HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND KIEFEL JJ

ROADS AND TRAFFIC AUTHORITY APPELLANT

AND

GRANT ROYAL & ANOR RESPONDENTS

Roads and Traffic Authority v Royal
[2008] HCA 19
14 May 2008
S517/2007

ORDER

1. Appeal allowed with costs.

2. Set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 4 April 2007 as varied by the further order made by consent on 1 August 2007, and in their place order that the appeal to that Court be dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J E Maconachie QC with T F McKenzie for the appellant (instructed by McCabe Terrill Lawyers)

S J Harben SC with S B Lowe for the first respondent (instructed by Rankin & Nathan Lawyers)

Submitting appearance for the second respondent

CATCHWORDS

Roads and Traffic Authority v Royal

Torts – Causation – Motor vehicle accident – Whether design of intersection a cause of the accident.

Negligence – Causation of damage at common law – Causation in fact – Whether multiple causes of damage exist – Whether highway construction and design a material contribution to collision – Whether foreseeable risk of harm to persons such as the plaintiff – "But for" test in causation – Considerations relevant to deciding contested questions of causation – Whether correct approach taken to question of causation by Court of Appeal in reversing conclusion of primary judge – Whether existence of *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) providing for contribution by tortfeasors relevant to causation in fact.

Appeal – Advantages enjoyed by primary judge in deciding contested question of causation of motor vehicle collision – Decision on question of fact – Whether Court of Appeal erred in giving effect to its own conclusion about causation – Whether Court of Appeal fulfilling duty to conduct an appeal on disputed questions of fact by reaching its own independent conclusion on the facts – Whether advantages of primary judge ought to have restrained Court of Appeal from substituting its own conclusion – Whether Court of Appeal applied incorrect legal test for deciding question of causation of motor vehicle collision.

Words and phrases – "a result of a tort" – "the extent of responsibility for the damage".

Law Reform (Miscellaneous Provisions) Act 1946 (NSW), s 5.
Supreme Court Act 1970 (NSW), s 75A.

GUMMOW, HAYNE AND HEYDON JJ.

The background

1 At about 8.40am on Monday 12 March 2001, Grant Royal, the first defendant and first respondent in this Court ("the defendant") was driving north along the Pacific Highway in a rural area near Wauchope. His car struck a car driven by George Smurthwaite, the plaintiff and second respondent ("the plaintiff"). The weather was fine. The light was good. Although the road was slightly damp in places from overnight rain, that played no role in the collision. The plaintiff was driving from the west to the east along a road which intersected with the Pacific Highway. To the west of the intersection it was called "Bago Road", and to the east it was called "Boyds Road".

2 The plaintiff brought proceedings in negligence against the defendant and the Roads and Traffic Authority of NSW ("the appellant"). Both the defendant and the appellant denied negligence and alleged contributory negligence by the plaintiff. They also cross-claimed against each other.

3 The trial was conducted in the District Court of New South Wales (Phelan DCJ). The trial judge found that the "primary cause" of the collision was the defendant's breach of his duty of care to the plaintiff. He also found that the damages payable to the plaintiff should be reduced by one-third on account of the contributory negligence of the plaintiff. He gave judgment for the plaintiff for $871,019.50. He appeared to find that the appellant was not in breach of its duty to the plaintiff. Accordingly he said nothing about the causative role of the appellant, and dismissed the defendant's cross-claim against it.

4 The defendant appealed to the Court of Appeal, Supreme Court of New South Wales (Santow, Tobias and Basten JJA). The defendant's appeal against the trial judge's orders in favour of the plaintiff, apart from complaints about damages and costs orders, contended that the plaintiff was 80 percent responsible for the collision. This aspect of the defendant's appeal was unanimously rejected. However, the Court of Appeal by majority (Basten JA dissenting) allowed the defendant's appeal against the trial judge's dismissal of the defendant's cross-claim against the appellant. The majority considered that the appellant was in breach of its duty of care: it knew that there had been crashes at the intersection, it should have moved a Stop sign so as to improve the vision of drivers in the position of the plaintiff, and instead of the existing cross-intersection constructed in 1993, it should have constructed "a staggered T-intersection and not a cross-intersection which was pregnant with avoidable

risk"[1]. After discussing causation questions in a manner complained of by the appellant in the present appeal, the majority concluded that the appellant should bear one-third of the judgment ordered against the defendant. Basten JA, on the other hand, considered that the issue of breach of duty could not be dealt with until one had identified what the cause of the collision was[2]. While he displayed some scepticism about the contention that the appellant was in breach of duty[3], he did not deal with the question of the appellant's breach of duty beyond saying: "whatever the faults of the design of the intersection, they did not materially contribute to the accident in any relevant sense"[4]. He found the cause of the collision to lie in the negligent driving of the defendant and the plaintiff.

5 The appellant was not given special leave to challenge the majority's conclusion that it was in breach of duty. The grant of special leave was limited to the question whether that breach caused the plaintiff's loss. The plaintiff, whose interests will not be affected by the outcome of the appeal either way, was joined in the appeal as second respondent, but filed a submitting appearance.

The division in the Court of Appeal

6 Basten JA described the background of the collision as follows. For drivers proceeding over the cross-intersection from west to east, the cross-intersection was controlled by a Stop sign. At that point, the Pacific Highway had two lanes for through traffic proceeding north, a left turn lane for traffic turning into Bago Road, and a right turn lane for traffic turning off the highway to the east down Boyds Road. The plaintiff stopped his vehicle at the Stop sign on Bago Road, and then proceeded to cross. At that moment there were four vehicles on the highway in the vicinity of the cross-intersection. Two were in the left-hand turn lane turning into Bago Road. A third was a vehicle driven by the defendant. The fourth was a Telstra van, which was a little

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1 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [92]. By the expression "staggered T-intersection" the majority meant a configuration pursuant to which drivers coming from Bago Road from west to east and wishing to cross the Pacific Highway in order to get to Boyds Road would make a left-hand turn into the left lane of the northbound carriageway, move across it to the right, and then make a right-hand turn some distance to the north so as to reach a new road connecting to the southbound carriageway.

2 *Royal v Smurthwaite* (2007) 47 MVR 401 at 429-430 [140].

3 *Royal v Smurthwaite* (2007) 47 MVR 401 at 424 [122].

4 *Royal v Smurthwaite* (2007) 47 MVR 401 at 434 [155].

distance behind the defendant's vehicle, and was driven by Mr Anthony Relf. The plaintiff crossed the two through lanes, and reached the right-hand turn lane before being hit by the defendant's vehicle.

7 Basten JA described the cross-intersection as being set in a State forest, on the crest of a hill. For drivers coming from the west on Bago Road, there was a "reasonably steep inclination"[5] approaching the Stop sign. For drivers going north on the Pacific Highway, the inclination was gentle. Although there was a dip in the Pacific Highway to the south of the cross-intersection, which meant that a driver at the Bago Road Stop sign could not see the *road surface* at all points, there was no interference with the vision of *traffic* approaching along the Pacific Highway. However, the Pacific Highway curved to the east on either side of the cross-intersection. As the plaintiff moved along Bago Road from the west and looked to his right, the Pacific Highway curved away from his side of the road and he was required to look across a grassy shoulder in order to see traffic approaching from a distance of more than 200 metres. His sight line of traffic up to 280 metres from the intersection was "reasonably unrestricted"[6]. (There was, however, according to the Court of Appeal majority, a visibility problem, to be discussed below[7].) The speed limit on the Pacific Highway was 100 kilometres per hour, but there was an advisory speed sign 300 metres before the cross-intersection showing 85 kilometres per hour as the appropriate speed for negotiating the bend. The right-hand lane on the Pacific Highway for traffic wishing to go down Boyds Road in an easterly direction commenced 210 metres before the cross-intersection. The left turn lane for traffic leaving the Pacific Highway and travelling to the west along Bago Road commenced 150 metres before the intersection. Each of the lanes on the Pacific Highway was marked with arrows. Thus each of the turn lanes had arrows indicating that they were for turning traffic only and the two through lanes had arrows indicating that they were through lanes only.

8 Basten JA then turned to the conduct of the plaintiff and the defendant. He found that although the plaintiff was unable to recall the events leading up to the collision because of his injuries, it was clear that he had stopped at the Stop sign. Basten JA inferred from the plaintiff's familiarity with the cross-intersection that he looked to the south, in which case he would have seen the defendant's vehicle. He found that if the plaintiff had accelerated across the

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5 *Royal v Smurthwaite* (2007) 47 MVR 401 at 423 [112].

6 *Royal v Smurthwaite* (2007) 47 MVR 401 at 423 [113].

7 At [24-[25].

intersection in a normal manner, he would have taken no more than 3.5 seconds to cross the Pacific Highway.

9 The defendant was travelling with his vehicle set on cruise control for fuel economy reasons at 105 kilometres per hour, and, like the plaintiff, had travelled the road on many occasions. He accepted that he was about 150 metres away from the intersection when he saw the plaintiff begin to move off.

10 Basten JA then said[8]:

> "Accepting the defendant's evidence that he was travelling at 105 km per hour when he saw the plaintiff move off from the stop sign, that speed equated with 29.2 m per second so that, even if the plaintiff had taken 4 seconds to reach the right-hand turn lane across the highway, which seems generous, and assuming that the defendant had remained in the through lanes, he would have been able to travel 116 m before colliding with the plaintiff. Two inferences can be drawn from this fact. The first is that if, as the trial judge accepted, he was 150 m back when he saw the plaintiff move off, he had ample time to slow down sufficiently to avoid the plaintiff's vehicle. The other inference is that he was well within view of the plaintiff when the plaintiff commenced to cross the highway, but was really too close for the plaintiff to safely undertake the crossing at that stage. If the defendant was in the right-hand lane, there is no reasonable explanation for the failure of the plaintiff to see him, if that had occurred. In my view the probable explanation for the plaintiff's conduct is that he observed the defendant in the right-hand turn lane and, without realising his speed, or that he was not slowing down, assumed that he intended to turn right. To do that he would have had to dramatically reduce his speed before reaching the Boyd[s] Rd turning and the plaintiff would no doubt have crossed the highway comfortably in front of him. It is possible that the plaintiff had seen him indicate when he moved into the right-hand lane, and thought he was indicating an intention to turn right."

Basten JA continued[9]:

> "The inference that he went into the right-hand turn lane near its commencement is consistent with the evidence of Mr Relf, is consistent with his view that he could use a right-hand lane as an overtaking lane

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8 *Royal v Smurthwaite* (2007) 47 MVR 401 at 433 [153].

9 *Royal v Smurthwaite* (2007) 47 MVR 401 at 433-434 [154].

> even though he was travelling through the intersection and was consistent with his intention to keep on cruise control at 105 km per hour through a curve which had an 85 km per hour advisory speed sign. In other words, his action in seeking 'to cut the corner' probably [misled] the plaintiff. The plaintiff was undoubtedly partly responsible for the accident, in failing to keep a better lookout and observing that the defendant was not reducing his speed. On the other hand, the defendant had every opportunity to avoid the plaintiff, but took no evasive action until it was far too late. As the trial judge found, he must bear the bulk of the responsibility for the accident."

Basten JA concluded that any faults in the design of the cross-intersection did not materially contribute to the accident. The cause was error by drivers who knew the cross-intersection well[10].

11 Basten JA dealt with the defendant's criticisms of the trial judge thus[11]:

> "The trial judge was criticised for dealing with the liability of the [appellant] in cursory terms, without giving due consideration to the evidence of the experts. For the reasons set out above, in my view his Honour came to the correct conclusion. The opinions of the experts were of little relevance in making that assessment. The conclusion was primarily based upon the particular circumstances of the accident and the errors on the part of the plaintiff and the defendant. Even if I held doubts as to his Honour's assessment of these matters (which I do not) I would have been reluctant to interfere given that his Honour had a view of the intersection, and was able to make an assessment of the defendant, in particular in the witness box, which may have allowed him to form a view as to his explanations of his own conduct which may not be readily inferred from the somewhat surprising attitudes revealed by parts of the cross-examination. The appeal with respect to issues of liability should be dismissed."

12 Basten JA's conclusions about the behaviour of the drivers before the collision coincide with those of the trial judge, who relied upon the evidence of two independent eyewitnesses, Mr Relf and Mr Hubbard. Basten JA's conclusions also coincide with the reasoning of the majority in the part of their reasons for judgment in which they declined to interfere with the trial judge's apportionment for contributory negligence.

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10 *Royal v Smurthwaite* (2007) 47 MVR 401 at 434 [155].

11 *Royal v Smurthwaite* (2007) 47 MVR 401 at 434 [156].

13 The majority's approach to causation, however, differed from that of Basten JA.

14 After finding that the appellant was in breach of duty, the majority said[12]:

> "The remaining question is whether the supervening conduct of [the defendant] represented an *intervening cause that could be said to have broken the chain* of causation from the [appellant's] original negligent design of the crossing so as to obviate any liability on its part in causal terms."

