Form 27A *Rule 44.02.2*

IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No. S307 of 2012**

BETWEEN: **IAN WALLACE**
Appellant

and **DR ANDREW KAM**
Respondent

APPELLANT'S *AMENDED* SUBMISSIONS

(served by leave of the Deputy Registrar)

PART I: PUBLICATION

1. The appellant certifies that this submission is in a form suitable for publication on the internet.

PART II: ISSUES ON THE APPEAL

2. The issues can be stated at different levels of generality.

3. At a high level of generality, the thematic issue is whether information (including inherent material risks "y" and "z") that should prospectively have been disclosed by the surgeon to a patient, to discharge the doctor's duty of care, before proposed surgery, but was not disclosed (in breach of duty), can be a factual and normative cause of a patient's decision to undergo surgery during which the patient suffers the materialisation of another inherent material risk (risk "x"), where all of these risks ("x", "y", "z") were inherent in the proposed surgery.

4. Less abstractly, the main issue is whether, as the appellant contends *and the respondent denies,* on the proper construction of *Civil Liability Act 2002* (NSW) (hereinafter ***'CLA'*)** ss 5(1)(a)(factual causation), 5(1)(b)(scope of liability), 5D(2)(exceptional case), 5D(3) (relevance) & 5E (causation), ~~as the applicant~~

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~~contends and the respondent denies,~~ it is appropriate for the scope of the liability that a surgeon (the respondent) owes a patient (the appellant), within the meaning of CLA s5D(1)(b), to extend to liability to a patient for negligence where a surgeon, in breach of his or her duty of reasonable care, fails prospectively to inform the patient of multiple material risks 'x', 'y' & 'z' respectively (as defined more fully below at par 20 of these submissions) that are inherent in a proposed surgical procedure, *in circumstances where, as here:*

(a) the inherent material risks 'x' & 'y' each added to the cumulative inherent material risk 'z' of the prospective surgery;

(b) the prospective inherent material risks 'x', 'y' & 'z' were each and all part of the scope and content of the respondent surgeon's duty of reasonable care to inform the appellant patient at the decision-making stage, before any surgery was consented to and carried out;

(c) one of the prospective inherent material risks, 'x', in fact came home in the sense that the surgery that was carried out by the surgeon (on 22 November 2004) was a necessary condition of the occurrence of that risk that materialised in fact and caused damage to the patient (appellant) (ss 5D(1)(a), 5E);

(d) the other prospective inherent material risks, 'y' & 'z' did not come home during the surgery (but the appellant contends they were nonetheless relevant to factual causation s 5D(3));

(e) *the risk that actually came home, 'x', **in isolation**, would not have dissuaded the patient (appellant) from undergoing surgery if the patient had been informed of inherent material risk 'x', only, before surgery*;

(f) *but if prospective inherent material risk 'x', together with the additional prospective inherent material risk, 'y', and the cumulative inherent material risk, 'z', had **all** been disclosed by the respondent surgeon to the appellant patient before surgery, those risks, **in combination and in cumulative totality,** would have dissuaded the patient (appellant) from consenting to undergo prospective surgery by the surgeon (the respondent) actually carried out on 22 November 2004; and accordingly, the surgery would not have taken place, and the risk, 'x', that actually came home would not have come home; and the patient would not have suffered damage.*

5. A number of subsidiary issues underlie the broader issue as follows:

(a) Whether, as the appellant contends, *for the purpose of applying* ss 5D(1)(a), 5D(1)(b), 5D(2), 5D(3) & 5E of the *CLA,* a failure by a medical practitioner to disclose *more than one* prospective material risk of injury inherent in a proposed surgical procedure constitutes *multiple breaches* of a *single, indivisible duty of care* to the patient?

(b) Whether, as the appellant contends, *each and all* of the non-disclosed prospective inherent material risks '*x*', 'y' & 'z' are capable of being, and were in this case, *relevant* (s 5D(3)) to the question of whether the patient would have consented to undergo the surgery, or would have refused to undergo the surgery, for the purpose of ss 5D(1)(a) & 5E of the *CLA?*

(c) Whether, as the appellant contends, each and all of the non-disclosed prospective material risks are capable of being, and were in this case, a *'necessary condition of the occurrence of the harm'* (viz, the risk that came home, ie 'x') within the meaning of the proper construction of ss 5D(1)(a) & 5E of the *CLA?*

(d) Whether, as the appellant contends, even if s 5D(1)(a) & 5D(1)(b) did not apply, in this case, nonetheless the circumstances set out in ~~special leave questions 1(a) to 1(d)~~ *paragraphs 4(a) to 4(f)* above are capable of enlivening, and were in this case, an *"exceptional case"* establishing both factual causation and scope of liability within the proper construction of ss 5D(2) & 5E of the *CLA?*

6. These issues inform the grounds of appeal in the Notice of Appeal filed on 18 October 2012.

7. Similar causation questions arise under: *Civil Law (Wrongs) Act 2002* (ACT) ss 45, 46; *Civil Liability Act 2003* (Qld) ss 11, 12; *Civil Liability Act 1936* (SA) ss 34, 35; *Civil Liability Act 2002* (Tas) ss 51, 52; Wrongs Act 1958 (Vic) ss 51, 52; *Civil Liability Act 2002* (WA) ss 5C, 5D. (There appears to be no equivalent in the Northern Territory.)

