Wallace v Kam - [2013] HCA 19

HIGH COURT OF AUSTRALIA

FRENCH CJ,
CRENNAN, KIEFEL, GAGELER AND KEANE JJ

IAN WALLACE APPELLANT

AND

DR ANDREW KAM RESPONDENT

Wallace v Kam
[2013] HCA 19
8 May 2013
S307/2012

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

P W Bates with P G White for the appellant (instructed by Gerard Malouf & Partners)

D J Higgs SC with E M Peden for the respondent (instructed by TressCox Lawyers)

CATCHWORDS

Wallace v Kam

Negligence – Causation – Medical practitioner – Where medical practitioner failed to warn patient of two distinct material risks inherent in surgical procedure – Where only one risk eventuated – Where patient would have chosen not to undergo surgical

procedure if warned of both risks – Where patient would have chosen to undergo surgical procedure if warned only of risk that eventuated – Whether failure to warn of both material risks was a necessary condition of injury caused by the risk that eventuated – Whether appropriate for scope of medical practitioner's liability to extend to that injury.

Words and phrases – "but for", "factual causation", "scope of liability".

Civil Liability Act 2002 (NSW), s 5D .

1. FRENCH CJ, CRENNAN, KIEFEL, GAGELER AND KEANE JJ. Mr Wallace sought medical assistance in relation to a condition of his lumbar spine. Dr Kam, a neurosurgeon, performed a surgical procedure on him. The surgical procedure had inherent risks. One risk was of temporary local damage to nerves within his thighs, described as "bilateral femoral neurapraxia", resulting from lying face down on the operating table for an extended period. Another, distinct risk was a one-in-twenty chance of permanent and catastrophic paralysis resulting from damage to his spinal nerves. The surgical procedure was unsuccessful: the condition of Mr Wallace's lumbar spine did not improve. The first risk materialised: Mr Wallace sustained neurapraxia which left him in severe pain for some time. The second risk did not.

2. Mr Wallace claimed damages from Dr Kam for the neurapraxia he sustained. Mr Wallace's claim in the Supreme Court of New South Wales was that Dr Kam negligently failed to warn him of risks including the risk of neurapraxia and the risk of paralysis and that, had he been warned of either risk, he would have chosen not to undergo the surgical procedure and would therefore not have sustained the neurapraxia.

3. The claim was dismissed at trial. Harrison J found that Dr Kam negligently failed to warn Mr Wallace of the risk of neurapraxia. But he also found that Mr Wallace would have chosen to undergo the surgical procedure even if warned of the risk of neurapraxia. He concluded, for that reason, that Dr Kam's negligent failure to warn Mr Wallace of the risk of neurapraxia was not a necessary condition of the occurrence of the neurapraxia. He declined to make any finding about whether Dr Kam negligently failed to warn Mr Wallace of the risk of paralysis, and about what Mr Wallace would have done if warned of the risk of paralysis, on the basis that the "legal cause" of the neurapraxia "could never be the failure to warn of some other risk that did not materialise" [1] .

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[1] *Wallace v Ramsay Health Care Ltd* [2010] NSWSC 518 at [96] .

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4. Mr Wallace appealed to the Court of Appeal of the Supreme Court of New South Wales (Allsop P, Beazley and Basten JJA). He argued that Harrison J erred in holding that the legal cause of the neurapraxia could not be the failure to warn of the risk of paralysis. The Court of Appeal tested that argument by assuming that Dr Kam negligently failed to warn Mr Wallace of the risk of paralysis and that, if warned of that risk, Mr Wallace would not have undergone the surgical procedure. Was Dr Kam, on that assumption, liable for the neurapraxia?

5. The Court of Appeal divided in answering that question. The majority, Allsop P and Basten JA, answered it in the negative. The appeal was therefore dismissed. Beazley JA answered it in the affirmative and would have ordered a new trial.

6. The negative answer of the majority of the Court of Appeal is to be preferred. Mr Wallace's appeal to this Court, which raises the same question, should therefore be dismissed.

Framework for analysis

7. Mr Wallace's claim against Dr Kam was in negligence at common law. The familiar elements of his cause of action were duty, breach and causation of damage. The question raised by the appeal requires attention to the first and third of those elements.

8. **Following paragraph cited by:**

Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright (17 February 2017) (Basten, Hoeben and Gleeson JJA)

> 32. Rogers v Whitaker (1992) 175 CLR 479 at 489 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ); Wallace v Kam (2012) 250 CLR 375; [2013] HCA 19 at [8] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Morocz v Marshman (11 August 2016) (Macfarlan and Payne JJA, Emmett AJA)
Biggs v George (17 May 2016) (Basten, Ward and Payne JJA)

> 22. The duty to warn is identified as extending to “material risks” which may attend a proposed treatment; the risk is “material”, relevantly for present purposes, if it is a risk to which a reasonable person in the position of the patient “would be likely to attach significance in choosing whether or not to undergo a proposed treatment.” [5] In *Wallace v Kam* , the risk was described as one of “physical injury”, because that was the nature of the risk in that case, as it is in the present case; it is not necessarily so limited.

> *via*

> 5. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 at [8] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

The common law duty of a medical practitioner to a patient is a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment [2] . A component of that single comprehensive duty is ordinarily to warn the patient of "material risks" of physical injury inherent in a proposed treatment [3] . A risk of physical injury inherent in a proposed treatment is material if it is a risk to which a reasonable person in the position of the patient would be likely to attach significance, or if it is a risk to which the medical practitioner knows or ought reasonably to know the particular patient would be likely to attach significance in choosing whether or not to undergo a proposed treatment [4] . The component of the duty of a medical practitioner that ordinarily requires the medical practitioner to inform the patient of material risks of physical injury inherent in a proposed treatment is founded on the underlying common law right of the patient to choose whether or not to undergo a proposed treatment. In imposing that component of the duty, the common law recognises not only the right of the patient to choose but the need for the patient to be adequately informed in order to be able to make that choice rationally. The policy underlying the imposition of that component of the duty is to equip the patient with information relevant to the choice that is the patient's to make [5] . The duty to inform the patient of inherent material risks is imposed to enable the patient to choose whether or not to run those inherent risks and thereby "to avoid the occurrence of the particular physical injury the risk of which [the] patient is not prepared to accept" [6] .

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[2] *Rogers v Whitaker* (1992) 175 CLR 479 at 489; [1992] HCA 58.

[3] *Rogers v Whitaker* (1992) 175 CLR 479 at 490 ; *Rosenberg v Percival* (2001) 205 CLR 434 at 453 [61]; [2001] HCA 18.

[4] *Rogers v Whitaker* (1992) 175 CLR 479 at 490.

[5] *Rogers v Whitaker* (1992) 175 CLR 479 at 486, 488-490 .

[6] *Chester v Afshar* [2005] 1 AC 134 at 144 [18] .

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9. The common law duty of a medical practitioner is therefore ordinarily breached where the medical practitioner fails to exercise reasonable care and skill to warn a patient of any material risk of physical injury inherent in a proposed treatment. However, consistent with the underlying purpose of the imposition of the duty to warn, the damage suffered by the patient that the common law makes compensable is not impairment of the patient's right to choose. Nor is the compensable damage exposure of the patient to an undisclosed risk. The compensable damage is, rather, limited to the occurrence and consequences of physical injury sustained by the patient as a result of the medical treatment that is carried out following the making by the patient of a choice to undergo the treatment[7].

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[7] Jones, "A Risky Business", (2005) 13 *Tort Law Review* 40 at 49-50; *Clerk & Lindsell on Torts*, 20th ed (2010) at [2-17]; Jones, *Medical Negligence*, 4th ed (2008) at [7-072].

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10. For particular physical injury sustained by a patient as a result of medical treatment the patient has chosen to have carried out to be compensable, it must be determined to have been caused by the particular failure of the medical practitioner to exercise reasonable care and skill to warn the patient of one or more material risks inherent in that treatment.

11. **Following paragraph cited by:**

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)
Value Constructions Pty Ltd v Badra (31 July 2024) (Leeming and Kirk JJA, Griffiths AJA)
Sydney Metro v G&J Drivas Pty Ltd (01 February 2024) (Payne and Kirk JJA, Griffiths AJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)

> 14. Wallace v Kam [2013] HCA 19 ; (2013) 250 CLR 375 (“Wallace”) (at [11]) per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

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" [8] .

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[8] *Miller v Miller* (2011) 242 CLR 446 at 469 [60]; [2011] HCA 9; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 509-516, 530-533; [1991] HCA 12. See Commonwealth of Australia, *Review of the Law of Negligence: Final Report*, (2002) at 108 [7.25], 116-117 [7.48]-[7.49], 119 [7.50].

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12. **Following paragraph cited by:**

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

> As we stated at the commencement of these reasons, whether the respondent's Developmental and Cognitive Impairments were caused by injuries to his brain resulting from the appellant's negligence was a question of fact to be established, on the balance of probabilities. In the context of the *Civil Liability Act* , that factual question arises in s 5C(1)(a) (i.e. 'factual causation'). [230]
>
> *via*
> [230] See ***Strong v Woolworths Ltd*** [2012] HCA 5; (2012) 246 CLR 182 (***Strong v Woolworths***) [18] (French CJ, Gummow, Crennan and Bell JJ). The other element of causation in s 5C(1) of the *Civil Liability Act* ('scope of liability') raises separate and distinct issues (***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 (***Wallace v Kam***) [12] (French CJ, Crennan, Kiefel, Gageler & Keane JJ); ***Apostolic Church Australia Ltd v Dixon*** [2018] WASCA 146 [67]).

Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

> 83. Section 5D "is the applicable statutory provision that must be applied" in any case to which Part 1A applies: *Adeels Palace* at [44] . Section 5D(1) d ivides legal causation into two elements, "factual causation" and "scope of liability": *Adeels Palace* at [42] ; *Wallace v Kam* at [12] .

Statute now requires that the two questions be kept distinct. Section 5D of the *Civil Liability Act* 2002 (NSW) , which is substantially replicated in each other Australian State and the Australian Capital Territory [9] , provides:

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[9] Section 51 of the *Wrongs Act* 1958 (Vic) ; s 34(1) and (3) of the *Civil Liability Act* 1936 (SA) ; s 11 of the *Civil Liability Act* 2003 (Q) ; s 5C of the *Civil Liability Act* 2002 (WA) ; s 13 of the *Civil Liability Act* 2002 (Tas) ; s 45(1) and (3) of the *Civil Law (Wrongs) Act* 2002 (ACT) .

"(1) A determination that negligence caused particular harm comprises the following elements:

(a) that the negligence was a necessary condition of the occurrence of the harm (***factual causation***), and

(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (***scope of liability***).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:

(a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party."

13. Section 5E of the *Civil Liability Act*, which is also substantially replicated in each other Australian State and the Australian Capital Territory [10] , provides that in determining liability for negligence, "the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation".

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[10] Section 52 of the *Wrongs Act* 1958 (Vic) ; s 35 of the *Civil Liability Act* 1936 (SA) ; s 12 of the *Civil Liability Act* 2003 (Q) ; s 5D of the *Civil Liability Act* 2002 (WA) ; s 14 of the *Civil Liability Act* 2002 (Tas) ; s 46 of the *Civil Law (Wrongs) Act* 2002 (ACT) .

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14. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

As the High Court stated in ***Wallace v Kam*** : [463]

via

[463] ***Wallace v Kam*** [14] (French CJ, Crennan, Kiefel, Gageler & Keane JJ). References in this passage to provisions in the *Civil Liability Act 2002* (NSW) ha ve been substituted with the equivalent provisions in the *Civil Liability Act* .

McLennan v Meyer Vandenberg (05 February 2020) (Burns and Mossop JJ and Robinson AJ)
Mal Owen Consulting Pty Ltd v Ashcroft (20 June 2018) (Basten and Macfarlan JJA, Barrett AJA)

100. The process just described goes to the issue of causation. It represents the first of what the joint judgment in *Sellars v Adelaide Petroleum NL* identif ies as two distinct stages relevant to the resolution of a case such as the present. [49] At that first stage, causation must be proved on the balance of probabilities: the question of causation is, after all, "entirely factual, turning on proof of relevant facts and on the balance of probabilities in accordance with s 5E " of the *Civil Liability Act* 2002 (NSW) [50] . The second stage becomes relevant only if causation is established at the first. The issue at the second stage is the assessment of damages; and the focus then is upon the actual value of the lost opportunity which, to that point, has been appraised only as not merely theoretical or negligible. Value must be ascertained at the second stage by reference to "the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance" of which the plaintiff has been deprived. These are again words used in the joint judgment in *Sellars v Adelaide Petroleum NL* .

via

50. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 at [14] .

Libra Collaroy Pty Ltd v Bhide (04 August 2017) (McColl, Meagher and Ward JJA)

85. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 (at [14]) per curiam (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

Libra Collaroy Pty Ltd v Bhide (04 August 2017) (McColl, Meagher and Ward JJA)
DC v State of New South Wales (10 August 2016) (Basten and Ward JJA, Sackville AJA)
Boateng v Dharamdas (02 August 2016) (Gleeson and Leeming JJA, Davies J)

92. The determination of "factual causation" in accordance with s 5D(1)(a) of the *Civil Liability Act* "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; 250 CLR 375 (***Wallace v Kam***) at [14] . It involves nothing more or less than the application of a "but for" test of causation: *Wallace v Kam* at [16] .