They said[13]:

> "[The appellant] could readily foresee that accidents of the very kind that here occurred were highly probable. The accidents statistics at cross-intersections in rural areas should have brought home to the [appellant] that inattention, even negligence, of the kind manifested by [the defendant] as well as the contributory negligence of [the plaintiff] were features of a crossing of this kind, avoidable by the adoption of a different design which would have been reasonable in the circumstances. There is considerable authority for the proposition that where an act was reasonably foreseeable by the initial tortfeasor, *the chain is not broken* when that action brings about injury, so that the initial tortfeasor remains responsible for the consequences of the intervening act ... It follows that the initial tortfeasor remains responsible for the consequences *to the extent it has materially contributed to them*."

They also said[14]:

> "Moreover, where an intervening intentional act is the very type of act against which the defendant, being the [appellant] here, was obliged to take precautions, such an act *does not break the chain of causation* for that reason also".

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12 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [92] (emphasis added).

13 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [94] (emphasis added).

14 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [95] (emphasis added).

They then quoted the following passage from Gaudron J's reasons for judgment in *Bennett v Minister of Community Welfare*[15]:

> "[T]he question whether some supervening event *broke a chain of causation* which began with or which relates back to an omission or a failure to perform a positive duty, is one that can only be answered by having regard to what would or would not have happened if the duty had been performed. It is only by undertaking that exercise that it is possible to say whether the breach was 'still operating', or, continued to be causally significant when the harm was suffered."

15 The majority then applied Gaudron J's test in the following passage[16]:

> "[A]ssuming the duty was performed, one is required to hypothesise that a staggered T-intersection had been designed rather than the cross-intersection. This is in order to answer the question, what would have or would not have happened in that event? If the accident would have happened anyway, the appellant must lose. When one relates that here to the very different circumstances so hypothesised, it is impossible to answer with an affirmative the question, would the accident have occurred in any event. We may start again by assuming the existence of a driver like [the defendant], his cruise-control engaged at a speed of around 105 km per hour who insists on his right-of-way while cutting the corner by placing himself in the right-hand lane. But then the facts to be hypothesised are of a staggered T-intersection with [the plaintiff] gradually entering the left-hand lane, doing so well to the left of [the defendant] whose supervening conduct is in question. It is not possible to assume that the vehicles so positioned would then have collided. In a 'but for' sense, the defective design therefore materially contributed to the accident."

16 The majority expressed their conclusion as follows[17]:

> "[T]he supervening conduct of [the defendant] so understood did not render the antecedent breach of duty of the [appellant] as *no longer operative*. Nor did it cause that breach to cease to be *causally significant so as to break the chain of causation*."

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15 (1992) 176 CLR 408 at 421 (emphasis added; footnote omitted); [1992] HCA 27.

16 *Royal v Smurthwaite* (2007) 47 MVR 401 at 420 [97].

17 *Royal v Smurthwaite* (2007) 47 MVR 401 at 420 [98] (emphasis added).

The appellant's arguments

17 The appellant advanced two submissions. First, it submitted that the collision was not caused by any breach of duty on its part, but only by the negligence of the defendant and the plaintiff. Secondly, the appellant submitted that the majority of the Court of Appeal moved straight from a conclusion that the appellant was in breach of duty to consideration of whether the defendant's supervening conduct broke the chain of causation, without first examining whether the chain of causation actually existed. In that respect the words emphasised in the passages quoted above have significance.

Some aspects of the evidence

18 It is desirable to make clear that whether or not the plaintiff, from his stationary position at the Stop sign, did see the defendant's vehicle moving north along the Pacific Highway, he was undoubtedly able to do so. That follows from three categories of evidence.

19 First, there is the evidence of the defendant that he saw the plaintiff, both when the plaintiff's car was stationary and when he had begun to move forward.

20 Secondly, there is the evidence of Mr Relf, driving in a through lane three or four seconds behind the defendant in the right-hand turn lane, that he saw the plaintiff's vehicle "pulled out from the stop sign", ie he "saw it move out". If Mr Relf could see the plaintiff moving out, it is likely that the plaintiff, while halted at the Stop sign, could have seen the defendant three or four seconds earlier. The trial judge thought that Mr Relf "made accurate assessments" and showed "very real care ... in reporting his observations."

21 Thirdly, there is the evidence of Mr Hubbard, driving immediately behind the plaintiff, that he saw the defendant. The defendant met the last point by arguing that what Mr Hubbard saw was an observation made just after the plaintiff began to move forward, and was thus made at a different point of time from the point at which the plaintiff, from a stationary position, could have looked right. "Whatever Mr Hubbard saw could not have been that same snapshot because it was a dynamic situation."

22 That submission is inconsistent with the evidence of Mr Hubbard, whom the trial judge described as "a careful and accurate witness". He said that as he approached the Stop sign in Bago Road he saw the plaintiff's vehicle stopped at the Stop sign waiting to cross the Pacific Highway. Both before and after the time when the plaintiff's vehicle started to move off, he looked right. He saw one car that had turned left off the Pacific Highway into Bago Road, and two other cars in the left turning lane with their blinkers on with a view to turning left into

Bago Road. He also saw Mr Relf's vehicle, and he saw the defendant's vehicle in the right-hand turning lane slightly ahead of Mr Relf and travelling faster than Mr Relf. Then he saw the defendant's vehicle braking, skidding and hitting the plaintiff's vehicle. With the cars so positioned – Mr Relf's behind and to the left of the defendant's – there was no possibility of the former masking the latter from observation by a driver at the Stop sign, and Mr Hubbard specifically identified them as distinct vehicles at all stages of his observations. He also said that the two vehicles in the left turning lane with their blinkers on turning left into Bago Road did not obscure his view of the defendant's vehicle.

Did the Court of Appeal majority find causation?

23 It is convenient to deal with the second submission of the appellant at once – that the Court of Appeal failed to make any finding about causation. This is a submission which has much support in the emphasised words quoted above[18]. The defendant sought to meet it by contending that the difficulty in the appellant's submission was that even if the passages quoted assumed an antecedent finding of causation, that finding had in fact been made in an earlier passage. In that earlier passage the majority said that the cross-intersection design adopted by the appellant in 1993 "gave rise to a statistical inevitability of a proportion of cross-vehicle crashes ... While it does not make the present accident inevitable it did materially contribute to its occurrence, by creating a heightened risk of such an accident."[19] However, the appellant is correct in submitting that the majority did not specifically deal with the causation of this particular collision.

24 The majority said what it said in the passage just quoted because of what it described as a "problem with sight distances"[20]. That problem was identified in part of an expert report which the majority appeared to find acceptable. The expert, Mr Keirnan, attributed to another expert the view "that eastbound drivers who do not carefully observe highway and traffic for a significant length of time, may not see vehicles that are obscured by vehicles in the adjoining lane because of the curved approach". Mr Keirnan said he agreed that "the curved approach is probably a factor"[21]. The majority referred to the problem a little later[22]:

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18 See [14] and [16].

19 *Royal v Smurthwaite* (2007) 47 MVR 401 at 416 [85].

20 *Royal v Smurthwaite* (2007) 47 MVR 401 at 417 [88].

21 Quoted by the majority in *Royal v Smurthwaite* (2007) 47 MVR 401 at 413 [65].

22 *Royal v Smurthwaite* (2007) 47 MVR 401 at 416 [84].

> "For approaching Pacific Hwy traffic travelling north, there was a right-hand curve and a dip in the highway south of the intersection ... [T]his configuration ... created a foreseeable problem for the observation of traffic travelling north by those vehicles exiting Bago Rd."

The majority found the appellant in breach of duty for not dealing with this "known danger"[23] – a problem of one car masking another – by constructing a staggered T-intersection so as to avoid the risk with which the existing cross-intersection was "pregnant"[24].

25 The problem – the danger, the risk – thus discussed, however, had nothing to do with the collision in question. The problem or danger or risk was that where two vehicles were approaching in adjoining lanes, one might obscure the other. That did not happen in this case. It was clear from the evidence of the defendant, the evidence of Mr Relf (driving behind the defendant) and the evidence of Mr Hubbard (driving behind the plaintiff), that the defendant's vehicle was not obscured from the plaintiff's view by another vehicle[25]. In short, even if it could be said that the appellant's breach of duty "did materially contribute" to the occurrence of *an* accident, "by creating a heightened risk of such an accident" due to the obscuring effect of one vehicle on another in an adjoining lane, it made no contribution to the occurrence of *this* accident.

26 Similar considerations apply to a report prepared by the appellant which stated that between December 1993 and March 2001 there had been 20 crashes at the intersection, 17 the result of cross-traffic. The significance of those figures depends on the causes of the crashes. The majority of the Court of Appeal did not assign any cause for the crashes, and no doubt was not in a position to. It identified, as the relevant danger which the appellant was in breach of duty for not dealing with, the problem of one car obscuring another. Whether that was the cause of the 20 crashes or not, the fact remains that this crash had nothing to do with that problem. The passage on which the defendant relied as a causation finding, while it might have been a step towards a causation finding in some other case, could not have been such a step in this case. That is because there was no evidence that any aspect of the plaintiff's decision, having stopped at the intersection, to move forward was caused by the fact that the defendant's vehicle was masked by some other vehicle. Neither Mr Relf nor Mr Hubbard gave any

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23 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [91].

24 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [92].

25 See [19]-[22] above.

evidence of any other vehicle capable of having a masking effect. In addition, the defendant, in whose interest it would have been to give that evidence, did not give it. Hence to submit, as the defendant did, that the appellant's breach of duty "restricted the [plaintiff's] view of the intersection" and created "problems of vision" for him may have been correct for some sets of circumstances, but was not correct for the circumstances preceding the collision in question in this appeal.

27 The defendant submitted that the Court of Appeal majority must have had causation in mind, and had not overlooked the need for it to be established, because at one point they referred to the trial judge's view that there had been a failure to demonstrate causation in relation to the appellant's conduct[26]. This does not, however, suggest that the majority made findings about causation after finding breach of duty; rather it suggests that by that much later stage of the judgment[27] the need to do so had been overlooked.

28 Hence the appellant's second submission should be accepted.

What did cause the collision?

29 The appellant's first argument should also be accepted. The appellant correctly submitted that before the accident both plaintiff and defendant were in a position to see each other quite clearly. The plaintiff was in a position either to move decisively across the intersection or to wait until the cars on the Pacific Highway passed. The defendant had ample time to stop, slow down, change lanes or otherwise avoid a collision. The defendant and the plaintiff were each in a position to see the other in more than sufficient time for each of them to avoid the collision. The design of the cross-intersection was thus irrelevant to the cause of the accident. If the plaintiff failed to see the defendant, that could have been one causal factor in the collision. But it is not a failure for which the appellant was responsible: for since in clear conditions the defendant could and did see the plaintiff's vehicle as it stopped at the intersection and then began to move forward, the plaintiff could also have seen the defendant, just as Mr Hubbard, approaching the intersection behind the plaintiff, did. If the plaintiff did see the defendant, just as the defendant had seen the plaintiff, a causal factor was his failure to use his very good knowledge of the intersection to drive sufficiently carefully to avoid the risk of a collision. A further causal factor was the defendant's failure to act on his very good knowledge of the intersection,

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26 *Royal v Smurthwaite* (2007) 47 MVR 401 at 411 [56].

27 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419-420 [92]-[98].

and use the ample time available to take steps to deactivate cruise control, slow down, stop or change lanes or otherwise avoid hitting the plaintiff's vehicle, when that vehicle was apparently doing nothing to avoid a collision, just as the driver behind him did. He had the time to do any of these things despite being in the wrong lane doing 105 kilometres per hour on cruise control in an area where the speed limit was 100 kilometres per hour and the advisory speed sign recommended 85 kilometres per hour. Another causal factor was the potentially misleading effect on the plaintiff of the defendant being in the right-hand turn lane rather than one of the through lanes.

30 In essence these propositions correspond with Basten JA's reasoning. The defendant's submission in answer to them was that there would have been no cross-intersection accident if there had not been a cross-intersection; the cross-intersection had a design fault in that one car visible from the Stop sign could mask another car in an adjoining lane; that fault could be overcome by eliminating the cross-intersection; and the failure to do this caused the accident. If the last step in this submission by the defendant were to be valid, it would be necessary to establish that the masking problem prevented the plaintiff from seeing the defendant's car. There was no evidence of that proposition, and no finding to support it. The defendant endeavoured to overcome this difficulty by submitting that the appellant's argument depended on the proposition that when the defendant observed the plaintiff's vehicle, the plaintiff also observed the defendant's vehicle; but that that was speculation, and that there was no evidence that the plaintiff made that observation or that it was possible for him to do so. It is true that there is no direct evidence that the plaintiff made that observation. But it is not true that there was no evidence that it was not possible for him to do so. There is the evidence of the defendant, Mr Relf and Mr Hubbard already mentioned[28].

Further arguments of the defendant

31 *The argument from Betts v Whittingslowe.* The defendant (but not the majority of the Court of Appeal) also relied on the following statement by Dixon J in *Betts v Whittingslowe*[29]:

> "[B]reach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any

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28 Above at [19]-[22].