PART III: SECTION 78B, *JUDICIARY ACT 1903* (CTH)

8. The appellant is of the view that notice in accordance with section 78B of the *Judiciary Act 1903* (Cth) is not required.

PART IV: REPORTS

9. The reasons of the primary judge (Harrison J) were delivered on 9 July 2010. It is not reported. The internet citation is *Wallace v Ramsay Health Care* [2010] NSWSC 518 **("J").**

10. The reasons of the Court of Appeal were delivered on 13 April 2012 by a court consisting of Allsop P, Beazley JA and Basten JA **("CA").** Those reasons are reported as *Wallace v Kam* [2012] Aust Torts Reports 82-101, [2012] AMLC-032. The internet citation is *Wallace v Kam* [2012] NSWCA 82.

PART V: FACTS

11. The appellant was overweight (J[6]).

12. The appellant had degenerative discs at L4/L5 in his lower spine (J[29], [32]).

13. The appellant had lower back pain (J[29], [32]).

14. The lower back pain was aggravated by the appellant's excessive body weight (J[21], [28]).

15. The appellant received medical advice from the respondent to the effect that losing weight was likely to reduce his back pain and improve mobility (J[6], [20], [30]).

16. The appellant received medical advice from the respondent to the effect that if the appellant lost weight, but the back pain did not improve, back surgery was an option to reduce pain (J[21], [26], [30-31]).

17. The appellant tried to lose weight, and thought he had done so, but his pain worsened and his loss of mobility worsened (J[77], [85]).

18. The appellant's belief that he had lost weight was wrong, as his home scales were inaccurate. In fact, unknown to the appellant, he had put on weight. The respondent did not weigh the ~~applicant~~ *appellant*. The respondent believed, from informal observation, that the appellant had gained weight, but did not tell the appellant of that observation or belief (which was, in fact, objectively true) (J[20], [31], [34]).

19. The appellant's back pain and loss of mobility worsened, although the appellant wrongly believed that happened even though he had lost weight, when in fact, he had gained it (J[20], [73]).

20. There was a dispute between the appellant and the respondent as to what information and warnings the respondent provided the appellant prior to surgery. For the purposes of explanation, the appellant will designate **'x'** as the inherent material risk that came home, of bilateral femoral neuropraxia (nerve damage to the appellant's thighs, of which the appellant was not informed); **'y'** as the 5% inherent material risk of catastrophic permanent spinal cord paralysis (that did not come home, and which the appellant says he was not informed of, although that is in dispute); and **'z'** representing the cumulative inherent material risk of the proposed surgery (comprising 'x' and 'y' as well as other inherent material risks too, as summarised in the 4th Further Amended Statement of Claim at par 11 thereof, at CA Red appeal book pp 23-24; and in the list of questions for the trial judge at CA Black 284 question 2).

    (a) The appellant contended the respondent did not warn him of risks 'x', 'y' and 'z'.

(b) The respondent contended that risks 'x', 'y' and 'z' were disclosed.

(c) The primary judge found that risk 'x' was not disclosed, and that risk came home (J [51], [53], [66-69]).

(d) As risks 'y' and 'z' did not come home, the primary judge held they were not relevant (the appellant contends they were relevant), and made no findings about whether risks 'y' and 'z' were disclosed (J [95-97]).

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(e) The appellant contended that if he had realised he had been gaining weight, which may have explained his worsening back pain and loss of mobility prior to surgery, he would have deferred surgery and tried to lose weight.

21. The appellant underwent back surgery (six hour L4/L5 posterior lumbar inter-body fusion) carried out by the respondent on 22 November 2004, and sustained injury, namely, local nerve damage bilaterally to each femoral nerve in each thigh, diagnosed as *'bilateral femoral neuropraxia'*. The primary judge found that one of the inherent prospective material risks actually materialised and came
20 home, namely, risk 'x' and that risk 'x' caused incomplete paraplegia for about six months (J [51], [55], [66-69]). Those findings were not challenged in the Court of Appeal, and are not challenged in the present appeal to this Court.

