SUPREME COURT OF QUEENSLAND

CITATION:	*The Corporation of the Synod of the Diocese of Brisbane v Greenway* [2017] QCA 103
PARTIES:	**THE CORPORATION OF THE SYNOD OF THE DIOCESE OF BRISBANE** ABN 39 906 010 979 (appellant) **v** **RACHEL LOUISE GREENWAY** (respondent)
FILE NO/S:	Appeal No 8913 of 2016 DC No 1047 of 2015
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane – [2016] QDC 195
DELIVERED ON:	26 May 2017
DELIVERED AT:	Brisbane
HEARING DATE:	10 February 2017
JUDGES:	Morrison and McMurdo JJA and Bond J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Appeal allowed.** **2. Set aside the judgment delivered on 5 August 2016.** **3. Judgment entered for the appellant against the respondent.** **4. Order the respondent to pay the appellant's costs unless written submissions seeking a different order are filed within 14 days of the date of this judgment.**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – where the respondent was employed by the appellant as a community support worker – where the respondent was working alone with a 15 year old boy with a history of drug use and aggressive, sometimes criminal behaviour, including conduct directed towards support workers – where, one evening, the boy became verbally abusive and physically aggressive to the respondent, including kicking a window and brandishing a large shard of glass in a threatening manner and attempting to steal the keys to a staff car – where the respondent successfully de-escalated

the situation and telephoned her supervisor who was also employed by the appellant – where her supervisor did not offer to relieve her from her shift or send another worker to support her and advised her against calling the police – where the respondent consequently spent the remainder of the night at the house alone with the boy – where the respondent contracted Post Traumatic Stress Disorder (PTSD) – where the trial judge found that the appellant was not negligent in failing to prevent the incident but was negligent in its response to the telephone calls from the respondent – where the psychiatric evidence was that the violent incident was a primary cause of the PTSD and the appellant's response may have been a secondary cause or 'stressor' – where the evidence was that, but for the appellant's negligence, there may have been 'a less severe PTSD' but there was only a 'remote possibility' that there would have been no PTSD at all – whether the respondent had discharged her onus to prove that the damage was caused by the appellant's negligence under s 305D *Workers' Compensation and Rehabilitation Act* 2003 (Qld)

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – where the respondent also argued that the judgment could be upheld on the basis that the respondent had proved that the injury would have been "minimised", even if not prevented, by the proper discharge of the appellant's duty – where the "injury" identified by the pleadings and at trial was not an exacerbation of an existing PTSD but rather the PTSD itself – whether the evidence supported a finding that the negligence exacerbated the PTSD – whether the respondent could argue the minimisation point on appeal despite her pleadings and the case conducted at trial

TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – where the appellant's negligence may have amounted to a material contribution to the respondent's injury but did not satisfy the 'but for' test of causation – where the respondent did not argue or plead at trial that this was an "exceptional case" where "in accordance with established principles" a breach of duty which did not satisfy the 'but for' test of causation should be accepted as satisfying the requirement of factual causation – whether factual causation could be established under s 305D(2) *Workers' Compensation and Rehabilitation Act* 2003 (Qld)

Workers' Compensation and Rehabilitation Act 2003 (Qld), s 305D

Bonnington Castings Ltd v Wardlaw [1956] AC 613; [1956] UKHL 1, considered
Greenway v The Corporation of the Synod of the Diocese of Brisbane [2016] QDC 195, related
Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd (2013) 247 CLR 613; [2013] HCA 10, cited

Kuhl v Zurich Financial Services Australia Ltd (2011) 243 CLR 361; [2011] HCA 11, distinguished
Strong v Woolworths Ltd (2012) 246 CLR 182; [2012] HCA 5, applied
Zanner v Zanner (2010) 79 NSWLR 702; [2010] NSWCA 343, cited

COUNSEL: R J Douglas QC, with G O'Driscoll, for the appellant
G Crowe QC, with J Sewell, for the respondent

SOLICITORS: Kaden Boriss Legal for the appellant
Slater and Gordon for the respondent

[1] **MORRISON JA:** I agree with the reasons of McMurdo JA and Bond J. I agree with the orders proposed by McMurdo JA.

[2] **McMURDO JA:** After a trial in the District Court, the respondent was awarded damages of $454,935.68 for a psychiatric injury which was found to have been caused by the appellant, her employer. There is no challenge to the judge's findings of negligence. The question in this appeal is whether all, or alternatively some, of her loss and damage was caused by the appellant's negligence. For the reasons that follow, that question should be answered in the negative and the appeal must be allowed.

The relevant events

[3] In August 2013, the appellant employed the respondent at a residential care facility which it conducted under the name Anglicare. The respondent was employed as a community support worker and, on the evening of 25 August 2013, was the appellant's only employee working at the facility. The only resident then was a 15 year old boy, who had a history of drug use and aggressive, sometimes criminal, behaviour, including conduct directed towards support workers.

[4] On that evening, the boy became verbally abusive and physically aggressive towards the respondent. He threw a phone at her and pushed her out of his way as he searched for keys to a car which was used by staff at the facility. He started to hyperventilate and threatened to kill himself by jumping through a window. He kicked the window of his room breaking a pane of glass. He then picked up a large shard of glass which he held in front of him, saying to the respondent that he could "fuck someone up with this".

[5] The respondent felt threatened and frightened. But she was able to calm him down and disarm him and she was then able to talk to him about his behaviour. She believed that the boy was under the influence of glue at the time and gave him some medication and got him to go to bed for the night in his room.