29 (1945) 71 CLR 637 at 649; [1945] HCA 31.

> sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty."

He went on to say that in the case before him "the facts warrant no other inference inconsistent with liability on the part of the defendant". The defendant submitted that the negligent driving of the defendant or the plaintiff was not a "sufficient reason to the contrary" because negligent driving was foreseeable by the appellant. That does not meet the appellant's argument. There was ample material in the behaviour of the drivers to create a "sufficient reason to the contrary", or "warrant [an] inference inconsistent with liability on the part of the" appellant.

32 *The argument from March v Stramare (E & M H) Pty Ltd.* The defendant also relied on the third-last paragraph of Mason CJ's reasons for judgment in *March v Stramare (E & M H) Pty Ltd*[30]. He there said, inter alia:

> "[I]t makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things."

That passage is inapplicable here. Discussions about the effect of a novus actus interveniens necessarily assume that a breach of duty has been causative. In the majority's view, there was a potential risk of injury, depending on the position of the cars on the Pacific Highway in any given circumstances, arising from the problem of one car masking another in an adjoining lane. That risk did not exist in relation to any of the cars involved in this collision: there was no car on the defendant's left masking it from the plaintiff. The collision did not occur as a result of "the ordinary course of things" in the particular circumstances. Mason CJ also remarked[31]:

> "[I]n the nature of things, there will be some cases in which a court concludes that a precondition does not play such a part in the consequence that it deserves to be characterized as a cause."

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30 (1991) 171 CLR 506 at 518-519; [1991] HCA 12.

31 (1991) 171 CLR 506 at 512.

That is the case here. Furthermore the reliance by the majority on a "but-for" test as a comprehensive causation test is erroneous since *March v Stramare (E & M H) Pty Ltd*[32].

The application of *Bennett v Minister of Community Welfare*

33 The defendant also relied on the majority's application of the test stated by Gaudron J in *Bennett v Minister of Community Welfare*[33]. That application is unconvincing. In the first place, Gaudron J's reasoning proceeds on the assumption that a chain of causation has been established: that assumption is not made out here. In the second place, it is no doubt true that if there had been a staggered T-intersection the plaintiff would not have been trying to negotiate a cross-intersection and would not have been injured doing so. But to say that is only to say that there would not have been a cross-intersection collision if there had not been a cross-intersection. It does not say that there would not have been a collision between drivers as careless as the defendant and the plaintiff as the plaintiff came onto the Pacific Highway in the left-hand lane and began to move over to the right-hand lane to execute a right-hand turn in order to get to Boyds Road.

Orders

34 In consequence the appeal should be allowed with costs, the Court of Appeal's orders allowing the defendant's appeal in relation to the appellant's responsibility should be set aside and it should be ordered that the appeal to that Court be dismissed with costs. This will leave in place the trial judge's orders.

35 A difficulty arises in relation to the orders made by the trial judge in relation to the costs of the trial, however. The trial judge favoured making a *Bullock* order in favour of the plaintiff against the defendant in relation to the costs of the appellant: that is, that the defendant (the unsuccessful defendant at trial) take responsibility for the costs which the plaintiff would have to pay to the appellant (the successful defendant at the trial). The defendant argued in the Court of Appeal that the trial judge erred in concluding that a *Bullock* order should be made. Basten JA agreed, and proposed varying the trial judge's costs orders. The majority did not deal specifically with this contention of the defendant, but considered that since in their view the appellant was liable for one-third of the judgment against the defendant, the costs to be paid by the

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32 See in particular Deane J: (1991) 171 CLR 506 at 522-524.

33 (1992) 176 CLR 408 at 421.

appellant should be "proportionate to its liability overall"[34]. Matters were then further complicated by the fact that, after the Court of Appeal's orders were taken out, they were varied by agreement.

36 In this Court the appellant has adopted inconsistent positions. On the one hand, in the notice of appeal it sought orders in relation to the costs of the trial consistent with those which Basten JA preferred. On the other hand, in its written submissions it sought restoration of the "judgment of the trial judge and the orders for costs made by him". The latter approach appears the sounder, in view of the fact that the defendant has not cross-appealed against the costs order made by the majority, and, in particular, he has not sought to repeat in this Court the arguments which found favour with Basten JA but which were not dealt with by the majority. The second order below will have the effect of causing the orders made by the trial judge to be restored.

37 The following orders should be made:

1. Appeal allowed with costs.

2. The orders of the Court of Appeal of the Supreme Court of New South Wales be set aside and in their place it be ordered that the appeal to that Court be dismissed with costs.

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34 *Royal v Smurthwaite* (2007) 47 MVR 401 at 421 [101].

38 KIRBY J. This appeal comes from a judgment of the Court of Appeal of the Supreme Court of New South Wales[35]. That Court was divided. As admitted to this Court by a limited grant of special leave[36], the appeal concerns only the cause or causes of a motor vehicle collision. That collision occurred on the Pacific Highway at Herons Creek, near Wauchope, in rural New South Wales.

39 The spectacle of five Justices of this Court labouring over highway plans and photographs and sifting through four appeal books in relation to such a question would be bound to cause surprise. The record describes the 12 day trial of these proceedings in the District Court of New South Wales, and the two day hearing in the Court of Appeal. What is, and is not, for legal purposes, a material cause of a motor vehicle collision is a question of fact. Ordinarily, it gives rise to no principle of law, binding on lower courts and future parties[37]. On the face of things, it concerns only the immediate parties and the outcome of their dispute.

40 There is not, in this case, even the residual human interest as to whether a seriously injured plaintiff will maintain, or lose, a verdict recovered in earlier proceedings[38]. In this appeal, the plaintiff's recovery (reduced by one third for his contributory negligence) is unchallenged[39]. The Court of Appeal was unanimous that the assessment of contributory negligence should not be disturbed, and that issue has not concerned this Court.

41 The issue that divided the judges below was whether the judgment entered at trial against the driver of the other vehicle involved in the collision should be amended, so as to uphold the claim made by that driver for contribution by the Roads and Traffic Authority of New South Wales ("the RTA"). The RTA is the statutory authority responsible for the design and maintenance of the Pacific Highway and adjoining roads at the intersection at which the accident occurred.

42 At trial, the plaintiff sued in negligence, naming both the other driver and the RTA as defendants. The primary judge in the District Court (Phelan DCJ) rejected the claim against the RTA. Because, nonetheless, the primary judge

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35 *Royal v Smurthwaite* (2007) 47 MVR 401.

36 [2007] HCATrans 596.

37 cf *Joslyn v Berryman* (2003) 214 CLR 552 at 602 [158] per Hayne J; [2003] HCA 34.

38 cf *New South Wales v Fahy* (2007) 81 ALJR 1021; 236 ALR 406; [2007] HCA 20; *Roads and Traffic Authority of NSW v Dederer* (2007) 81 ALJR 1773; 238 ALR 761; [2007] HCA 42.

39 See (2007) 47 MVR 401 at 422 [108].

upheld the plaintiff's claim in negligence against the other driver, the plaintiff is now unconcerned about the ongoing contest between that driver and the RTA. He submits to such orders as this Court might make. The majority in the Court of Appeal concluded that the judgment at trial should be amended so that the RTA would pay the plaintiff one-third of the judgment entered against the other driver. The costs orders made at trial were modified to reflect this variation.

43 The appeal to the Court of Appeal proceeded by way of rehearing. By the terms of its statute[40] and established law[41], the Court of Appeal had the power and duty to decide whether legal or factual errors had occurred in the trial. It had the responsibility to reconsider, independently and for itself, the contested factual determinations reached at trial and, if persuaded that the primary judge erred in approach or conclusion, to state and give effect to its own conclusions on the facts, so far as it could properly do so. This the majority in the Court of Appeal did in respect of their conclusion that the RTA was liable to contribute in proportion to its responsibility for the damage suffered by the plaintiff.

44 In accordance with the Constitution, as it has been interpreted[42], an appeal to this Court is not a rehearing[43]. It is a strict appeal. This is a Court of error. Ordinarily, it would not involve itself in suggested errors of fact, least of all in respect of the cause of a motor vehicle accident and the responsibility of various parties for it. Such questions are inherently contestable. This Court would usually leave them to be determined by an intermediate court unless some important question of principle or apparent miscarriage of justice were demonstrated. Nevertheless, once special leave is granted and a case of the present kind is before this Court, the Court must necessarily decide the matter by the application of the relevant legal rules to the facts as found or otherwise appearing in the record.

45 There is no question of principle and no injustice in the present case. The conclusion reached by the majority of the Court of Appeal was clearly open. No error of law or other error affected the approach of the majority. There is no warrant for our intervention. The judgment of the Court of Appeal should stand. The appeal should be dismissed.

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40 *Supreme Court Act* 1970 (NSW), s 75A.

41 See eg *Fox v Percy* (2003) 214 CLR 118 at 126-127 [24]-[26]; [2003] HCA 22.

42 *R v Taufahema* (2007) 228 CLR 232 at 272 [105]; [2007] HCA 11 citing *Mickelberg v The Queen* (1989) 167 CLR 259 at 267, 279, 298-299; [1989] HCA 35 and *Eastman v The Queen* (2000) 203 CLR 1 at 79-89 [240]-[266]; [2000] HCA 29.

43 *Fox* (2003) 214 CLR 118 at 129 [32].

The facts

46 *A vehicular collision*: The collision between the motor vehicles of Mr George Smurthwaite, the second respondent ("the plaintiff") and of Mr Grant Royal, the first respondent ("the defendant") occurred at an intersection near Herons Creek where Bago Road meets the northbound carriageway of the Pacific Highway ("the highway") on its western side.

47 The plaintiff, having stopped at a stop sign and holding line controlling traffic exiting Bago Road at its intersection with the highway, attempted to cross the northbound carriageway to proceed into Boyds Road opposite. His purpose was to follow that road to the southbound carriageway of the highway, some 250 metres to the east. The plaintiff's intended path required him to traverse two lanes of northbound through-traffic, as well as a dedicated right-turn lane designed to allow northbound vehicles to exit to Boyds Road. Obviously, the traffic on the highway commonly proceeds with speeds typical on such a major national road.

48 In the result, the plaintiff's vehicle did not reach the safety of Boyds Road. Instead, some 21 metres from the Bago Road stop sign, at a point within the right-turn lane, his vehicle came into collision with that of the defendant. The point of impact was in the vicinity of the driver's side door of the plaintiff's vehicle. It occasioned serious and permanent injuries to the plaintiff. Because of those injuries, including cerebral trauma, the plaintiff was unable to remember, or describe, the circumstances immediately preceding the impact. Specifically, he was unable to give evidence of exactly what he could, or could not, see when his vehicle was stationary in Bago Road before proceeding across the highway.

49 The collision occurred at 8.40am on a Monday. It was daylight and the weather was fine. As a result of overnight rain, the road surface was slightly damp in places. However, both the plaintiff and the defendant were familiar with the highway and roads as they intersected. The defendant was travelling at 105 km/hour. This reflected the setting at which he had fixed a "cruise control" device governing the speed of his vehicle. The legally mandated maximum speed at the relevant section of the highway was 100 km/hour. An advisory sign, not far from the intersection, indicated a safe driving speed of 85 km/hour.

50 The lower speed advisory sign was presumably placed in recognition of the geography of the highway and the intersecting roads. The terrain was undulating. The highway proceeded through a succession of curves and inclines which occasioned visual difficulties, including for drivers of vehicles standing at the holding line in Bago Road, looking towards the oncoming traffic travelling north along the highway. In approaching the intersection, such traffic negotiates a right-hand curve. There is also a dip in Bago Road some 200 metres from the intersection. These features were illustrated by aerial and road surface

photographs and a plan produced by terrestrial photogrammetry. These were in evidence and are thus part of the record.

51 Also part of the record are photographs taken at successive intervals of a few seconds illustrating the rapid movement of vehicles travelling towards the intersection (as the defendant was), and the degree to which such vehicles could be obscured, from the perspective of a driver stopped at the holding line in Bago Road, by any vehicles turning left (however quickly) from the highway into Bago Road. Whether the plaintiff's vision of the defendant's vehicle approaching the point of the intersection was in fact obstructed in this way by a turning vehicle or by another vehicle travelling at speed along the highway in a northerly direction is unknown because of the plaintiff's post-accident memory loss. However, such obstruction was entirely possible. It would be consistent with, and predictable upon, the foregoing photographic evidence.

52 *Evidence of the drivers*: The plaintiff and the defendant each gave evidence at the trial. So did two other drivers who were in the area. One, Mr George Hubbard, was travelling along Bago Road behind the plaintiff. The other, Mr Anthony Relf, was proceeding north along the highway, to the rear of the defendant's vehicle. Each witness described what he had been able to see. Mr Hubbard indicated that the plaintiff's vehicle started to move off from the holding line shortly after coming into his field of vision. As he himself approached the holding line, he saw the oncoming vehicle of the defendant. Mr Relf gave evidence that, from his position, he had seen the plaintiff's vehicle standing at the stop sign.