Marsh v Baxter (03 September 2015) (McLure P; Newnes and Murphy JJA)

Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy (27 August 2015) (McColl, Basten and Leeming JJA)
Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

105. In addition to factual causation, the plaintiff must establish that it is appropriate for the scope of the negligent party's liability to extend to the harm so caused: CL Act, s 5D(1)(b) ; *Wallace v Kam* [2013] HCA 19; 87 ALJR 648 at [21] (*per curiam*); *Paul v Cooke* [2013] NSWCA 311 at [86] (Leeming JA). While a determination of factual causation is "entirely factual", a determination under s 5D(1)(b) that it is appropriate for the scope of the defendant's liability to extend to the harm so caused is "entirely normative": *Wallace v Kam* at [14] . In addressing that normative question, the court is to be guided by precedent. But in a novel case, s 5D(4) requires the court 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: *Wallace v Kam* at [23] .

Perry v Killmier (04 April 2014) (Muir and Gotterson JJA and Applegarth J)
Warth v Lafsky (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

58. In order to establish that any breach of duty on the appellant's part caused his harm, the respondent had to establish "factual causation" in accordance with s 5D(1)(a) of the *Civil Liability Act* , that is to say that the appellant's negligence was a necessary condition of the occurrence of that harm. That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E ": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Lucantonio v Stichter (06 February 2014) (McColl, Basten and Barrett JJA)

80. Such determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E" (*Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14])) and is approached by applying common sense to those facts: *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 (at [43] ; [56]) per French CJ, Hayne and Kiefel JJ. It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]). "Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred": *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ.

Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1)(a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

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 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. **Following paragraph cited by:**

Nominal Defendant v Bacon (21 August 2014) (McColl, Macfarlan and Ward JJA)

Thus, as Allsop P explained in the present case [11] :

"[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 enquiry 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."

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[11] *Wallace v Kam* (2012) Aust Torts Reports ¶82-101 at 66,044-66,045 [4] .

16. **Following paragraph cited by:**

Stanberg v State of New South Wales (06 June 2025) (Mitchelmore and McHugh JJA, Griffiths AJA)

119. The law concerning s 5D(1)(a) is well-established. The section "involves nothing more or less than the application of a 'but for' test of causation" (*Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16]). In cases like the present, where the alleged negligence involves an omission to do something, it "requires consideration of the probable course of events had the omission not occurred" (***Strong v Woolworths*** *Limited* (2012) 246 CLR 182; [2012] HCA 5 at [32]). Here, the relevant question is whether Addison proved that it is more probable than not that his injuries would not have occurred but for the School's failure to ensure an adequate amount of sand in the long jump landing area.

Insurance Australia Limited t/as NRMA Insurance v Le (06 June 2025) (Mitchelmore, Stern and Ball JJA)

57. This analysis would apply to the determination of factual causation under s 5D of the CLA which, as was explained in *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16] , "involves nothing more or less than the application of a 'but for' test of causation".

Hassan v Minister for Home Affairs (22 April 2025) (Katzmann, Thawley and Kennett JJ)

66. A determination that the first element is made out involves nothing more than the application of the "but for" test, ie a determination on the balance of probabilities that the harm that actually occurred would not have occurred but for the negligence of the respondent: *Wallace v Kam* [2013] HCA 19; 250 CLR 375 (***Wallace***) at [16] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) . In a novel case, the second element requires a court "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": *Wallace* at [23] . Their Honours went on to say in *Wallace* at [24] :

> A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid. Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach.

(Footnotes omitted.).

TJ v The Public Trustee of Queensland (30 July 2024) (Bowskill CJ; Mullins P; Bond JA)
Gomez v Woolworths Group Limited (21 May 2024) (Bell CJ, Gleeson and Adamson JJA)
Nestlé Australia Ltd v Metri (10 December 2021) (Basten, Leeming and Brereton JJA)
Ethicon Sarl v Gill (05 March 2021) (Jagot, Murphy and Lee JJ)
Officeworks Ltd v Christopher (06 May 2019) (Meagher, Gleeson and Leeming JJA)

29. It was necessary for Ms Christopher to establish factual causation that any harm to her left shoulder would not have occurred but for the Officeworks incident: s 5D(1)(a) ; *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16] . (No reliance was sought to be placed upon s 5D(2) at trial or in this Court.) At all times, the onus lay with Ms Christopher of proving any fact relevant to the issue of causation: s 5E .

Apostolic Church Australia Ltd v Dixon (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

67. In cases governed by the CLA, the two questions identified in s 5C(1) mus t be kept distinct. [98] The determination of factual causation in accordance with s 5C(1)(a) involves nothing more or less than the application of a 'but for' test of causation. [99] In a novel case not governed by precedent, the scope of liability question dictated by s 5C(1)(b) requires the identification and articulation of an evaluative judgment by reference to the purposes and policy of the relevant part of the law. [100]

Contributory negligence

via
[99] ***Wallace v Kam*** [16] ; ***Badenach v Calvert*** [2016] HCA 18; (2016) 257 CLR 440 [36].

Berhane v Woolworths Ltd (08 August 2017) (Gotterson and Morrison JJA and Dalton J,)
RinRim Pty Ltd v Deutsche Bank AG (12 July 2017) (Beazley P, Payne JA and Sackville AJA)
Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network (31 May 2017) (Meagher, Gleeson and Payne JJA)

95. His Honour observed, with reference to *Adeels Palace* at [51] , that describing the injury as "*the very kind of thing*" which was the subject of the duty does not prove factual causation: at [335]. Reference was also made at [337] to the High Court's statement in *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16] that the test of factual causation in accordance with s 5D(1)(a) "involves nothing more or less than the

determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence".

Ralston v Jurisich (03 April 2017) (Ward JA, Emmett AJA and McDougall J)

71. It is well settled that the issue of factual causation posed by s 5D(1)(a) of the *Civil Liability Act* involves an application of the "but for" test of causation: would the harm have occurred in the absence of the breach of duty? [33] A determination on that question "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities…" [34] . Do the proved facts support the inference that, but for the breach of duty, the harm would not have occurred?

via

33. Wallace v Kam (2013) 250 CLR 375 at [16] .

Ralston v Jurisich (03 April 2017) (Ward JA, Emmett AJA and McDougall J)
Boateng v Dharamdas (02 August 2016) (Gleeson and Leeming JJA, Davies J)
Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)
Curtis v Harden Shire Council (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)
Warth v Lafsky (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

58. In order to establish that any breach of duty on the appellant's part caused his harm, the respondent had to establish "factual causation" in accordance with s 5D(1)(a) of the *Civil Liability Act* , that is to say that the appellant's negligence was a necessary condition of the occurrence of that harm. That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E ": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Lucantonio v Stichter (06 February 2014) (McColl, Basten and Barrett JJA)

80. Such determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E" (*Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14])) and is approached by applying common sense to those facts: *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 (at [43] ; [56]) per French CJ, Hayne and Kiefel JJ. It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]). "Proof of the causal

link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred": *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ.

Gratrax Pty Ltd v T D & C Pty Ltd (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1)(a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeel s Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

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[12]. 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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[12] *Strong v Woolworths Ltd* (2012) 246 CLR 182 at 190-191 [18]; [2012] HCA 5.

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17. **Following paragraph cited by:**

Lucantonio v Stichter (06 February 2014) (McColl, Basten and Barrett JJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

In a case where a medical practitioner fails to exercise reasonable care and skill to warn a patient of one or more material risks inherent in a proposed treatment, factual causation is established if the patient proves, on the balance of probabilities, that the patient has sustained, as a consequence of having chosen to undergo the medical treatment, physical injury which the patient would not have sustained if warned of all material risks. Because that determination of factual causation necessarily turns on a determination of what the patient would have chosen to do if the medical practitioner had warned of all material risks, the determination of factual causation is governed by s 5D(3) . What the patient would have done if warned is to be determined subjectively in the light of all relevant circumstances in accordance with s 5D(3)(a) , but evidence by the patient about what he or she would have

done is made inadmissible for that purpose by s 5D(3)(b) , except to the extent that the evidence is against the interest of the patient.

18. **Following paragraph cited by:**

Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq) (14 November 2016) (McColl JA at [1], Sackville AJA at [2], Barrett AJA at [89])

51. In *Wallace v Kam* , [18] the High Court pointed out that a determination in accordance with s 5D(1)(a) of the CL Act, that negligence was a necessary condition of the occurrence of the harm, is entirely factual. The issue turns on proof by the plaintiff of the relevant facts on the balance of probabilities, as required by s 5E . [19] As their Honours explained: [20]

> "The determination of factual causation in accordance with s 5D(1)(a) involv es 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."

Three factual scenarios have been presented by the cases. One is where the patient would have chosen to undergo the treatment that was in fact chosen even if warned of all material risks [13] . In that scenario, a determination can be made of no factual causation. That is because, absent the negligent failure to warn, the treatment would still have gone ahead when it did and the physical injury would still have been sustained when it was. Leaving aside the possibility of an exceptional case in which s 5D(2) might be invoked, the negligent failure to warn can therefore be determined not to have caused the physical injury. Section 5D(1)(a) is not satisfied in that scenario and there is no occasion to consider the normative question posed by s 5D(1)(b) .

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[13] See eg *Rosenberg v Percival* (2001) 205 CLR 434.

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19. Another scenario is where the patient would have chosen not to undergo the treatment at all if warned of all material risks [14] . In that scenario, a determination of factual causation can be made without difficulty. That is because, absent the negligent failure to warn, the treatment would not have gone ahead at any time and the physical injury would not have been sustained.

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[14] See eg *Rogers v Whitaker* (1992) 175 CLR 479.

20. **Following paragraph cited by:**

Central Darling Shire Council v Greeney (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)

56. Gummow J made a distinction of this type when he observed in *Rosenberg v Percival* at [97] , in relation to the failure of a surgeon to give an appropriate warning:

> " … Had the warning been given, the plaintiff in [*Chappel v Hart*] would have had the operation at a different time by a different surgeon. Given the very low probability of the risk occurring, it would have been extremely unlikely that the harm would have eventuated. That was so, even if the view of the minority was correct and the likelihood of the injury occurring was the same irrespective of who performed the operation. Therefore, in a legally sufficient sense, the failure of the defendant to warn of the risk caused the harm" (citations omitted).

See also *Chappel v Hart* at [67] and *Wallace v Kam* at [20] .

Yet another scenario is where the patient, if warned of material risks, would have chosen not to undergo the treatment at the time the treatment in fact took place but may have chosen to undergo the treatment at a later time [15] . Analysis of that further scenario has been more controversial. The better analysis is that it is also a scenario in which a determination of factual causation should be made. Absent the negligent failure to warn, the treatment that in fact occurred would not have occurred when it did and the physical injury in fact sustained when the treatment occurred would not then have been sustained. The same treatment may well have occurred at some later time but (provided that the physical injury remained at all times a possible but improbable result of the treatment) the physical injury that was sustained when the treatment in fact occurred would not on the balance of probabilities have been sustained if the same treatment had occurred on some other occasion [16] .

[15] See eg *Chappel v Hart* (1998) 195 CLR 232; [1998] HCA 55; *Chester v Afshar* [2005] 1 AC 134.

[16] *Chappel v Hart* (1998) 195 CLR 232 at 257 [67] ; *Rosenberg v Percival* (2001) 205 CLR 434 at 465 [96]-[97] ; *Chester v Afshar* [2005] 1 AC 134 at 142 [11], 161 [81] . See Stevens, "An Opportunity to Reflect", (2005) 121 *Law Quarterly Review* 189 at 190; Jones, "A Risky Business", (2005) 13 *Tort Law Review* 40 at 45-47; Stapleton, "Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar* ", (2006) 122 *Law Quarterly Review* 426 at 429-430; Jones, *Medical Negligence*, 4th ed (2008) at [7-075].

21. **Following paragraph cited by:**

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)
Clare & Gilbert Valleys Council v Kruse (06 September 2019) (Blue, Lovell and Hinton JJ)

> 81. Thus, it is necessary to determine “factual causation” which involves the application of the “but for” test of causation. Having determined factual causation, it is then necessary to determine the normative question posed by s 34(3) of the Act . In a case falling within an established class, the normative question is properly answered by a court through the application of precedent. Section 34(1) provides guidance but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled. In a novel case, a court must identify and articulate an evaluative judgment by reference to "the purposes and policy of the relevant part of the law". [28]

via
[28] *Wallace v Kam* [2013] HCA 19 at [21] per French CJ, Crennan, Kiefel, Gageler and Keane JJ ; *Barnes v Hay* (1988) 12 NSWLR 337 at 353 per Mahoney JA; quoted in *Henville v Walker* (2001) 206 CLR 459 at [98] per McHugh J.

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)
Gratrax Pty Ltd v T D & C Pty Ltd (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

> 86. It is also clear that a plaintiff will not obtain a favourable verdict merely by establishing breach and loss which would not have been suffered but for the breach. That is to say, factual causation is not a sufficient condition for legal causation. That was plainly the position at common law (hence for example notions of remoteness and *novus actus interveniens*) and the Act , especially s 5D(1)(b) and 5D(4) , proceeds on that premise, which is confirmed by *Wallace v Kam* at [21] . Scope of liability is the means by which what Professor Stapleton described as the "voraciousness" of negligence may be controlled by a court: "Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences" 54 *Va nderbilt Law Review* 941 at 956 (2001), which is especially relevant when the trier of fact is a jury, as in the United States of America.

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. **Following paragraph cited by:**

Black Head Bowling Club Ltd v Harrower (09 November 2023) (Payne and Adamson JJA, Simpson AJA)
Black Head Bowling Club Ltd v Harrower (09 November 2023) (Payne and Adamson JJA, Simpson AJA)
Bitupave Ltd t/as Boral Asphalt v Pillinger (30 September 2015) (Ward, Emmett and Gleeson JJA)
Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

201. As was pointed out in *Wallace v* Kam, [132] the normative question posed by s 5D(1)(b) of the Civil Liability Act is to be answered through the application of precedent. In a novel case, however: [133]

> "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 party 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." (Citations omitted.)

via
[132] [2013] HCA 19 ; 250 CLR 375 at [22] .

