach to that issue is now governed by s 11 of the *Civil Liability Act* 2003. The methodology required by that section must be applied whether or not a different methodology might be derived from decisions on the common law.[30]

[24] At one point during oral argument counsel for the appellant submitted that s 11 was not applicable because the respondent was found liable for breach of contract, but counsel ultimately acknowledged that the respondent was found liable both for breach of a duty of care arising under the common law and for breach of a contractual duty of care which was co-extensive with the common law duty of care. Both duties fall within the word "duty" in s 11(1) as it is defined in Sch 2 of the Act.

[25] In applying the methodology mandated by s 11(1)(b) and referring for that purpose to authoritative decisions about the effect of an intervening decision of a claimant which is a more immediate cause of the claimant's loss than the wrongdoer's breach of duty, the trial judge anticipated the High Court's decision in *Wallace v Kam*.[31] French CJ, Crennan, Kiefel, Gageler and Keane JJ explained the operation of the relevant aspects of the materially identical provision in s 5D of the *Civil Liability Act* 2002 (NSW)[32] in the following passages:

> "[11] The common law of negligence requires determination of causation for the purpose of attributing legal responsibility. Such a determination inevitably involves two questions: a question of historical fact as to how particular harm occurred; and a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person. The distinct nature of those two questions has tended, by and large, to be overlooked in the articulation of the common law. In particular, the application of the first question, and the existence of the second, have been obscured by traditional expressions of causation for the purposes of the common law of negligence in the conclusory language of 'directness', 'reality', 'effectiveness' and 'proximity'.
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> [14] The distinction now drawn by s 5D(1) between factual causation and scope of liability should not be obscured by judicial glosses. A determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by

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30 *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [44] (French CJ, Gummow, Hayne, Heydon and Crennan JJ).

31 (2013) 87 ALJR 648.

32 Section 5D is in the same terms as s 11(1) of the Queensland Act save that s 5D uses the terms, and derivatives of the terms, "determination" and "negligence" instead of "decision" and "breach of duty".

the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E. A determination in accordance with s 5D(1)(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused is entirely normative, turning in accordance with s 5D(4) on consideration by a court of (amongst other relevant things) whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.

[15] Thus, as Allsop P explained in the present case (at [4]):

> '[T]he task involved in s 5D(1)(a) is the elucidation of the factual connection between the negligence (the relevant breach of the relevant duty) and the occurrence of the particular harm. That task should not incorporate policy or value judgments, whether referred to as 'proximate cause' or whether dictated by a rule that the factual inquiry should be limited by the relationship between the scope of the risk and what occurred. Such considerations naturally fall within the scope of liability analysis in s 5D(1)(b), if s 5D(1)(a) is satisfied, or in s 5D(2), if it is not.'

[16] The determination of factual causation in accordance with s 5D(1)(a) involves nothing more or less than the application of a 'but for' test of causation. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence.

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[21] To determine factual causation in a case within the second or third scenarios, however, is to determine only that s 5D(1)(a) is satisfied. Satisfaction of legal causation requires an affirmative answer to the further, normative question posed by s 5D(1)(b): is it appropriate for the scope of the negligent medical practitioner's liability to extend to the physical injury in fact sustained by the patient?

[22] In a case falling within an established class, the normative question posed by s 5D(1)(b) is properly answered by a court through the application of precedent. Section 5D guides but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled.

[23] In a novel case, however, s 5D(4) makes it incumbent on a court answering the normative question posed by s 5D(1)(b) explicitly to consider and to explain in terms of legal policy whether or not, and if so why, responsibility for the harm

> should be imposed on the negligent party. What is required in such a case is the identification and articulation of an evaluative judgment by reference to "the purposes and policy of the relevant part of the law". Language of 'directness', 'reality', 'effectiveness' or 'proximity' will rarely be adequate to that task. Resort to 'common sense' will ordinarily be of limited utility unless the perceptions or experience informing the sense that is common can be unpacked and explained.
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> …
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> [26] Within that limiting principle of the common law, the scope of liability for the consequences of negligence is often coextensive with the content of the duty of the negligent party that has been breached. That is because the policy of the law in imposing the duty on the negligent party will ordinarily be furthered by holding the negligent party liable for all harm that occurs in fact if that harm would not have occurred but for breach of that duty and if the harm was of a kind the risk of which it was the duty of the negligent party to use reasonable care and skill to avoid. However, the scope of liability in negligence is not always so coextensive: '[t]he scope of liability for negligence finds its genesis but not its exhaustive definition in the formulation of the duty of care'. That is in part because the elements of duty and causation of damage in the wrong of negligence serve different functions (the former imposing a forward-looking rule of conduct; the latter imposing a backward-looking attribution of responsibility for breach of the rule) with the result that the policy considerations informing each may be different. It is in part because the policy considerations that inform the imposition of a particular duty, or a particular aspect of a duty, may operate to deny liability for particular harm that is caused by a particular breach of that duty."[33]

