Scope of liability

Christine Paul v Kenneth Cooke [2012] NSWSC 840

By Anna Walsh and Divya Pahwa

The provisions governing causation under the *Civil Liability Act* 2002 (NSW) have recently been the subject of judicial scrutiny. In this recent medical negligence decision of Brereton J in the Supreme Court of NSW, the central issue was *scope of liability* – the second part of the two-pronged legislative test of causation. The case was run purely on the interpretation of s5D(1) (a) and (b) and the application of s5I, with the defendant admitting a breach of duty of care, the experts in agreement regarding the medicine and damages agreed at $1 million.

FACTS

The plaintiff brought proceedings against the defendant radiologist for injuries she sustained during the course of a coiling procedure to treat a berry aneurysm in 2006. The plaintiff had undergone a cerebral CT angiogram in 2003, which the defendant incorrectly reported as normal. The plaintiff underwent another cerebral CT angiogram in 2006, which demonstrated a 7-8mm aneurysm related to the right anterior cerebral artery. It was discovered that this aneurysm was present in 2003, but had not been recognised by the defendant. There was no physical change in the aneurysm between 2003 and 2006. Upon discovery of the aneurysm, the plaintiff was presented with three options: observation or surgical clipping or endovascular coiling. The plaintiff opted for endovascular coiling based on the advice she received from her neurosurgeon. There was evidence that the plaintiff would have opted for surgical clipping if she had sought advice in 2003. During the coiling procedure, the aneurysm ruptured causing the plaintiff to suffer a stroke. The plaintiff alleged that if the defendant had diagnosed her aneurysm in 2003, she would have obtained treatment for it by surgical clipping and therefore avoided the rupture and stroke in 2006.

JUDGMENT

The defendant denied liability (causation) for the plaintiff's damages on the following basis:

(a) The scope of his duty did not extend to responsibility for harm that occurred in the course of the coiling procedure.
(b) The loss and damage suffered by the plaintiff was not caused by the defendant's breach.
(c) The rupture of the aneurysm was an inherent risk of the coiling procedure and accordingly there was no liability in respect of it under s5I.

Justice Brereton found that 'scope of duty' considerations are relevant to breach of duty and therefore the defendant could not escape liability merely by asserting that his duty of care did not extend to responsibility for the coiling procedure. Given the defendant had admitted breach, the next step was to turn to the question of causation.

Under s5D(1)(a), the plaintiff must prove that but for the negligence, the harm would have been avoided. In this case, that involved the hypothetical circumstance of what would have happened two-and-a-half years earlier; specifically, what surgical option would have been chosen and what effect that would have had upon the occurrence of the intra-operative bleed and the extent of any harm caused by that bleed. The plaintiff was successful in relation to proving factual causation, as there was substantial evidence that the plaintiff would have opted for the clipping procedure had the defendant not breached his duty of care. The expert neurosurgeons who gave evidence in this case agreed that had the plaintiff undergone the clipping procedure in 2003, the probability that she would have avoided rupture and stroke was greater than 99 per cent.

Under s5D(1)(b), the plaintiff must establish that the scope of liability is such that it is appropriate to hold the defendant responsible for the harm caused.

The plaintiff argued that given the importance of timely and accurate diagnosis of serious conditions by radiologists, the defendant should be liable in this case. Brereton J formed the view that such an approach meant that a breach of duty was sufficient to attract a remedy without regard to causation.

Unfortunately, the plaintiff was unsuccessful in this regard, with Brereton J finding that the rupture of the plaintiff's aneurysm during coiling was 'logically unassociated' with the defendant's delayed diagnosis. In coming to this decision, His Honour gave the following reasons:

1. The risk of intra-operative rupture of the aneurysm is distinguished from the risk of spontaneous rupture of the aneurysm. The former was a foreseeable risk of the coiling procedure, which arose because of the diagnosis of the aneurysm. The defendant's breach of duty did not create or increase this risk. On the other hand, the latter was a risk that the plaintiff was exposed to (between 2003 and 2006) because of the defendant's failure to diagnose the aneurysm. However, this risk did not eventuate.
2. Failure to warn cases are distinguished from failure to diagnose cases. The rationale of the duty to warn is to protect a patient from harm from material inherent risks that are unacceptable to the patient. On the other hand, the rationale of the duty to diagnose is to enable appropriate treatment to be identified. The present case fell into the former category and, therefore, the purpose of the defendant's duty was not to enable the plaintiff to make an informed choice, but to enable timely treatment before their condition deteriorated. As the plaintiff's condition did not deteriorate between 2003 and 2006, there was no clear relationship between the delay and the harm.
3. The 'but for' test of factual causation was satisfied only in the barest sense in this case. The plaintiff could not rely on *Chappel v Hart* to argue that the risk of rupture and stroke would not have materialised on a different occasion. This 'different occasion' argument is accepted in failure to warn cases like *Chappel v Hart* and *Chester v Afshar* as the scope of liability extends to these cases because the relevant risk gives rise to the duty to warn. This is distinguishable from failure to diagnose cases.

Accordingly, the court was not satisfied that it was appropriate to hold the defendant responsible for the plaintiff's harm in this case and the plaintiff was unsuccessful in proving negligence.

In relation to the defendant's argument that s5I could exonerate him from liability, Brereton J clarified that 'reasonable care and skill' in this provision refers to that of a defendant and not of a subsequent intervener, whose intervention is occasioned by the defendant's negligence. Given that it was not the defendant's conduct that caused the inherent risk to materialise, his Honour held that s5I had no application to this case.

Although the factual scenario in this case closely resembled that in *Chappell v Hart*, the plaintiff was unsuccessful. The case highlights, therefore, that practitioners ought not to assume that well-established principles of causation continue to apply post the *Civil Liability Act*. This particular section, 5D(1)(b), requires the plaintiff to ensure that they have a strong underpinning public policy argument regarding why the defendant ought to be liable. The case is currently on appeal. ■

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