22. The primary judge found as a fact that prospective inherent material risk 'x' should have been disclosed, and the failure to do so was a breach of the respondent's duty of care to the appellant (J [50]-[51]), which finding has not been challenged on appeal. The primary judge also found that that if risk 'x' had been disclosed, that risk, alone, would not have dissuaded the appellant patient from consenting to the proposed back surgery if the appellant had known of 'x'
30 (J [91], [94]). That finding was not challenged in the Court of Appeal, and is not challenged in the present appeal to this Court.

23. The appellant suffered incomplete paraplegia from the bilateral femoral neuropraxia to each thigh that materialised and came home in the initial operation of 22 November 2004, being an inherent material risk that was not disclosed in breach of the respondent's breach of duty, resulting also in the appellant undergoing a second (investigative/remedial) operation on 23 November 2004 which did not cure the appellant; and *the primary judge* found that the damage was not *de minimis* (J [1], [66]-[69]). Even on the primary
40 judge's approach, the appellant succeeded on duty, breach (with respect to failure to inform of the inherent material risk of bilateral femoral neuropraxia) and damage (the materialisation and coming home of bilateral femoral neuropraxia), although he failed on causation.

PART VI: ARGUMENT

24. Overview of judgments below: The primary judge (Harrison J) found in favour of the present respondent at *J [97]-[98].*

25. The NSW Court of Appeal, by a majority (Allsop P & Basten JA; Beazley JA dissenting) found in favour of the present respondent.

26. No common principle for finding in favour of the respondent emerges from the majority (Allsop P & Basten JA) in the Court of Appeal – there is no *ratio decidendi.*

27. No common principle emerges from the reasons of any two of the four justices (Harrison J at first instance; Allsop P & Basten JA, Beazley JA dissenting) who have now provided reasons either at first instance and in the NSW Court of Appeal:

(a) Allsop P expressly disagreed (at CA [2]) with Harrison J's analysis of the principles.

(b) Allsop P also expressly disagreed (at CA [2]) with Basten JA's approach in the majority.

(c) Allsop P said (at CA [1]) that: *"Though relatively relatively simple in its primary factual marix, this case reveals the subtleties and difficulties that underlie questions of causation. I have not found the resolution of the case easy. That difficulty stems from the fulcrum about which the question of liability turns..."*.

(d) Basten JA said (at CA [181]) that to the extent his own approach differed from Allsop P, Basten JA would be prepared to accept Allsop P's *"alternative analysis, if ~~it~~ thought to be preferable"*.

(e) Beazley JA said (at CA [74]-[75]) that: *"Section 5D is relatively recent legislation and there is at this point little High Court authority as to its scope and application and there is no authority on the application of s 5D in a case such as the present. There also appears to be scant consideration in the case law generally of the particular issue of causation that arises here....The Court was not referred to any Australian case law directly on point (even on the non-statutory test for causation)..."*. Beazley JA (at CA [105-111], [142]) regarded the reasoning in *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553 (Samuels JA & Meagher JA; Kirby P dissenting) as persuasive in support of the proposition that there may be a causal link to harm suffered, even though one or two more material risks does not eventuate. Basten JA commented (at CA [156]) that *"It is curious that the circumstances of this case have not previously arisen, so far as this Court is aware"*. However, the appellant submitted and contended, both at first instance and in the NSW Court of Appeal, that the *ratio* in *Shead v Hooley* [2000] NSWCA 362 at [1], [3], [5] per Mason P; [8] per Beazley JA; [9], [17-23], [48-52], [58], [68-70] per Davies AJA (with special leave refused *Shead v Hooley* [2001] HCATrans661 (Gleeson CJ & Callinan J)), supported the appellant's contentions; and Beazley JA in her dissenting judgment rightly noted at [116-117] that *Moyes v Lothian Health Board* [1990] SLT 444 at p 447 per Lord ~~Caplin~~ *Caplan* in *obiter* supported the appellant's contentions.

(f) Basten JA said (at CA [179]) that the scope of liability *"...is not a matter which can properly be resolved by this Court, but should properly be addressed by the High Court, or the Parliament"*.

28. Unlike previous decisions of this Court in-

(a) *Rogers v Whitaker* [1992] HCA 58, (1992) 175 CLR 479 (sympathetic ophthalmia resulting in loss of sight),

(b) *Chappel v Hart* [1998] HCA 55, (1998) 195 CLR 232 (perforated oesophagus resulting in infection & vocal cord damage), &

(c) *Rosenberg v Percival* [2001] HCA 58, (2001) 205 CLR 434 (temporomandibular joint disorder),

in which only *one* inherent material risk, in each case, was not disclosed, the present appeal arises in the context of the failure to disclose *three* inherent material risks, 'x', 'y', 'z'.