[6] During this incident the respondent had telephoned a Mr Mafulu, who was employed by the appellant as the respondent's supervisor. Mr Mafulu could hear the commotion that was occurring. He was told by the respondent that the boy had managed to get inside the staff room, that she wanted to get off the phone so that she could deal with the situation and that she would call him back. After the boy had gone to bed, the respondent rang Mr Mafulu and reported what had occurred. There were differences between the recollections of the respondent and Mr Mafulu about this conversation, but it was common ground that he made no offer to then relieve the respondent from the rest of her shift, which was not to finish until the following morning, or to come

to the house or send another worker to support her. Nor did the respondent ask for any of those things. The trial judge found that this was because the respondent thought that Mr Mafulu did not think that the incident was serious and she did not want to appear to him to be unable to manage the situation. The trial judge found that they discussed who the respondent should call and that Mr Mafulu told her to call a glazier, someone from the relevant government department and the boy's aunt. The respondent asked Mr Mafulu whether the police should be called and he said that there was no need to do so because she had de-escalated the situation. The boy was then on bail and staff had been instructed to call the police if he absconded or they were unaware of his whereabouts.

[7] A tradesman came that night to fix the window. Apart from that visit, the respondent was left alone in the house with the boy overnight before Mr Mafulu visited at about 9 o'clock on the following morning.

[8] After that shift the respondent did not return to work. When she tried to undergo some training she felt that she was unable to continue and was off work from that time. She suffered anxiety and panic attacks which were ongoing at the time of the trial and which, according to the evidence of psychiatrists, were likely to continue. In the unanimous opinion of the psychiatrists who gave evidence, she suffered from chronic post-traumatic stress disorder.

The respondent's claim in the District Court

[9] The respondent alleged that the appellant breached a common law duty of care and a like duty under the parties' contract of employment. She alleged that by reason of the appellant's breaches of those duties, she had suffered what her pleading called "the Injury", which was described as "a psychiatric injury in the form of a post-traumatic stress disorder [requiring] psychiatric treatment and psychological counselling and [leaving the respondent] with a permanent impairment".

[10] The respondent pleaded that the Injury was caused by the appellant's breaches of its duties which were particularised in several ways. As the trial judge analysed those allegations, they fell into three categories. The first was that the appellant had failed to prevent "the incident", by which the judge referred to what had occurred between the respondent and the boy before he went to sleep for the night. The second category consisted of allegations that the appellant had failed to adequately respond after the first of the telephone conversations between her and Mr Mafulu. The third category was that the appellant had not adequately responded after the second of those telephone conversations.[1]

The findings about negligence

[11] The trial judge described that first category as involving allegations that the appellant should have refused to accept the boy as a resident of the facility, that it should have provided another worker to assist in his care and that it had not adequately trained the respondent before requiring her to care for the boy alone.[2] She found that the respondent had not proved any of those allegations. The judge thereby concluded that there had been no breach of any duty by the appellant which had caused the occurrence of the incident.

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1 *Greenway v The Corporation of the Synod of the Diocese of Brisbane* [2016] QDC 195 at [8].

2 Ibid at [19].

[12] The trial judge then considered whether the appellant's response after the telephone conversations between the respondent and Mr Mafulu had involved a breach of its duty. She thereby considered, realistically, the second and third categories as involving the one question. She found that Mr Mafulu was aware of a number of circumstances which should have caused him to be concerned about the respondent's safety: the respondent was alone in the house with a boy with a history of violence, he had become agitated and angry and had forced his way into the secure staff room, he had kicked and broken the window in his bedroom, he had assaulted the respondent although she had not been physically injured, he had threatened to harm himself, he had threatened the respondent whilst armed with the shard of glass and although he had calmed down by the second conversation, the house was still not secure and there was broken glass in the boy's bedroom.

[13] The only inquiry made by Mr Mafulu was to ask the respondent how she was feeling and he was told that she was "OK". Referring to that inquiry, the trial judge said:

> "[55] In that context, Mr Mafulu's sole enquiry was inadequate. That is particularly so, when viewed in the context of his other statements to her: that he was not going to come over because she had de-escalated the situation and she had to establish her authority in the house; and that there was no need to call the police. Acting only on a brief response to a single enquiry in those circumstances placed inordinate responsibility on an employee who had just experienced a traumatic incident.
>
> [56] There were other options open to him. He could have called the Police, visited the house himself or to sent another worker to check on her and assist."

[14] The trial judge referred to evidence, called in the appellant's case, that it was "best practice for the on call Team Leader to support the worker to continue to provide care for the young person without being relieved".[3] The judge also referred to evidence from the same witness about the process which the witness would undertake, in the position of Mr Mafulu, to assess the employee's welfare. The judge described that process as going well beyond the sole enquiry which was made by Mr Mafulu.[4]

[15] The trial judge then continued with her analysis of whether the appellant had breached its duty as follows:

> "[59] Anglicare has not adopted guidelines to assist Team Leaders in this regard. It does not train Team Leaders in how to make such an assessment and what factors might indicate a carer should be further assessed, assisted or relieved.
>
> [60] Anglicare relied on the TCI course as providing direction to Team Leaders. The focus of that training is de-escalating a crisis situation and guiding the young person afterwards. There is no evidence it adequately equips a Team Leader to assess a staff member's welfare.
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> [61] Other than the carer's training, the provision of an on-call Team Leader is the measure adopted by Anglicare to protect the safety

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3 Ibid at [57].