53 In his evidence, the defendant admitted that he had seen the plaintiff stationary at the intersection on his left. He did not reduce his speed, or disengage the cruise control. Although it was suggested that this was because of a concern with fuel economy, a fair reading of the defendant's evidence was that he considered that he had right of way and did not expect that the plaintiff would be so foolish as to attempt to traverse the highway in the face of the oncoming vehicles that would be visible to him (including that of the defendant). In short, the defendant expected that the plaintiff would wait for a safe break in the highway traffic before proceeding to cross.

54 *Expert evidence on highway design*: Both the plaintiff and the defendant relied on expert evidence to establish that the RTA was, in part, causally responsible for the occurrence of the collision. The plaintiff tendered such evidence from Mr Grant Johnston. The defendant called Mr Michael Griffiths and Mr Roger Stuart-Smith. The RTA, in response, called Mr Warwick Keirnan[44]. Without reference to the evidence of the experts, the issues raised

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44 (2007) 47 MVR 401 at 404 [20].

against the RTA cannot be understood or properly decided. It is arguable that such reference is required given the manner in which the case developed. Putting it out of consideration reduces the case to a banal contest between the imperfect and incomplete knowledge and recollections of the motorists who gave evidence.

55 Judges, dissecting the testimony of motorists years after the event, do so to the best of their abilities. Nevertheless, it is critical to remind oneself that, in cases such as the present, the court is examining events that occurred within the space of a few minutes, if not seconds. Given the speed at which he was travelling along the highway, the defendant argued that he had only 2.8 to 3.5 seconds to react to the sudden action of the plaintiff in leaving Bago Road and, in effect, "running the intersection"[45].

56 In the Court of Appeal, Santow JA, for the majority, concluded that this timeframe was "never reliably established to be no more than 3.5 seconds"[46]. However, incontestably, it was only a tiny space of time. The competing evidence propounded at the trial suggested that it was, at most, 6.5 seconds[47]. Although, physically, such an interval might have afforded enough time, in perfect conditions, for an attentive and alert driver of average reflexes to avoid a collision, it is important to keep the timeframe at the forefront of attention, especially when considering evidence concerning causative factors additional to driver behaviour and determining the "material" cause or causes of the collision according to law. In essence, it was the defendant's (and the plaintiff's) case at trial that the RTA had negligently imposed such a short timeframe on drivers by seriously faulty design, construction and maintenance of the intersection – despite being aware of the occurrence of multiple collisions of an identical kind.

57 *Evidence of a "black spot"*: Importantly, the evidence demonstrated that the intersection of the Pacific Highway and Bago Road was regarded as a "black spot" by the RTA itself[48]. In his reasons in the Court of Appeal, Santow JA extracted the following passage from a report of Mr Keirnan, the RTA's own expert[49]:

> "Details of crashes recorded as occurring at the intersection of Pacific Highway and Bago Road between December 1993 and March 2001, ie,

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45 (2007) 47 MVR 401 at 407 [37].

46 (2007) 47 MVR 401 at 408 [42].

47 (2007) 47 MVR 401 at 409 [48].

48 (2007) 47 MVR 401 at 411 [57].

49 (2007) 47 MVR 401 at 411-412 [57].

since dual carriageway construction and this crash, are tabulated on an RTA document …

The following is a summary of the characteristics of these crashes:

- There have been 20 recorded crashes that were either fatal, injury or tow away.
- Two of these crashes resulted in a fatality and 14 resulted in one or more person being injured, ie, 16 casualty crashes – 2 per year.
- 17 of the 20 crashes were the result of 'cross traffic at the intersection'.
- All 20 crashes were in dry weather conditions, and all but one were in daylight.
- No identifiable hazardous features at the site were recorded.
- One crash involved a motor cycle, one other a semi-trailer and the remainder were light passenger type vehicles.
- Speed was recorded by police as a factor in one crash.
- In 16 of the 20 crashes the unit at fault was identified as the eastbound driver.

Details of crashes recorded as occurring between April 2001 and March 2003 are [also recorded].

The following is a summary of characteristics of these crashes.

- There have been 6 crashes recorded in this 2 year period.
- Two crashes resulted in a fatality and four resulted in injuries, ie, 3 casualty crashes per year.
- All six crashes were cross traffic at the intersection.
- Three crashes were in wet weather.
- All six crashes were in daylight.
- All six crashes were light passenger type vehicles.
- No hazardous features were identified.
- Speed was not identified by the police as a factor in all crashes.

> Because of the significant number of casualty crashes over a period of 10 years, the RTA have examined possible improvements, and modifications to traffic control devices have been carried out at the intersection."

58 When evidence of this kind is produced, almost entirely from the records of the RTA itself, and forms part of the record of the trial, it is unsurprising that it should attract the attention of the Court of Appeal. Individual motorists have no power or authority to alter, or eliminate, highway "black spots". They cannot change the configuration of roads and intersections so as to make them safer and to reduce established risks of accidents. Where action is required by standards of reasonable conduct, that is the responsibility of the authority with the duty to act, the RTA. Especially so, where the evidence revealed (as it did in this case) that the configuration of the particular intersection was altered by the RTA in material ways both prior to, and following, the serious collision involving the plaintiff and the defendant.

59 The record indicates that, before the RTA reconstructed the Pacific Highway in the area of the Bago Road intersection in 1993, the highway had only two lanes: one travelling north and the other south. At that stage, Bago Road formed a "T" intersection with the highway. This permitted entering traffic either to turn left into the northbound lane of the highway or to cross that lane, turning right in order to head south.

60 In 1993, the RTA effected modifications such that at the relevant point, the southbound carriageway was separated from the northbound. Thereafter it proceeded on a new and different roadway. Near the point of the Bago Road intersection, the southbound carriageway was some 250 metres distant from the northbound.

61 *Options to change the intersection*: In effecting this change, a question was necessarily presented to the RTA as to how vehicles exiting from Bago Road would access the southbound carriageway of the highway. Leaving aside expensive solutions such as overhead fly-overs or under-road tunnels, the reasonably available options for dealing with such vehicles were:

(1) to direct all traffic from Bago Road left into the northbound carriageway of the highway, and construct a designated turning point further north to facilitate safe entry into the now separated southbound carriageway (the "staggered entry option"); or

(2) to permit traffic from Bago Road to cross directly over the northbound carriageway of the highway and to join the southbound carriageway by way of Boyds Road (the "cross-intersection option").

62 Although the cross-intersection option (which the RTA chose) had some advantages, it had important disadvantages, especially in terms of road safety.

These were acknowledged by the RTA's expert, Mr Keirnan, in his evidence at the trial. In particular, he accepted that:

(1) It is generally desirable to avoid "cross-intersections", inferentially especially where involving a vehicular trajectory across the lanes of a fast-moving major highway;

(2) The distance which cross-traffic exiting Bago Road was obliged to negotiate was increased by the reconstruction (from one northbound lane to, in effect, three lanes);

(3) The distance through which cross-traffic had to pass was, in effect, even greater than the width of three lanes given the placement of the stop sign and holding line regulating egress from Bago Road. At the time of the subject collision, the sign and holding line were several metres back from the highway in Bago Road. Afterwards, the RTA shifted them to a point much closer to the actual intersection. However, the original placement required a motorist crossing the highway from Bago Road to cover a distance of about 30 metres before entering Boyds Road proper;

(4) The established point of impact and the absence of road surface evidence of evasive action on the defendant's part tended to indicate that the defendant did not anticipate that the plaintiff would cross the highway and hence the path of his vehicle;

(5) The number of crashes at the intersection was significant and remedial action on the part of the RTA was required, although Mr Keirnan contested that the defects were causative of this particular accident; and

(6) The curve of the highway at this point may have reduced the ability of drivers exiting Bago Road to anticipate gaps in the northbound traffic in order to determine when it would be safe to proceed across the highway without unreasonable risk to themselves and other motorists. Mr Keirnan agreed with the defendant's expert, Mr Griffiths, that, because of the curved trajectory, drivers such as the plaintiff, who did not observe potential northbound traffic for a sufficient time, might not see, or adequately notice, oncoming vehicles obscured by other northbound vehicles in adjoining lanes. He conceded that the crash history following the 1993 reconfiguration demonstrated that most of the collisions were the fault of drivers exiting Bago Road.

63 *Dangers of cross-intersections*: The effect of this evidence, given by the RTA's own expert, and reinforced by the evidence of other experts in highway design, construction and maintenance, was that the intersection created in 1993 was such that, at that time, experts in highway design would reasonably have expected accidents to occur, as indeed they did. As noted, in terms of safe

highway design, Mr Keirnan agreed that it was generally desirable to avoid cross-intersections. Common sense suggests that this was especially so where:

(1) The cross-intersection was created in substitution for earlier, less dangerous traffic conditions, and compelled drivers proceeding across the highway to negotiate a multi-lane roadway containing fast-moving traffic all proceeding in the same direction;

(2) The oncoming traffic approached the intersection through an undulating landscape and on a curved trajectory, which had the potential to obscure sight lines and render appreciation of the existence and speed of other vehicles difficult or impossible; and

(3) A significant distance had to be traversed by the cross-traffic, starting from a stationary position well behind the intersection itself, and then crossing, in effect, three lanes of one of the major arterial highways of the Commonwealth[50].

The decisional history

64 *The decision at trial*: The primary judge dealt with the issue that is now before this Court very briefly. Relevantly, he said[51]:

> "There remains the case against the [RTA]. The evidence … clearly establishes that this part of the roadway was seen by the RTA as a 'black spot'. There had been a number of serious accidents, including some fatalities, over the period of time that the highway had been upgraded.
>
> The RTA had taken steps from time to time to deal with the problem and the chief problem seems to have been … the difficulty of somebody stopped facing east at the Bago intersection being in a position of not being aware of traffic behind other cars proceeding north, particularly in the left hand lane."

65 The primary judge acknowledged that there had been fewer serious accidents following changes effected by the RTA after the present collision.

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50 In his report of 24 November 2003, Mr Keirnan expressed the opinion: "I agree there may be some visual obscuring of vehicles on the curve. Also there may be some uncertainty as to which lane the approaching vehicles were travelling around the right curve when viewed from the stop line in Bago Road."

51 *George Smurthwaite v Grant Royal*, unreported, District Court of NSW, 7 February 2006 at 33 ("reasons of the primary judge").

However, in a single sentence, he rejected the claims which the plaintiff and the defendant had presented against the RTA[52]:

> "Whilst I conclude that in a number of respects more could have been done by the RTA to improve this intersection, in the end result I am not satisfied that the accident represented a failure by the RTA in the circumstances of this case and thus there will be a verdict for the [RTA]."

66 Effectively, the primary judge's reasons on this point are unelaborated.

67 *The majority in the Court of Appeal*: The reasons of the majority of the Court of Appeal were given by Santow JA, with whom Tobias JA agreed.

68 Santow JA acknowledged the complaint of the defendant about the adequacy of the reasons of the primary judge addressed to the issue of the liability of the RTA. He remarked that those reasons were "conclusionary and extremely brief"[53]. His Honour obviously considered that they were inadequate, such that the Court of Appeal was obliged to embark upon a review of the evidence addressed to the issue. That evidence included the expert evidence on highway design that I have described. But the review was not limited to expert evidence. It was addressed to all of the factual evidence of the trial.

69 After reviewing the evidence in some detail, Santow JA made a number of findings, including that:

- "[The post-1993] configuration, as the [defendant] contends, created a foreseeable problem for the observation of traffic travelling north by those vehicles exiting Bago Rd. It can be taken … that those physical features must have been known to the RTA before the reconfiguration of the intersection in 1993, but neither the crest nor the curve were changed at all in the reconstruction."[54]

- "[The choice of the cross-intersection option] gave rise to a statistical inevitability of a proportion of cross-vehicle crashes, as demonstrated by the statistics to which I have … referred. While it does not make the present accident inevitable it did *materially*

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52 Reasons of the primary judge at 34.

53 (2007) 47 MVR 401 at 411 [56].

54 (2007) 47 MVR 401 at 416 [84].

> *contribute* to its occurrence, by creating a heightened risk of such an accident."[55]

- "The adverse traffic history started to manifest itself almost immediately after 1993 in accidents … [D]espite the RTA being alive to the problem with sight distances in 1997, nothing further was done until after the present accident and then only to move the stop sign further forward."[56]

70 After noting that the standard of care required of an authority such as the RTA, having powers in relation to the design, construction and maintenance of roads, was that of taking "reasonable care that their exercise … does not create a foreseeable risk of harm to a class of persons (road users) which includes the plaintiff"[57], Santow JA said[58]:

> "In my view, the RTA failed to take the steps that would have been reasonable in this case, not just to move the stop sign as it did only after the accident but more fundamentally to have constructed a staggered T-intersection and not a cross-intersection which was pregnant with avoidable risk. It thus breached its duty-of-care in that regard. The remaining question is whether the supervening conduct of [the defendant] represented an intervening cause that could be said to have broken the chain of causation from the RTA's original negligent design of the crossing so as to obviate any liability on its part in causal terms."

