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Paul v Cooke — a review of normative causation in a medical negligence case

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The manner in which the two-staged legislative approach to proving causation in a medical negligence case was recently ventilated by the New South Wales Supreme Court in an interesting case that provided an opportunity for the court to review the common law approach to causation as against s 5D(1) of the Civil Liability Act 2002 (NSW) (the Act). In Paul v Cooke, while this case was similar to Chappel v Hart, Brereton J’s construction of s 5D(1) reasoning generated a different outcome for the plaintiff.

Facts

The issues for the trial judge were very specific. The defendant radiologist failed to diagnose an aneurysm of the right cerebral artery in 2003. At that time, the evidence was that treatment of an aneurysm was either by traditional surgical clipping or a newer technique of endovascular coiling. The plaintiff lost the opportunity for treatment at that time by either technique. When the aneurysm was diagnosed in 2006, she sought advice from her doctors who recommended endovascular coiling. This was undergone but unfortunately, during the procedure, and most probably as a result of the technique used, the aneurysm ruptured and the plaintiff suffered a stroke.

The aneurysm had not grown in the two and a half years during which time it went undiagnosed. The risk of rupture of an aneurysm during clipping or coiling surgery is roughly the same, but clipping carried a slightly higher risk of intra-operative rupture. The undisputed expert evidence however was that if there was a rupture with clipping, there would be less risk of permanent neurological injury from a stroke than with endovascular coiling because of the capacity to control the consequences of a bleed using the clipping technique.

As it so happened, during the surgery, it is most likely that one of the coils perforated the bleeding vessel, resulting in a stroke and permanent neurological damage. The plaintiff sued the defendant for negligence alleging that, had the aneurysm been diagnosed in 2003, she would have undergone surgical clipping of the aneurysm and would not have suffered a stroke because the manner in which the bleed occurred in 2006 was related to the fact that coils were used.

Liability

The defendant admitted that he had breached his duty when he reported that the examination of the cerebral CT angiogram was normal in 2003. However, the defendant denied liability for the plaintiff’s subsequent damages, primarily on the basis that the breach of duty did not cause the loss and damage suffered by the plaintiff.

Proof of causation is dependant upon a two-stage test, comprising proof of factual causation as well as an evaluation of the reasonableness of finding the defendant responsible in law (scope of liability).

Factual causation

Section 5D(1)(a) of the Act embodies the “but for” test of causation at common law. To satisfy this test, the plaintiff had to prove that the rupture and stroke would have been avoided but for the defendant’s failure to accurately report on the cerebral CT angiogram in 2003. This involved a hypothetical consideration of the outcome for the plaintiff in 2003 if the defendant had accurately diagnosed the aneurysm.

The evidence demonstrated that the plaintiff had three options upon discovery of the aneurysm: conservative management by observation and monitoring, surgical clipping or endovascular coiling. This was the same in 2003 and 2006. There was evidence that the plaintiff would never have opted for conservative management, as her twin sister had died from the rupture of an aneurysm. There was also evidence that surgical clipping would have been the preferred procedure, had the plaintiff been referred to a neurosurgeon in 2003. The expert neurosurgeons who gave evidence in this case agreed that if the plaintiff had undergone the clipping procedure in 2003, the probability that she would have avoided a rupture and stroke was greater than 99 per cent.

The plaintiff was therefore successful in establishing factual causation under s 5D(1)(a) of the Act.
Scope of liability

Section 5D(1)(b) of the Act requires the courts to normatively evaluate the appropriateness of holding the defendant responsible for the plaintiff's harm. The plaintiff's case failed on this ground. Curiously, even though the plaintiff had established factual causation, Brereton J formed the view that the rupture of the plaintiff's aneurysm was "logically unassociated" with the defendant's delayed diagnosis. The reasons for his Honour's decision can be summarised as follows.

Type of risk — intraprocedure rupture versus spontaneous rupture

The defendant could not be held liable for the risk of intraoperative rupture of the aneurysm, which was not linked with his failure to diagnose but instead materialised as a result of the diagnosis. This type of risk was distinguished from a spontaneous rupture of the aneurysm, which could be linked with the defendant's failure to diagnose. However, as this risk did not eventuate, the defendant could not be held liable. Only the latter was a foreseeable risk.

Type of case — failure to warn versus failure to diagnose

The court commented there is a marked distinction between failure to warn cases and failure to diagnose cases. The reasons for requiring a health practitioner to exercise care and skill in the provision of information to a patient is to protect a patient from harm related to material risks inherent in the procedure that are unacceptable to the patient. The rationale of the duty to diagnose, on the other hand, is to enable appropriate treatment to be identified so as to protect the patient from harm arising from a progressive condition. As the present case was a failure to diagnose case, the purpose of the defendant's duty was limited to this and did not include enabling the plaintiff to make an informed choice in relation to the treatment she may undertake, when she will undergo that treatment, and who shall perform it.