Gratrax Pty Ltd v T D & C Pty Ltd (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)

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. **Following paragraph cited by:**

Hassan v Minister for Home Affairs (22 April 2025) (Katzmann, Thawley and Kennett JJ)

Black Head Bowling Club Ltd v Harrower (09 November 2023) (Payne and Adamson JJA, Simpson AJA)

3. Section 5D(1)(b) of the *Civil Liability Act* poses a normative question that is properly answered through the application of precedent: *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [22] . In a novel case, s 5D(4) requires the court to consider, amongst other relevant things, whether or not and why responsibility for the harm should be imposed on the negligent party: *Wallace v Kam* at [23] . The case against Mr Edstein was not novel. As the primary judge found, he was clearly negligent. Mr Edstein's insurance status provided no reason why responsibility for the harm should not be imposed on the negligent party. Nor did the fact that another defendant was held liable.

Apostolic Church Australia Ltd v Dixon (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

67. In cases governed by the CLA, the two questions identified in s 5C(1) must be kept distinct. [98] The determination of factual causation in accordance with s 5C(1)(a) involves nothing more or less than the application of a 'but for' test of causation. [99] In a novel case not governed by precedent, the scope of liability question dictated by s 5C(1)(b) requires the identification and articulation of an evaluative judgment by reference to the purposes and policy of the relevant part of the law. [100]

Contributory negligence

via
[100] ***Wallace v Kam*** [23] .

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)

174. In *Wallace v Kam* , at [23] , the Court similarly noted the role of legal policy in the determination of causation:

> "In a novel case [it is] incumbent on a court answering the normative question [as to causation] 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'."

Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

McKenna v Hunter & New England Local Health District (23 December 2013) (Beazley P, Macfarlan JA and Garling J)

185. Section 5D(1)(b) requires, as well, that it be "appropriate for the scope of the negligent person's liability to extend to the harm so caused". This precludes a merely mechanical application of the "but for" test, in disregard of "the purposes and policy of the relevant part of the law" (*Wallace v Kam* [2013] HCA 19; 87 ALJR 648 at [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" [17] . Langu age 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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[17] *Barnes v Hay* (1988) 12 NSWLR 337 at 353, quoted in *Henville v Walker* (2001) 206 CLR 459 at 491 [98]; [2001] HCA 52.

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24. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)

278. Neither of those cases assists the respondents. As the High Court said in *Wallace v Kam* at [24] (footnotes omitted), referring to *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 214 and *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 444-445 [76][77] following the appeal to the High Court:

> "a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action" but "only for the consequences of the information being wrong." A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a "foreseeable consequence of mountaineering but has nothing to do with his knee".

Hassan v Minister for Home Affairs (22 April 2025) (Katzmann, Thawley and Kennett JJ)

66. A determination that the first element is made out involves nothing more than the application of the “but for” test, ie a determination on the balance of probabilities that the harm that actually occurred would not have occurred but for the negligence of the respondent: *Wallace v Kam* [2013] HCA 19; 250 CLR 375 (***Wallace***) at [16] (French CJ, Crennan, Kiefel, Gageler and Keane JJ). In a novel case, the second element requires a court “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”: *Wallace* at [23] . Their Honours went on to say in *Wallace* at [24] :

> A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid. Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach.
>
> (Footnotes omitted.).

Bondi Beach Foods Pty Ltd v Chadwick (09 November 2023) (Gleeson, Leeming and Payne JJA)
Ku-ring-gai Council v Chan (07 September 2017) (McColl and Meagher JJA, Sackville AJA)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

105. The primary judge relied on what McHugh J had said in *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 535 which is now reflected in s 5D(1)(b) . Applying what had there been said as to what was fairly to be regarded as within the risk created by the negligence, Ms Paul said that Dr Cooke's negligence created the risk of spontaneous rupture. That is true in the loose sense that his negligence created the risk that the aneurysm, which otherwise would have been clipped or coiled in 2003, might while it was left untreated rupture spontaneously in 2004 or 2005. However, as the primary judge observed, on no view did Dr Cooke's negligence create the risk of intra-operative rupture. More recently, in *Wallace v Kam* at [24] , the High Court has confirmed the "limiting principle" that "the scope of liability normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid". It was no part of Dr Cooke's duty to avoid the risk of intra-operative rupture. In my view this is a clear case for the application of that limiting principle rather than its displacement through the prism of s 5 D(1)(b) "appropriateness".

A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid [18] . Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach [19] . In a similar way, "a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action" but "only for the consequences of the information being wrong" [20] . A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a "foreseeable consequence of mountaineering but has nothing to do with his knee" [21] .

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[18] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213 ; *Fleming's The Law of Torts*, 10th ed (2011) at 245; Restatement Third, Torts: Liability for Physical and Emotional Harm §29; Glanville Williams, "The Risk Principle", (1961) 77 *Law Quarterly Review* 179.

[19] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] AC 388; *Mount Isa Mines Ltd v Pusey* (1970) 125 CLR 383 at 397-400; [1970] HCA 60.

[20] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 214 ; *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 444-445 [76]-[77]; [1999] HCA 25.

[21] *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213. See Stapleton, "Occam's Razor Reveals an Orthodox Basis for *Chester v Afshar* ", (2006) 122 *Law Quarterly Review* 426 at 444-448; Stapleton, "The Risk Architecture of the *Restatement (Third) of Torts*", (2009) 44 *Wake Forest Law Review* 1309 at 1325-1326; Stapleton, "Reflections on Common Sense Causation in Australia", in Degeling, Edelman and Goudkamp (eds), *Torts in Commercial Law*, (2011) 331 at 354-355.

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25. **Following paragraph cited by:**

Collins v Insurance Australia Ltd (02 August 2022) (Meagher and Kirk JJA, Basten AJA)
Endeavour Energy v Precision Helicopters Pty Ltd (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

205. For the same reasons, I do not think that Endeavour's failure to propose a route plan caused (in the relevant sense) the injuries to Mr Edward. The preparation of a route plan would not have enabled Mr Carter to detect

the catenary wire or to be aware of the hazard it presented. The risk that materialised was one which was beyond the scope of the duty of Precision and Mr Carter to avoid harm to the pilot and passengers of the helicopter by the exercise of reasonable care. [134]

via

[134] Wallace v Kam [2013] HCA 19 ; 250 CLR 375 at [25] per curiam.

Accordingly, as has been pointed out more than once, a medical practitioner is not liable to a patient for physical injury that represents the materialisation of a risk about which it is beyond the duty of the medical practitioner to warn [22] :

> "Thus, a medical practitioner will not be held liable for the failure to warn a patient of a material risk of damage to 'her laryngeal nerve', if the injury that eventuated resulted from a misapplication of anaesthetic. This is so despite the fact that the patient would not have had the treatment and therefore would not have suffered the injury from the misapplication of anaesthetic if the patient had been warned of the risk to 'her laryngeal nerve'." (footnote omitted)

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[22] *Rosenberg v Percival* (2001) 205 CLR 434 at 460 [83] , referring to *Chappel v Hart* (1998) 195 CLR 232 at 257 [66] .

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26. **Following paragraph cited by:**

Karpik v Carnival plc (The Ruby Princess) (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)
Aliraja v Susan Dukes, Commissioner of Titles (04 July 2025) (Quinlan CJ; Vaughan JA; Solomon J)

> 32. The normative question, being concerned with the attribution of legal responsibility, calls attention to the *purpose* of the relevant right, duty, liability or obligation in question. In other words the nature of the causal connection contemplated by a particular legal rule, whether statutory or common law, creating (or excluding) liability will be informed by the legal policy of the rule itself. So, for example, in the tort of negligence the scope of liability for the purposes of causation is often coextensive with the content of the duty of the negligent party that has been breached. [8] That is because: [9]
>
> > 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.

via
[8] ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 (***Wallace v Kam***) [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Aliraja v Susan Dukes, Commissioner of Titles (04 July 2025) (Quinlan CJ; Vaughan JA; Solomon J)
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

15. Similarly, in relation to the negligence claim, the relevant breach of duty was the failure to take a precaution against the very risk that materialised, namely damage to the loader by fire. As the Court said in ***Wallace v Kam*** , the scope of liability is often coextensive with the content of the duty of the negligent party that has been breached. [6] That is because: [7]

> 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.

via
[6] ***Wallace v Kam*** [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

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> 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.

via
[7] ***Wallace v Kam*** [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Collins v Insurance Australia Ltd (02 August 2022) (Meagher and Kirk JJA, Basten AJA)

Grasso Consulting Engineers Pty Ltd v SafeWork NSW; Grasso v SafeWork NSW (10 December 2021) (Simpson AJA, Walton and Cavanagh JJ)

> 9. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 at [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)
Clare & Gilbert Valleys Council v Kruse (06 September 2019) (Blue, Lovell and Hinton JJ)
Boateng v Dharamdas (02 August 2016) (Gleeson and Leeming JJA, Davies J)

> 93. In *Strong v Woolworths* [2012] HCA 5; 246 CLR 182 at [32] the plurality said that "proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred." The enquiry into the causes of an accident is wholly retrospective, unlike the issues of duty of care and breach which are forward looking: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [124] (Hayne J); *Wallace v Kam* at [26] .

Warth v Lafsky (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)
Takla v Nasr (13 December 2013) (McColl, Basten and Hoeben JJA)

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" [23] . 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.

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[23] *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 446 [79] .

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27. Accordingly, to accept that a medical practitioner is not liable to a patient for physical injury that represents the materialisation of a risk about which it is beyond the duty of the medical

practitioner to warn is not necessarily to accept the converse. It is not necessarily appropriate for the liability of the medical practitioner to extend to every physical injury to a patient that does represent the materialisation of a risk about which it is the duty of the medical practitioner to warn, even where factual causation is established. Further analysis is required.

Analysis

28. On the facts found and assumed, Dr Kam breached his single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment to Mr Wallace by failing to warn Mr Wallace of two material risks of physical injury inherent in the surgical procedure Dr Kam was to perform: the risk of neurapraxia and the risk of paralysis.

29. On the facts assumed, that failure to exercise reasonable care and skill on the part of Dr Kam was a necessary condition of the neurapraxia Mr Wallace sustained. The case in respect of factual causation falls squarely within the second of the factual scenarios already discussed: if warned of all material risks, Mr Wallace would have chosen not to undergo the surgical procedure at all and would therefore not have sustained the neurapraxia. Section 5D(1)(a) is satisfied. Section 5D(2) is irrelevant.

30. The critical question, as the Court of Appeal recognised and on which it divided, is the scope of liability question posed by s 5D(1)(b) . Is it appropriate for the scope of Dr Kam's liability to extend to the physical injury in fact sustained by Mr Wallace in circumstances where Mr Wallace would not have chosen to undergo the surgical procedure had he been properly warned of all material risks but where he would have chosen to undergo the surgical procedure had he been warned only of the risk that in fact materialised?

31. The argument in favour of an affirmative answer to that question, to which Beazley JA was persuaded, is that it aligns the scope of Dr Kam's liability with the scope of the duty that Dr Kam (on the facts found and assumed) has breached. The case is unlike that of the mountaineer caught in the avalanche or the patient who suffers injury from the misapplication of anaesthetic. The risk that came home to Mr Wallace was a risk of which Dr Kam had a duty to warn Mr Wallace and of which, in breach of that duty, Dr Kam failed to warn Mr Wallace. The imposition of liability in such a case would reinforce the duty, which Dr Kam would otherwise have breached with impunity to the detriment of Mr Wallace. It would compensate Mr Wallace for the coming home of a risk which was amongst those of which he should have been warned and which he would not in fact have borne had Dr Kam discharged his duty.

32. The argument in favour of a negative answer, to which Allsop P and Basten JA were persuaded, can be expressed somewhat glibly in the proposition that Mr Wallace should not be compensated for the materialisation of a risk he would have been prepared to accept. As is demonstrated by the careful analysis of Allsop P and of Basten JA, however, the ultimately persuasive force of that proposition lies not in its intuitive attraction but in recognition of the distinct nature of the material risks about which Dr Kam failed to warn Mr Wallace and in relating Mr Wallace's acceptance of the risk that came home to the policy underlying Dr Kam's duty to warn Mr Wallace of all material risks.

33. A useful starting point is the discussion of principle by Lord Caplan in *Moyes v Lothian Health Board* [24] . He observed [25] :

"The ordinary person who has to consider whether or not to have an operation is not interested in the exact pathological genesis of the various complications which can occur but rather in the nature and extent of the risk. The patient would want to know what chance there was of the operation going wrong and if it did what would happen."

He went on to say [26] :

"If we were to suppose a situation where an operation would give rise to a 1 per cent risk of serious complication in the ordinary case but where there could be four other special factors each adding a further 1 per cent to the risk, a patient to whom all five factors applied might have a 5 per cent risk rather than the 1 per cent risk of the average person. It is perfectly conceivable that a patient might be prepared to accept the risk of one in 100 but not be prepared to face up to a risk of one in 20. If a doctor contrary to established practice failed to warn the patient of the four special risks but did warn the patient of the standard risk and then the patient suffered complication caused physiologically by the standard risk factor rather [than] by one or other of the four special risks factors I do not think the doctor should escape the consequences of not having warned the patient of the added risks which that patient was exposed to."

He added [27] :

"The coincidence that the damage which occurred was due to the particular factor in respect of which a warning was given does not alter the fact that the patient was not properly warned of the total risks inherent in the operation and thus could not make an informed decision as to whether or not to go through with it. In the example I give, by going through an operation with five risk factors rather than one the patient was exposed to a degree of risk materially in excess of what the patient had been warned about and was prepared to accept."