71 After examining the facts and further decisional authority, Santow JA rejected the RTA's submission that the supervening conduct of the defendant was such that it rendered the "antecedent breach of duty of the RTA as no longer operative" or caused it "to cease to be causally significant so as to break the chain of causation"[59].

72 There followed consideration of issues of apportionment, damages and costs. Applying the statute on contribution between tortfeasors found to be

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55 (2007) 47 MVR 401 at 416 [85] (emphasis added).

56 (2007) 47 MVR 401 at 417 [87]-[88].

57 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 577 [150]; [2001] HCA 29 cited (2007) 47 MVR 401 at 417 [89]. See also *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104 at 1111 [40]; 215 ALR 418 at 427; [2005] HCA 27.

58 (2007) 47 MVR 401 at 419 [92].

59 (2007) 47 MVR 401 at 420 [98].

liable[60], Santow JA concluded that the RTA should bear one-third responsibility for the judgment entered against the defendant[61].

73 *The dissenting opinion*: In his reasons, Basten JA rejected the foregoing conclusions. Relevantly, his Honour dissented for reasons which, like those of the primary judge, were expressed in short and largely conclusionary terms[62]:

> "[W]hatever the faults of the design of the intersection, they did not materially contribute to the accident in any relevant sense. Both parties knew the intersection well; each knew it was a cross-intersection and that it had turn lanes; indeed, the only mistakes which were made related to the conduct of the other driver, based on common knowledge of the design features of the intersection.
>
> The trial judge was criticised for dealing with the liability of the RTA in cursory terms, without giving due consideration to the evidence of the experts. For the reasons set out above, in my view his Honour came to the correct conclusion. The opinions of the experts were of little relevance in making that assessment. The conclusion was primarily based upon the particular circumstances of the accident and the errors on the part of the plaintiff and the defendant. Even if I held doubts as to his Honour's assessment of these matters (which I do not) I would have been reluctant to interfere given that his Honour had a view of the intersection, and was able to make an assessment of the defendant, in particular in the witness box, which may have allowed him to form a view as to his explanations of his own conduct which may not be readily inferred from the somewhat surprising attitudes revealed by parts of the cross-examination."

74 Basten JA would therefore have dismissed the appeal against the liability of the RTA. All other contested issues were agreed between the members of the Court of Appeal. That Court's judgment gave effect to the conclusions of the majority.

The issues

75 *The limited grant of leave*: When approaching this Court for special leave to appeal, the RTA persisted with its objection to the conclusion that it owed a duty of care to the plaintiff and that it had breached such duty. The grant of special leave excluded these issues. The RTA was therefore obliged to accept the

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60 *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5.

61 (2007) 47 MVR 401 at 420 [99].

62 (2007) 47 MVR 401 at 434 [155]-[156].

conclusions of the Court of Appeal in favour of the defendant to this extent. In addition, were it to be held liable in negligence, it brought no challenge to the quantum of recovery or to the apportionment ordered by the Court of Appeal.

76 *The emerging issues*: The central issue thus presented is whether the majority of the Court of Appeal erred in concluding that the factual evidence justified the opinion that the trial judge was wrong in deciding that the RTA was not liable to the plaintiff (and hence, under the contribution statute, liable to the defendant on his cross-claim). Specifically, did the majority of the Court of Appeal err in finding that the evidence, properly considered, required the conclusion that the acts and omissions of the RTA in designing, constructing and maintaining the intersection caused, in the appropriate legal sense, the subject collision and hence the damage suffered by the plaintiff?

77 In support of its argument, the RTA presented submissions that raise three relevant issues:

(1) *The incorrect approach issue*: Did the majority of the Court of Appeal err by failing specifically to address the issue of causation? The RTA argued that the majority had inappropriately proceeded from a finding of breach of duty on the part of the RTA to the consequential question of whether a break in the chain of causation was established, thereby reducing the defendant's negligence to an issue of its "supervening effect"[63];

(2) *The incorrect conclusion issue*: Even if the foregoing error was not made, did the majority nonetheless err in fact in concluding that the evidence in the record justified a conclusion that the RTA's acts and omissions were causative of the damage sued upon? and

(3) *The appellate review issue*: Did the majority err in giving effect to their own conclusions on causation, overriding those of the primary judge despite the advantages that he enjoyed having conducted the trial?

78 These reasons will seek to demonstrate that each of these issues should be resolved in favour of the defendant. The conclusion reached by the majority of the Court of Appeal should be affirmed.

The applicable principles on causation

79 Before addressing the three stated issues, it is appropriate to note the common law principles that have been accepted by this Court as governing

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63 See (2007) 47 MVR 401 at 419 [92].

decisions on contested issues of causation in relation to claims framed in negligence.

80 The Court has considered these principles in a number of decisions in recent years[64]. Because there was no substantial contest about them in this appeal, it is appropriate to state them without much elaboration. The authorities are well known[65]. This appeal, in substance, concerns the application of the principles, not their content.

81 First, it is important to recognise that, in the context of the law of negligence, causation is essentially a question of fact. Relevantly, the decision-maker must reach a conclusion by the application to the entirety of the evidence of common sense and the lessons of common experience. The fact-specific nature of contested problems of causation tends to render them unsuitable for determination by this Court. As Professor Jane Stapleton has said, the "question rarely gives rise to appellate case law because the question is one of *fact*"[66].

82 Secondly, the burden of proving causation-in-fact, whether at trial or in a review of factual findings on an appeal by way of rehearing, is on the claimant. The standard of proof that must be met is the balance of probabilities[67]. But to disturb a conclusion reached on this issue in a strict appeal to this Court, it is necessary for an appellant (here the RTA) to demonstrate error in the determination under challenge. This Court does not merely give fresh effect to its own view.

83 Thirdly, whilst the "but for" test may be useful in defining the outer limits of liability where causation is contested, it is "not a comprehensive and exclusive criterion, and the results which are yielded by its application properly may be tempered by the making of value judgments and the infusion of policy

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64 See eg *Henville v Walker* (2001) 206 CLR 459; [2001] HCA 52; *Travel Compensation Fund v Tambree* (2005) 224 CLR 627; [2005] HCA 69.

65 See eg *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12; *Bennett v Minister of Community Welfare* (1992) 176 CLR 408; [1992] HCA 27; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1; [1995] HCA 5; *Chappel v Hart* (1998) 195 CLR 232; [1998] HCA 55.

66 Stapleton, "Lords a'leaping evidentiary gaps", (2002) 10 *Torts Law Journal* 276 at 279 (emphasis in original).

67 *Chappel* (1998) 195 CLR 232 at 270-271 [93(4)]; Stapleton, "Lords a'leaping evidentiary gaps", (2002) 10 *Torts Law Journal* 276 at 279-280 referring to *Bonnington Castings Ltd v Wardlaw* [1956] AC 613 at 620 per Lord Reid.

considerations"[68]. Where a question is presented in respect of statutory liability, the primary duty of the court is to determine the ambit of that liability by reference to the statutory subject, scope and purpose[69]. However, where, as here, the issue is the ambit of common law liability, it is settled that[70]:

> "[w]here several factors operate to bring about the injury to a plaintiff, selection of the relevant antecedent (contributing) factor as legally causative requires the making of a value judgment and, often enough, consideration of policy considerations. This is because the determination of a causal question always involves a normative decision."

84 The reference to policy choices does not imply an open-ended judicial assignment of legal liability according to indeterminate criteria. However, it comprises a recognition of the fact that ultimately, a finding on causation depends not on a philosophical or theoretical criterion but involves a practical decision as to whether the common law will assign the whole, or part, of *legal* responsibility (usually sounding in an obligation to pay monetary damages) to a particular party. It would be a mistake to turn the legitimate use of "policy" considerations, based on identified legal principles, into the use of "value judgments at large"[71]. But the determination of causation-in-fact is not one that can be made without recourse to broader considerations.

85 Fourthly, where, as is sometimes argued to be the case, several acts or omissions on the part of contesting parties are alleged to be causes-in-fact of a claimant's damage, the resolution of the contest presents a question of fact that is itself to be decided by reference to the foregoing considerations. The search is not necessarily for "the" cause because, in some cases, two or more factors may be found to have contributed in a legally relevant way to the damage that occasions the action. If, by the foregoing criteria, a conclusion is reached that two or more causes have played a part in causing the damage, legal liability will attach so long as a nominated cause is held to have "materially contributed" to

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68 *Chappel* (1998) 195 CLR 232 at 255 [62] per Gummow J. See also *March* (1991) 171 CLR 506 at 510.

69 *Travel Compensation Fund* (2005) 224 CLR 627 at 644 [50] per Gummow and Hayne JJ.

70 *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568 at 586-587 [55] per McHugh J (footnote omitted); [2005] HCA 26. See also *March* (1991) 171 CLR 506 at 515 per Mason CJ; *Henville* (2001) 206 CLR 459 at 491-493 [98]-[103].

71 *Travel Compensation Fund* (2005) 224 CLR 627 at 639 [29] per Gleeson CJ.

that result[72]. The position under Australian law was correctly described in *Henville v Walker*[73] by McHugh J:

> "If the defendant's breach has 'materially contributed'[74] to the loss or damage suffered, it will be regarded as a cause of the loss or damage, despite other factors or conditions having played an even more significant role in producing the loss or damage. As long as the breach materially contributed to the damage, a causal connection will ordinarily exist even though the breach without more would not have brought about the damage."

86 This exposition puts paid to the suggestion in this appeal that the search must be for "the" cause, as if for legal purposes all damage could simplistically be attributed only to one possible cause on the basis that that is what "common sense" dictates. The law recognises the possibility of multiple causes. So long as they can be classified as contributing "materially" to the occurrence of the damage, it is open to the judicial decision-maker to find causation-in-fact on that basis.

87 Fifthly, in cases where causation-in-fact may appear to be established on the foregoing bases, it may sometimes be the case that legal liability will nevertheless be denied because the decision-maker comes to a conclusion that an occurrence has intruded which is effectively "the" cause of the damage, to the exclusion of other putative causes. This is sometimes described in terms of the occurrence of a *novus actus interveniens*. In *Henville*, McHugh J also said[75]:

> "In exceptional cases, where an abnormal event intervenes between the breach and damage, it may be right as a matter of common sense to hold that the breach was not a cause of damage. But such cases are exceptional."

88 Sixthly, the way in which individual decision-makers ought to reason to their conclusions about contested issues of causation-in-fact cannot be expressed in terms of imperative rules of universal application. As with most legal reasoning, several considerations will typically combine to bring the mind of the decision-maker to his or her conclusion about the preferable view of the facts. In

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72 *March* (1991) 171 CLR 506 at 512-514 per Mason CJ; *Henville* (2001) 206 CLR 459 at 480 [60] per Gaudron J.

73 (2001) 206 CLR 459 at 493 [106].

74 *Bonnington Castings* [1956] AC 613 at 620 per Lord Reid.

75 (2001) 206 CLR 459 at 493 [106].

Betts v Whittingslowe[76], Dixon J helpfully explained the way in which a finding of the existence of a duty of care and the breach of that duty may open the way for (whilst not compelling) an inference of causation-in-fact. His Honour said[77]:

> "[b]reach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach".

89 Seventhly, where the decision-maker concludes that causation-in-fact has been established, but that more than one cause has materially contributed, rights will then arise, in accordance with the contribution statute, as between the tortfeasors so held to be liable. In the present case, the statute concerned is the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW). The applicable provision is s 5(1), which enacts:

> "Where damage is suffered by any person as a result of a tort …
>
> (c) any tort-feasor liable in respect of that damage may recover contribution from any other tort-feasor who is, or would if sued have been, liable in respect of the same damage … ".

90 Section 5(2) of the Act expresses the criteria for the determination of such contribution:

> "In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the court shall have power to exempt any person from liability to make contribution, or to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

91 The foregoing provisions indicate that questions of causation are inextricably linked to the entitlement to recovery and, if so, its extent. The tortfeasor seeking recovery must show that the damage is "a result of a tort". And the extent of the recovery is determined by "the extent of that person's responsibility for the damage". Clearly, the contribution statute is a remedial provision. It is designed to facilitate just and equitable apportionment of "liability to make contribution" to an award of damages by reference to considerations of causative responsibility. Inherent in the scheme of the Act is

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76 (1945) 71 CLR 637; [1945] HCA 31.

77 (1945) 71 CLR 637 at 649.

the recognition that material causes, contributing to the same actionable damage, may be several in number and differ in degrees of significance. As Mason CJ remarked in *March v Stramare (E & M H) Pty Ltd*[78]:

> "[T]he courts are no longer constrained as they were to find a single cause for a consequence and to adopt the 'effective cause' formula. These days courts readily recognize that there are concurrent and successive causes of damage on the footing that liability will be apportioned as between the wrongdoers."

92 The contribution statute, and decisions upon it, acknowledge that judgments upon respective causative contributions will doubtless differ. To some extent, they may depend upon intuitive notions of justice and equity in evaluating "the extent of the person's responsibility for the damage".

93 The common law evolves in the orbit of statute[79]. Given that, in Australia, contribution statutes have been in force for 50 years[80], it is inevitable that the existence of the contribution facility has influenced the approach of courts to decisions about causation in circumstances where there are multiple material causes.