29. The appellant contends that the primary judge (at J [81], [96]) and the majority in the NSW Court of Appeal (Allsop P, at CA [23] & [29] and Basten JA, at CA [166]-167]) erred in applying, to a situation of multiple undisclosed risks, in the present case, the principle previously enunciated by Gummow J in ~~*Chappel v Hart* [1998] HCA 55, (1998) 195 CLR 232~~ *Rosenberg v Percival [2001] HCA 18, (2001) 205 CLR 434* at 453[60-61], 461[86], which had been enunciated by Gummow J in the context of a single undisclosed inherent material risk. The appellant contends that the primary judge and Court of Appeal majority should have held (as per Beazley JA in dissent at CA [99], [138] –[142], [151]) that the aforesaid principle enunciated by Gummow J should be confined to a situation where there is only one undisclosed inherent material risk, and should not be applied in the present case of multiple undisclosed inherent material risks, as in the present case.

30. Facts relevant to factual causation (CLA s 5D(3)): The primary judge made no findings, one way or the other, on whether risk, 'y' (spinal cord damage) and/or risk 'z' (cumulative risk of 'x' & 'y') were material risks and were not disclosed by the respondent to the ~~applicant~~ *appellant* (J[95]-[96]). The primary judge held that additional risk was irrelevant to factual causation (J: [81], [96])), which the appellant disputes *(CLA* s 5D(3)). The appellant did *ask* the primary judge to find that it was relevant to factual causation, and that if so informed the appellant would have refused to undergo the surgery of 22.11.2004. The Court of Appeal did not resolve that issue of disputed fact, but two of their Honours (Allsop P, in the majority, and Beazley JA, in dissent) decided the legal issues in the appeal *by a 'demurrer' type of analysis by assuming, in favour of the appellant's case at its highest, that* at any retrial it would be open to the trial judge to find as facts: (a) that the risk 'y' (spinal nerve damage) was ~~an~~ *a* material risk and had not been disclosed by the respondent to the appellant and was not known by the appellant before agreeing to undergo the respondent's surgery, and (b) that if

both risks 'x' and 'y' been disclosed, the patient (appellant) would have been dissuaded from undergoing the respondent's proposed surgery, and would not have undergone it on 22 November 2004, and factual causation would have been established. (See CA: Allsop P [11], [22]; Beazley JA [67]-[68], [136].) Basten JA (while agreeing with Allsop P in the disposition of the appeal, but disagreeing in the reasons), agreed with the primary judge that the issue of whether or not the appellant would have refused surgery, if informed of the additional risk was not relevant (CA: at [180]).

31. The primary judge found that the only risk that was relevant in applying s 5D(1)(a) of the *CLA* was the risk that, with hindsight, came home, viz risk 'x' (local nerve damage) (J [95]-[96]). Basten JA agreed (at CA [164], [170]-[176]) with the primary judge on this. Allsop P & Beazley JA disagreed with the primary judge on this. Allsop P (at CA [8]-[19] *passim)*, & Beazley JA (at CA [136]-[151] *passim)* held that risk 'y' was also relevant, in conjunction with risk 'x', to the application of ss 5D(1)(a) & 5E. The appellant contended, and contends, that risks x, y & z are all relevant *(CLA* s 5D(3)) to the application of *CLA* ss 5D(1)(a) & 5E.

32. The primary judge (J [95]-[97])) and the majority in the NSW Court of Appeal (CA: Allsop P at [29]-[32] & Basten JA at [169]-[180] *passim)* held that the non-disclosure of risk 'y' (spinal cord damage) did not establish scope of liability in favour of the appellant pursuant to s 5D(1)(b) of the *CLA.* Beazley JA, in dissent, held (at [146]-[154]) that s 5D(1)(b) was enlivened. The appellant agrees with and supports Beazley JA's approach.

33. The primary judge held (J [96]) that prospective risk 'y', as it did not materialise and did not come home, was not relevant (J[81], [95]-[96], to whether the ~~applicant~~ *appellant* would have refused to consent to the proposed surgery pursuant to ss 5D(1)(a) & 5E of the *CLA.* Basten JA (CA [180]) agreed with the primary judge. Allsop P (CA [8]-[9], [11], [14], [18], [21]-[22], [31]) and Beazley JA each disagreed with ~~the~~ both the primary judge and with Basten JA on the issue of relevance, and held that the assumed non-disclosure of risk 'y' as well as the proven non-disclosure of risk 'x' were relevant to whether the appellant would have refused to consent to the proposed surgery pursuant to ss 5D(1)(a), 5D(3) & 5E of the *CLA.* The appellant agrees it was relevant to ss 5D(1)(a) & 5E. Allsop P (CA [11]) & Beazley JA (CA [152]-[153], [155]) also held that as the s 5E issue depended on credit issues, for which there were no findings by the primary judge, that factual dispute could only be determined at any retrial.