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[24] 1990 SLT 444 .

[25] 1990 SLT 444 at 447.

[26] 1990 SLT 444 at 447.

[27] 1990 SLT 444 at 447.

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34. **Following paragraph cited by:**

Doble Express Transport Pty Ltd (Administrator Appointed) v John L Pierce Pty Ltd (13 December 2016) (Ward JA, Sackville AJA and Hall J)

That reasoning, and its conclusion, are entirely appropriate to a case that involves the coming home of the risk of a single physical injury to which there are several contributing factors the combination of which operate to increase the risk of that physical injury occurring. To fail to warn the patient of one factor while informing the patient of another may in a particular case be to fail to warn the patient of the extent of the risk and thereby to expose the patient to a level of risk of the physical injury occurring that is unacceptable to the patient.

35. The reasoning, however, is not directed or applicable to a case such as the present where what is involved is the materialisation of one of a number of distinct risks of different physical injuries. To fail to warn the patient of one risk while informing the patient of another may still in such a case be to expose the patient to a level of risk of physical injury occurring that is unacceptable to the patient. But the risk of physical injury that comes home in such a case is not necessarily the risk of physical injury that is unacceptable to the patient.

36. **Following paragraph cited by:**

State of New South Wales v Cullen (20 December 2024) (Gleeson, White and Kirk JJA)
RinRim Pty Ltd v Deutsche Bank AG (12 July 2017) (Beazley P, Payne JA and Sackville AJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)

184. The relevant "*rule of responsibility*" in a medical negligence case was again considered in *Wallace v Kam*. The Court, having referred to the duty of a medical practitioner at [36] and the policy underlying that duty, said, at [37] :

> "The appropriate rule of attribution, or 'rule of responsibility' … is therefore one that 'seeks to hold the doctor liable for the consequence of material risks that were not warned of [and] that were unacceptable to the patient'. The normative judgment that is appropriate to be made is that the liability of a medical practitioner who has failed to warn the patient of material risks inherent in a proposed treatment 'should not extend to harm from risks that the patient was willing to hazard …'"

Consideration

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)

Consideration of a case involving the materialisation of one of a number of distinct risks of different physical injuries makes it necessary to return to the nature of the duty and the policy that underlies its imposition. The duty of a medical practitioner to warn the patient of material risks inherent in a proposed treatment is imposed by reference to the underlying common law right of the patient to choose whether or not to undergo a proposed treatment. However, the policy that underlies requiring the exercise of reasonable care and skill in the giving of that

warning is neither to protect that right to choose nor to protect the patient from exposure to all unacceptable risks. The underlying policy is rather to protect the patient from the occurrence of physical injury the risk of which is unacceptable to the patient. It is appropriate that the scope of liability for breach of the duty reflect that underlying policy.

37. **Following paragraph cited by:**

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)

181. The relevant "*rule of responsibility*" of the alleged tortfeasor in the determination of causation has been widely endorsed in Australian law: see for example *Rosenberg v Percival* at [85] per Gummow J; *Modbury Triangle Shopping Centre v Anzil* at [40] per Gleeson CJ, Gaudron and Hayne JJ agreeing; *Wallace v Kam* at [37] (where the plurality cited the above passage from *Banque Bruxelles Lambert SA v Eagle Star Insurance*) and *Paul v Cooke* at [90] ff per Leeming JA. Directing attention to the "*r ule of responsibility*" highlights the connection between the duty of care of the negligent party and the scope of liability in negligence.

Central Darling Shire Council v Greeney (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)

50. The primary judge referred to the requirements of s 5D of the *Civil Liability Act* that the defendant's negligence be a necessary condition of the occurrence of the plaintiff's harm and that it be appropriate for the scope of the defendant's liability to extend to the harm so caused. Whilst his Honour did not (as he should have) give reasons for his conclusion that the Council's breach caused Mr Greeney's injury, the conclusion was warranted by the facts that his Honour found. His Honour found that Mr Hocking's direction to move camp in the knowledge that it would involve use of the defective coupling mechanism was negligent and constituted a breach of the Council's duty of care to Mr Greeney. If the negligence had not occurred, and the direction had therefore not been given, the incident and injury in question would have been avoided. The Council's negligence was thus a "necessary condition of the harm" and there is no reason why, in accordance with s 5D(1)(b) , its liability should not extend to the harm so caused (as to the latter, compare *Wallace v Kam* [2013] HCA 19; 250 CLR 375 at [37]).

The appropriate rule of attribution, or "rule of responsibility" to use the language of Allsop P, is therefore one that "seeks to hold the doctor liable for the consequence of material risks that were not warned of [and] that were unacceptable to the patient" [28] . The normative judgment that is appropriate to be made is that the liability of a medical practitioner who has failed to warn the patient of material risks inherent in a proposed treatment "should not extend to harm from risks that the patient was willing to hazard, whether through an express choice or as found had their disclosure been made" [29] .

[28] (2012) Aust Torts Reports ¶82-101 at 66,049 [23] , referring to *Rosenberg v Percival* (2001) 205 CLR 434 at 461 [86] .

[29] (2012) Aust Torts Reports ¶82-101 at 66,048 [19] .

38. Essentially the same rule of attribution, and the same justification for that rule, were articulated in the seminal case on a doctor's duty to disclose material risks in the United States [30] . There it was stated that "the very purpose of the disclosure rule is to protect the patient against consequences which, if known, he would have avoided by foregoing the treatment" and that "[t]he patient obviously has no complaint if he would have submitted to the therapy notwithstanding awareness that the risk was one of its perils" [31] . It appears now to be well-settled in the United States that "the non-disclosed risk must manifest itself into actual injury in order for a plaintiff to establish proximate causation"[32], so that "[a]bsent occurrence of the undisclosed risk, the doctor's omission is legally inconsequential"[33].

[30] *Canterbury v Spence* 464 F 2d 772 (1972).

[31] 464 F 2d 772 at 790 (1972).

[32] *Cochran v Wyeth Inc* 3 A 3d 673 at 680 [28] (2010).

[33] *Downer v Veilleux* 322 A 2d 82 at 92 (1974).

39. Dr Kam is not liable to Mr Wallace for impairment of Mr Wallace's right to choose whether or not to undergo the surgical procedure and is not liable to Mr Wallace for exposing him to an unacceptable risk of catastrophic paralysis. He can be liable, if at all, for the neurapraxia Mr Wallace sustained. As both Allsop P and Basten JA pointed out [34] , the position of Mr Wallace in respect of the neurapraxia when considered for the purposes of causation is in principle no different from what his position would have been had Dr Kam properly warned him of the risk of neurapraxia and had he made an express choice to proceed with the surgical procedure in light of that warning. He is not to be compensated for the occurrence of physical injury the risk of which he was prepared to accept.

[34] (2012) Aust Torts Reports ¶82-101 at 66,049 [26], 66,071 [174] .

40. The distinct nature of the risks of neurapraxia and paralysis, and the willingness of Mr Wallace to accept the risk of neurapraxia, therefore combine to support the shorthand holding of Harrison J that any failure of Dr Kam to warn Mr Wallace of the risk of paralysis could not be the "legal cause" of the neurapraxia that materialised.

Conclusion

41. The appeal should be dismissed with costs.

Cited by:

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 (29 July 2025) (Markovic, Sarah C Derrington and Jackson JJ)

278. Neither of those cases assists the respondents. As the High Court said in *Wallace v Kam* at [24] (footnotes omitted), referring to *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 214 and *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 at 444-445 [76][77] following the appeal to the High Court:

> "a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, not generally regarded as responsible for all the consequences of that course of action" but "only for the consequences of the information being wrong." A useful example, often repeated, is that of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche. His injury is a "foreseeable consequence of mountaineering but has nothing to do with his knee".

Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Karpik v Carnival plc (The Ruby Princess) [2025] FCAFC 96 -
Aliraja v Susan Dukes, Commissioner of Titles [2025] WASCA 103 (04 July 2025) (Quinlan CJ; Vaughan JA; Solomon J)

32. The normative question, being concerned with the attribution of legal responsibility, calls attention to the *purpose* of the relevant right, duty, liability or obligation in question. In other words the nature of the causal connection contemplated by a particular legal rule, whether statutory or common law, creating (or excluding) liability will be informed by the legal policy of the rule itself. So, for example, in the tort of negligence the scope of liability for the purposes of causation is often coextensive with the content of the duty of the negligent party that has been breached. [8] That is because: [9]

> 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.

via

[8] ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 (***Wallace v Kam***) [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Aliraja v Susan Dukes, Commissioner of Titles [2025] WASCA 103 -
Aliraja v Susan Dukes, Commissioner of Titles [2025] WASCA 103 -
Stanberg v State of New South Wales [2025] NSWCA 127 (06 June 2025) (Mitchelmore and McHugh JJA, Griffiths AJA)

119. The law concerning s 5D(1)(a) is well-established. The section "involves nothing more or less than the application of a 'but for' test of causation" (*Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16]). In cases like the present, where the alleged negligence involves an omission to do something, it "requires consideration of the probable course of events had the omission not occurred" (***Strong v Woolworths*** *Limited* (2012) 246 CLR 182; [2012] HCA 5 at [32]). Here, the relevant question is whether Addison proved that it is more probable than not that his injuries would not have occurred but for the School's failure to ensure an adequate amount of sand in the long jump landing area.

Insurance Australia Limited t/as NRMA Insurance v Le [2025] NSWCA 121 (06 June 2025) (Mitchelmore, Stern and Ball JJA)

57. This analysis would apply to the determination of factual causation under s 5D of the CLA w hich, as was explained in *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16] , "involves nothing more or less than the application of a 'but for' test of causation".

Stanberg v State of New South Wales [2025] NSWCA 127 -
Insurance Australia Limited t/as NRMA Insurance v Le [2025] NSWCA 121 -
Hassan v Minister for Home Affairs [2025] FCAFC 57 (22 April 2025) (Katzmann, Thawley and Kennett JJ)

66. A determination that the first element is made out involves nothing more than the application of the "but for" test, ie a determination on the balance of probabilities that the harm that actually occurred would not have occurred but for the negligence of the respondent: *Wallace v Kam* [2013] HCA 19; 250 CLR 375 (***Wallace***) at [16] (French CJ, Crennan, Kiefel, Gageler and Keane JJ). In a novel case, the second element requires a court "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": *Wallace* at [23] . Their Honours went on to say in *Wallace* at [24] :

> A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid. Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach.
>
> (Footnotes omitted.).

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responsibility for the harm should be imposed on the negligent party": *Wallace* at [23] . Their Honours went on to say in *Wallace* at [24] :

> A limiting principle of the common law is that the scope of liability in negligence normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid. Thus, liability for breach of a duty to exercise reasonable care and skill to avoid foreseeable harm does not extend beyond harm that was foreseeable at the time of breach.
>
> (Footnotes omitted.).

Hassan v Minister for Home Affairs [2025] FCAFC 57 -
State of New South Wales v Cullen [2024] NSWCA 310 (20 December 2024) (Gleeson, White and Kirk JJA)

The High Court said in Wallace v Kam that 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": at [22]. Arguments that the chain of causation is broken by what has traditionally been called a novus actus interveniens invoke a well-established type of limitation on legal causation. Whether or not the chain of causation is broken is "very much a matter of circumstance and degree": Chapman v Hearse (1961) 106 CLR 112 at 122; [1961] HCA 46; Mahony v J Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522 at 524; [1985] HCA 37. This aspect of causation is distinct from whether or not the type of injury that occurred is reasonably foreseeable: at [22].

State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
State of New South Wales v Cullen [2024] NSWCA 310 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

15. Similarly, in relation to the negligence claim, the relevant breach of duty was the failure to take a precaution against the very risk that materialised, namely damage to the loader by fire. As the Court said in ***Wallace v Kam*** , the scope of liability is often coextensive with the content of the duty of the negligent party that has been breached. [6] That is because: [7]

> 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.

via

[6] ***Wallace v Kam*** [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

171. Kirk JA made this analysis of the role of value judgments and policy considerations in limiting the attribution of legal responsibility as distinct from the invocation of common sense in determining causation in fact [110] [111]:

> [I]n ***March v Stramare*** at 515, Mason CJ's references to 'causation being "ultimately a matter of common sense" were evidently intended to disapprove the proposition "that value judgment has, or should have, no part to play in resolving causation as an issue of fact"' (quotation from ***Ad eels Palace Pty Ltd v Moubarak*** [2009] HCA 48; (2009) 239 CLR 420 at [43]). This usage of common sense has fallen into some disfavour. Section 5D of the *Civil Liability Act 2002* (NSW) a nd equivalent provisions have now separated out factual and normative issues in a manner that has also perhaps influenced the common law: note ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR

> 375 at [11] [12] . More broadly, the High Court has doubted the utility and transparency of speaking of common sense as a guide to value or policy judgments limiting the attribution of legal responsibility, and has indicated that such judgments are to be made by reference to the purpose of attributing legal responsibility for the norm in question. The quotation from ***Martin*** above, and the authority there cited, illustrates the point; see also ***Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd*** [2022] HCA 11; (2022) 273 CLR 454 at [45] [46] and [101] . Where the norm is a statutory one, 'notions of "cause" ... are to be understood by reference to the statutory subject, scope and purpose': ***Allianz Australia Insurance Limited v GSF Australia Pty Limited*** [2005] HCA 26; (2005) 221 CLR 568 at [99] .
>
> In this context, two members of the High Court have recently gone so far as to say that 'the concept of common sense should be eschewed when applying the principles of causation': ***Young v Chief Executive Officer (Housing)*** [2023] HCA 31; (2023) 97 ALJR 840 at [60] per Gordon and Edelman JJ. As is implicit in that statement, there are some dangers in invoking common sense in evaluating causation issues. In particular that is so if the notion distracts from either the need to consider any normative and policy-based limitations on the broad reach of the 'but for' test of causation or, relatedly, the need to consider the nature of any statutory causation test in its particular statutory context. This does not mean, however, that any invocation of common sense involves legal error.