4 Ibid.

and welfare of its employees when working under a sole carer model. How effective that measure is depends on the knowledge and skill of Team Leaders in assessing a carer's welfare in such a situation. Mr Mafulu was not adequately equipped by Anglicare to fulfil that responsibility and, in this case, his response to the situation was inadequate.

[62] A reasonable employer in Anglicare's position would have taken the following precautions:

1. Established guidelines for on call Team Leaders to support workers caring alone for young people with complex or extreme support needs; and

2. Trained on-call Team Leaders in how to assess a worker's welfare in the aftermath of a crisis, considering emotional and psychological issues as well as physical safety.

[63] There is no evidence to suggest those precautions would present an unreasonable burden on Anglicare, when balanced against the probability and magnitude of the risk of a worker sustaining an injury when caring for a troubled young person alone.

[64] Anglicare's breach is constituted by its failure to take those precautions."

Factual causation

[16] The respondent was required to prove that her injury had been caused by a breach of duty according to the principles prescribed by s 305D of the *Workers' Compensation and Rehabilitation Act* 2003 (Qld) (the WCR Act). Section 305D provides as follows:

"(1) A decision that a breach of duty caused particular injury comprises the following elements –

(a) the breach of duty was a necessary condition of the occurrence of the injury (***factual causation***);

(b) it is appropriate for the scope of the liability of the person in breach to extend to the injury so caused (***scope of liability***).

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty – being a breach of duty that is established but which can not be established as satisfying subsection (1)(a) – should be accepted as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the worker who sustained an injury would have done if the person who was in breach of the duty had not been so in breach –

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

> (b) any statement made by the worker after suffering the injury about which he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.
>
> (4) For the purpose of deciding any scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party who was in breach of the duty."

[17] The appellant's argument is that on the evidence the respondent did not prove the first of the elements in s 305D(1), namely factual causation. It is argued that the trial judge's reasons reveal a legal error in her understanding of what was required by this element. It is further argued that with a proper understanding of that matter, the trial judge could not have concluded, as she did, that the breaches of duty were a necessary condition of the occurrence of the injury.

[18] There was no argument at the trial or in this appeal that s 305D(2) could and should operate to facilitate the proof of causation in this case. Nor was there any argument as to the element of "scope of liability": the appellant accepted that if factual causation was established, it was appropriate for its liability to extend to this injury.

The evidence of psychiatrists

[19] On this question of causation, the judgment referred to the evidence of two psychiatrists, Dr Chalk and Dr de Leacy. There were reports from each of them which were tendered and they gave oral evidence concurrently.

[20] In his report which was dated 28 July 2014, Dr Chalk described the circumstances of "the incident" as the respondent had related it to him. It is unnecessary to set out that description here. It is sufficient to say that it was a description of what had happened between the respondent and the boy until he went to bed. In answer to the question "does the claimant suffer from a psychiatric/psychological condition as a result of the work-related incident?", Dr Chalk answered "Yes. She suffers from post-traumatic stress disorder". In answer to some other questions, Dr Chalk wrote that "it is the work-related incident that has caused her injury" and "there is a direct causal relationship between the current diagnosis and the stated mechanism of injury." He also wrote that with treatment over time, he expected that ultimately the respondent's level of impairment would at least halve. Notably the report did not discuss the effect, if any, of the respondent being left alone in the house, after the incident, without assistance.

[21] Dr de Leacy wrote a report in November 2014. Under the heading "History of the Incident", he included a statement of what had occurred after the boy went to bed. Dr de Leacy wrote:

> "She said she did what she could to de-escalate the situation and reported the matter to her manager. She was required to finish the shift and complete the sleepover despite having extreme distress."

His diagnosis was "Post-traumatic Stress Disorder, chronic moderate." He wrote that "Post-traumatic Stress Disorder is a serious disorder of anxiety that results from a life threatening situation and which is accompanied by hyperarousal, avoidance and re-experiencing phenomenon. These features are present in this case." Relevantly to the question of causation, Dr de Leacy wrote:

> "Your client was injured psychologically at work. She was threatened verbally and attacked physically and was threatened with a large shard of glass. This was a criterion A event and she developed a range of psychological symptoms *from this*."
>
> (emphasis added)

[22] Shortly before the trial, Dr de Leacy wrote a letter recording that he and Dr Chalk had discussed their findings and had agreed "about the diagnosis and causality and the quantum of PI assessed at the time." He wrote that there was no significant issue on which they disagreed.

[23] On the initiative of the trial judge, the psychiatrists gave their oral evidence concurrently. The judge prepared a document headed "Topics for Concurrent Evidence Session", which included this question:

> "1. Causal nexus between the employer's response to the incident and Ms Greenway's PTSD
>
> Assuming the facts below are proved are you able to express an opinion on whether they have a causal connection.
>
> If so, are you able to differentiate between the causal nexus with Ms Greenway's PTSD of the incident itself and the employer's response to the incident?"

The assumed facts which were set out in that document corresponded with the evidence and the judge's findings. The judge's questions indicated the likelihood of findings that the appellant had not breached its duty by causing the incident, but had done so by its response to the incident. The psychiatrists were provided with this document prior to their concurrent evidence, which commenced with questions of each of them from the judge before questions from each of the counsel.

[24] The judge told the psychiatrists that the topic of these questions was the "causal nexus between the way in which the defendant, the employer, responded to the incident and Ms Greenway's post-traumatic stress disorder". She explained that by "the incident", she meant the "actual incident involving the young person", lasting about half an hour. In other words the incident, the subject of her questions, was what had occurred between the respondent and the boy.