34. Allsop P held (CA [8]-[11]) held that, on the proper construction of the *CLA,* that the factual inquiry required by ss 5D(1)(a) & 5E should be strictly compartmentalised from the normative inquiry required by s 5D(1)(b). Beazley JA (CA [147]) and Basten JA (CA [164], [170]-[171], [181]) differed from Allsop P in holding that there was an overlap between the requirements to be determined under ss 5D(1)(a) & 5D(1)(b). This was a difference in the approach of Allsop P (CA [2]) & Basten JA (CA [181]) who agreed in the disposition but not the reasons (see CA [2] & [181]).

35. Allsop P held that although risks 'x' and 'y' were sufficiently related (CA[8]-[9], [11], [14]), such that their non-disclosure did enliven ss 5D(1)(a) and 5E, the said risks were insufficiently related (CA [15]-[21], [27]-[28], [31) to engage s 5D(1)(b). Basten JA (CA [170]-[172]) went further and held, like the trial judge, that 'x' and 'y' ~~the~~ were insufficiently related to engage ss 5(1)(a) or 5(1)(b). Beazley JA in dissent held (CA [147]-[154]) that risks 'x' and 'y' were sufficiently related to engage ss 5D(1)(a), 5D(1)(b) & 5E. The appellant agrees with Beazley JA on this issue. Although Allsop P (CA [11]) and Beazley JA (CA [150], [152]) dealt with the causation issues on the assumed basis that the factual inquiry (if undertaken) would have been resolved in favour of the ~~applicant~~ *appellant*, Basten JA disagreed that inquiry was relevant to factual causation (CA [180]). The appellant contends all the inherent material risks of the proposed surgery were relevant to his decision-making and factual causation. This is developed below in this argument at pars 38-40 below *("Interrelationship of material inherent risks").*

36. Prospective vs retrospective considerations: The appellant contends that the primary judge's approach, and that of each of the majority justices in the NSW Court of Appeal (Allsop P and Basten JA respectively), errs in diluting a surgeon's prospective obligations (as to the reasonable scope and content of a doctor's duty of care) by retrospective findings (as to breach of duty, causation and damage), contrary to the mode of analysis required by *Vairy v Wyong Shire Council* [2005] HCA 62, (2005) 223 CLR 422 at 427[7] per Gleeson CJ & Kirby J, 439[49] per McHugh J, 443[61] per Gummow J, 460[122]-463[129], 467[150] *passim* per Hayne J, 480[213]-[214] per Heydon & Callinan JJ; *Mulligan v Coffs Harbour City Council* [2005] HCA 63, (2005) 223 CLR 486 at 495[22] per McHugh J, 401[50]-402[50] per Hayne J. Analysis of relevance (s 5D(3)), factual causation (s 5D(1)(a)) and the *"appropriate"* scope of liability (ss 5D(1)(b)) should be applied so as to reinforce the scope and content of the prospective duty of care of a medical practitioner, including a surgeon such as the ~~appellant~~ *respondent*: *"Otherwise the surgeon's important duty would in many cases be drained of content" (Chester v Afsar* [2004] UKHL 41, [2005] 1 AC 134 per Lord Walker at 166G [101]). The overall duty of a surgeon to his or her patient is *"a single comprehensive duty": Rogers v Whitaker* [1992] HCA 58, (1992) 175 CLR 479 ~~at p 490.9~~ *("Rogers")* in the plurality judgment per Mason CJ, Brennan, Dawson, Toohey & McHugh JJ at p 489.2.

37. Scope & content of duty of care: The appellant is entitled, at the prospective decision-making stage, to be informed of the material inherent risks of proposed surgery; a material risk is a risk that a reasonable person in the patient's position is likely to have attached significance to, or a risk that the medical practitioner would reasonably know the particular patient, if warned, is likely to attach significance to: *Rogers* in the plurality judgment per Mason CJ, Brennan, Dawson, Toohey & McHugh JJ at p 490.8. The *CLA* structurally and textually preserves this principle as to the general scope and content of a doctor's duty of care to give adequate information and warnings before prospective treatment, see ss 5H(2)(c), 5I(3) & 5P. The rationale ~~it~~ *is* to protect, facilitate and further the patient's interest in decision-making, see *Rogers* in the plurality reasons at: p 487.9 approving the statement in *F v R* (1983) 33 SASR at p 193 of giving

weight to *"the paramount consideration that a person is entitled to make his own decisions about his own life"*; and also at p 489.6: *"But the choice is, in reality, meaningless unless it is made on the basis of relevant information and advice. Because the choice to be made calls for a decision by the patient on the information known to the medical practitioner but not to the patient, it would be illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession."* The scope and content of the surgeon's (respondent's) duty is to provide information, not merely warnings, to the patient (appellant).

