IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

No. 307 of 2012

BETWEEN:

IAN WALLACE
Appellant

and

Dr ANDREW KAM
Respondent

HIGH COURT OF AUSTRALIA
FILED
16 NOV 2012
THE REGISTRY SYDNEY

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The respondent certifies that these submissions are in a form suitable for publication on the internet.

Part II: Issues

2. The real issue in the appeal is whether the respondent is legally responsible pursuant to s5D *Civil Liability Act* 2002 (NSW) ("the Act") for a harm, the risk of which, the appellant accepted.

Part III: Judiciary Act

3. The respondent is of the view that notice in accordance with section 78B of the *Judiciary Act* 1903 (Cth) is not required.

Part IV: Contested facts

4. On the fourth day of the trial the appellant was given leave to file an Amended Statement of Claim. In the judgment granting leave the learned trial judge recorded for the avoidance of any doubt, the appellant no longer made any claim against the respondent in relation to the appellant undergoing this surgery or undergoing the surgery having regard to his

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weight where it was likely the operation would require him to remain in a prone position for possibly in excess of six hours.

5. The relevant facts are:

a. The risk of neurapraxia was an acceptable risk to the appellant, and was the only risk that came home, or for which damages were claimed (Trial judge, paragraphs [91]-[94]).

b. The risk of permanent paralysis never came home (Trial judge, paragraph [94]).

c. The appellant ran his case at first instance on the basis that the risk of neurapraxia was a different risk to permanent paralysis, but that the neurapraxia would have been avoided had the operation been avoided. (Trial judge, paragraph [95])

d. On appeal the matter was determined on the basis that the appellant would not have undergone the operation had he been warned of the 5% risk of the permanent paralysis. (Allsop P, CA, paragraph [22])

Part V: Legislation

6. The respondent agrees the relevant legislative provisions are those set out at paragraphs 44-46 of the appellant's submissions.

Part VI: Statement of Argument

7. Part 1A of the Act applies to any claim for damages for harm resulting from negligence, regardless of whether the claim is brought in tort, in contract, under statute or otherwise: s5A(1). "Negligence", for the purpose of Pt 1A, is defined to mean the failure to exercise reasonable care and skill: s5A. Section 5E provides that, in determining liability for negligence, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact relevant to the issue of causation. The principles governing the determination of causation are set out in s 5D.

8. Section 5D(1) relevantly provides that the determination of whether "... negligence caused **particular** harm..." is comprised by:

a. first, "... *the negligence [being] a necessary condition of the occurrence of that harm* [***factual causation***], *and*

b. secondly, "*... that it is* ***appropriate*** *for the scope of the negligent person's liability to extend to the harm so caused...*[***scope of liability***]".

9. The Act is not a code. Therefore, the common law approach to the law of negligence and allocation of liability by causation is still relevant to the operation of s5D.

10. Section 5A of the Act provides that the part, in which 5D is found, concerns "*any claim for damages for harm resulting from negligence*". Therefore, there must be a connection between the breach of duty that is alleged, and the harm or injury for which the damages are claimed.

11. Here, the appellant frames the issue as whether the respondent's breach of duty of care in failing to warn the appellant of the risk of permanent paralysis can be said to have caused a different harm of neurapraxia, within the meaning of s5D, when the risk of permanent paralysis did not materialise, and the appellant accepted the risk of neurapraxia.

12. There is no relevant connection between breach and harm here, because the risk of permanent paralysis did not come home.

13. In tort (being the sole cause of action pleaded here) damage is the gist of the action: see eg *Chappel v Hart* (1998) CLR 232 at 254 [58] per Gummow J. This contrasts with trespass where damage is not the gist of the action. If there is no valid consent, surgery would constitute trespass/battery (*Rogers v Whittaker* (1992) 175 CLR 479); so that even where the patient is cured, he or she would be awarded damages for the wrong done.

14. Consistent with above, the underlying policy (why responsibility for harm is imposed) in tort is to protect the patient from harm (damage) caused by a doctor's negligence; rather than to protect the integrity of the patient's

decision (as is the case with trespass); *Rogers v Whittaker* (1992) 175 CLR 479 at 489-90; see also *Rosenberg* at 453 [61].[1]

15. It is axiomatic that a defendant can only be liable for harm that was caused by the negligence. Further, the purpose of a legal test of causation is to attribute legal responsibility, not engage in a scientific enquiry: *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506 at 509 per Mason CJ.