[25] Dr de Leacy began by saying:

> "My view is that the threatening incident itself is the primary cause of the PTSD and the issue about the phone calls was somewhat secondary … [W]hen someone experiences a stressful event, some sort of a debriefing usually is beneficial. But in this case, when there appears to be a lack of support, there is an absence of something that might ameliorate the development of the trauma and the chance of these issues."

He added that:

> "[T]he absence of a response made things worse for her … [i]f she had have had a supportive response, she may have felt more reassured … [a]nd that may not have led to a severe stress reaction with more reassurance."

There was then this exchange:

"HER HONOUR: I see. So there might have been a less severe PTSD.

DR DE LEACY: Yes.

HER HONOUR: Or is it possible there would be no PTSD?

DR DE LEACY: That would be possible too.

HER HONOUR: Yes.

DR DE LEACY: I think if there was a high level of support following the incident, it's possible that the way the brain processed the trauma may have been altered to the extent where the stress was ameliorated to a significant degree. And it's remotely possible that PTSD might not have developed.

HER HONOUR: All right. And I think I'm asking the impossible question here, and if I am you can tell me that. With hindsight, are you able to look back on her experience and differentiate between one contribution and another?

DR DE LEACY: It is a difficult question. I think to quantify the role of each would be quite difficult, except to say that there would be a contribution of each factor.

HER HONOUR: All right.

DR DE LEACY: I'd – I couldn't say – I couldn't quantify the level of importance. But I would tend to consider that the actual incident itself was the primary trigger. And – but the second – but the lack of response was an additional stressor."

[26] Dr Chalk was then asked for his view about that evidence of Dr de Leacy and gave this evidence:

"DR CHALK: Your Honour, my view is that the – the incident with the breaking of the glass and the threat was clearly the primary incident. I don't have any great disagreement with that. The – contextually, this lady does appear to have responded in a fairly appropriate manner in the aftermath of the event by de-escalating it. And it would appear that she seemed to have coped with that contemporaneously and to have had these phone calls with the [indistinct] or the team leader. And I understand what Dr De Leacy is saying about the fact that her perception was that she wasn't supported. I have some disagreement with him about the role of debriefing. There's no clear evidence that debriefing, as such, is a therapeutic endeavour. In other words, critical incident stress debriefing is not something that's been shown to prevent the development of problems. I think that it would appear that this lady did feel as though she could have garnered some more support. But by the same token, she was also wanting to appear competent and able to handle things. So I just think that she was in a bind as well.

HER HONOUR: Okay. Can I ask you this, Dr Chalk: if – if we look at those facts as not merely being an issue of debriefing but an indication that she was in a position where she felt – she continued to feel at risk. And I'm thinking here, particularly, in (d) and (e) of the facts on the plaintiff's evidence, if I accept it, she wanted assistance but felt uncomfortable about asking for it and continued to fear further

> escalation or possible escalation again from the young person. Is that anything that might contribute to the condition that you've diagnosed?
>
> DR CHALK: Look, I think it probably did – would be seen as a contributing factor towards her ongoing anxiety. Absolutely. I think that if one thinks about it, there's been glass broken. There's been some threat made, and she's then in that environment for the next – it's eight hours or so – and is sleeping there overnight. I think that there would be a degree of understandable discomfort and anxiety. I don't have any great issue with that. If there had been a response and the person had come and visited, I think that that may have provided a degree of comfort to her.
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> HER HONOUR: All right. And do you agree or disagree with Dr De Leacy that you can't look back and separate different contributors in any kind of percentage terms? You might be able to identify primary and secondary, but, really, beyond that you couldn't do so.
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> DR CHALK: I think it becomes a very difficult exercise. And one of the points that I make – and which Dr De Leacy is well aware of – is that psychiatrists are appalling at mathematics and it's very difficult to divide either by two or by three. And to try and sort of quantify something that is very nebulous, I think, becomes an exercise in trying to split a pie. It's – I think there are problems in doing it. And you wouldn't want to have – appear to have a degree of certainty that isn't there."

[27] Each of the doctors was then questioned by the appellant's counsel who suggested, in effect, that the respondent had not suffered PTSD as a result of anything which occurred on the night in question because, in fact, she had been able to remain calm and de-escalate the situation with the boy. Each of the doctors disagreed with that suggestion. Dr de Leacy said that "there are cases where PTSD can develop more insidiously, even if the person appears to cope at the time." Dr Chalk said that "I would agree with him that those problems, and one's perception of the problems and the experience can develop over time, and there could be a whole variety of reasons why that might occur …"

[28] The appellant's counsel then asked Dr Chalk whether the "stressors … or feelings of the plaintiff following from the event are important", to which Dr Chalk answered:

> "Yes, I think they're terribly important. This lady rightly or wrongly felt that she was unsupported, and also … obviously has this internal process going on that she doesn't want the workplace to feel that she is incompetent …"

Counsel then asked Dr Chalk whether those factors "played a more significant role in the development of the plaintiff's condition, rather than being exposed to the PTSD event", to which Dr Chalk answered:

> "I think that both played a part. I think that it would seem … that this lady's symptoms escalated. They developed further over a period of time and I think in those circumstances, whilst … both have contributed, … it's probably those other … additional feelings that are described that led to – that sustained the problems that she continued to have or did continue to have."

Dr de Leacy then said that he agreed with that analysis.