38. Interrelationship of material inherent risks: The ~~applicant~~ *appellant* contends that Allsop P (CA [27]-[28]) and Basten JA (CA [170]-[172) did not correctly state the ~~applicant's~~ *appellant's* contention with regard to risk 'z', as their Honours did not address *cumulative* risk. Risks 'x' and 'y' both added to and increased the overall cumulative risk, 'z', that the ~~applicant~~ *appellant* contends was relevant to his prospective decision-making, as was submitted by the ~~applicant~~ *appellant* both at 1st instance and in the NSW Court of Appeal. The appellant's case at 1st instance before the primary judge had relied inter alia not only on the separate 5% inherent material risk of catastrophic paraplegia, but also on the *"the total impact of the risk this man was facing in undergoing this surgery"* (at Tp 224 lines 20-25 in CA Black appeal book p 224). The case was conducted that way also in the argument of the appeal (CA transcript, at Tpp 20 lines 10-20; 22 line 50; 23 lines 5, 10; 28 lines 1, 10-15, 28-30; 55 lines 37, 49; 58 lines 1, 8, 9, 10, 43).

39. The operation was either to be accepted or refused **as a whole.** The inherent material risks could not be segmented. It was not like a car purchase where a patient has a choice of selecting additional safety features – all risks were inherent in the operation. In that regard, the back surgery carried out by the respondent on the appellant differs from some other forms of surgery, such as exploratory or diagnostic procedures. The notion of *"medically related"* risks and *"distinct"* risks at pars CA [21] & [31] of Allsop P's reasoning and at CA [172] of Basten JA's reasoning requires further analysis and deconstruction. The appellant submitted below, and contends, that the risks **were** medically related in that they were inherent in the same operation. Even the President accepted that at CA [14] *("The harm here **did not occur** by the acts or omissions of a third party, or by a misapplied anaesthetic, or by some random act or circumstance of the day distinct from the duty to warn")* & CA [21] ("...should have been disclosed to Mr Wallace **in one body of disclosure"**) (counsel's bolding **added**). The appellant contends that a different example which illustrates this factual distinction would be an exploratory operation, such as a laparotomy, where, depending on the intra-operative findings, while the patient is still unconscious, a decision may have to be made (in line with the patient's pre-operative decision) as to whether to stop the operation, and wake the patient up for further instructions, or to extend the operation while the patient remains unconscious eg, by removing pathology that is detected during the operation. If the operation is extended, separate and distinct risks may arise. In the present appeal, the operation that was performed was not so extended. Allsop P was, with respect, wrong to conclude (at CA [31]) that the risks in this

operation were "...not said to be related in any way". The appellant contended the risks were inter-related and inter-connected (see CA [30] of Allsop's reasons) as being inherent in the same operation. The inter-connections are correctly summarised by Beazley JA (dissenting) at CA [65]-[68]. The appellant should reasonably have ~~been~~ been informed by the respondent pre-operatively not only about the separate inherent risks, but also ~~with~~ *about* the cumulative total risk, inherent in the proposed surgery.

40. An additional reason why cumulative risk should be disclosed *is* that specific risks can be categorised in different ways (see J [91]). However, the appellant submits that *the* exposition by Lord Caplan in *Moyes v Lothian Health Board* [1990] SLT 445 (Outer House) at p 447G-K right hand column should be adopted: *"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 that can occur but rather in the nature and extent of the risk....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....A patient might well with perfect reason consider that if there were five risk factors rather than one then the chance of one or other of those factors materialising was much greater....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 that the patient had been warned about and was prepared to accept. If he had been given due warning he would not have risked suffering adverse complication from that particular operation and the fact that such complication occurred is causal connection enough to found a claim against the doctor."* The appellant contended both before the primary judge (see CA Black 306-326) and also before the Court of Appeal (CA transcript 19.9.11, at Tp 1 lines 30-40; Tp 19 line 19 to Tp 21 line 5; Tp 23 lines 15-30); & CA Black that this mode of analysis should be adopted, and was the true *ratio* whereby causation was established in favour of the patient against the surgeon's non-disclosure of various material and cumulative material inherent risks (of stomach surgery) in *Shead v Hooley* [2000] NSWCA 362 (Mason P, Beazley JA & Davies AJA), from which special leave was refused in *Shead v Hooley* [2001] HCATrans 661 (Gleeson CJ & Callinan J).