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

> Wallace v Kam [2013] HCA 19 ; (2013) 250 CLR 375

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

15. Similarly, in relation to the negligence claim, the relevant breach of duty was the failure to take a precaution against the very risk that materialised, namely damage to the loader by fire. As the Court said in ***Wallace v Kam*** , the scope of liability is often coextensive with the content of the duty of the negligent party that has been breached. [6] That is because: [7]

> 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.

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

9. The significance of the *purpose* for which problems of causation arise in the law (namely, the attribution of legal responsibility) remain critical to the concept of causation in the law. Indeed, if anything, the significance of that purpose has become even more pronounced in the cases decided since ***March v Stramare*** . In ***Wallace v Kam*** , for example, the High Court more clearly articulated the two distinct questions involved in the determination of legal causation at common law: [4]

    (a) a question of historical fact as to how particular harm occurred; and

    (b) a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person.

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 (08 October 2024) (Quinlan CJ; Buss P; Lundberg J)

15. Similarly, in relation to the negligence claim, the relevant breach of duty was the failure to take a precaution against the very risk that materialised, namely damage to the loader by fire. As the Court said in ***Wallace v Kam*** , the scope of liability is often coextensive with the content of the duty of the negligent party that has been breached. [6] That is because: [7]

> 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.

via

[7] ***Wallace v Kam*** [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Summit Rural (WA) Pty Limited v Lenane Holdings Pty Ltd [2024] WASCA 122 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
Value Constructions Pty Ltd v Badra [2024] NSWCA 181 -
TJ v The Public Trustee of Queensland [2024] QCA 137 -
Hornsby Shire Council v Salman [2024] NSWCA 155 (27 June 2024) (White and Adamson JJA, Basten AJA)

122. For completeness on the issue of causation, I accept Mr Lloyd's submission that it could not be said (and was not said in the Court below) that the risk which ensued was so divorced from the risk of tripping addressed in the Playfix reports as to breach the causal chain: see *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 (in which the consequences of a risk of which the surgeon failed to warn the patient were not compensable in circumstances where, had the warning been given, the patient would have proceeded with the operation); *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169; [2015] Aust Torts Reports 82-227 at [203] (Macfarlan JA and Sackville AJA) (in which Precision was held not to be liable for a breach of duty that was unrelated to its failure to detect the hazard that materialised).

Alleged error in failing to find that a reasonable person in the Council's position would have considered that the risk of harm, when correctly identified, did not require a response (ground 7)

Hornsby Shire Council v Salman [2024] NSWCA 155 (27 June 2024) (White and Adamson JJA, Basten AJA)

Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 ; *Endeavour Energy v Precision Helicopters Pty Ltd* [2015] NSWCA 169, cited.

Gomez v Woolworths Group Limited [2024] NSWCA 121 (21 May 2024) (Bell CJ, Gleeson and Adamson JJA)

26. Turning to causation, after referring to the statutory statement in s 5D of the *Civil Liability Act* , the onus of proof in s 5E , and the leading High Court authorities (*Strong v Woolworths Limited* (2012) 246 CLR 182; [2012] HCA 5 at [18] ; *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16]-[19]), his Honour observed at [155] that the breaches of duty as found raised significant issues as to causation. His Honour concluded that causation was not established, and Ms Gomez's case must fail giving the following reasons at [155]-[158]:

> In paragraph 80 of his report, as stated above, Mr Wagstaffe expresses the opinion that the systems of the defendant in relation to cleaning and inspection for a supermarket were adequate. On the facts of the present case, I have found that additional inspection was required at the front of store area. However, the breaches of duty I have found raise significant issues as to causation. If the "service zero"

inspection had occurred at 5 o'clock it would not have resulted in the fruit being identified as it was dropped at 5:02pm. Similarly, an additional system of inspection in the front of store area at either 5pm or 5:30pm would also not have identified the piece of fruit as the former was before it was dropped and the latter was after the accident. Even if, contrary to my view, an inspection occurred on the quarter hour, one at 5pm would not have located the fruit and one at 5:15pm would have been after the accident.

The plaintiff submits that Stanley could have seen the piece of fruit if he had enforced the "clean as you go" system. However, the fruit was outside his area, he looked after the likely busy check-out area and it is not clear on the footage that his line of sight enabled him to see the fruit as part of his duties.

The onus rests on the plaintiff to establish factual causation. Having considered the matter carefully, in my view the breaches of duty of care found have not caused the loss suffered by the plaintiff. If the precautions had been taken which I have indicated should have been taken, the plaintiff would still have slipped and suffered injuries. That is because the inspection would have occurred at 5.00pm before the fruit was dropped and no other inspection should have occurred until 6.00pm. Any more frequent inspection would also not have occurred, even if a greater obligation was imposed on the defendant, earlier than 5.15pm.

I have concluded above that Mr Cheong, having finished his work and gone off duty, and the employee Stanley, who had responsibility for a different area, did not breach any duty of care. That is the same with the coffee-counter employee.

Gomez v Woolworths Group Limited [2024] NSWCA 121 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Leakes Road Property Development Pty Ltd v Brasse [2023] VSCA 34 -
Davie v Manuel [2024] WASCA 21 (07 March 2024) (Buss P; Vaughan JA; Seaward J)

Wallace v Kam [2013] HCA 19 ; (2013) 250 CLR 375

Davie v Manuel [2024] WASCA 21 (07 March 2024) (Buss P; Vaughan JA; Seaward J)

71. The legal principles regarding factual causation are governed by both the *Civil Liability Act* an d the common law. The *Civil Liability Act* guides, but does not displace, the application of common law methodology on the issue of causation. [78]

via

[78] ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 [22].

Davie v Manuel [2024] WASCA 21 -
Fisher v Nonconformist Pty Ltd [2024] NSWCA 32 (20 February 2024) (Meagher and Kirk JJA, Simpson AJA)

110. Fourthly, in *March v Stramare* at 515, Mason CJ's references to "causation being 'ultimately a matter of common sense' were evidently intended to disapprove the proposition 'that value judgment has, or should have, no part to play in resolving causation as an issue of fact'" (quotation from *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 at [43]). This usage of common sense has fallen into some disfavour. Section 5D of the *Civil Liability Act 2002* (NSW) and equivalent provisions have now separated out factual and normative issues in a manner that has also perhaps influenced the common law: note *Wallace v Kam* [201 3] HCA 19; (2013) 250 CLR 375 at [11]-[12] . More broadly, the High Court has doubted the

utility and transparency of speaking of common sense as a guide to value or policy judgments limiting the attribution of legal responsibility, and has indicated that such judgments are to be made by reference to the purpose of attributing legal responsibility for the norm in question. The quotation from *Martin* above, and the authority there cited, illustrates the point; see also *Tapp v Australian Bushmen's Campdraft & Rodeo Association Ltd* [2022] HCA 11; (2022) 273 CLR 454 at [45]-[46] and [101] . Where the norm is a statutory one, "notions of 'cause' ... are to be understood by reference to the statutory subject, scope and purpose": *Allianz Australia Insurance Limited v GSF Australia Pty Limited* [2005] HCA 26; (2005) 221 CLR 568 at [99] .

Sydney Metro v G&J Drivas Pty Ltd [2024] NSWCA 5 -
Sydney Metro v G&J Drivas Pty Ltd [2024] NSWCA 5 -
Black Head Bowling Club Ltd v Harrower [2023] NSWCA 267 (09 November 2023) (Payne and Adamson JJA, Simpson AJA)

3. Section 5D(1)(b) of the *Civil Liability Act* poses a normative question that is properly answered through the application of precedent: *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [22] . In a novel case, s 5D(4) requires the court to consider, amongst other relevant things, whether or not and why responsibility for the harm should be imposed on the negligent party: *Wallace v Kam* at [23] . The case against Mr Edstein was not novel. As the primary judge found, he was clearly negligent. Mr Edstein's insurance status provided no reason why responsibility for the harm should not be imposed on the negligent party. Nor did the fact that another defendant was held liable.

Black Head Bowling Club Ltd v Harrower [2023] NSWCA 267 -
Black Head Bowling Club Ltd v Harrower [2023] NSWCA 267 -
Bondi Beach Foods Pty Ltd v Chadwick [2023] NSWCA 265 -
Buljat v Coles Supermarkets Australia Pty Ltd [2022] ACTCA 71 (16 December 2022) (Elkaim, Mossop and Kennett JJ)
Wallace v Kam [2013] HCA 19; 250 CLR 375
Watts v Rake

Buljat v Coles Supermarkets Australia Pty Ltd [2022] ACTCA 71 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Collins v Insurance Australia Ltd [2022] NSWCA 135 -
Rayney v The State of Western Australia [No 4] [2022] WASCA 44 (12 April 2022) (Buss P; Murphy JA; Corboy J)

103. As to the second of those elements, the State submitted that it invites attention to policy considerations, including whether the harm alleged ought fairly be regarded as a consequence of the tortious conduct. [126] The State submitted that those policy or normative considerations include, but are not confined to, whether there is some supervening event responsible for the particular damage claimed. [127]

Ground 3 (interest)

via

[126] Respondent's written submissions, par 56; WB 58 - 59, referring to ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 [23] - [24]; ***Hudson Investment Group Ltd v Atanaskovic*** [2014] NSWCA 255; (2014) 311 ALR 290 [103].

Rayney v The State of Western Australia [No 4] [2022] WASCA 44 (12 April 2022) (Buss P; Murphy JA; Corboy J)

125. In *Wallace v Kam* , [160] the High Court explained the law in the following terms:

> 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'.

Novus actus interveniens

Rayney v The State of Western Australia [No 4] [2022] WASCA 44 -
Rayney v The State of Western Australia [No 4] [2022] WASCA 44 -
Grasso Consulting Engineers Pty Ltd v SafeWork NSW; Grasso v SafeWork NSW [2021] NSWCCA 288 (10 December 2021) (Simpson AJA, Walton and Cavanagh JJ)

9. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 at [26] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Nestlé Australia Ltd v Metri [2021] NSWCA 303 -
Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 (28 May 2021) (Macfarlan and Brereton JJA, Simpson AJA)

15. Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420 at 440 [41]-[44] (French CJ, Gummow, Hayne, Heydon and Crennan JJ); [2009] HCA 48 ; Wallace v Kam (2013) 250 CLR 375 at 382 [12] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) ; [2013] HCA 19 .

Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 (28 May 2021) (Macfarlan and Brereton JJA, Simpson AJA)

15. Adeels Palace Pty Ltd v Moubarak (2009) 239 CLR 420 at 440 [41]-[44] (French CJ, Gummow, Hayne, Heydon and Crennan JJ); [2009] HCA 48 ; Wallace v Kam (2013) 250 CLR 375 at 382 [12] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); [2013] HCA 19 .

Ethicon Sarl v Gill [2021] FCAFC 29 -
Rayney v The State of Western Australia [No 2] [2020] WASCA 207 (09 December 2020) (Murphy JA)

21. The State's submissions include:[20]

> 95. In an effort to avoid the effect of the [Tribunal's] findings, [Mr Rayney's] amended case limits the claim for economic loss up to 24 January 2018 ...
>
> 96. In the [State's] submission, the relevance of the [Tribunal's] findings and orders cannot be so easily circumscribed.
>
> 97. Significantly, the misconduct upon which [the Tribunal] based its recommendation that [Mr Rayney] be removed from the roll of persons admitted to the legal profession was that, in 2009, he twice provided false evidence to the Magistrates Court with the intention of misleading the Court ... The conduct, upon which, on [the Tribunal's] findings, [Mr Rayney] was not a fit and proper person to practice as a lawyer had all occurred prior to the period during which, on appeal, [Mr Rayney] now claims damages.

98. In that scenario, [Mr Rayney] is claiming damages for the inability to practice law, for a period during which, on [the Tribunal's] findings, he was not a fit and proper person to do so. Given that the assessment of special damage caused by the defamation necessarily proceeds on the basis of an assessment of a scenario that is hypothetical (ie what would have occurred in absence of the defamation) it is appropriate that that hypothetical assessment be made on the basis that [Mr Rayney] was practising in circumstances in which he was not a fit and proper person to do so.

99. In this regard, the normative considerations relevant to a finding of causation both at common law [21] and under the *Civil Liability Act* take on particular significance ... [W]here the only reason that [Mr Rayney] would (in the absence of the tortious conduct) have been able to earn income as a lawyer was that his own conduct rendering him unfit to do so had not yet been identified and dealt with by the relevant authorities, his loss of that earning capacity ought not fairly be regarded as a consequence of the tortious conduct.

100. Those normative considerations relevant to a finding of causation require the identification of the legal policy as to why responsibility for particular loss should be imposed on the tortfeasor. In circumstances where professional misconduct, if earlier identified and dealt with, would have resulted in an early determination that a person was not fit to earn particular income ... that legal policy should prevent such loss of income to be attributed to the tortious conduct.