[29] Later in the concurrent evidence, the appellant's counsel asked this question of Dr Chalk:

> "If we put on one side of the ledger the PTSD culminating in the de-escalation in the home as opposed to the other constellation of symptoms of feeling inadequate, not supported and balance those up with the ultimate diagnosis, do you still hold to a diagnosis of PTSD?"

Dr Chalk answered as follows:

> "I certainly have no issue with the fact that this lady was traumatised by the event and I think that the diagnosis of PTSD in those circumstances is understandable … However I think that there are other factors which I have endeavoured to enunciate that I think have impinged upon that and complicated the picture … My view would be that this lady was exposed to a traumatic event. She did have problems subsequently [after the night in question] and I think that those problems are … multifactorial in origin. And those factors are her previous distinct history and vulnerability, the fact that she felt unsupported – rightly or wrongly – within the workplace and also her own internal belief that she had, in some way – that she had to be stronger than she might otherwise have felt."

There was then this evidence:

> "MR O'DRISCOLL: Would you agree with me, Doctor, that those constellation of factors after the exposure to the seminal event loom larger in medical causation for the plaintiff's condition?
>
> DR CHALK: I think that as time has gone on, my view would be that those other factors are likely to have – to have loomed larger over time.
>
> MR O'DRISCOLL: Dr De Leacy, do you agree or disagree?
>
> DR DE LEACY: I agree with what Dr Chalk has said."

[30] In none of that evidence did either psychiatrist say anything to the effect that that the appellant's response to the incident, on the night in question, was an essential condition for the occurrence of her post-traumatic stress disorder. In other words, there was no evidence that, but for the acts and omissions which were found to have been a breach of the appellant's duties, the respondent would not have suffered the post-traumatic stress disorder which occurred.

[31] In that last mentioned piece of evidence, Dr Chalk did say that a "constellation of factors after the exposure to the seminal event" were likely to have "loomed larger". But the comparison which he was asked to make was one between those factors and "the PTSD culminating in the de-escalation in the home". The so-called "constellation of other factors", Dr Chalk said, had "impinged upon [the respondent's PTSD] and complicated the picture". That was not evidence that absent those other factors, including but not limited to what had happened to the respondent on that night after the boy went to bed, the respondent would not have suffered PTSD. Unsurprisingly then, the trial judge did not refer to that evidence in her judgment.

[32] Each psychiatrist said that the absence of support for the respondent on the night in question after the incident was a contributing factor to her PTSD. Dr de Leacy said that its relative contribution would be "quite difficult" to quantify. Rather than saying

that this lack of support was an essential condition of the respondent's PTSD, Dr de Leacy said only that it was "remotely possible that PTSD might not have developed" had there been a "high level of support following the incident". And Dr de Leacy referred to the amelioration, which might have been provided by that high level of support, only in terms of a possibility.

The reasons of the trial judge on causation

[33] The trial judge began her reasons as to causation by correctly identifying the elements of factual causation and scope of liability, according to s 305D(1) of the WCR Act.

[34] The judge then characterised the case as follows:

> "[66] It is common ground the traumatic incident itself was a major contributor to Ms Greenway's injury. She says that being required to stay alone with her assailant overnight without any support was also a cause of her injury. There is also evidence that her feelings of being let down and unsupported contributed to her injury.
>
> [67] Ms Greenway does not need to prove that Anglicare's breach of duty was the sole cause of her injury, provided it was a necessary condition of the injury being caused. In some cases where there are multiple factors which have contributed to an injury, it is not possible to disentangle them. This is one of those cases. It *involves the cumulative operation of factors in the occurrence of the total harm in circumstances in which the contribution of each factor to that harm is unascertainable*."
>
> (emphasis added; footnotes omitted)

[35] One of the appellant's arguments to the trial judge (which was not repeated in this Court) was that if Mr Mafulu had visited the home on that night, it should be inferred that nothing different would have occurred because the respondent would have told him that she did not need assistance. The trial judge did not accept this submission but nor did she find that the respondent would have asked Mr Mafulu for assistance. The judge wrote:[5]

> "Had he visited that night her perception about his attitude may well have been different and she may well have asked to be relieved. What she might or might not have said or done if Mr Mafulu had responded differently is too speculative for the court to draw an inference about it."

[36] The balance of the judge's reasoning on causation was relevantly as follows:

> "[72] Further, Anglicare's breach of duty is failing to adopt the precautions outlined at [62] of these reasons: i.e. guidelines for and training of on call Team Leaders in assessing the welfare of workers subjected to traumatic incidents. Had Mr Mafulu been adequately equipped to assess Ms Greenway's welfare, he would, on Ms Lloyd's evidence, have asked a series of prompting questions and drawn on his observations (whether by phone or in person). He would not have relied solely on the self-assessment of a person who had so recently been through a traumatic incident.

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5 Ibid at [71].

…

[74] The question of causation is a legal not a medical enquiry, but, in this case, it is informed by the evidence of the psychiatrists called by the parties. In a concurrent evidence session, Dr Chalk and Dr de Leacy agreed that Ms Greenway had not been so overwhelmed by the incident itself that it was inevitable she would develop PTSD. That was demonstrated by her actions in de-escalating and disarming the young person.

[75] They also agreed that for Ms Greenway, staying in the house with the young person overnight and without support added an additional level of anxiety and this "*would be seen as a contributing factor*" to the injury. Although Ms Greenway's feelings were connected to Mr Mafulu's response on the night, it is the ongoing exposure to the potential of further harm which contributed to her injury.