41. Giving effect to the scope and content of the duty of care: The approaches adopted by the primary judge (Harrison J) and the majority in the NSW Court of Appeal (Allsop P & Basten JA) deprive a patient, in this instance the appellant, of real and effective opportunity to make an informed decision as to whether or not to accept inherent material risk of prospective treatment. The effect of the approaches of the primary judge and the CA majority is to introduce a form of *'Russian Roulette'* into doctor-patient disclosure and decision-making, whereby a Court determines, after any breach has already occurred and after any risk has retrospectively materialised, whether the doctor's prospective duty, which was not discharged, should be excused, with hindsight. By contrast, Beazley JA's dissenting approach, supported by the appellant, is consistent with the ~~notion~~ *content* of a doctor's *prospective* duty to inform, and *with characterising* his or her breaches of duty (by failure to disclose all *'contributing'* inherent material risks to a patient's informed decision-making), as *being* breaches of duty that materially contribute in a

factually causal way to the occurrence of the harm, as explained in *Strong v Woolworths Ltd* [2012] HCA 5, (2012) 86 ALJR 267 at [20] in the plurality judgment of French CJ, Gummow, Crennan & Bell JJ, namely inherent material risks 'x','y' & 'z' are each ~~and~~ *material* information that should be disclosed to the patient, breach of which is factually causal: "*However, there may be more than one set of conditions necessary for the occurrence of a particular harm and it follows that a defendant's negligent act or omissions which is necessary to complete a set of conditions that are jointly sufficient to account for the occurrence of the harm will meet the test of factual causation within s 5D(1)(a).* ***In such a case, the defendant's conduct may be described as contributing to the occurrence of the harm.***" *(Present counsel's emphasis)*

42. Implementing the content and scope of the duty of care to inform of prospective material inherent risks is an *'exceptional case'*: If (contrary to the ~~applicant's~~ *appellant's* contentions) ss 5D(1)(a) and/or 5D(1)(b) are not otherwise applicable, the ~~applicant~~ *appellant* nonetheless contended, and contends, that the *'exceptional case'* provision in s 5D(2) of the *CLA* should be enlivened to establish both factual causation and scope of liability for risks 'x', 'y' and 'z'. This contention was pressed by the appellant (CA transcript of 19.11.12, Tpp 27-31), although it was not the subject of a specific finding. This engagement of s 5D(2) would preserve the prospective scope and content of a doctor's duty of care to inform patients of inherent material risks, in a meaningful way, that is not drained of content and emasculated by retrospective determinations of the kind made here by the primary judge and the CA majority in the NSWCA, see: *Chester v Afshar* [2004] UKHL 41, [2005] AC 134 (HL) – summarised in the headnote, as extracted at CA [113] of Beazley JA's reasons. The provisions of CLA ss 5H(2)(c), 5I(3) & 5P indicate, textually and structurally, in terms of the *CLA*, the legislature's intentions that a medical practitioner's professional duty of care to inform a patient of inherent material risks of personal injury or death in a doctor-patient relationship has some special aspects compared to other modes of negligence.

43. The appellant contends that the reasons and judgment of Beazley JA in Her Honour's dissenting reasons and judgment were correct and should be adopted.

PART VII: LEGISLATION

44. The appeal concerns the proper construction and application particularly of the causation provisions of the *Civil Liability Act 2002* (NSW) ***("CLA")***, sections 5D and 5E in the context of sections 3, 5, 5A, 5B, 5C, 5H, 50 and 5P of that Act.

45. Other than section 5E, the provisions have not been amended between the time the appellant's cause of action against the respondent arose (22 November 2004) and the time of making of these submissions. Section 5E was amended with effect from 6 July 2012.

46. These provisions (including the provisions amended section 5E) are set out in full in Annexure "A" to these submissions.

PART VIII: ORDERS SOUGHT

47. The appellant seeks the orders claimed at page 4 of the Notice of Appeal filed on 18 October 2012 as follows:

(1) Appeal allowed;

(2) Set aside the verdict for the respondent, and the judgment and costs order made in favour of the respondent, by the New South Wales Court of Appeal *(Wallace v Kam* [2012] NSWCA 82 at [34], [180]);

(3) Set aside the verdict for the respondent, and the judgment and costs order made in favour of the respondent, by the trial judge *(Wallace v Ramsay Health Care* [2010] NSWSC 518 at [98]).

(4) Remit the matter for rehearing on liability and causation in the Supreme Court of New South Wales at first instance, noting that quantum is agreed;

(5) Order that the costs of the original trial be in the determination of the judge on the retrial (or abide the outcome of the retrial);

(6) Order the respondent to pay the appellant's costs in the New South Wales Court of Appeal and in the High Court of Australia in any event.

