

King v Western Sydney Local Health Network [2013] NSWCA 162 (14 June 2013)

Key Points

- This case highlights the importance of establishing a causal link between a failure to offer treatment and the harm suffered.

Background

The plaintiff / appellant, Tamara King, (Ms King) developed foetal varicella syndrome (FVS). The condition, which causes severe physical and intellectual disability, resulted from her mother contracting varicella (or chickenpox) early in the second trimester of her pregnancy with Ms King. The source of the mother's exposure was Ms King's older sister.

Immediately upon realising that the sister might have chickenpox, the mother sought advice from a doctor at Blacktown Hospital (the hospital). The mother believed, and advised the doctor, that she herself had not suffered from chickenpox before. She was therefore unlikely to have the necessary immunity. In accordance with standard medical practice in 2002, she should have been offered an intramuscular dose of 600 international units (IU) of varicella-zoster immunoglobulin (VZIG) to boost her defences to the virus. Ms King's mother was not offered such treatment and contracted chickenpox.

It was not in dispute that Ms King's condition was a result of the mother's infection. Ms King sued the respondent, as the entity responsible for Blacktown Hospital and its medical staff, in negligence.

The trial Judge found that the legal duty of care owed by a medical practitioner to his or her patient extended to offering the mother VZIG. He also found that the mother would have accepted the treatment, if offered. He found that the treatment was not offered.

However, the trial Judge found against Ms King on causation. He found that that whilst it is a possibility that VZIG, if administered to Ms King's mother, may have prevented her infection, it had not been proved that it was more likely than not to have been effective, by reference to the evidence.

The issue on appeal was whether the trial Judge was correct in concluding that Ms King had not established causation.

The Law

Causation

Ms King relied on the principle of causation formulated by McHugh J in *Chappel v Hart* [1998] HCA

55; 195 CLR 23. She submitted that the hospital's conduct in not offering to administer VZIG increased the risk of injury to her. The risk which was increased was that she would develop varicella. She did in fact develop varicella and accordingly, the risk of injury came home in the relevant sense and causation was established in that the hospital's conduct materially contributed to the injury. On the latter issue, Ms King called in aid the analysis of material contribution in *Strong v Woolworths Ltd* at [23]–[29].

Basten JA (dissenting on the duty of care issue) stated that there are real difficulties in applying the “but for” test to the concept of “increase in risk” case. Far from assisting Ms King's submission, the analysis in *Strong v Woolworths* of “increase in risk” in the context of a “material contribution to harm” is strongly suggestive that in most of those cases, the “but for” test will not be satisfied.

Basten JA went on to say that there was another difficulty with Ms King's articulation of the basis for establishing causation relying on *Chappel v Hart*. The negligence on the part of the hospital was one of omission in failing to offer a particular therapeutic substance. As *Strong v Woolworths Ltd* established “proof of the causal link between an omission and an occurrence requires consideration of the probable course of events had the omission not occurred”. Here, the risk to which Ms King was exposed existed regardless of any conduct of the hospital, i.e. she had already been exposed to the varicella virus. It was therefore not correct to say that the hospital had “increased the risk of injury” and that this risk had eventuated. To apply that test to the facts of this case involves a circuitry of reasoning. It presupposes an affirmative answer to the fundamental causation question.

Basten JA held that, whilst it is a possibility that VZIG, if administered to Ms King's mother, may have prevented her infection, by reference to the evidence, it had not been proved that it was more likely than not to have been effective. Ms King's challenge to the primary Judge's finding on causation therefore failed.

Hoeben and Ward JJA stated that the question was not whether the failure to administer VZIG contributed to the development of adult chickenpox in the mother, but whether it made a material contribution to the contraction of FVS by Ms King.

Ultimately Hoeben and Ward JJA upheld the decision of the primary Judge. They held that based on the evidence, it was difficult to accept that the failure to prescribe VZIG caused or materially contributed to Ms King's injury. Further, the risk to the foetus remains that it is more likely than not that the vaccination of the mother would not have prevented the foetus contracting FVS.

Conclusion

Brief outline of the evidence presented – if relevant

Brief summary of the Tribunal's findings and reasoning

Lessons Learnt

This case highlights the importance of establishing a causal link between a failure to offer treatment

and the harm suffered. In particular, a mere inference that a failure to offer treatment caused the harm will not be sufficient. Evidence must be adduced to support a finding that a failure caused or materially contributed to the harm.

Further, as Basten JA highlighted, a straightforward application of the test of causation in *Chappel v Hart* will generally be inappropriate for increased risk of harm cases. In such cases, the risk is likely to have been apparent in any event. It is therefore not correct to say that a defendant had “increased the risk of injury” and that this risk had eventuated.

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