Based on these reasons, Brereton J was not satisfied that it was appropriate to hold the defendant responsible for the plaintiff's harm in this case. Brereton J placed great importance on the fact that the plaintiff's condition did not deteriorate between 2003 and 2006. In his Honour's view, this in itself nullified the relationship between the delay in diagnosis and the resulting harm. In addition, his Honour suggested that the passage of time advantaged the plaintiff, as it allowed for further development of coiling procedures.

As alluded to at the outset, the factual matrix of the present case was similar to that in the case of Chappel v Hart, even though that case involved a claim based upon a failure to warn. The underpinning argument as to causation which was successful in Chappel v Hart, failed in this case, ie, the complications associated with the surgical procedure would not have arisen if the surgery had been performed on a different occasion. The reason for this distinction was Brereton J's demarcation between failure to warn and failure to diagnose cases. Based on his Honour's approach, it is only "appropriate" to extend the scope of liability based on this "different occasion" argument in failure to warn cases, because the relevant risk in these cases gave rise to the duty to warn.

Factual causation — revisited

Following the analysis under s 5(1)(b), his Honour returned to the issue of factual causation and held that the plaintiff had only satisfied the "but for" test in the barest sense. In other words, his Honour used his reasoning under s 5D(1)(b) to test the strength of the finding in s 5D(1)(a).

Notably, the plaintiff also alluded to the importance of timely and accurate diagnosis of serious conditions by radiologists as public policy concerns justifying the imposition of liability on the defendant. His Honour dismissed these arguments on the basis that they were invitations to disregard the requirements set out in the legislation to establish causation. This is curious, given that the plaintiff had established factual causation and the policy arguments were raised to support the plaintiff's case under s 5(1)(b).

Other arguments raised by the defendant

Scope of duty

The defendant argued that the scope of his duty did not extend to responsibility for harm that occurred in the course of the coiling procedure. His Honour found that "scope of duty" considerations are relevant to consideration of whether there was a breach of duty and, therefore, the defendant could escape liability merely by asserting that his duty of care did not extend to responsibility for the coiling procedure.

Section 5I

Interestingly, the defendant also pleaded s 5I of the Act, arguing that the injury was an inherent risk and, accordingly, no liability could be attributed to the defendant even though he was not the person who performed the surgery. The plaintiff argued that this provision had no application, as the defendant had not correctly diagnosed the plaintiff nor warned her of the risks.

His Honour rejected both of these submissions and clarified that s 5I was a codification of the common law. Accordingly, his Honour found that this provision was
not a defence but simply the corollary of the requirement that the plaintiff prove breach of duty and causation. The defendant could not rely on this provision as “reasonable care and skill” referred to that of a defendant and not a subsequent intervener, whose intervention was necessitated by the defendant’s negligence. Given that it was not the defendant’s conduct that caused the inherent risk to materialise, s 51 had no application to this case.

The future

Questions of causation in medical negligence cases can be extremely complex where the case involves an omission and a hypothetical situation of what would have happened. This decision and the need to satisfy the two-staged approach required under s 5(1)(a) and 5(1)(b) has arguably exacerbated the situation. Given that the defendant admitted breach of duty, the experts were in agreement regarding the medicine and the parties had also agreed on quantum, this should have been a relatively straightforward case for the plaintiff. However, the decision demonstrated a clear departure from well established common law principles and was in line with the intent of the Act, namely, to reduce liability for defendants. Whether such a departure is necessitated under the legislation requires further judicial clarification.

This case is currently on appeal.

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Footnotes

1. Anna Walsh was the solicitor for Mrs Paul.
2. Civil Law (Wrongs) Act 2002 (ACT) s 45; Civil Liability Act 2003 (Qld) s 11; Civil Liability Act 1936 (SA) s 34; Civil Liability Act 2002 (Tas) s 13; Wrongs Act 1958 (Vic) s 51; Civil Liability Act 2002 (WA) s 5C. There is no equivalent provision in Personal Injuries (Liabilities and Damages) Act 2003 (NT).
5. Above, n 3 at [104].
6. Above, n 3 at [72].
7. Above, n 3 at [66].
8. Above, n 3 at [76].
9. Above, n 3 at [78].
10. Civil Liability Act 2003 (Qld) s 16; Civil Liability Act 1936 (SA) s 39; Wrongs Act 1958 (Vic) s 55; Civil Liability Act 2002 (WA) s 5P. There is no equivalent provision in Personal Injuries (Liabilities and Damages) Act 2003 (NT), Civil Liability Act 2002 (Tas), and Civil Law (Wrongs) Act 2002 (ACT).
11. Above, n 3 at [129].
12. Above, n 3 at [129].