PART IX: ORAL ARGUMENT

48. The appellant estimates that his oral argument will require about two hours.

Dated 28 October 2012

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COUNSEL FOR THE APPELLANT

IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY **No. S307 of 2012**

BETWEEN: **IAN WALLACE**

Appellant

and **DR ANDREW KAM**

Respondent

ANNEXURE "A" TO THE APPELLANT'S SUBMISSIONS

10

1. This Annexure sets out the terms of sections 3, 5, 5A, 5B, 5C, 5D, 5E, 5H, 5O, and 5P of the *Civil Liability Act 2002* (NSW).

2. Section 3 has not been amended since the act was first enacted in 2002.

3 Definitions

In this Act:

court includes tribunal, and in relation to a claim for damages means any court or tribunal by or before which the claim falls to be determined.

damages includes any form of monetary compensation but does not include:

(a) any payment authorised or required to be made under a State industrial
20 instrument, or

(b) any payment authorised or required to be made under a superannuation scheme, or

(c) any payment authorised or required to be made under an insurance policy in respect of the death of, injury to or damage suffered by the person insured under the policy.

non-economic loss means any one or more of the following:

(a) pain and suffering,

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(b) loss of amenities of life,

(c) loss of expectation of life,

(d) disfigurement.

3. Sections 5, 5A, 5B, 5C, 5D, 5E, 5H, 5O and 5P are contained within Part 1A of the Act entitled "Negligence". Sections 5, 5A, 5B, 5C, 5H, 5O and 5P have stood in the same form as when they were inserted into the Act with effect from 6 December 2002.

5 Definitions

In this Part:

harm means harm of any kind, including the following:

(a) personal injury or death,

(b) damage to property,

(c) economic loss.

negligence means failure to exercise reasonable care and skill.

personal injury includes:

(a) pre-natal injury, and

(b) impairment of a persons physical or mental condition, and

(c) disease.

5A Application of Part

(1) This Part applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise.

(2) This Part does not apply to civil liability that is excluded from the operation of this Part by section 3B.

5B General principles

(1) A person is not negligent in failing to take precautions against a risk of harm unless:

(a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and

(b) the risk was not insignificant, and

(c) in the circumstances, a reasonable person in the persons position would have taken those precautions.

(2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):

(a) the probability that the harm would occur if care were not taken,

(b) the likely seriousness of the harm,

(c) the burden of taking precautions to avoid the risk of harm,

(d) the social utility of the activity that creates the risk of harm.

5C Other principles

In proceedings relating to liability for negligence:

(a) the burden of taking precautions to avoid a risk of harm includes the burden of taking precautions to avoid similar risks of harm for which the person may be responsible, and

(b) the fact that a risk of harm could have been avoided by doing something in a different way does not of itself give rise to or affect liability for the way in which the thing was done, and

(c) the subsequent taking of action that would (had the action been taken earlier) have avoided a risk of harm does not of itself give rise to or affect liability in respect of the risk and does not of itself constitute an admission of liability in connection with the risk.

4 Section 5D was in the following form since it came into force on 6 December 2002 and was subsequently amended with effect from 22 July 2003.

5D General principles

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

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

(b) that it is appropriate for the scope of the negligent persons 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.

5. It was amended by the Statute Law (Miscellaneous Provisions) Act 2003 (No. 40 of 2003) with effect on 22 July 2003. The amendment corrected a spelling error.

5D General principles

Omit "occurance" from section 5D(2). Insert instead "occurrence".

6. Section 5E was in the following form since it came into force on 6 December 2002 and was subsequently amended with effect from 6 July 2012.

5E Onus of proof

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.

7. It was amended by the Statute Law (Miscellaneous Provisions) Act 2012 (No. 42 of 2012, Schedule 2.7 with effect on 6 July 2012.

5E Onus of proof

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

8. Sections 5H, 5O and 5P have stood in the same form as when they were inserted into the Act with effect from 6 December 2002.

5H No proactive duty to warn of obvious risk

(1) A person ("the defendant") does not owe a duty of care to another person ("the plaintiff") to warn of an obvious risk to the plaintiff.

(2) This section does not apply if:

(a) the plaintiff has requested advice or information about the risk from the defendant, or

(b) the defendant is required by a written law to warn the plaintiff of the risk, or

(c) the defendant is a professional and the risk is a risk of the death of or personal injury to the plaintiff from the provision of a professional service by the defendant.

(3) Subsection (2) does not give rise to a presumption of a duty to warn of a risk in the circumstances referred to in that subsection.

5O Standard of care for professionals

(1) A person practicing a profession ("a professional") does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinion being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

5P Division does not apply to duty to warn of risk

This Division does not apply to liability arising in connection with the giving of (or the failure to give) a warning, advice or other information in respect of the risk of death of or injury to a person associated with the provision by a professional of a professional service.