

Wallace v Kam [2013] HCA 19

Key Points

- High Court case update – Causation
- In *Wallace v Kam*, the High Court unanimously dismissed a failure to warn claim by a patient against a surgeon.
- The surgeon failed to warn the patient of material risks of the surgery, including the risks of developing neurapraxia and paralysis.
- Although the surgeon was found to be negligent for failing to warn, the plaintiff's claim ultimately failed on the issue of causation.

Background

The plaintiff had sought treatment from the surgeon for a disc protrusion of the lumbar spine. As a result of the surgery, the plaintiff developed neurapraxia. The surgeon had failed to warn the plaintiff about the risk of developing this condition as a result of the surgery. However, the trial judge found that the plaintiff would still have undergone the surgery even if he been warned of the risk of developing this condition and the plaintiff's claim was dismissed.

On appeal, the plaintiff argued that the trial judge erred in law in failing to consider whether the legal cause of the neurapraxia could be the surgeon's failure to warn of a different risk, that being the 5% risk of paralysis, which was a risk that did not actually eventuate. The plaintiff argued that if he had been warned by the surgeon that there was a chance of paralysis, he would never have agreed to undergo the surgery, and therefore, he would not have developed the neurapraxia condition.

The Law

The High Court considered the caselaw relating to failure to warn and the leading authority of *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 at 489. The High Court confirmed that a component of the duty of a medical practitioner to a patient is to warn the patient of material risks of physical injury inherent in proposed medical treatment. A risk is material if it is a risk to which a reasonable person would attach significance, or a risk which the medical practitioner knows or ought reasonably to know that the particular patient would be likely to attach significance in deciding whether or not to proceed with the treatment.

The High Court also confirmed that in order for a particular injury to be compensable, it must have been caused by the medical practitioner's failure to exercise reasonable care and skill in warning the patient of the material risks inherent in the proposed treatment.

The High Court considered the issue of causation and the 2 limb test set out in s5D of the Civil Liability Act 2002 (NSW) (replicated in s5C of the Civil Liability Act 2002 (WA)). The High Court found that on the accepted facts, the first limb of the test for causation, factual causation, (i.e. the "but for" test), was established. The plaintiff would not have undergone the surgery if the surgeon

had exercised reasonable care in warning about the risk of paralysis arising from the surgery. However, the second limb of causation, scope of liability, was not established.

The second limb under s5D(2) requires the Court to consider “whether or not and why responsibility for the harm should be imposed on the negligent party.” The High Court observed that the purpose of the duty to warn is not to compensate a patient for losing the right to choose or for exposure to an undisclosed risk. Rather, the policy behind the duty to warn is “to avoid the occurrence of the particular physical injury the risk of which [the] patient is not prepared to accept” (Chester v Afshar [2005] 1 AC 134 at 144 [18]).

Conclusion

The High Court concluded that it was not appropriate for a surgeon to be found liable for damages for failing to warn of a different risk which did not eventuate and the plaintiff should not be compensated for the occurrence of a physical injury when he was prepared to accept the risk of that injury. Therefore any failure by the surgeon to warn of the risk of paralysis could not be the “legal cause” of the neurapraxia condition.

Lessons Learnt

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.

The decision also clearly establishes that a medical practitioner will not be liable for damages in negligence for failing to warn patients about material risks that do not eventuate.

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