16. The respondent's three (overlapping) submissions as to why the appeal ought to be dismissed are:[2]

a. The appellant did not suffer a relevant "harm", as section 5D(1)(a) is aimed at compensating for "particular harm" or "the harm" from a wrong (the failure to warn of a risk that did not come home). Common sense has a role to pay in this assessment.

b. The inquiry into causation under s5D(1)(b) involves a value judgment. In terms of scope of liability, it is not "appropriate" for the respondent to be liable in the present context, because the undisclosed risk did not materialise.

c. This is not an "exceptional case" within the meaning of s5D(2).

No relevant "harm" and/or liability not appropriate

17. Section 5D(1) concerns causation. The determination of factual causation under s 5D(1)(a) is a statutory statement of the "but for" test of causation: the plaintiff would not have suffered the particular harm but for the

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1 Similarly, as a matter of economic theory, it has been said that only where an activity (operation) causes a loss to a victim (particular harm) that is greater than the benefit of the activity that the law imposes liability (chance of cure/benefit): see eg Posner, "A Theory of Negligence" (1972) 1 *Journal of Legal Studies* 29; see also the Ipp Report on the "negligence calculus".

2 The first two submissions are in effect Basten JA's conclusion at paragraph [175]: "...that aspect of the negligence of the respondent did not bear that causal relationship with the outcome sufficient to warrant imposing on him responsibility for that harm. That conclusion is at least consistent with the language of s5D(1)(a). Alternatively, if the exclusion of something which otherwise qualifies as a necessary condition of the injury depends on a normative judgment, then it is appropriately excluded in the present case, pursuant to s5D(1)(b) and (4)."

defendant's negligence: *Strong v Woolworths* [2012] HCA 5, per French CJ, Gummow, Crennan and Bell JJ at [18]. The majority also recognised that the 'but for' test produces some anomalous results and it does not address policy considerations involved in attribution of legal responsibility for harm.

18. At common law, the "but for" test must give way on occasion to "common sense" and value judgment: *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506. The respondent's submission is that while value judgment does not have a role to play in s5D(1)(a),[3] what is required by s5D(1)(a) is an identification of the relevant harm or "particular harm". An alternative approach is that s5D(1)(a) involves a test of "common sense" (and, in the further alternative, it operates in relation to s5D(1)(b) as outlined below). Here, there is no sufficient causal link between any injury and the relevant breach of duty (see *Chappel v Hart* (1998) 195 CLR 232 at [23] per McHugh J: "causation theory insists that the plaintiff prove that the injury is relevantly connected to the breach".)

19. In caselaw and commentary[4] explanations of the application of the factual causation test favour the respondent. For example:

a. In *Chappel v Hart* (1998) 195 CLR 232 at 257 [66] Gummow J gave an example of why the 'but for' test of causation ought not to be applied generally without qualification. His Honour explained that (despite the 'but for' test) the law would not hold a doctor liable if a patient suffers harm during an operation, that is different to the risk, of which the doctor failed to warn. And this was so even if, had the risk been explained the patient would have decided against having the operation or suffered the other form of harm.

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3 *Strong v Woolworths* [2012] HCA 5, per French CJ, Gummow, Crennan and Bell JJ at [18]-[19].

4 In relation to causation in tort law generally, see in particular, Allsop, "Causation in Commercial Law", chapter 13 in Degeling, Edelman, Goudkamp, *Torts in Commercial Law*, Thomson Reuters, 2011; Stapleton, "Reflections on Common Sense Causation in Australia", chapter 14, in Degeling, Edelman, Goudkamp, *Torts in Commercial Law*, Thomson Reuters, 2011; Stapleton, "Choosing what we mean by 'Causation' in the Law" (2008) 73 *Modern Law Review* 433; and the articles referred to in those publications.

b. Further, Gummow J in *Rosenberg v Percival* (2001) 205 CLR 434 at [86] held that if a medical practitioner failed to warn a patient of a particular consequence "***and that consequence in fact eventuates***" *then, subject to the question of materiality, the rule [with respect to causation] seeks to hold the medical practitioner liable for* ***that consequence***" (emphasis added). See similarly, *Chappel v Hart* (1998) 195 CLR 232 at 238, [8] per Gaudron J (citing Dixon J in *Betts v Whittingslowe* (1945) 71 CLR 637 at 649); at 247, [34] per McHugh J.