94 The foregoing considerations are all to be considered within the framework of the traditional approach to causation, as observed by this Court. Neither party to the present appeal argued for a different approach reflecting, for example, the views expressed by the House of Lords in *McGhee v National Coal Board*[81], *Fairchild v Glenhaven Funeral Services Ltd*[82] or *Barker v Corus UK Ltd*[83], or approaches to proportional recovery adopted in civil law countries such

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78 *March* (1991) 171 CLR 506 at 512.

79 *Brodie v Singleton Shire Council* (2001) 206 CLR 512 at 602 [231]; [2001] HCA 29.

80 See now *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW), s 5; *Law Reform Act* 1995 (Q), Pt 3 Div 2; *Law Reform (Contributory Negligence and Apportionment Of Liability) Act* 2001 (SA), s 6; *Wrongs Act* 1954 (Tas), s 3; *Wrongs Act* 1958 (Vic), Pt IV; *Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act* 1947 (WA), s 7; *Law Reform (Miscellaneous Provisions) Act* (NT), Pt IV; *Civil Law (Wrongs) Act* 2002 (ACT), Pt 2.5.

81 [1973] 1 WLR 1; [1972] 3 All ER 1008.

82 [2003] 1 AC 32.

83 [2006] 2 AC 572.

as France[84]. In the absence of argument calling for reconsideration of the traditional approach, it has not been attempted in these reasons.

The Court of Appeal's approach was not erroneous

95 *The issue of approach*: Because of the constraints that apply to this Court in correcting the suggested errors of the majority of the Court of Appeal, it is appropriate to start with the RTA's submission that Santow JA adopted an incorrect approach to the questions presented in the appeal before it. Naturally, if this could be demonstrated, it would render it easier for this Court to find error on the part of the intermediate court. Certainly, error might then be clearer than ordinarily it would be in a challenge to conclusions based on no more than another court's performance of its own fact-finding functions.

96 The RTA's complaint is that Santow JA did not expressly address the "causation-in-fact" question, but assumed such causation to have been proved and then asked whether the RTA had established, in effect, a *novus actus interveniens*, that is, an "abnormal event interven[ing] between the breach and damage [such that] it may be right as a matter of common sense to hold that the breach was not a cause of damage"[85]. In my view, this is not a correct reading of what Santow JA said or of how the majority in the Court of Appeal reasoned.

97 *Correct majority reasoning*: It is true that Santow JA expressly addressed the *novus actus interveniens* question. Presumably, his Honour did so because, as in this Court, the RTA urged that "common sense" dictated a simple conclusion that the material causes of the plaintiff's damage were limited to the negligence of the two drivers[86].

98 On this issue, Santow JA concluded[87]:

> "I consider that the supervening conduct of [the defendant] did not render the antecedent breach of duty of the RTA as no longer operative. Nor did it cause that breach to cease to be causally significant so as to break the chain of causation."

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84 cf Khoury, "Causation and Risk in the Highest Courts of Canada, England, and France", (2008) 124 *Law Quarterly Review* 103 at 121-130.

85 *Henville* (2001) 206 CLR 459 at 493 [106] per McHugh J.

86 Reasons of Gummow, Hayne and Heydon JJ at [17] ("joint reasons").

87 (2007) 47 MVR 401 at 420 [98].

99 If this had been the sole reference to causation-in-fact in Santow JA's reasons, there might have been some merit in the RTA's submission. However, it was not. At an earlier point in his reasons, Santow JA clearly addressed himself to the causation-in-fact issue. His Honour accepted that the configuration of the highway, as the defendant contended, created "a foreseeable problem for the observation of traffic travelling north by those vehicles exiting Bago Rd"[88]. He also concluded that the RTA was aware of the defect but had failed to address it in effecting the 1993 reconstruction, instead compounding the problem by creating cross-traffic to Boyds Road. Santow JA then went on[89]:

> "[The reconstruction] gave rise to a statistical inevitability of a proportion of cross-vehicle crashes, as demonstrated by the statistics to which I have earlier referred. While it does not make the present accident inevitable it *did materially contribute to its occurrence*, by creating a heightened risk of such an accident."

100 Against the background of the authorities that I have collected, establishing that causation-in-fact may be proved by establishing a "material contribution" to the occurrence of damage, there is no other way to read the foregoing passage than as an expression of a conclusion that the acts and omissions of the RTA in its reconstruction of the intersection had caused the collision between the vehicle of the plaintiff and that of the defendant. The RTA had done so by materially contributing to the heightened risk of such an accident. That this is so is made even clearer by the description which Santow JA gave a little earlier of the way in which the plaintiff had to "cross the path of two lanes of high-speed through traffic"[90].

101 The conclusions so stated by Santow JA were plainly open on the evidence. By reconfiguring the intersection as it did, the RTA compounded the difficulties confronting motorists in the respective positions of the plaintiff and the defendant. The plaintiff was tempted into running the intersection so as to reach Boyds Road directly, even though there was not a completely safe break in the traffic. The defendant was tempted to assume that no careful driver would do anything so foolish. Each was negligent. But the predisposing negligence of the RTA was causative-in-fact because it materially contributed to the happening of the subject collision.

102 *Conclusion: no error*: The result is that the RTA's complaint that Santow JA adopted an incorrect approach is without substance. In fact, given

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88 (2007) 47 MVR 401 at 416 [84].

89 (2007) 47 MVR 401 at 416 [85] (emphasis added).

90 (2007) 47 MVR 401 at 416 [85].

that Santow JA considered the establishment of causation by reference to the criterion of "material contribution" and then addressed the suggested disentitling *novus actus interveniens*, his Honour's reasoning was impeccable. It was fully in accord with the instruction of this Court on the law governing decisions on causation.

The Court of Appeal's conclusion involved no error

103 *The issue about the conclusion*: Once the complaint of erroneous approach is disposed of, the question that remains is a very narrow one. It is whether it was open to the majority of the Court of Appeal to conclude, on all of the evidence in the record, that the RTA's breach of duty materially contributed to the plaintiff's damage. If it did, it was open to the Court of Appeal to find causation-in-fact, subject to any disqualifying reasons, such as the establishment of a relevant novus actus interveniens. A separate question is whether there was any particular reason to refrain from disturbing the primary judge's conclusion because he enjoyed advantages which the Court of Appeal could not replicate[91].

104 With respect to those of a different view, the conclusion of Santow JA that the antecedent negligence of the RTA materially contributed to the occurrence of the collision in this case was one fully available to the Court of Appeal on the evidence in the record. Not to labour the point unduly, the most important considerations (all mentioned in the reasons of Santow JA) are as follows:

(1) The case was not one, such as commonly arises, involving an old road whose defects were inherited from long ago. The evidence showed that the RTA had reconstructed the subject intersection in 1993 and created a new hazard of direct cross-traffic. The peril thus occasioned was clearly demonstrated by the crash statistics[92];

(2) The dangers inherent in electing for cross-traffic at the intersection, instead of a staggered approach, were shown to be known to highway designers in 1993 and before. Effectively, by acting as it did, the RTA created the "black spot". Then, despite the occurrence of multiple entirely predictable collisions, it failed to take action to mitigate the heightened risk of accidents which the reconstruction had occasioned[93];

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91 This is the third issue considered below at [119]-[125].

92 (2007) 47 MVR 401 at 416 [85].

93 (2007) 47 MVR 401 at 416 [85].

(3) At the time of, and after, the 1993 reconstruction, the RTA was aware of the significant impediments to the vision of drivers approaching the intersection caused by the undulating terrain and the curved trajectory of the highway[94]. As Santow JA observed[95]:

"[D]espite the RTA being alive to the problem with sight distances in 1997, nothing further was done until after the present accident and then only to move the stop sign further forward."

(4) The RTA's movement of the stop sign and holding line to a point much closer to the actual intersection of Bago Road with the highway was an initiative which the RTA could have taken earlier, but did not take until it was too late for the plaintiff and the defendant. Not only did this change improve the capacity of drivers in their respective positions to see and appreciate the movements of each other. It also reduced the distance which a driver crossing the highway from a stationary position in Bago Road had to traverse[96]. The obligation to take appropriate preventive measures, and to put in place warning signs so as to avoid, or reduce the risk of, collisions, is manifestly part of the duty of a body such as the RTA[97]. The fact that the change was not effected by the RTA until after the subject collision does not, of itself, prove that the omission in fact caused that collision, in the sense of materially contributing to it. However, after so many earlier collisions, several of them very serious, the RTA's belated movement of the stop sign and holding line clearly shows what it might have done in fact. Given that the point of impact with the plaintiff's vehicle was near the driver's seat, reducing the distance involved in a safe crossing of the highway would obviously have reduced the risk-in-fact of the present collision in a material way; and

(5) In judging causation-in-fact (and hence whether an anterior cause of poor highway design, construction and maintenance materially contributed to a collision) it is erroneous for a decision-maker to act on the assumption that every driver has perfect vision, cognition, alertness, reaction time, attention and responsiveness to danger. According to standards of reasonable care, highway design, construction and maintenance must take into account all material circumstances, including imperfections on the part of users of the road. The dangers to which human misjudgment can

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94 (2007) 47 MVR 401 at 415-416 [80].

95 (2007) 47 MVR 401 at 417 [88].

96 (2007) 47 MVR 401 at 417 [88].

97 *Brodie* (2001) 206 CLR 512 at 578 [153].

give rise were well-known to have resulted in multiple earlier collisions at the subject intersection. This imposed on the RTA affirmative duties to seek to reduce or avoid those dangers[98]. Clearly, in light of the evidence before the Court of Appeal, it was open to that Court to conclude, as the majority did, that the RTA had failed to take steps to alleviate the dangers, such as constructing a staggered T-intersection, or at least moving the stop sign and holding line forward much earlier than it did[99].

105 *The dissenting reasons*: Santow JA noted the dissenting opinion of Basten JA but disagreed with it[100]. Such disagreement was clearly open to the majority.

106 In his reasons, Basten JA was influenced by the fact that the defendant was driving in the right-turn lane of the highway even though he was travelling through the intersection constituted by Bago and Boyds Roads. His Honour considered that this "probably mislead the plaintiff" and that the defendant "had every opportunity to avoid the plaintiff, but took no evasive action until it was far too late"[101].

107 Such conclusions do not make proper allowance for the fact that the highway approaches the intersection on a curve and contains fast-moving lanes of through-traffic which enjoy priority over traffic entering from country roads. The defendant did not expect the plaintiff to cut across his path. In any case, the negligence of the defendant is accepted. Driving in the third (turning) lane may have involved some degree of negligence, as might the slight degree by which the defendant's speed exceeded the maximum speed limit, given the advisory speed signs and the known sight lines of this portion of the highway[102]. The contributory negligence of the plaintiff is unchallenged. The observation of Basten JA is not, therefore, responsive to the defendant's cross-claim against the RTA. That cross-claim is based essentially upon the fact that the poor design and construction of the intersection exposed both drivers to the serious perils so frequently arising in precisely the same way as on this occasion, such that an affirmative duty to reduce the risk was enlivened. It was either a good argument or a bad one; but it had to be answered.

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98 (2007) 47 MVR 401 at 419 [91].

99 (2007) 47 MVR 401 at 419 [92].

100 (2007) 47 MVR 401 at 420 [100].

101 (2007) 47 MVR 401 at 433-434 [154].

102 cf joint reasons at [29].

108 Next, Basten JA remarked that "[b]oth parties knew the intersection well". He attributed to them "[mistaken] conduct … based on common knowledge of the design features of the intersection"[103]. It is one thing for drivers to know about an intersection. It is quite another to expect them to react in the available seconds so as to avoid an impact caused by the sudden movement of a vehicle, such as the plaintiff's, across the highway. The defendant had no responsibility or opportunity to contribute to improving the "design features of the intersection". That was the responsibility of the RTA alone. And it is enough to support the conclusions of the majority that the evidence was sufficient to sustain an opinion that these "design features" materially contributed to the ensuing damage.

109 Basten JA was dismissive of the "opinions of the experts", which he regarded as being "of little relevance"[104]. However, given that the only way that the defendant could establish duty, breach and causation against the RTA was by calling evidence on reasonably safe highway design, construction and maintenance, his Honour here evidences, in my respectful view, the same error as was manifest in the reasons of the primary judge. If the evidence adduced by a party is ignored or dismissed by the judicial decision-maker, it will not be surprising that the decision-maker will fail to address attention to (and resolve judicially) that party's propounded case.

110 The only way that the reasons of the dissenting judge can be supported, based on such an approach, is by embracing a theory that the defendant's conduct comprised a *novus actus interveniens* or by a simplistic return to a related theory of "last opportunity" of avoiding damage. But to adopt the "last opportunity" approach would be to reintroduce into the law of negligence an approach that this Court has for some time regarded as disputable, confusing and difficult to apply[105].