[76] Given that evidence and accepting Ms Greenway's evidence about her circumstances that night and how she felt at the time, it is more probable than not that Anglicare's breach of duty was a necessary condition of her injury. Anglicare accepted that, if that was my finding, it is appropriate for the scope of its liability to extend to this injury."

(footnotes omitted)

Consideration of the judge's reasoning

[37] In the passage from the judgment which I have just set out, the judge did express her conclusion in the terms of s 305D(1)(a), by finding that the appellant's breach of duty was a necessary condition of the respondent's injury. However her Honour reached that conclusion by reasoning which was inconsistent with the well-established effect of that provision.

[38] In *Strong v Woolworths Limited*, the majority said of the equivalent provision of s 5D(1) of the *Civil Liability Act* 2002 (NSW):[6]

> "The determination of factual causation under s 5D(1)(a) is a statutory statement of the 'but for' test of causation: the plaintiff would not have suffered the particular harm but for the defendant's negligence."

Yet at no point did the trial judge apply the "but for" test: she did not consider whether, but for the acts and omissions which she found constituted the breaches of duty, the injury would not have occurred.

[39] These provisions, such as that considered in *Strong v Woolworths* and s 305D of the WCR Act, were enacted upon the recommendations in the Final Report of the *Review of the Law of Negligence* published in 2002, the so-called Ipp Report. As was discussed in *Strong v Woolworths*,[7] the Ipp Report instanced two categories of cases which would not pass the "but for" test of causation and for which special legislative provision should be made. The first category was said to be exemplified by *Bonnington*

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6 (2012) 246 CLR 182 at 190 [18] citing *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at 443 [55]; see also *Wallace v Kam* (2013) 250 CLR 375 at 383 [16].

7 (2012) 246 CLR 182 at 193-194 [25]-[27].

Castings Ltd v Wardlaw.[8] It was in the description of that category of case that the majority in *Strong v Woolworths* referred to cases which involve "the cumulative operation of factors in the occurrence of the total harm in circumstances in which the contribution of each factor to that harm is unascertainable".[9] The majority in *Strong* summarised that decision as follows:[10]

> "In *Bonnington Castings Ltd v Wardlaw*, the expression 'material contribution' was employed in determining the causation of the pursuer's pneumoconiosis, a disease caused by the gradual accumulation of particles of silica in the lungs. There were several sources of exposure: the pneumatic hammers, the floor grinders and the swing grinders. The employer's breach of statutory duty lay only in exposing the pursuer to the dust generated by the swing grinders. The greater proportion of the pursuer's exposure to silica dust had come from the use of the pneumatic hammers. Lord Reid characterised the 'real question' as whether the dust from the swing grinders 'materially contributed' to the disease. The swing grinders had contributed a quote of silica dust that was not negligible to the pursuer's lungs and had thus helped to produce the disease."
>
> (footnotes omitted)

[40] Of that type of case, the majority in *Strong* also noted that Allsop P (as he then was) in *Zanner v Zanner*,[11] like the authors of the Ipp Report, had assumed that a case such as *Bonnington Castings* would not pass the "but for" test.[12] But the majority said:[13]

> "However, whether that is so would depend upon the scientific or medical evidence in the particular case, a point illustrated by the decision in *Amaca Pty Ltd v Booth* with respect to proof of causation under the common law. In some cases, although the relative contribution of two or more factors to the particular harm cannot be determined, it may be that each factor was part of a set of conditions necessary to the occurrence of that harm."
>
> (footnotes omitted)

[41] Consequently, the trial judge's categorisation of the case, which used the description in *Strong* of the facts in *Bonnington Castings*, did not answer the question of factual causation under s 305D(1)(a). The trial judge had to decide whether the appellant's breaches of duty were "*necessary* to complete a set of conditions that [were] jointly sufficient to account for the occurrence of the harm".[14]

[42] The question of factual causation was not answered by the judge's finding that the respondent's "ongoing exposure to the potential of further harm … contributed to her injury."[15] The injury of which the respondent complained was, as I have set out above, "a psychiatric injury in the form of a post-traumatic stress disorder [requiring] psychiatric

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8 [1956] AC 613.
9 (2012) 246 CLR 182 at 194 [25].
10 Ibid at 193 [23].
11 (2010) 79 NSWLR 702 at 706 at [11].
12 (2012) 246 CLR 182 at 194 [27].
13 Ibid.
14 (2012) 246 CLR 182 at 191 [20].
15 [2016] QDC 195 at [75].

treatment and psychological counselling and [leaving the respondent] with a permanent impairment". If what happened to the respondent after her conversations with Mr Mafulu did contribute to that injury, it did not follow that absent that experience, the injury would not have occurred.

[43] At [74] of her reasons for judgment, the trial judge said that Dr Chalk and Dr de Leacy had agreed that the respondent "had not been so overwhelmed by the incident itself that it was inevitable that she would develop PTSD". If that was an accurate summary of their evidence, the acceptance of that evidence would not have proved factual causation. To say that the appellant's PTSD was not inevitable from the incident itself was to recognise the respective possibilities that the injury would or would not have occurred, absent the breach of duty. But the respondent bore the onus of proving that, more probably than not, the injury would not have occurred from the incident alone. The injury may not have been inevitable because there was a "remote possibility" that, absent the breach of duty, it would not have occurred, but that was not proof of causation on a balance of probabilities.

Did the evidence prove factual causation?