10 c. Kirby J explained that liability will be displaced where "the event was logically irrelevant to the actual damage which occurred": *Chappel v Hart* (1998) 195 CLR 232 at 271, citing *Leask Timber and Hardware Pty Ltd v Thorne* (1961) 106 CLR 33 at 39, 46.

d. In *Banque Bruxelles Lambert SA v Eagle Star Insurance Ltd* [1997] AC 191 at 213 (in a case concerning negligent valuation) Lord Hoffman gave the example of a doctor who negligently told a patient that his knee was sufficiently fit to allow him to climb a mountain. The doctor could not be held liable if the patient died as the result of an avalanche, despite the fact that the man would not have climbed the
20 mountain but for the doctor's advice. In particular he said at 214:

> "a person under a duty to take reasonable care to provide information on which someone else will decide upon a course of action is, if negligent, **not generally regarded as responsible for all the consequences of that course of action**." (emphasis added)

See discussion by the High Court in *Kenny & Good Pty Ltd v MGICA (1992) Ltd* (1999) 199 CLR 413 especially at 425-8 per Gaudron J; at 438 per McHugh J.

30 e. Fleming criticised the suggestion that " ... 'informed consent' [be] a surrogate for, in effect, imposing strict liability for unsuccessful treatment... If the 'right of choice' had been recognised as a dignitary interest protected, like battery, by symbolic damages, the link with

physical injury and causation would have been avoided.": "Standard of Care", in Fleming, *The Law of Torts*, 9th edition, p123; adopted in Sappideen and Vines, eds, *Fleming's The Law of Torts*, 10th ed, 2011, p145.

f. *Clerk & Lindsell on Torts* 19th ed, 2006, state relevantly:

i. "... a patient who alleges that a doctor negligently failed to advise her about the risks of an operative procedure must prove that had she been informed about the risks she would have declined the treatment, thereby avoiding the risk that has now materialised." (at paragraph 2-12);

ii. "a patient's claim in respect of non-disclosure of risk is for the *physical damage* attributable to the materialisation of the risk, not exposure to risk *per se*. That is why if the risk does not materialise and no physical damage ensues there is no claim." (paragraph 2-17).

20. In the respondent's submission the appeal ought to fail because the harm, of which the appellant complains was not logically or relevantly caused by the breach.

21. **Alternatively**, the respondent's submission is that s5D(1)(b) operates to limit the scope of the respondent's liability as to what is "appropriate" as a matter of value judgment, even if the "but for" test would otherwise be satisfied. This would lead to the conclusion here that the appellant could only succeed if he had suffered permanent paralysis, which he did not.

22. Section 5D(4) provides that for the purposes of determining the scope of liability, the Court is to consider (amongst other relevant things) "... *whether or not and why responsibility for the harm should be imposed on the negligent party*."

23. The Act is more specific in directing a court to determine this issue in favour of the respondent by reason of the language of section 5D(4) which mandates consideration as to "*why responsibility for the harm should be imposed on the negligent party*". There is no reason of policy why the respondent ought to be liable here; instead the contrary is true.

24. The approach to the enquiry under s5D(1)(b) should protect a patient by holding the doctor responsible for the harm that results from material inherent risks that were not the subject of a warning.

25. While there are many authorities in common law jurisdictions dealing with liability of doctors who fail to warn of risks not accepted by patients that in fact materialise, there are only two decisions that refer to a factual situation that has any possible similarity to the current case, namely, the US case of *Cochran v Wyeth* Inc 3 A 3d 673 (Pa Super 2010) and Scottish decision of *Moyes v Lothian Health Board* 1990 S.L.T. 444.