111 So far as the *novus actus interveniens* argument was concerned, it was convincingly answered by Santow JA. By reference to the evidence which he explained, his Honour concluded that the RTA's "material contribution" continued to operate to the point of the collision. It had not ceased to be "causally significant"[106]. That conclusion was open. It is the more convincing because Santow JA's reasons are the only place in which the causative "material

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103 (2007) 47 MVR 401 at 434 [155].

104 (2007) 47 MVR 401 at 434 [156].

105 *Alford v Magee* (1952) 85 CLR 437 at 450-464; [1952] HCA 3; cited *March* (1991) 171 CLR 506 at 511-512.

106 (2007) 47 MVR 401 at 420 [98].

contribution" of the RTA is adequately explained or even mentioned. In reaching their conclusions, the trial judge and Basten JA did not give sufficient attention to the manner in which the evidence at trial established the "material contribution" of the RTA. Nor, with respect, do the majority in this Court.

112 *Conclusion: no error*: Because this Court does not conduct a rehearing but is a court of error, the Supreme Court judgment in favour of the defendant must be upheld if it can be shown that the conclusion reached by Santow JA, for the majority, was open on the evidence. That the defendant has demonstrated.

113 This Court cannot repeatedly remind intermediate courts of their duty in civil[107] and criminal[108] appeals to conduct their own independent review of evidence and to give effect to their own independent conclusions, only to deny the result although the intermediate court has carefully and thoroughly performed that function. Santow JA did this in the present case. In doing so, his Honour, with respect, conducted an analysis of the evidence relating to the defendant's cross-claim that the Court of Appeal was obliged to undertake, such analysis having been neglected by the primary judge.

114 *Correct approach: correct conclusion*: There are additional considerations of a general kind that support this conclusion. They include:

- the undesirability of giving encouragement to the sophistry of single causes where evidence shows that more than one cause has materially contributed to the damage complained of[109]; and

- the fulfilment of an important objective of the law of torts. The law of actionable civil wrongs exists not only to provide monetary compensation (and contribution) where that is justified, but also to encourage appropriate conduct (including on the part of public officials) by the imposition of appropriate monetary sanctions[110]. I realise, of course, the

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107 *Warren v Coombes* (1979) 142 CLR 531 at 551; [1979] HCA 9; *Fox* (2003) 214 CLR 118 at 127-128 [27]-[29].

108 *Weiss v The Queen* (2005) 224 CLR 300 at 316 [42], 318 [47]; [2005] HCA 81.

109 cf *Travel Compensation Fund* (2005) 224 CLR 627 at 648 [62].

110 Fleming, *The Law of Torts*, 9th ed (1998) at 13-14. See also Linden, "Tort Law as Ombudsman", (1973) 51 *Canadian Bar Review* 155; Linden, "Reconsidering Tort Law as Ombudsman", in Steel and Rodgers-Magnet (eds), *Issues in Tort Law*, (1983) at 1; Schuck, *Suing Government: Citizen Remedies for Official Wrongs*, (1983) at 184; cf *Neindorf v Junkovic* (2005) 80 ALJR 341 at 359-360 [84]-[85];

(Footnote continues on next page)

imperfections, inefficiencies and paradoxes involved in treating the law of torts as a guardian of communal fairness and as a stimulus to accident prevention[111]. Doubtless, there are other, usually legislative, means of attaining these ends. However, so long as the law of torts survives, its role in distributive justice and in promoting safety should be maintained rather than denied.

115 The joint reasons in this Court substantially confine their attention to the particular danger known to the RTA, being the "problem of one car masking another"[112]. With respect, this approach to causation-in-fact is far too narrow. It ignores the fact that the RTA was the statutory authority with relevant powers and functions to seek out ways of improving safety. It overlooks the RTA's actual knowledge of the "black spot" that it had created. And it gives no weight to the fact that this particular collision might have been avoided had simple and inexpensive improvements been made to the design of the intersection. It neglects the fact that, after the subject collision, the RTA at last took action to reduce the risks that had made the reconstructed intersection a "black spot". How many deaths and injuries were necessary to establish some degree of negligence in the authority responsible for the highway's design and safety?

116 I do not accept that to uphold the approach of the Court of Appeal majority is "to impose something approaching absolute liability" on the RTA[113]. Indeed, the apportionment of responsibility favoured by the majority in the Court of Appeal plainly denies this. I accept that "[t]he accident was caused by driver error"[114]. But that is not the question. The question is whether the accident was *only* caused by driver error. The majority in the Court of Appeal demonstrate why that was not so. The contrary has not been shown to warrant reversal.

117 To hold that the defendant motorist was the *only* tortfeasor liable for negligence in the present case, for decisions made or not made by him in the space of seconds when confronted by the sudden peril of the plaintiff's vehicle crossing his path, and to exculpate the RTA entirely for the dangers it caused at the intersection, is to do nothing at all to address the "material contribution"

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222 ALR 631 at 653; *Fahy* (2007) 81 ALJR 1021 at 1055 [169]; 236 ALR 406 at 449; *Dederer* (2007) 81 ALJR 1773 at 1805 [166]; 238 ALR 761 at 801.

111 Smillie, "The future of negligence", (2007) 15 *Torts Law Journal* 300 at 303 (fn 12).

112 Joint reasons at [24]. See also reasons of Kiefel J at [145].

113 Reasons of Kiefel J at [145].

114 Reasons of Kiefel J at [145].

involved in the RTA's conduct and omissions. Until such contributions are brought home to an authority such as the RTA, no stimulus is provided by the law of negligence for risk assessment, measures of accident prevention and safer highway design, construction and maintenance.

118 It follows that considerations of relevant legal principle and policy support the majority's approach in the Court of Appeal. It conformed to the manner in which the question of causation-in-fact should be resolved in a case such as the present. The majority were correct to scrutinise carefully the evidence presented against the RTA. The conclusions reached by them were supported by that evidence. Subject to what follows, those conclusions should not be disturbed by this Court.

There was no error of appellate review

119 *The suggested issue*: Finally, the RTA complained that, notwithstanding its conclusions, the Court of Appeal had erred in substituting its view on causation-in-fact for that of the primary judge, having regard to what were said to be unique advantages which the primary judge enjoyed in conducting the trial. The defendant objected to the maintenance of this ground of appeal. However, in my view it should be dealt with. It was raised in the RTA's written grounds of appeal. No injustice is done to the defendant in deciding the point.

120 *Basis of the objection*: Because appeals to an intermediate court are ordinarily conducted, as here, substantially on the written record, a rehearing involves recognised disadvantages. These include the lack of opportunity to observe witnesses giving their evidence and the less structured way in which an appellate court typically receives, and considers, such evidence[115]. It is necessary for the appellate court to accord appropriate respect to any material advantage that the primary judge enjoyed which is denied to it by the nature of its process.

121 It may be accepted that, in these proceedings, the primary judge enjoyed the advantage of seeing witnesses and hearing all the evidence informing the conclusion on the facts to which he gave expression in his reasons. However, in this appeal no significant issue of credibility remains live. The primary judge was not very impressed with some of the evidence of the defendant. But what the defendant did, or failed to do, happened in a matter of seconds. His negligence is now accepted to some degree. The outstanding question is whether

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115 cf *State Rail Authority of New South Wales v Earthline Constructions Pty Ltd (in liq)* (1999) 73 ALJR 306 at 327-330 [87]-[88]; 160 ALR 588 at 615-618; [1999] HCA 3; *Whisprun Pty Ltd v Dixon* (2003) 77 ALJR 1598 at 1614-1616 [90]-[100], 1627 [164]; 200 ALR 447 at 470-473, 488; [2003] HCA 48. See also *Fox* (2003) 214 CLR 118 at 125-126 [23].

negligence on the part of the RTA materially contributed at all to the collision that occurred.

122 *Absence of appellate error*: In his reasons, Basten JA said that he would have been reluctant to interfere with the decision of the primary judge because he "had a view of the intersection, and was able to make an assessment of the defendant"[116]. On the outstanding issue of the cross-claim against the RTA, neither of these considerations impeded the conduct by the Court of Appeal of an analysis of the facts, considered in their entirety. This was an analysis that the primary judge had failed to undertake.

123 Understandably, in my view, the very careful examination of the evidence undertaken by Santow JA led to his conclusion about the inadequacy of the primary judge's reasons in this respect. By rejecting that complaint, Basten JA compounded, in my view, the defects in the treatment of the cross-claim at trial. He accepted the wholly simplistic case presented by the RTA which could only be rebutted by a thorough analysis of the evidence that was relevant to the cross-claim. Only Santow JA performed that analysis.

124 The conclusion of the primary judge on the cross-claim could carry but little weight when all of the evidence relevant to that cross-claim was taken into account. Likewise, the primary judge's poor opinion of the defendant could not displace the substantial and largely unchallenged evidence of known design faults and maintenance failings that Santow JA carefully demonstrated.

125 *Conclusion: no error*: Conformably with the recent authority of this Court[117], there was therefore no impediment to the Court of Appeal's review of the evidence relevant to the cross-claim against the RTA. Especially is this so because the primary judge inferentially rejected that evidence but did so unconvincingly because he failed to consider it in an appropriate, or any real, way. It was that defect that the majority in the Court of Appeal identified and cured. The contrary approach amounts to an attempt by the RTA to have this Court return to the unjust days of single causes and last opportunities which *March*, and cases since, have finally rejected. We should reject that attempt and adhere to our own established authority. We should not continue down the path, for unpersuasive reasons and in the absence of demonstrated error, of substituting

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116 (2007) 47 MVR 401 at 434 [156].

117 See in particular *Earthline Constructions* (1999) 73 ALJR 306 at 321 [63]-[64], 332 [94], 343-344 [154]; 160 ALR 588 at 607, 622, 636; *Fox* (2003) 214 CLR 118 at 129 [32]; *CSR Ltd v Della Maddalena* (2006) 80 ALJR 458 at 462 [1], 470 [46], 479 [105]; 224 ALR 1 at 3, 14, 26; [2006] HCA 1.

differing views about the facts in this Court for those of judges who have the function, time and duty to address them thoroughly[118].

Conclusion and order

126 None of the RTA's arguments succeeds. The appeal should be dismissed with costs.

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118 *Fahy* (2007) 81 ALJR 1021 at 1055 [168]; 236 ALR 406 at 448; *Dederer* (2007) 81 ALJR 1773 at 1805 [166]; 238 ALR 761 at 801.

127 KIEFEL J. On 12 March 2001 a collision occurred between a vehicle driven by the first respondent, Mr Royal, and one driven by Mr Smurthwaite near the intersection of Bago Road with the Pacific Highway, south of Wauchope in New South Wales. In proceedings brought by Mr Smurthwaite, to recover damages for his injuries, he and Mr Royal were found to have contributed to the accident, by their negligence, although Mr Royal was held largely responsible. The Roads and Traffic Authority of New South Wales ("the RTA") was joined in the proceedings. Mr Smurthwaite and Mr Royal claimed that the intersection was designed in such a way as to put drivers at risk. The trial judge (Phelan DCJ) dismissed the claim against the RTA. It may be inferred that his Honour was not satisfied that any failure on the RTA's part materially contributed to the accident. A majority in the Court of Appeal of the Supreme Court of New South Wales (Santow and Tobias JJA) disagreed. This appeal concerns the method by which their Honours determined that the RTA was liable.

128 On the date in question Mr Smurthwaite was travelling from Wauchope in an easterly direction along Bago Road. Where that road intersects with the northbound section of the Pacific Highway there is a stop sign and lines marked on the roadway. The highway at this point is four lanes wide, with an additional left-turn lane into Bago Road and a right-turn lane into Boyds Road. A vehicle crossing the highway at the intersection proceeds from Bago Road and into Boyds Road which connects, to the east, with the Pacific Highway southbound. That was Mr Smurthwaite's intended route.

129 Mr Smurthwaite had no recollection of the accident, as a consequence of his injuries, and Mr Royal's account was largely rejected by the trial judge as unreliable. The evidence of two other drivers provided a detailed account of what had occurred. After stopping at the stop sign, Mr Smurthwaite's vehicle proceeded across the highway. His vehicle continued to move forward without any alteration of speed. Mr Royal's vehicle was seen by the driver of the vehicle immediately behind that of Mr Smurthwaite at the same time as he observed Mr Smurthwaite's vehicle move off. Mr Royal was travelling faster than he should. At a point where the highway curves to the right, his vehicle changed from the left lane to the right lane and then moved into the right-turning lane. It appeared to be cutting the corner. The driver observing Mr Royal saw Mr Smurthwaite's vehicle and he braked. Mr Royal did not do so until some time later. It later emerged that he had maintained the cruise control of his vehicle. He did not attempt to swerve or steer clear of Mr Smurthwaite's vehicle, which he could have done. The two vehicles collided.