[44] Because the trial judge did not answer the "but for" question under s 305D(1)(a), it is necessary for this Court to do so. That requires first a consideration of how the discharge of the appellant's duties would have made a difference to the respondent's experience of the night in question. For the appellant it is argued that another error by the trial judge consisted of failing to consider the so-called counterfactual circumstance. However, it is sufficiently clear from the judgment that the trial judge was satisfied that had the appellant discharged its duty, the respondent would not have experienced "the ongoing exposure to the potential of further harm which contributed to her injury".[16] Whether that meant that she would have been relieved from the performance of the rest of her shift, or whether her safety would have been assured by the addition of another staff member, need not be determined. On the findings which are not challenged, the exercise of reasonable care required the appellant to take whatever steps were necessary to protect the respondent from that ongoing exposure to the potential of further harm and that duty was breached.

[45] The relevant psychiatric evidence has been set out above. At its highest, that evidence proved no more than a possibility that, but for the breach of duty, the injury, as it was pleaded, would not have occurred. Dr de Leacy agreed with the judge's suggestion that "there might have been a less severe PTSD", but as I have just noted, he described the relative likelihood that PTSD might not have developed at all as a "remote possibility". Dr Chalk agreed with Dr de Leacy that the respondent's experience after the incident was a contributor, but so was the incident itself. Importantly, the reports by each of these witnesses had attributed the injury to the incident itself,[17] and neither witness said that he had altered that opinion.

[46] Faced with these limitations in the evidence, the respondent's counsel argues that the judgment could be upheld upon a different basis, namely that the respondent had proved that her injury would have been "minimised", if not prevented, by the discharge of the appellant's duty. That argument cited what was said by Barwick CJ in *Victoria v Bryar*,[18] as applied in the majority judgment in *Kuhl v Zurich Financial Services Australia Ltd*.[19] They were each cases decided under the common law.

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16 Ibid at [75].
17 As discussed above at [19] – [22].
18 (1970) 44 ALJR 174 at 175.
19 (2011) 243 CLR 361 at 397 [104].

[47] In *Kuhl*, the appellant's arm was sucked into a vacuum hose where it remained for some time and he suffered serious injuries. There was a question of whether the negligent failure to provide a device which would have broken the vacuum pressure, once the arm was inside the hose, had caused the appellant's injuries. It was said that the possible causes of these injuries were divisible into three groups: those derived from the vacuum forces at the moment the arm was sucked in, those from the forces operating until the arm was pulled out and those from the forces applied by the appellant and others who were struggling to extract his arm from the hose. The majority (Heydon, Crennan and Bell JJ) said that "a not insignificant amount of the plaintiff's injuries would have occurred after the initial few seconds in which his arm was sucked into the hose", so that there was "no bar to the conclusion that the plaintiff's damage was caused by the breach of the duty alleged".[20] The majority added:[21]

> "In any event, the first respondent's submissions operate on an erroneous assumption about the test for causation. The question is whether the taking of a particular step which the defendant did not take 'more probably than not … would have prevented or *minimised* the injury which was in fact received.' Unless all the damage to the plaintiff was caused when and immediately after his arm was sucked into the hose, the sliding open of the aperture in the break box would have minimised the damage by avoiding some of it – that which would have occurred after that time. That is so whether the aperture was slid open after a very short time by a worker placed behind it, or whether it was slid open a little later by a worker standing in the position of Mr Kelleher. It is less probable than not that all the damage was caused at the moment when, and immediately after, the plaintiff's arm entered the hose. Doubts about what damage was caused when would go the question of quantum: but the parties' agreement on quantum eliminated debate about it."
>
> (footnote omitted)

[48] In reliance upon that passage, counsel for the respondent argues that the respondent had to prove only that the PTSD would have been minimised, had the appellant discharged its duty. There are several difficulties in this argument. The first is that it is not supported by any finding by the trial judge, who found that the respondent's PTSD was caused, rather than minimised, by the appellant's breach. The second is that the psychiatric evidence would not have supported such a finding. There was some evidence from Dr de Leacy that the PTSD may not have been as severe. But it is another thing to say that the PTSD *would* have been minimised. Thirdly, and most importantly, in this case causation had to be proved according to s 305D(1)(a), for which the relevant "injury" had to be identified. There is a difference between an injury in the form of a psychiatric or psychological disorder and an injury in the nature of an aggravation of such a disorder which appears from the definition of "injury" as in s 32(3) of the WCR Act. The respondent's case, both as pleaded and as argued at the trial, was that her injury was her post-traumatic stress disorder. There was no case, even in the alternative, that she had suffered an injury which was an exacerbation of a post-traumatic stress disorder which would have been suffered from the incident itself. Because that alternative case was not pleaded or otherwise presented at the trial, the appellant had no opportunity to answer it in the conduct of its case. Such a case was not raised simply by a few questions being asked and answered in the course of the concurrent evidence session.

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20 Ibid at 397 [103].

21 Ibid at 397-398 [104].

[49] It is submitted for the respondent that the appellant's counsel at the trial had conceded this question of factual causation. In the final addresses, the appellant's counsel was asked whether, if the judge concluded that there was a breach because of Mr Mafulu's failure to provide assistance to her on that night and the respondent being required to continue and complete her shift, the appellant accepted that "factual causation and medical causation is established". The judge was there using the term "factual causation" apparently to refer to a question of what would have happened differently on the night in question, after the incident, had the duty been performed. Her reference to "medical causation" was an apparent reference to the question argued in this appeal, namely whether on the medical evidence, the breach of duty was a necessary condition of the occurrence of the injury. It is true that in response to that question, the first thing which counsel said was "I accept your Honour's analysis". However the exchange which then followed made it clear that counsel was contesting causation in both of those senses. In this Court, counsel for the respondent suggests that this exchange might explain why the judge did not give more detailed attention to the question of factual causation. That cannot be accepted: notably there was no suggestion in the reasons for judgment that factual causation had been conceded. And the judge's reasons, although revealing an error, do not lack a detailed attention to the question.