10 **26.** Justice Beazely reasoned that the American decisions were unpersuasive because "proximate causation" is not an element of negligence in NSW (at CA [135]). However, her Honour's comparative analysis does not go beyond noting the difference in terminology in the different jurisdictions. The American *Torts Restatement Third*[5] (the most recent) has abandoned "proximate causation" and adopts instead a scheme that, like s5D, separates "factual causation" from "scope of liability".[6] The authors claim that US case law is susceptible to reinterpretation according to that scheme. "Scope of liability", they say, is closely equivalent to the meaning of "proximate cause", and they quote the following textbook advice to US
20 law students: "when you encounter the term 'proximate cause' in reading a case, you must always examine the context to see whether the court is using it to mean cause in fact, legal cause [ie, scope of liability], or both."[7] Therefore, *Cochran v Wyeth* Inc 3 A 3d 673 (Pa Super 2010), can be considered relevant, where the court held at [15] "before a plaintiff can prove that a non-disclosed risk would have altered the physician's decision

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5 The American Law Institute, *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm,* Vol I (ALI Publishers, St Paul MN, 2010), 512.

6 See Stapleton, "Reflections on Common Sense Causation in Australia" in Degeling, Edelman, Goudkamp (eds), *Torts in Commercial Law* (Thompson Reuters, Sydney, 2011), 332–333.

7 David W Robertson et al, *Cases and Materials on Torts* (3rd ed, 2004), 169, quoted in The American Law Institute, *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm,* Vol I (ALI Publishers, St Paul MN, 2010), 512.

to prescribe a drug, the plaintiff must first demonstrate that he/she suffered from the precise injury that the manufacturer failed to disclose".

27. The appellant relies upon the Scottish decision *Moyes v Lothian Health Board* 1990 S.L.T. 444, for his argument of "cumulative risk" (discussed below). In *Moyes*, there was a failure to warn of an "aggravated risk" that came home, when the doctor had failed to warn of special risks that did not come home. Lord Caplan stated that the failure to warn of all the risks that led to liability. However, Lord Caplan's reasoning is met with the answer that there is no compensation for mere exposure to risk, but only when risk comes home. Therefore, *Moyes* ought to have been decided in favour of the doctor.

Application – s5D(1)(a)

28. The express language of the section is "particular harm". The appellant misdescribes the particular harm when he claims he suffered "harm" by undergoing the operation and suffering neurapraxia. The relevant breach was in relation to the risk of permanent paralysis, and therefore the only possible "particular harm" was permanent paralysis, which never materialised.

29. Logically, the appellant's claim can only arise if there is damage, caused by the negligence, which is assessed by a conventional retrospective analysis. Because the risks of permanent paralysis and neurapraxia have not been shown to be related (except that the operation was the necessary precondition to either), it is irrelevant whether the appellant would have consented to surgery if advised of the risk of paralysis, either alone or in combination with neurapraxia.

30. The Court ought to reject the appellant's argument that it is irrelevant that permanent paralysis did not occur, and that the issue of causation should be determined in a vacuum without regard to the fact that the appellant did not suffer permanent paralysis, but rather neurapraxia, which was

acceptable to him. The test of factual causation must involve common sense.[8]

31. If the common law caselaw was applied to the facts of this case, then the appellant would not be able to establish causation, because permanent paralysis never came home.

32. The determination of the issue of causation is different and separate to the determination of the issue of duty of care. These issues cannot be run together – as the appellant seeks to do. Duty of care is to be adjudged prospectively. The issue of causation is adjudged retrospectively (see eg *Henville v Walker* (2001) 206 CLR 459 at 490, [97] per McHugh J). Duty of care is an objective test.[9] The appellant's argument that the respondent had a "single comprehensive duty to advise about the risk of surgery" (eg Appellant's submissions, paragraph 36, citing *Rogers v Whitaker*) is undoubtedly correct. However, within this single comprehensive duty are different obligations that need to be assessed individually.

33. It is plain that an allegation of negligent treatment is different to a failure to adequately warn of various risks. However, if one compares the law of the defence of voluntary assumption of risk, that defence only operates where a defendant can show that a plaintiff assumed the particular risk that came home; as a plaintiff can assume some risks but not others. Here, the appellant accepted the risk of neurapraxia, which came home. There is no suggestion of acceptance of the risk of permanent paralysis, because it does not enter the equation.

34. It may be, as was pointed out by Allsop J, that a failure to warn the appellant about the risk of permanent paralysis might impact upon the issue of causation if permanent paralysis was linked to the risk of temporary

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8 In this regard, Gleeson CJ warned against failing to take into account context "where the alleged breach of duty of care is a failure to warn about the possible risks associated with a course of action, where there were, at the time, strong reasons in favour of pursuing the course of action": *Rosenberg v Percival* (2001) 205 CLR 434 at 442 [16].