101. This proposition has particular force ... in relation to the period after 10 February 2016. At all material times after that date, there were proceedings on foot in relation to [Mr Rayney's] misconduct and, as [the Tribunal] also found, [Mr Rayney] had repeated his false evidence before [the Tribunal] in 2015 (as well as before [the Tribunal] and the Supreme Court in 2017). Given that [Chaney J] found that the alleged conduct 'raised questions' as to [Mr Rayney's] fitness to practice adversely effecting his earning capacity; *fortiori* the resolution of those questions, adverse to [Mr Rayney's] fitness to practise, provide additional grounds for upholding [Chaney J's] decision.

via

[21] ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 [11].

Rayney v The State of Western Australia [No 2] [2020] WASCA 207 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

As the High Court stated in ***Wallace v Kam*** : [463]

via

[463] ***Wallace v Kam*** [14] (French CJ, Crennan, Kiefel, Gageler & Keane JJ). References in this passage to provisions in the *Civil Liability Act 2002* (NSW) have been substituted with the equivalent provisions in the *Civil Liability Act* .

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

There were no novel circumstances, such as were present in ***Wallace v Kam*** to suggest that there was some additional limiting principle, such that the appellant should not have been held liable for the harm that, as a matter of fact, was caused by its negligence.

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

> As we stated at the commencement of these reasons, whether the respondent's Developmental and Cognitive Impairments were caused by injuries to his brain resulting from the appellant's negligence was a question of fact to be established, on the balance of probabilities. In the context of the *Civil Liability Act* , that factual question arises in s 5C(1)(a) (i.e. 'factual causation'). [230]

via

[230] See ***Strong v Woolworths Ltd*** [2012] HCA 5; (2012) 246 CLR 182 (***Strong v Woolworths***) [18] (French CJ, Gummow, Crennan and Bell JJ). The other element of causation in s 5C(1) of the *Civil Liability Act* ('scope of liability') raises separate and distinct issues (***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 (***Wallace v Kam***) [12] (French CJ, Crennan, Kiefel, Gageler & Keane JJ); ***Apostolic Church Australia Ltd v Dixon*** [2018] WASCA 146 [67]).

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 (10 September 2020) (Quinlan CJ, Mitchell JA, Beech JA)

> As the learned trial judge recognised, in cases falling with an established class, the normative question posed by s 5C(1)(b) is properly answered through the application of precedent. In that context, as the Court observed in ***Wallace v Kam*** : [465]

East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
East Metropolitan Health Service v Ellis (by his next friend Christopher Graham Ellis) [2020] WASCA 147 -
McLennan v Meyer Vandenberg [2020] ACTCA 7 -
McLennan v Meyer Vandenberg [2020] ACTCA 7 -
Question of Law Reserved (NO. 1 OF 2019) [2019] SASCFC 149 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

80. The factual limb will be established when it is shown to be more probable than not that, [25] but for the defendant's act or omission, the harm would not have occurred. The scope of liability limb, while not defined in any real sense, is a concept that incorporates normative (undefined) considerations. In *Wallace v Kam,* [26] the High Court considered the construction of s 5D of the *Civil Liability Act 2002* (NSW) ('the NSW Act '). Sections 5D(1) and (4) of the NSW Act are in identical terms to ss 34(1) and (3) of the South Australian Act. The Court stated: [27]

> 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 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.
>
> Thus, as Allsop P explained in the present case:
>
> > "[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 enquiry 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."
>
> 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.
>
> (Citations omitted)

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

80. The factual limb will be established when it is shown to be more probable than not that, [25] but for the defendant's act or omission, the harm would not have occurred. The scope of liability limb, while not defined in any real sense, is a concept that incorporates normative (undefined) considerations. In *Wallace v Kam,* [26] the High Court considered the construction of s 5D of the *Civil Liability Act 2002* (NSW) ('the NSW Act '). Sections 5D(1) and (4) of the NSW Act are in identical terms to ss 34(1) and (3) of the South Australian Act. The Court stated: [27]

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>
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>
> (Citations omitted)

via

[27] *Wallace v Kam* [2013] HCA 19 at [14]-[16] per French CJ, Crennan, Kiefel, Gageler and Keane JJ .

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

80. The factual limb will be established when it is shown to be more probable than not that, [25] but for the defendant's act or omission, the harm would not have occurred. The scope of liability limb, while not defined in any real sense, is a concept that incorporates normative (undefined) considerations. In *Wallace v Kam,* [26] the High Court considered the construction of s 5D of the *Civil Liability Act 2002* (NSW) ('the NSW Act '). Sections 5D(1) and (4) of the NSW Act are in identical terms to ss 34(1) and (3) of the South Australian Act. The Court stated: [27]

> 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 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.
>
> Thus, as Allsop P explained in the present case:
>
> > "[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 enquiry 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."
>
> 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.
>
> (Citations omitted)

via

[26] [2013] HCA 19 .

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

82. There is a relationship between the scope of liability for the consequences of negligence and the content of the negligent party's duty of care that has been breached. As the High Court stated in *Wallace* : [29]

> ..."[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.
>
> (Citations omitted)

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 (06 September 2019) (Blue, Lovell and Hinton JJ)

81. Thus, it is necessary to determine "factual causation" which involves the application of the "but for" test of causation. Having determined factual causation, it is then necessary to determine the normative question posed by s 34(3) of the Act . In a case falling within an established class, the normative question is properly answered by a court through the application of precedent. Section 34(1) provides guidance but does not displace common law methodology. The common law method is that a policy choice once made is maintained unless confronted and overruled. In a novel case, a court must identify and articulate an evaluative judgment by reference to "the purposes and policy of the relevant part of the law". [28]

via

[28] *Wallace v Kam* [2013] HCA 19 at [21] per French CJ, Crennan, Kiefel, Gageler and Keane JJ ; *Barnes v Hay* (1988) 12 NSWLR 337 at 353 per Mahoney JA; quoted in *Henville v Walker* (2001) 206 CLR 459 at [98] per McHugh J.

Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Lloyd v Thornbury [2019] NSWCA 154 -
Officeworks Ltd v Christopher [2019] NSWCA 96 (06 May 2019) (Meagher, Gleeson and Leeming JJA)

29. It was necessary for Ms Christopher to establish factual causation that any harm to her left shoulder would not have occurred but for the Officeworks incident: s 5D(1)(a) ; *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16] . (No reliance was sought to be placed upon s 5D(2) at trial or in this Court.) At all times, the onus lay with Ms Christopher of proving any fact relevant to the issue of causation: s 5E .

Rayney v The State of Western Australia [2019] WASCA 23 (30 January 2019) (Murphy JA; Corboy J)

21. In the respondent's answer, the State contends, in effect, that Chaney J was correct to limit Mr Rayney's damages for economic loss to the period before he was charged with the murder of his wife. It submits, amongst other things, that policy considerations are relevant to whether the alleged harm ought fairly be regarded as a consequence of the tortious conduct.[17] The State submits (at par 42), with reference to the observations of the High Court in ***Wallace v Kam*** [18] that:

> Causation, for the purposes of the common law, is a question of fact to be determined according to common sense and not according to philosophical and scientific notions of causation. The Court inevitably asks 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. That test at common law is consistent with the approach under the *Civil Liability Act* [2002 (WA)].

via

[18] ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 [11] - [12].

Rayney v The State of Western Australia [2019] WASCA 23 -
Rayney v The State of Western Australia [2019] WASCA 23 -
Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

67. In cases governed by the CLA, the two questions identified in s 5C(1) must be kept distinct. [98] The determination of factual causation in accordance with s 5C(1)(a) involves nothing more

or less than the application of a 'but for' test of causation. [99] In a novel case not governed by precedent, the scope of liability question dictated by s 5C(1)(b) requires the identification and articulation of an evaluative judgment by reference to the purposes and policy of the relevant part of the law. [100]

Contributory negligence

via

[98] ***Wallace v Kam*** [2013] HCA 19; (2013) 250 CLR 375 [12].

Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

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Contributory negligence

via

[99] ***Wallace v Kam*** [16] ; ***Badenach v Calvert*** [2016] HCA 18; (2016) 257 CLR 440 [36].

Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

Wallace v Kam [2013] HCA 19 ; (2013) 250 CLR 375

Apostolic Church Australia Ltd v Dixon [2018] WASCA 146 (21 August 2018) (Murphy JA, Beech JA, Pritchard J)

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Contributory negligence

via

[100] ***Wallace v Kam*** [23] .

Mal Owen Consulting Pty Ltd v Ashcroft [2018] NSWCA 135 (20 June 2018) (Basten and Macfarlan JJA, Barrett AJA)

100. The process just described goes to the issue of causation. It represents the first of what the joint judgment in *Sellars v Adelaide Petroleum NL* identifies as two distinct stages relevant to the resolution of a case such as the present. [49] At that first stage, causation must be proved on the balance of probabilities: the question of causation is, after all, "entirely factual, turning on proof of relevant facts and on the balance of probabilities in accordance with s 5E " of the *Civil Liability Act* 2002 (NSW) [50] . The second stage becomes relevant only if causation is established at the first. The issue at the second stage is the assessment of damages; and the focus then is upon the actual value of the lost opportunity which, to that point, has been appraised only as not merely theoretical or negligible. Value must be ascertained at the second stage by reference to "the degree of probabilities, or possibilities, inherent in the plaintiff's succeeding had the plaintiff been given the chance" of which the plaintiff has been deprived. These are again words used in the joint judgment in *Sellars v Adelaide Petroleum NL* .

via

50. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 at [14] .

Sutherland Shire Council v Safar [2017] NSWCA 203 -
Ku-ring-gai Council v Chan [2017] NSWCA 226 -
Davies v Nilsen [2017] VSCA 202 (11 August 2017) (Osborn, Beach JJA and Keogh AJA)

53. Having dealt with the evidence of the applicant and her mother, the judge then turned to the question of causation. In describing the applicable legal principles, the judge conducted a detailed analysis of relevant authority including *Watts v Rake* ,[30] *Purkess v Crittenden* ,[31] *I.C.A.N.Z. v Murphy* ,[32] *Malec v J C Hutton Pty Ltd* ,[33] *March v E & M H Stramare Pty Ltd* ,[34] *Seltsam Pty Ltd v Ghaleb* ,[35] *Strong v Woolworths Ltd* ,[36] *Wallace v Kam* , [37] and *Smith v Gellibrand Support Services Inc.* [38]

Davies v Nilsen [2017] VSCA 202 -
Berhane v Woolworths Ltd [2017] QCA 166 -
Berhane v Woolworths Ltd [2017] QCA 166 -
Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 (04 August 2017) (McColl, Meagher and Ward JJA)

85. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 (at [14]) per curiam (French CJ, Crennan, Kiefel, Gageler and Keane JJ).

Libra Collaroy Pty Ltd v Bhide [2017] NSWCA 196 -
RinRim Pty Ltd v Deutsche Bank AG [2017] NSWCA 169 -
RinRim Pty Ltd v Deutsche Bank AG [2017] NSWCA 169 -
Daniel Smith by his tutor Debra Smith v South Western Sydney Local Health Network [2017] NSWCA 123 (31 May 2017) (Meagher, Gleeson and Payne JJA)

95. His Honour observed, with reference to *Adeels Palace* at [51] , that describing the injury as "*the very kind of thing*" which was the subject of the duty does not prove factual causation: at [335]. Reference was also made at [337] to the High Court's statement in *Wallace v Kam* (2013) 250 CLR 375; [2013] HCA 19 at [16] that the test of factual causation in accordance with s 5D(1)(a) "involves nothing more or less than the determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence".

The Corporation of the Synod of the Diocese of Brisbane v Greenway [2017] QCA 103 -
Chevron Australia Holdings Pty Ltd v Federal Commissioner of Taxation [2017] FCAFC 62 -
Ralston v Jurisich [2017] NSWCA 63 (03 April 2017) (Ward JA, Emmett AJA and McDougall J)

71. It is well settled that the issue of factual causation posed by s 5D(1)(a) of the *Civil Liability Act* i nvolves an application of the "but for" test of causation: would the harm have occurred in the absence of the breach of duty? [33] A determination on that question "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities..." [34] . Do the proved facts support the inference that, but for the breach of duty, the harm would not have occurred?

via

33. Wallace v Kam (2013) 250 CLR 375 at [16] .

Ralston v Jurisich [2017] NSWCA 63 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 (17 February 2017) (Basten, Hoeben and Gleeson JJA)

32. Rogers v Whitaker (1992) 175 CLR 479 at 489 (Mason CJ, Brennan, Dawson, Toohey and McHugh JJ); Wallace v Kam (2012) 250 CLR 375; [2013] HCA 19 at [8] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Doble Express Transport Pty Ltd (Administrator Appointed) v John L Pierce Pty Ltd [2016] NSWCA 352 -
Doble Express Transport Pty Ltd (Administrator Appointed) v John L Pierce Pty Ltd [2016] NSWCA 352 -
Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq) [2016] NSWCA 308 (14 November 2016) (McColl JA at [1], Sackville AJA at [2], Barrett AJA at [89])

59. As the High Court explained in *Wallace v Kam* , the inquiry required by s 5D(1)(a) of the CL Act is whether OFS has shown, on the balance of probabilities, that it would not have lost its advance of $4.5 million "absent [WWL's] negligence". If the primary Judge found, or should have found, that WWL's duty of care required it to advise OFS not to proceed with the advance, the inquiry mandated by s 5D(1)(a) would have to be undertaken on the (counterfactual) assumption that WWL gave that advice to OFS. To that extent, Mr Abadee's submissions are correct.

No finding was made

Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq) [2016] NSWCA 308 (14 November 2016) (McColl JA at [1], Sackville AJA at [2], Barrett AJA at [89])

51. In *Wallace v Kam* , [18] the High Court pointed out that a determination in accordance with s 5 D(1)(a) of the CL Act, that negligence was a necessary condition of the occurrence of the harm, is entirely factual. The issue turns on proof by the plaintiff of the relevant facts on the balance of probabilities, as required by s 5E . [19] As their Honours explained: [20]

> "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."