[26] That reflects the trial judge's approach; the trial judge complied with s 11(1) by asking whether or not the respondent's negligence was a necessary condition of the occurrence of the loss which the appellant sustained (the "but for" test)[34] and, having answered that question in the affirmative, answering the "normative question"[35] in s 11(1)(b) by applying precedents on the footing that s 11(1)(b) "guides but does not displace common law methodology".[36]

[27] The appellant argued that *Wallace v Kam* should be distinguished because the New South Wales Act does not contain a provision equivalent to the provision in s 7(5) of the Queensland Act that the Act does not codify the law relating to civil claims for damages for harm. That provision could not justify disregard of the commands in s 11. The appellant also argued that *Wallace v Kam* should be distinguished because it concerned a failure to warn in a medical negligence context. Of course

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33 I have omitted the footnotes.
34 (2013) 87 ALJR 648 at [16].
35 (2013) 87 ALJR 648 at [21].
36 (2013) 87 ALJR 648 at [22].

the actual decision in *Wallace v Kam* turned upon its facts, but the factual distinction between that case and this case could not justify disregard of the applicable statutory provision or the High Court's explanation of how that provision is to be applied.

[28] Another argument advanced for the appellant was that its conduct in proceeding to lay the pavement without obtaining the results of the soaked CBR tests on the sub-grade and the council's approval of the final pavement design after an inspection was not deliberate. The submission is not reconcilable with the cumulative effect of the trial judge's findings summarised in [6], [7] and [8] of these reasons, findings which informed the trial judge's conclusion that the appellant's conduct was "more serious than a mere failure to take reasonable care."[37]

[29] The appellant also relied upon a passage in Mr Rebibou's evidence as support for a conclusion that the appellant's conduct in proceeding to lay the pavement without obtaining the test results and approval to the final design was reasonable. As the trial judge persuasively explained,[38] the effect of this passage in the context of Mr Rebibou's evidence was merely that it was reasonable to assume that the material specified in the design would not change as a result of the testing; it did not follow that it was reasonable to proceed to lay the sub-base and the base without first conducting the testing to confirm that the sub-grade met the required strength or without first complying with the council's requirements for inspection and for approval of the final pavement design.

[30] The trial judge did not err either in the methodology or in the application of that methodology to the facts to produce the resulting judgment.

> **Ground 3: Having made a finding that the plaintiff was guilty of contributory negligence, the learned trial judge erred in law by then failing to carry out the assessment of damages in accordance with section 10(1)(b) of the *Law Reform Act* 1995, which, had he done so in accordance with the evidence, assessment would have resulted in a reduction in the amount of damages in the order of $10,000.**

[31] The matters upon which the respondent relied as breaking the chain of causation between its negligence and the relevant part of the appellant's loss were also relied upon by the respondent as amounting to contributory negligence. Because the trial judge accepted that the appellant could not recover the relevant part of its loss it was not necessary for the trial judge to consider contributory negligence. The trial judge nevertheless made a finding that it was not reasonable for the appellant to proceed to lay the pavement without first having conducted the necessary tests, having the sub-grade inspected, and obtaining approval for the final pavement design before laying the pavement.[39] The trial judge did not make any particular apportionment, holding that to do so would be artificial.[40]

[32] The appellant argued that the trial judge should have allowed the appellant to recover the whole of its loss, subject to a reduction of $10,000 on account of the appellant's own negligence. The argument for a contribution in that amount was

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37 [2013] QDC 63 at [78].
38 [2013] QDC 63 at [88].
39 [2013] QDC 63 at [90].
40 [2013] QDC 63 at [86].

based upon evidence that if the correct material had been specified the cost which the appellant would have incurred as a result of proceeding to lay the pavement above the sub-grade would have been about $10,000.

[33] Sub-section 10(1) of the *Law Reform Act* 1995 (Qld) provides that where a claimant "suffers damage partly because of the claimant's failure to take reasonable care (***contributory negligence***) and partly because of the wrong of someone else … the damages recoverable for the wrong are to be reduced to the extent the court considers just and equitable having regard to the claimant's share in the responsibility for the damage." It is not easy to see how that provision can be reconciled with the appellant's approach of assessing a lump sum contribution by reference to damage which a claimant did not in fact suffer but which the claimant would have suffered if the respondent had not been guilty of the negligence found against it. In view of my conclusion that the trial judge was not in error in holding that the relevant part of the appellant's loss was not recoverable it is unnecessary to consider this issue further.

**Proposed order**

[34] The appeal should be dismissed with costs.

[35] **MORRISON JA:** I have read the reasons of Fraser JA and agree with his Honour and the order he proposes.

[36] **MARGARET WILSON J:** I agree with the order proposed by Fraser JA, and with his Honour's reasons for judgment.