130 A finding by the trial judge that Mr Royal had been negligent, by reason of his multiple failures to take reasonable care, presented no difficulty. It was more difficult to understand why Mr Smurthwaite did not appear to have appreciated the danger presented by Mr Royal's vehicle. The witnesses and Mr Smurthwaite were familiar with the intersection and with the degree of visibility from it to the right along the highway. The witnesses said that there

was good visibility at the intersection and that, so long as a driver waited for a gap in the highway traffic, they could easily cross it without having to speed. Mr Smurthwaite, who worked in the area, said that he knew when it was safe to cross. His Honour the trial judge conjectured that Mr Royal's vehicle may have been in a dip in the highway at the moment when Mr Smurthwaite proceeded from the intersection, but if that was so he should have had sufficient time to clear the intersection without colliding with Mr Royal's vehicle. Amongst other possibilities his Honour considered, one was whether Mr Smurthwaite may have been misled by Mr Royal travelling in the right-hand turn lane. He may have assumed that Mr Royal would slow down. This, however, involved the assumption of a risk of collision. Whatever the true reason for Mr Smurthwaite's inaction, his Honour concluded that he had been inattentive and thereby contributed to the accident.

131 There was evidence before his Honour that that part of the roadway, upon which the accident occurred, had been considered as something of a "black spot" by the RTA. A number of serious accidents, including some involving fatalities, had occurred at that point. The chief problem created by the intersection, identified by his Honour, was that a driver stopped at the entry into the intersection from Bago Road may have had obscured from their view cars travelling behind other northbound vehicles, particularly those in the left-hand lane.

132 The expert evidence concerning the design of the intersection was reviewed in the Court of Appeal. The intersection had been reconstructed in 1993. At this point and subsequently the RTA could have chosen to construct a staggered T-intersection, which would have obviated the need for vehicles to travel across the highway. It would have required drivers from Bago Road wishing to join the southbound highway to turn left, join the highway northbound, proceed for a distance sufficient to enable them to move across the lanes and utilise a right-turn lane which would connect with a roadway to the southbound highway. The construction of such an intersection was not impracticable.

133 The requirement of such an intersection was not accepted by Basten JA. His Honour did not consider the selection of the intersection to have been unreasonable, at the time. His Honour observed that many of the risks said to be associated with the intersection design, and which affect the statistics as to accidents, were irrelevant to this case[119]. It is not necessary to determine the correctness of his Honour's assessment. These considerations are rendered

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119 *Royal v Smurthwaite* (2007) 47 MVR 401.

hypothetical if the configuration of the intersection did not materially contribute to Mr Smurthwaite suffering his injuries[120].

134 Santow JA (with whom Tobias JA agreed) held that the RTA owed a duty to road-users, such as Mr Royal and Mr Smurthwaite, to take steps to alleviate a known danger at a specific location, given available options to do so[121]. In failing to take steps reasonably open to it, not just to move the stop sign, as it did after the accident, but to construct a staggered T-intersection, the RTA breached that duty. His Honour then said that "[t]he remaining question is whether the supervening conduct of Mr Royal represented an intervening cause that could be said to have broken the chain of causation from the RTA's original negligent design"[122]. His Honour posed the question whether the accident would have happened if the duty had been performed, following the approach of Gaudron J in *Bennett v Minister of Community Welfare*[123], and concluded that in a "but for" sense the defective design materially contributed to the accident[124].

135 The but for test has clear limitations. It was rejected as the exclusive test of factual causation in *March v Stramare (E & M H) Pty Ltd*[125]. Its inadequacy as a test for whether an earlier wrongful act or omission, although amounting to a condition of the occurrence of the ultimate harm, was a true cause of that harm, was acknowledged by Mason CJ, Deane and Toohey JJ in *Bennett*[126]. In *Chappel v Hart*[127] McHugh J said that, underlying the rejection of the but for test in such

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120 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410; 1 ALR 125; *March v Stramare (E & M H) Pty Ltd* (1991) 171 CLR 506; [1991] HCA 12.

121 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [91], referring to *Brodie v Singleton Shire Council* (2001) 206 CLR 512; [2001] HCA 29 and *Commissioner of Main Roads v Jones* (2005) 79 ALJR 1104; 215 ALR 418; [2005] HCA 27.

122 *Royal v Smurthwaite* (2007) 47 MVR 401 at 419 [92].

123 (1992) 176 CLR 408 at 420-421; [1992] HCA 27.

124 *Royal v Smurthwaite* (2007) 47 MVR 401 at 420 [97].

125 (1991) 171 CLR 506 at 508 per Mason CJ, 522-523 per Deane J, 524 per Toohey J.

126 (1992) 176 CLR 408 at 413; and see *Medlin v State Government Insurance Commission* (1995) 182 CLR 1 at 6 per Deane, Dawson, Toohey and Gaudron JJ; [1995] HCA 5; *Chappel v Hart* (1998) 195 CLR 232 at 243-244 [24]-[26] per McHugh J; [1998] HCA 55.

127 (1998) 195 CLR 232.

cases, is the instinctive belief that a person should not be liable for every wrongful act which is a necessary condition of the occurrence of the injury[128]. Causation for legal purposes is concerned with the allocation of responsibility for harm, according to commonsense ideas; its concern is not that of philosophy or science, to explain phenomena by reference to the relationship between conditions and occurrences, as Mason CJ explained in *March*[129]. For that reason, McHugh J observed, the mere fact that injury would not have occurred but for the defendant's act or omission here is often not enough to establish a causal connection for legal purposes[130].

136 The reasons of Santow JA disclose a conclusion of liability before the application of the but for test. His Honour reasoned from a failure, on the part of the RTA, to reduce an identifiable risk, to a conclusion of liability. The submissions for the first respondent seek to support such an approach. They rely upon observations by Dixon J in *Betts v Whittingslowe*[131] and by Mason CJ in *March*[132] to show that causation may be taken as proved in the circumstances of the present case and by the method applied by Santow JA.

137 In *Betts* Dixon J said[133]:

> "breach of duty coupled with an accident of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the accident did occur owing to the act or omission amounting to the breach of statutory duty."

138 In *March* Mason CJ said[134]:

> "it makes no sense to regard the negligence of the plaintiff or a third party as a superseding cause or novus actus interveniens when the defendant's wrongful conduct has generated the very risk of injury resulting from the

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128 *Chappel v Hart* (1998) 195 CLR 232 at 243-244 [26].

129 (1991) 171 CLR 506 at 509.

130 *Chappel v Hart* (1998) 195 CLR 232 at 243-244 [26].

131 (1945) 71 CLR 637 at 649; [1945] HCA 31.

132 (1991) 171 CLR 506 at 518-519.

133 (1945) 71 CLR 637 at 649.

134 (1991) 171 CLR 506 at 518-519.

negligence of the plaintiff or a third party and that injury occurs in the ordinary course of things."

139 *Betts* concerned a statutory duty, on the part of the employer, to securely fence and safeguard all dangerous parts of machinery. The observations of Dixon J were referrable to the circumstances of that case. The fact that a young worker's hand came into contact with part of the machinery which needed to be guarded permitted an inference of breach of that duty. Indeed, as his Honour went on to say immediately after the passage relied upon, "the facts warrant no other inference inconsistent with liability on the part of the defendant"[135]. His Honour's reasons do not suggest any presumption to operate or any alteration to the requirement of proof of causation. They have not been understood to suggest any lessening of it[136]. As Dixon CJ later confirmed in his judgment in *Jones v Dunkel*[137], the facts proved must form a reasonable basis for a definite conclusion, affirmatively drawn[138].

140 The statement of Dixon J in *Betts* does not provide support for a conclusion of liability to be drawn from a failure to address, or reduce, a risk. That of Mason CJ in *March,* relied upon by the first respondent, confirms the commonsense approach to causation, spoken of in that case. It does not suggest to the contrary of the requirement that the risk must come to pass. It is "that" injury which occurs "in the ordinary course of things".

141 The approach of Santow JA in the present case implies that there is some equivalence between a failure to address the risk identified as created by the intersection and causation in fact. It has been suggested that a finding that an injury has occurred within an identified area of foreseeable risk may be sufficient to prove that it has caused or materially contributed to the injury[139]. The conclusion so reached has been explained by a shift in the evidentiary onus of

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135 *Betts* (1945) 71 CLR 637 at 649; and see 641 per Latham CJ, 645 per Starke J.

136 See *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410 at 417 per Gibbs J; 1 ALR 125 at 138.

137 (1959) 101 CLR 298; [1959] HCA 8.

138 (1959) 101 CLR 298 at 305, as pointed out in *Seltsam Pty Ltd v McGuiness* (2000) 49 NSWLR 262 at 289 [168] per Spigelman CJ and *Flounders v Millar* (2007) 49 MVR 53 at 59 [33] per Ipp JA.

139 *Bennett* (1992) 176 CLR 408 at 420-421 per Gaudron J; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 279 [31] per Gaudron J; [1999] HCA 22; *Chappel v Hart* (1998) 195 CLR 232 at 273 per Kirby J.

proof taking place[140]. This approach was taken up in *North Sydney Council v Binks*[141]. In that case Santow JA suggested that the statement from *Betts*, set out above, required no more than that the accident which occurred be a reasonable possibility. This might be inferred from the use of the word "might" which his Honour considered[142]:

> "invokes notions of foreseeability and a degree of correlation, not merely temporal, which is typically referred to as within an 'area of foreseeable risk' connecting the defendant's negligence to the accident which follows."

142 His Honour there held that the accident was within the foreseeable area of risk which arose from inadequate and delayed signage[143]. Liability was thereby established.

143 It remains a requirement of the law that a plaintiff prove that a defendant's conduct materially caused the injury[144]. Nothing said in *Betts* detracts from that requirement, which forms the basis for the restatement of the test of causation in *March*. The question whether there is no real distinction between breach of duty and causation[145], and the question whether a failure to take steps which would reduce a risk amounts to a material contribution to the injury, have been discussed elsewhere in connection to a possible shift in the onus of proof[146]. No decision of this Court holds that there is that equivalence or some lessening of

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140 *Bennett* (1992) 176 CLR 408 at 420 per Gaudron J; cf 416 per Mason CJ, Deane and Toohey JJ; *Naxakis v Western General Hospital* (1999) 197 CLR 269 at 279 [31] per Gaudron J; cf *Chappel v Hart* (1998) 195 CLR 232 at 270-271 [93] per Kirby J.

141 (2007) 48 MVR 451 per Santow JA, Beazley JA agreeing, Basten JA dissenting; see also *Amaca Pty Ltd (formerly James Hardie & Co Pty Ltd) v Hannell* (2007) 34 WAR 109.

142 *North Sydney Council v Binks* (2007) 48 MVR 451 at 458 [30].

143 *North Sydney Council v Binks* (2007) 48 MVR 451 at 459 [37].

144 *Bonnington Castings Ltd v Wardlaw* [1956] AC 613; *Duyvelshaff v Cathcart & Ritchie Ltd* (1973) 47 ALJR 410; 1 ALR 125; *March* (1991) 171 CLR 506.

145 *McGhee v National Coal Board* [1973] 1 WLR 1; [1972] 3 All ER 1008.

146 As noted in *Bennett* (1992) 176 CLR 408 at 416 per Mason CJ, Deane and Toohey JJ.

the requirement of proof. As the majority in *Bennett* observed, they are questions which have not been considered by this Court[147].

144 The present state of authority does not accept the possibility of risk of injury as sufficient to prove causation. It requires that the risk eventuate[148]. Kitto J in *Jones v Dunkel* said that one "does not pass from the realm of conjecture into the realm of inference" unless the facts enable a positive finding as to the existence of a specific state of affairs[149]. Spigelman CJ pointed out in *Seltsam Pty Ltd v McGuiness*[150], with respect to an increased risk of injury, that the question is whether it *did* cause or materially contribute to the injury actually suffered[151]. This enquiry is consistent with the commonsense approach required by *March*.

145 In the present case the only risk arising from the nature of the intersection, which might possibly have been referrable to the circumstances of the accident, was that Mr Smurthwaite may have had part of his vision of cars travelling north on the highway obscured momentarily. But his Honour the trial judge discounted this and, as Basten JA pointed out[152], Mr Royal was not travelling in the left lane, but in the right. The better inference is that Mr Smurthwaite thought that Mr Royal was turning right and would therefore slow down. There is nothing to suggest that Mr Royal could not be seen by Mr Smurthwaite. The evidence did not show that the design of the intersection contributed to the accident. It is not sufficient to suggest that there was a statistical possibility of an accident at the intersection because it was not the best design. To hold the RTA liable on this account would be to impose something approaching absolute liability. The accident was caused by driver error.

146 I would allow the appeal, set aside the orders of the Court of Appeal and in their place order that the appeal to that Court be dismissed with costs.

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147 (1992) 176 CLR 408 at 416.

148 *Chappel v Hart* (1998) 195 CLR 232 at 244-245 [27] per McHugh J.

149 (1959) 101 CLR 298 at 305.

150 (2000) 49 NSWLR 262 at 280 [118].

151 See *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307 at 318 per Mason P; *Van Den Heuvel v Tucker* (2003) 85 SASR 512 at 531 [98] per Doyle CJ and Duggan J; *Batiste v State of Queensland* [2002] 2 Qd R 119 at 124 [9] per Thomas JA, McMurdo P agreeing.

152 *Royal v Smurthwaite* (2007) 47 MVR 401 at 433 [153].