

## Paul v Cooke [2013] NSWCA 311 (19 September 2013)

### Key Points

- Recent Medical Negligence/Causation Case – NSW
- One sentence summarising the issue that the Tribunal was required to consider
- Optional further sentence summarising the conclusion, or the key point in the case

### Background

Mrs Paul, the appellant brought proceedings against a radiologist, Mr Cooke, for failing to diagnose an aneurysm on an angiogram. Mrs Paul's twin sister had died from a ruptured aneurysm in 1989. Mrs Paul underwent the angiogram in 2003. Mr Cooke admitted that he breached his duty of care in failing to identify the aneurysm, however, he denied liability on the basis that his breach of care did not cause Mrs Paul's subsequent injuries.

Mrs Paul's aneurysm was eventually identified in 2006. The aneurysm remained the same size and shape as it had been in 2003 and there was no increased propensity for rupture. Mrs Paul underwent a surgical procedure known as coiling to avoid the risk of a spontaneous rupture. During the surgery the aneurysm ruptured, causing Mrs Paul to suffer a stroke and serious and permanent disabilities. The rupture was a known risk of the surgery and was not due to any lack of skill or care on part of the surgeon.

Following the rupture, Mrs Paul issued proceedings against the radiologist Mr Cooke. She claimed that if she had undergone an operation in 2003, there would have been less risk of rupture. However, this argument was ultimately unsuccessful on the medical evidence. Mrs Paul also argued that had she been correctly diagnosed in 2003, she would not have undergone coiling, but would have undergone a more invasive procedure known as clipping.

### The Law

The trial judge dismissed Mrs Paul's claim. His Honour found that the radiologist's negligence in failing to identify the aneurysm did not cause Mrs Paul's harm as required by s5D of the Civil Liability Act 2002 (NSW). Whilst His Honour found that the first limb (factual causation) was established, the second limb (scope of liability) was not.

His Honour accepted that if Mrs Paul was correctly diagnosed in 2003, then she would have undergone the more invasive clipping procedure and that the subsequent rupture would not have occurred (factual causation). However, it was inappropriate for the radiologist to be held liable (scope of liability), since the risk of intra-operative rupture was always present, and the risk could only have been avoided if the decision to undergo surgery had not been made.

The Court of Appeal upheld the decision of the trial judge and dismissed Mrs Paul's appeal. It was observed that the delayed diagnosis did not of itself increase the risks associated with treatment. The Court agreed with the trial judge that the risk of intra-operative rupture could only have been avoided if the decision to undergo surgery had not been made and it was not Dr Cooke's duty to avoid or warn against the risk of intra-operative risk.

## Conclusion

The decision in Paul v Cooke, follows the line of reasoning adopted by the High Court in Wallace v Kam [2013] HCA 19. The High Court's decision in Wallace v Kam clearly demonstrates that factual causation and scope of liability, are separate and distinct issues under s5C of the Civil Liability Act 2002 (WA). Both factual causation (the "but for" test) and scope of liability must be established by a plaintiff in order to succeed in a negligence claim.

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