9 It is not disputed that the issue of causation in this type of case is adjudged by reference to the subjective attitude of the patient: see s5D(3) and *Chappel v Hart* (1998) 195 CLR 232.

paralysis, so that the patient's decision to accept the risk of temporary paralysis was affected (CA, paragraphs [17]-[18]; [30]). The appellant suggests (Submissions paragraph 38) that this case is one of "cumulative risk", which is not a meaningful concept. Further:

a. Here, the risks were different. This is not a case like *Shead v Hooley* [2000] NSWCA 362, where there might not be a distinction between warning of the same side-effect in a temporary or permanent form.

b. Allsop P (at CA [21], [31]) and Basten JA (at [172]) correctly identify that the risks were distinct. This is sufficient for the result that causation could not be established, because the risk of neurapraxia was accepted, and distinct, and a different result would have been "opportunistic" (Basten JA, at [173]).

c. The way in which the appellant ran this case at first instance was that the risks of permanent paralysis and neurapraxia were separate and distinct, yet he sought compensation because he would not have had the operation at on 22 November, had he been warned of permanent paralysis (Transcript, Black Book, p260:3).

Application – s5D(1)(b)

35. If the Court is of the view that s5D(1)(a) has been satisfied, either because there is relevant "harm" within the meaning of the section, or because the 'but for' test is applied strictly with no reference to common sense, then the respondent submits it is not "appropriate" within s5D(1)(b) for the scope of the respondent's liability to extend to the harm of neurapraxia, which was a risk that the appellant was prepared to take (unlike permanent paralysis). This finding of fact is not challenged. It was part of the "price" the appellant was prepared to pay for the 70-75% chance of a better outcome or cure (Trial judge, paragraph [94]).

36. If the appellant were to succeed, he would be able to obtain damages for an injury that he was willing to risk (on the rationale that he was not advised of another risk that did not come home). That result seems to be unjust and

opportunistic. Further, it would also mean that a patient, who has a completely successful operation could complain that he had suffered the "harm" of the cost and inconvenience of the operation, because he discovered after the event an undisclosed risk of a complication that ought to have been disclosed and would have dissuaded him from having the operation at all.[10]

37. Analogies can be dangerous. However, if the facts of this case were altered slightly so as to draw an analogy between tort and contract, an appropriate assumption would be that the parties discussed all of the risks (temporary and permanent paralysis); and agreed on an appropriate contract. The appropriate hypothetical contract would be that the doctor warranted there would be no permanent paralysis. A warranty about temporary paralysis would not be required (this being a risk the patient was prepared to take). In that case, even though the parties had got together and specifically agreed about these risks, there would be no damages available in contract. There would be no breach of the warranty because the risk of permanent paralysis did not come home. It would be odd that the appellant in this case could not succeed in contract, but would be able to obtain damages in the codified tort legislation.

Section 5D(2) has no operation here

38. The alternative submission of the appellant is that this is an exceptional case within s5D(2). That section assumes the appellant would not be able to establish negligence as a necessary condition of the occurrence of this harm. The NSW Court of Appeal assumed the appellant would be able to establish negligence as a necessary condition of the occurrence of this harm. If that assumption is correct, s5D(2) does not apply. If this assumption is incorrect, there is no 'established principle' identified by the appellant that would justify any finding that this is an 'exceptional case'; rather the seeming opportunism of the claim (Allsop P at CA [16]-[17];

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10 See Allsop P, CA, paragraph [15].

Basten JA at CA [173]-[174]) compels the conclusion that this is not an exceptional case.

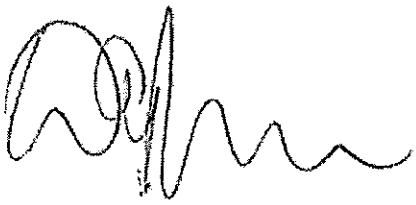
Part VII: Notice of contention/cross-appeal

39. Not applicable – there is no notice of contention or cross-appeal.

Part VIII:

40. The respondent estimates that his oral argument will require no more than three hours.

Dated: 16 November 2012



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