Richtoll Pty Ltd v WW Lawyers Pty Ltd (in liq) [2016] NSWCA 308 -
Redzepovic v Western Health [2016] VSCA 251 -

Morocz v Marshman [2016] NSWCA 202 -
DC v State of New South Wales [2016] NSWCA 198 -
DC v State of New South Wales [2016] NSWCA 198 -
Boateng v Dharamdas [2016] NSWCA 183 (02 August 2016) (Gleeson and Leeming JJA, Davies J)

92. The determination of "factual causation" in accordance with s 5D(1)(a) of the *Civil Liability Act* "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; 250 CLR 375 (***Wallace v Kam***) at [14] . It involves nothing more or less than the application of a "but for" test of causation: *Wallace v Kam* at [16] .

Boateng v Dharamdas [2016] NSWCA 183 (02 August 2016) (Gleeson and Leeming JJA, Davies J)

93. In *Strong v Woolworths* [2012] HCA 5; 246 CLR 182 at [32] the plurality said that "proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred." The enquiry into the causes of an accident is wholly retrospective, unlike the issues of duty of care and breach which are forward looking: *Vairy v Wyong Shire Council* [2005] HCA 62; 223 CLR 422 at [124] (Hayne J); *Wallace v Kam* at [26] .

Boateng v Dharamdas [2016] NSWCA 183 (02 August 2016) (Gleeson and Leeming JJA, Davies J)

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Boateng v Dharamdas [2016] NSWCA 183 -
Biggs v George [2016] NSWCA 113 (17 May 2016) (Basten, Ward and Payne JJA)

22. The duty to warn is identified as extending to "material risks" which may attend a proposed treatment; the risk is "material", relevantly for present purposes, if it is a risk to which a reasonable person in the position of the patient "would be likely to attach significance in choosing whether or not to undergo a proposed treatment." [5] In *Wallace v Kam* , the risk was described as one of "physical injury", because that was the nature of the risk in that case, as it is in the present case; it is not necessarily so limited.

via

5. Wallace v Kam (2013) 250 CLR 375; [2013] HCA 19 at [8] (French CJ, Crennan, Kiefel, Gageler and Keane JJ) .

Biggs v George [2016] NSWCA 113 (17 May 2016) (Basten, Ward and Payne JJA)

Rogers v Whitaker (1992) 175 CLR 479; *Wallace v Kam* (2013) 250 CLR 375 , discussed.

Biggs v George [2016] NSWCA 113 -

Badenach v Calvert [2016] HCA 18 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Nightingale v Blacktown City Council [2015] NSWCA 423 -
Bitupave Ltd t/as Boral Asphalt v Pillinger [2015] NSWCA 298 -
Marsh v Baxter [2015] WASCA 169 (03 September 2015) (McLure P; Newnes and Murphy JJA)

Wallace v Kam [2013] HCA 19 ; (2013) 250 CLR 375

Marsh v Baxter [2015] WASCA 169 -
Marsh v Baxter [2015] WASCA 169 -
Patrick Stevedores Operations (No 2) Pty Ltd v Hennessy [2015] NSWCA 253 -
Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

184. The relevant "*rule of responsibility*" in a medical negligence case was again considered in *Wallace v Kam.* The Court, having referred to the duty of a medical practitioner at [36] and the policy underlying that duty, said, at [37] :

> "The appropriate rule of attribution, or 'rule of responsibility' ... is therefore one that 'seeks to hold the doctor liable for the consequence of material risks that were not warned of [and] that were unacceptable to the patient'. The normative judgment that is appropriate to be made is that the liability of a medical practitioner who has failed to warn the patient of material risks inherent in a proposed treatment 'should not extend to harm from risks that the patient was willing to hazard ...'"

Consideration

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

187. As this case cannot be decided by direct analogy with *Cattanach v Melchoir*, it falls within the general principles of causation discussed above. In particular, as found in *Wallace v Kam* , the underlying policy consideration giving rise to the relevant rule of attribution of legal liability is the duty to protect patients from the occurrence of physical injury, the risk of which is unacceptable to the patient. In this case, the unacceptable risk that the appellants were not willing to bear was having a child with the inherited condition of ATD. That risk came home, but no loss was shown to have been caused by the ATD. However, as Kiefel J observed in *Roads and Traffic Authority v Royal* [2008] HCA 19; 82 ALJR 870, to make the respondent liable for expenses that flowed from something that would have occurred in any event, would be to impose a liability on the respondent that was, in effect, one of strict liability.

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

Cattanach v Melchior [2003] HCA 38; 215 CLR 1 ; *Wallace v Kam* [2013] HCA 19; 250 CLR 375 ; *Roads and Traffic Authority v Royal* [2008] HCA 19; 82 ALJR 870; *Moyes v Lothian Health Board* 1990 SCT 444; [1990] 1 Med LR 463 ; *Kenny and Good v MGICA* [1999] HCA 25; 199 CLR 413; *Wallace v Kam* [2012] NSWCA 82; [2012] Aust Torts Reports ¶82-101; *Barnes v Hay* (1988) 12 NSWLR 337; *Henville v Walker* [2001] HCA 52; (2001) 206 CLR 459; *Paul v Cooke* [2013] NSWCA 311; 85 NSWLR 167.

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

157. The appellants submitted that, the policy derived from personal injury cases described in *Wallace v Kam* (see above at [92]-[93]), did not apply here. Rather, in this case, the relevant policy of the law was to protect the appellants' right to plan their family in terms of choosing if, whether and when they would undertake the moral and legal responsibility to rear and

maintain a child. More specifically, the appellants claimed that they were denied the right to choose not to have a child when there was a risk that the child would be inflicted with the same stress and suffering that the second appellant had suffered as a result of his ATD, and it was that right to choose that the policy of the law sought to protect. The appellants sought to sustain this analysis by reference to *Cattanach v Melchior* and in particular by reference to McHugh and Gummow JJ's characterisation of the harm in that case at [68] , as being "*the burden of the legal and moral responsibilities which arise by reason of the birth of the child*".

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

Wallace v Kam [2013] HCA 19; 250 CLR 375 *; Rosenberg v Percival* [2001] HCA 18; 205 CLR 434; *Caltex Refineries (Qld) Pty Limited v Stavar* [2009] NSWCA 258; 75 NSWLR 649; *Tame v New South Wales* [2002] HCA 35; 211 CLR 317.

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

174. In *Wallace v Kam* , at [23] , the Court similarly noted the role of legal policy in the determination of causation:

> "In a novel case [it is] incumbent on a court answering the normative question [as to causation] 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'."

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

181. The relevant "*rule of responsibility*" of the alleged tortfeasor in the determination of causation has been widely endorsed in Australian law: see for example *Rosenberg v Percival* at [85] per Gummow J; *Modbury Triangle Shopping Centre v Anzil* at [40] per Gleeson CJ, Gaudron and Hayne JJ agreeing; *Wallace v Kam* at [37] (where the plurality cited the above passage from *Banque Bruxelles Lambert SA v Eagle Star Insurance*) and *Paul v Cooke* at [90] ff per Leeming JA. Directing attention to the "*rule of responsibility*" highlights the connection between the duty of care of the negligent party and the scope of liability in negligence.

Waller v James [2015] NSWCA 232 (13 August 2015) (Beazley P, McColl and Ward JJA)

14. Wallace v Kam [2013] HCA 19 ; (2013) 250 CLR 375 ("Wallace") (at [11]) per French CJ, Crennan, Kiefel, Gageler and Keane JJ.

Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Chand v Commonwealth Bank of Australia [2015] NSWCA 181 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

199. In *Wallace v Kam* , [130] the High Court emphasised the distinction between the separate requirements in s 5D(1) of the Civil Liability Act of factual causation and scope of liability. Their Honours stated that: [131]

> "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 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."

via

[130] [2013] HCA 19 ; 250 CLR 375 .

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

Wallace v Kam [2013] HCA 19; 250 CLR 375 referred to.

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

201. As was pointed out in *Wallace v* Kam, [132] the normative question posed by s 5D(1)(b) of the C ivil Liability Act is to be answered through the application of precedent. In a novel case, however: [133]

> "s 5D(4) makes it incumbent on a court answering the normative question posed by s 5 D(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 party 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." (Citations omitted.)

via

[132] [2013] HCA 19 ; 250 CLR 375 at [22] .

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

205. For the same reasons, I do not think that Endeavour's failure to propose a route plan caused (in the relevant sense) the injuries to Mr Edward. The preparation of a route plan would not have enabled Mr Carter to detect the catenary wire or to be aware of the hazard it presented. The risk that materialised was one which was beyond the scope of the duty of Precision and Mr Carter to avoid harm to the pilot and passengers of the helicopter by the exercise of reasonable care. [134]

via

[134] Wallace v Kam [2013] HCA 19 ; 250 CLR 375 at [25] per curiam.

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

150. This second point suggested poor airmanship for a reason which was unrelated to the accident. Thus, in terms of s 5B of the *Civil Liability Act* , to remain on the west side was to take a precaution against "a risk" of harm, but not the risk which materialised. On one view, that contention raised a question of causation similar to that considered recently in *Wallace v Kam* . [111] Thus, although the accident would not have occurred "but for" the helicopter crossing to the eastern side of the wire, the damage suffered may not have been within the scope of liability appropriate to that particular breach. [112] On any view, the matter was to be addressed on the basis of the foreseeability of harm, with specific attention to the terms of s 5B .

via

[111] [2013] HCA 19 ; 250 CLR 375 .

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 (22 June 2015) (Basten and Macfarlan JJA, Sackville AJA)

159. A similar problem arose in *Curtis v Harden Shire Council,* [115] a case involving a car skidding out of control on loose aggregate laid by the Council. In discussing whether the Council was liable for the loss of control, where it had failed to breached its duty to give adequate warnings, but the driver had arguably lost control as a result of inattention, I noted: [116]

> "As the joint reasons in *Wallace v Kam* further explained, attribution of responsibility requires consideration of the purpose served by the imposition of the particular duty of care which has been breached. In some circumstances, liability has been excluded where the harm which results may be described as "sheer coincidence": *Chester v Afshar.* [117] Lord Walker gave the example of a taxi driver driving too fast, with the result that the cab was in the way of a falling tree and the passenger was injured. Absent breach of the duty to drive slower, the injury would not have occurred; nevertheless liability should not attach. The example is similar to that referred to in *W allace v Kam* , 'of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche'. [118] In the language of Lord Hoffmann in *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (on appeal from *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd*), [119] the injury was 'a foreseeable consequence of mountaineering but has nothing to do with his knee'."

Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Endeavour Energy v Precision Helicopters Pty Ltd [2015] NSWCA 169 -
Central Darling Shire Council v Greeney [2015] NSWCA 51 (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)

56. Gummow J made a distinction of this type when he observed in *Rosenberg v Percival* at [97] , in relation to the failure of a surgeon to give an appropriate warning:

> " ... Had the warning been given, the plaintiff in [*Chappel v Hart*] would have had the operation at a different time by a different surgeon. Given the very low probability of the risk occurring, it would have been extremely unlikely that the harm would have eventuated. That was so, even if the view of the minority was correct and the

> likelihood of the injury occurring was the same irrespective of who performed the operation. Therefore, in a legally sufficient sense, the failure of the defendant to warn of the risk caused the harm" (citations omitted).

See also *Chappel v Hart* at [67] and *Wallace v Kam* at [20] .

Central Darling Shire Council v Greeney [2015] NSWCA 51 (16 March 2015) (Macfarlan JA, Sackville AJA and Beech-Jones J)

50. The primary judge referred to the requirements of s 5D of the *Civil Liability Act* that the defendant's negligence be a necessary condition of the occurrence of the plaintiff's harm and that it be appropriate for the scope of the defendant's liability to extend to the harm so caused. Whilst his Honour did not (as he should have) give reasons for his conclusion that the Council's breach caused Mr Greeney's injury, the conclusion was warranted by the facts that his Honour found. His Honour found that Mr Hocking's direction to move camp in the knowledge that it would involve use of the defective coupling mechanism was negligent and constituted a breach of the Council's duty of care to Mr Greeney. If the negligence had not occurred, and the direction had therefore not been given, the incident and injury in question would have been avoided. The Council's negligence was thus a "necessary condition of the harm" and there is no reason why, in accordance with s 5D(1)(b) , its liability should not extend to the harm so caused (as to the latter, compare *Wallace v Kam* [2013] HCA 19; 250 CLR 375 at [37]).

Central Darling Shire Council v Greeney [2015] NSWCA 51 -
Walsh v Department of Human Services [2014] VSCA 244 (03 October 2014) (Nettle, Hansen and Tate JJA)

63. Latham CJ thus acknowledged that the determination of the legal cause of an injury will involve what the High Court has described more recently in *Wallace v Kam* [52] as 'a normative question as to whether legal responsibility for that particular harm occurring in that way should be attributed to a particular person' by contrast with 'a question of historical fact as to how particular harm occurred'. [53] He went on to say:

> A partial incapacity which, in the sense stated, results from an injury may itself, without the intervention of any new cause, result in total incapacity; for example, a man whose eye is injured may be only partially incapacitated for a time, but the injury may, without any new cause operating, so develop as to produce complete blindness in both eyes. In such a case first the partial incapacity, and next the total incapacity, would have resulted from the injury. The position is the same if the injury aggravates an already existing disease so as to bring about incapacity, partial or total. [54]

via

[53] Ibid 381 [11] (French CJ, Crennan, Kiefel, Gageler, Keane JJ) . Speaking of causation in the context of negligence at common law, the High Court went on to say: 'The distinct nature of those two questions [factual causation and legal causation] 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".' In pointing out that the *Civil Liability Act 2002 (NSW)* now requires that the two questions be kept distinct, the High Court said (at 385 [21]-[22]):

Walsh v Department of Human Services [2014] VSCA 244 (03 October 2014) (Nettle, Hansen and Tate JJA)

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via

[52] (2013) 250 CLR 375 .