Section 305D(2)

[50] As I have noted, there was no case argued for the respondent, either at trial or in this Court, for the application of s 305D(2). In neither court did the respondent suggest that this was an "exceptional case" where "in accordance with established principles", a breach of duty which could not satisfy the "but for" test should be accepted as satisfying the requirement of factual causation. Under s 305D(2), in such a case the court is to consider (among other relevant things) whether or not and why responsibility for the injury should be imposed on the party in breach. Those necessary considerations and any other relevant ones were not addressed here. As Hoeben JA said in *King v Western Sydney Local Health Network*,[22] the normative considerations relevant to this provision may require the adducing of evidence at a trial and a case in reliance upon this provision should be properly raised by a pleading.[23]

Conclusion and order

[51] The result is that the respondent suffered a serious injury at work but one which was not caused, in the required sense, by the breach of duty which was found by the trial judge. On the way in which the respondent's case was pleaded and conducted, the respondent had to prove that but for the breach of duty which was established, she would not have suffered a post-traumatic stress disorder. The trial judge should have found that this was not proved and the judgment must be set aside. I would order as follows:

1. Appeal allowed.
2. Set aside the judgment delivered on 5 August 2016.
3. Judgment entered for the appellant against the respondent.
4. Order the respondent to pay the appellant's costs unless written submissions seeking a different order are filed within 14 days of the date of this judgment.

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22 [2013] NSWCA 162 at [155].

23 See also, in the same case, Ward JA at [222].

[52] **BOND J:** I have had the advantage of reading in draft the reasons for judgment of McMurdo JA. I agree with the orders which he proposes and I substantially agree with his reasons. I wish only to add some additional remarks explaining why the appellant must succeed.

[53] In *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 the High Court (French CJ, Gummow, Hayne, Heydon and Crennan JJ) observed[24] at [55] (footnotes omitted):

> "At once it must be recognised that the legal concept of causation differs from philosophical and scientific notions of causation. It must also be recognised that before the *Civil Liability Act* and equivalent provisions were enacted it had been recognised that the 'but for' test was not always a *sufficient* test of causation. But as s 5D(1) shows, the 'but for' test is now to be (and has hitherto been seen to be) a *necessary* test of causation in all but the undefined group of exceptional cases contemplated by s 5D(2)."

[54] Two points are significant for present purposes.

[55] **First**, at common law the "but for" test was not a sufficient test of causation. That was especially so in circumstances such as the present, which call for an analysis of the causal significance of concurrent and successive tortious acts. The position at common law was summarised in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613 at [45], where French CJ, Hayne and Kiefel JJ observed (footnotes omitted):

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

[56] **Second**, however after the enactment of s 305D(1), the "but for" test of factual causation set out in s 305D(1)(a) became the necessary test of causation in all but the undefined group of exceptional cases contemplated by s 305D(2).

[57] For the reason explained by McMurdo JA, the respondent has not established factual causation in the sense required by s 305D(1)(a). It would not avail the respondent in seeking to support a finding of "but for" factual causation under s 305D(1)(a) that the evidence probably would have satisfied the common law test of causation as articulated in *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd*. For the respondent to succeed, she needed to be able to rely on s 305D(2) and to address her argument in the context of the normative considerations made relevant by its terms. As the High Court observed in *Strong v Woolworths Limited* (2012) 246 CLR 182 at [26] (footnote omitted):

> "Negligent conduct that materially contributes to the plaintiff's harm but which cannot be shown to have been a necessary condition of its

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[24] The statute to which the High Court referred was the *Civil Liability Act* 2002 (NSW). Section 5D was not materially different from s 305D of the *Workers Compensation and Rehabilitation Act* 2003 (Qld), which are quoted by McMurdo JA at [16].

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

[58] If a party is going to contend that, although it cannot satisfy s 305D(1)(a) in terms, the court should nevertheless conclude that factual causation is established in reliance on s 305D(2), authority suggests that the party must explicitly flag that contention, so that opponents are not taken by surprise and the court may be given the benefit of full argument addressing the relevant normative considerations. As McMurdo JA notes (at [49]), that was the approach taken by the New South Wales Court of Appeal in *King v Western Sydney Local Health Network* [2013] NSWCA 162 at [155] and [222]. The Victorian Court of Appeal has taken the same approach: see *Powney v Kerang and District Health* (2014) 43 VR 506 per Osborn and Beach JJA and Forrest AJA at [100] where their Honours observed:

> "We are firmly of the view that if [the equivalent of s 305D(2)] is to be relied upon as providing the appropriate causal link between a negligent act and attributing responsibility for the alleged consequential harm to a defendant, the basis of the claim should be set out in the pleadings, or at the very least, raised as an issue at the commencement of the trial."

[59] In the present case, the respondent neither pleaded reliance on s 305D(2) nor otherwise advanced at trial any argument founded on s 305D(2) or the normative considerations made relevant by its terms. And in this Court reliance on s 305D(2) was expressly disavowed by counsel for the respondent.[25] Having demonstrated that the respondent failed to satisfy s 305D(1)(a) in terms, the appellant must succeed.

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[25] Transcript, p 1-45 lines 5 to 22.