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Walsh v Department of Human Services [2014] VSCA 244 -
Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

87. And, finally, in *Wallace* the High Court adopted what was said by Allsop P in the New South Wales Court of Appeal:

> [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).* [54]

via

[54] (2013) 250 CLR 375 , 383 , [15] (emphasis added), referring to *Wallace v Kam* [2012] NSWCA 82, [4] .

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

74. The Court also said of the distinction between questions of factual causation and scope of liability:

> 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 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 (among other relevant things) whether or not, and if so why, responsibility for the harm should be imposed on the negligent party. [36]

via

[36] Ibid 383 [14] . See also *Adeels Palace* (2009) 239 CLR 420, 440 [42] ; *Strong* (2012) 246 CLR 182, 191 [19] .

Powney v Kerang and District Health [2014] VSCA 221 (11 September 2014) (Osborn and Beach JJA and Forrest AJA)

73. In *Wallace,* the High Court said of the factual causation test:

> The determination of factual causation in accordance with s 5D(1)(a) involv es 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. [35]

via

[35] (2013) 250 CLR 375 , 383 [16] . See also *Strong* (2012) 246 CLR 182, 190 [17] ; *Adeels Palace* (2009) 239 CLR 420, 440 [45] .

Powney v Kerang and District Health [2014] VSCA 221 -
Powney v Kerang and District Health [2014] VSCA 221 -

Powney v Kerang and District Health [2014] VSCA 221 -
Curtis v Harden Shire Council [2014] NSWCA 314 (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

327. The present case is distinguishable from *Wallace v Kam* in two important respects (amongst others). First, the nature of the harm suffered by the plaintiff in *Wallace v Kam* was different in kind, resulting from the materialisation of a risk, different from that which he would not have accepted. In the present case, the harm (losing control of the vehicle and sliding off the road) is of the same kind as that which would have resulted had control been lost due to skidding on loose aggregate. On the other hand, in *Wallace v Kam* both risks were risks of which the plaintiff should have been warned. In the present case, the risk which eventuated (on the assumptions identified above) was the risk of leaving the road through inattention or distraction, being a risk of which the Council had no duty to warn or guard against by reducing the speed limit.

Curtis v Harden Shire Council [2014] NSWCA 314 (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

326. The purpose of the restricted speed zone was to prevent loss of control on the resealed sections, not to limit the consequences of veering across the road through sleepiness or inattention. This, as the High Court noted in *Wallace v Kam* at [22]-[23] , requires a finding as to the "scope of liability" in accordance with s 5D(1)(b) and, to the extent that it is a novel case, by application of s 5D(4) . As the joint reasons in *Wallace v Kam* further explained, attribution of responsibility requires consideration of the purpose served by the imposition of the particular duty of care which has been breached. In some circumstances, liability has been excluded where the harm which results may be described as "sheer coincidence": *Chester v Afshar* [2005] 1 AC 134 at [94] (Lord Walker of Gestingthorpe). Lord Walker gave the example of a taxi driver driving too fast, with the result that the cab was in the way of a falling tree and the passenger was injured. Absent breach of the duty to drive slower, the injury would not have occurred; nevertheless liability should not attach. The example is similar to that referred to in *Wallace v Kam,* "of a mountaineer who is negligently advised by a doctor that his knee is fit to make a difficult climb and who then makes the climb, which he would not have made if properly advised about his knee, only to be injured in an avalanche": at [24]. In the language of Lord Hoffmann in *Banque Bruxelles Lambert SA v Eagle Star Insurance Co Ltd* [1997] AC 191 at 213, the injury was "a foreseeable consequence of mountaineering but has nothing to do with his knee".

Curtis v Harden Shire Council [2014] NSWCA 314 (10 September 2014) (Bathurst CJ, Beazley P and Basten JA)

323. A similar (though by no means identical) issue arose in *Wallace v Kam* [2013] HCA 19; 250 CLR 375 , as discussed in the joint reasons of French CJ, Crennan, Kiefel, Gageler and Keane JJ. The plaintiff underwent a surgical procedure which was accompanied by two significant inherent risks of which he was not warned. The trial judge (Harrison J) held that if warned of the risk which materialised, he would nevertheless have undergone the procedure. He therefore dismissed the claim. On appeal to this Court, the plaintiff alleged that if warned of the other (more serious) risk, he would have declined the operation. This Court accepted that factual premise, but concluded that he was not entitled to recover. The case turned on the application of s 5D of the *Civil Liability Act* . The High Court upheld that result. Referring to the analysis earlier undertaken in *Strong v Woolworths Ltd* [2012] HCA 5; 246 CLR 182 at [18] , the joint reasons in *Wallace v Kam* noted at [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."

Curtis v Harden Shire Council [2014] NSWCA 314 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Nominal Defendant v Bacon [2014] NSWCA 275 -
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

105. In addition to factual causation, the plaintiff must establish that it is appropriate for the scope of the negligent party's liability to extend to the harm so caused: CL Act, s 5D(1)(b) ; *Wallace v Kam* [2013] HCA 19; 87 ALJR 648 at [21] (*per curiam*); *Paul v Cooke* [2013] NSWCA 311 at [86] (Leeming JA). While a determination of factual causation is "entirely factual", a determination under s 5D(1)(b) that it is appropriate for the scope of the defendant's liability to extend to the harm so caused is "entirely normative": *Wallace v Kam* at [14] . In addressing that normative question, the court is to be guided by precedent. But in a novel case, s 5D(4) requires the court 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: *Wallace v Kam* at [23] .

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 (05 August 2014) (Beazley P, Ward JA and Sackville AJA)

Wallace v Kam [2013] HCA 19; 87 ALJR 648 ; *Paul v Cooke* [2013] NSWCA 311; *March v E. & M.H. Stramare Pty Ltd* [1991] HCA 12; 171 CLR 506; *Roe v Minister for Health* [1954] 2 QB 66; applied.

TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 -
TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd [2014] NSWCA 255 -
Perry v Killmier [2014] QCA 64 (04 April 2014) (Muir and Gotterson JJA and Applegarth J)
Wallace v Kam (2013) 87 ALJR 648; [2013] HCA 19 , followed

Perry v Killmier [2014] QCA 64 -
Warth v Lafsky [2014] NSWCA 94 (01 April 2014) (McColl JA, Preston CJ of LEC and Tobias AJA)

58. In order to establish that any breach of duty on the appellant's part caused his harm, the respondent had to establish "factual causation" in accordance with s 5D(1)(a) of the *Civil Liability Act* , that is to say that the appellant's negligence was a necessary condition of the occurrence of that harm. That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E ": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

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Kam [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Moubarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Warth v Lafsky [2014] NSWCA 94 -
Lucantonio v Stichter [2014] NSWCA 5 (06 February 2014) (McColl, Basten and Barrett JJA)

80. Such determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E" (*Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14])) and is approached by applying common sense to those facts: *Hunt & Hunt Lawyers (a firm) v Mitchell Morgan Nominees Pty Ltd* [2013] HCA 10; (2013) 247 CLR 613 (at [43] ; [56]) per French CJ, Hayne and Kiefel JJ. It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace Pty Ltd v Mourbarak* [2009] HCA 48; (2009) 239 CLR 420 (at [45], [55]). "Proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred": *Strong v Woolworths Ltd* (at [32]) per French CJ, Gummow, Crennan and Bell JJ.

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Lucantonio v Stichter [2014] NSWCA 5 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 (23 December 2013) (Beazley P, Macfarlan JA and Garling J)

185. Section 5D(1)(b) requires, as well, that it be "appropriate for the scope of the negligent person's liability to extend to the harm so caused". This precludes a merely mechanical application of the "but for" test, in disregard of "the purposes and policy of the relevant part of the law" (*Wallace v Kam* [2013] HCA 19; 87 ALJR 648 at [23]).

Parkview Constructions Pty Ltd v Abrahim [2013] NSWCA 460 (20 December 2013) (McColl and Gleeson JJA, Sackville AJA)

76. It is equally clear that, had Parkview discharged its duty of care, the danger constituted by the removal of Plank 3 would have been detected and remedied before the accident occurred. As the primary Judge found, the absence of Plank 3 from the hop-up would have been obvious to anyone inspecting the area. Once it was seen that Plank 3 was missing, it would also have been obvious that its tie-wire, the sole means of securing the hop-up, had been cut. The severed tie-wire was clearly visible. The test of whether negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E of the CL Act . That task does not involve policy judgments, and requires no more than the application of a "but for" test of causation: *Wallace v Kam* [2013] HCA 19; 297 ALR 383, at [14]-[16] , *per curiam.* O n that test, Parkview's negligence was therefore a necessary condition of the occurrence of the harm (s 5D(1)(a)).

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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> ...
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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 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.
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> [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.

...

[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 gu ides 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.

...

[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]

via

[31] (2013) 87 ALJR 648 .

Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)

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 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.

Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 (17 December 2013) (Fraser and Morrison JJA and Margaret Wilson J,)

Wallace v Kam (2013) 87 ALJR 648; [2013] HCA 19 , applied

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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 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?

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> [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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Gratrax Pty Ltd v T D & C Pty Ltd [2013] QCA 385 -
Takla v Nasr [2013] NSWCA 435 (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1)(a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Takla v Nasr [2013] NSWCA 435 (13 December 2013) (McColl, Basten and Hoeben JJA)

88. The primary judge concluded (at [71]) that the appellant would have proceeded with the purchase no matter what advice she was given. This was a determination of no factual causation. Leaving aside the possibility of an exceptional case within s 5D(2) (a sub-section the appellant did not invoke), this determination entitled his Honour to conclude that the putative breaches he had assumed for the purpose of the causation inquiry (failure to give written confirmation of Ms Johnson's oral warning of the danger the appellant might lose her deposit and the fact the directors might have no assets to back up the guarantee) had not caused the appellant to suffer harm, that is to say, they were not a "necessary condition of the occurrence of the harm": *Wallace v Kam* (at [16] - [18]); *Adeels Palace* (at [53]). Accordingly the scope of liability considerations in s 5D(1)(b) did not arise.

Takla v Nasr [2013] NSWCA 435 (13 December 2013) (McColl, Basten and Hoeben JJA)

74. In order to establish that any breach of duty on the respondent's part caused her harm, the appellant had to establish in accordance with s 5D(1)(a) of the *Civil Liability Act* that that negligence was a necessary condition of the occurrence of that harm, an exercise the Act labels "factual causation": s 5D(1)(a) . That determination "is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E": *Wallace v Kam* [2013] HCA 19; (2013) 87 ALJR 648 (at [14]). It "involves nothing more or less than the application of a 'but for' test of causation": *Wallace v Kam* (at [16]); *Adeels Palace* (at [45], [55]); *Strong v Woolworths Ltd* [2012] HCA 5; (2012) 246 CLR 182 (at [18]) per French CJ, Gummow, Crennan and Bell JJ.

Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -
Takla v Nasr [2013] NSWCA 435 -
Paul v Cooke [2013] NSWCA 311 (19 September 2013) (Basten, Ward and Leeming JJA)

83. Section 5D "is the applicable statutory provision that must be applied" in any case to which Part 1A applies: *Adeels Palace* at [44] . Section 5D(1) divides legal causation into two elements, "factual causation" and "scope of liability": *Adeels Palace* at [42] ; *Wallace v Kam* at [12] .

Paul v Cooke [2013] NSWCA 311 (19 September 2013) (Basten, Ward and Leeming JJA)

105. The primary judge relied on what McHugh J had said in *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506 at 535 which is now reflected in s 5D(1)(b) . Applying what had there been said as to what was fairly to be regarded as within the risk created by the negligence, Ms Paul said that Dr Cooke's negligence created the risk of spontaneous rupture. That is true in the loose sense that his negligence created the risk that the aneurysm, which otherwise would have been clipped or coiled in 2003, might while it was left untreated rupture spontaneously in 2004 or 2005. However, as the primary judge observed, on no view did Dr Cooke's negligence create the risk of intra-operative rupture. More recently, in *Wallace v Kam* at [24] , the High Court has confirmed the "limiting principle" that "the scope of liability normally does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid". It was no part of Dr Cooke's duty to avoid the risk of intra-operative rupture. In my view this is a clear case for the application of that limiting principle rather than its displacement through the prism of s 5 D(1)(b) "appropriateness".

Paul v Cooke [2013] NSWCA 311 (19 September 2013) (Basten, Ward and Leeming JJA)

86. It is also clear that a plaintiff will not obtain a favourable verdict merely by establishing breach and loss which would not have been suffered but for the breach. That is to say, factual causation is not a sufficient condition for legal causation. That was plainly the position at common law (hence for example notions of remoteness and *novus actus*

interveniens) and the Act , especially s 5D(1)(b) and 5D(4) , proceeds on that premise, which is confirmed by *Wallace v Kam* at [21] . Scope of liability is the means by which what Professor Stapleton described as the "voraciousness" of negligence may be controlled by a court: "Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences" 54 *Vanderbilt Law Review* 9 41 at 956 (2001), which is especially relevant when the trier of fact is a jury, as in the United States of America.

Paul v Cooke [2013] NSWCA 311 (19 September 2013) (Basten, Ward and Leeming JJA)

Wallace v Kam [2013] HCA 19; (2013) 87 ALJR 648 , applied

Paul v Cooke [2013] NSWCA 311 -
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