2013 . Vol 23 No 10

Contents

Information contained in this newsletter is current as at August 2013

LexisNexis® Butterworths

Australian
Product Liability
Reporter

The High Court takes a defendant-friendly approach to extending the scope of liability for a failure to warn

James Whittaker *and* ***Aditi Kogekar*** *CORRS CHAMBERS WESTGARTH*

Following the publication of the Ipp Report[1] on 30 September 2002, most states and territories in Australia implemented statutory provisions to supplement common law negligence principles in relation to causation and remoteness of damages.[2] The new legislative regime introduced a two-pronged approach to causation by reference to the notions of "factual causation" and "scope of liability", giving weight to whether the negligent conduct actually played a role in bringing about the relevant harm, as well as whether policy considerations would support the extension of the defendant's liability to that harm.

The High Court of Australia has considered the notion of "factual causation" on a number of occasions since the introduction of the Ipp legislative reforms.[3] While it appears settled that factual causation is determined by reference to the "but for" test, the "scope of liability" is becoming an issue that Australian courts are grappling with more and more often. In May this year, the High Court handed down its decision in *Wallace v Kam*,[4] a medical negligence case involving a failure to warn. In the course of its judgment, the High Court considered the concepts of factual causation and scope of liability in depth — particularly the latter. The High Court's judgment provides useful guidance on how to navigate both these ideas, extending from medical negligence to product liability and beyond, both here and overseas.

Causation under civil liability legislation

As we know, following proof of duty and breach, the tort of negligence requires that the breach first caused the relevant injury or loss, and that injury or loss was not too remote a consequence of the breach. Civil liability legislation in most states and territories now provides the following supplementary rules (the provisions below are contained in s 5D of the Civil Liability Act 2002 (NSW), but are mirrored in each relevant state and territory):

(1) A determination that negligence caused particular harm comprises the following elements:
   (a) that the negligence was a necessary condition of the occurrence of the harm (**"factual causation"**), and
   (b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (**"scope of liability"**).

(2) In determining in an exceptional case, in accordance with established principles, whether negligence that cannot be established as a necessary condition of the occurrence of harm should be accepted as establishing factual causation, 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.

(3) If it is relevant to the determination of factual causation to determine what the person who suffered harm would have done if the negligent person had not been negligent:
   (a) the matter is to be determined subjectively in the light of all relevant circumstances, subject to paragraph (b), and
   (b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of determining the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party.

According to the Ipp Report:

1. "factual causation" … concerns the factual issue of whether the negligence played a part in bringing about the harm; and
2. "scope of liability" … concerns the normative issue of the appropriate scope of the negligent person's liability for the harm, once it has been established that the negligence was a factual cause of the harm. "Scope of liability" covers issues, other than factual causation, referred to in terms such as "legal cause", "real and effective cause", "commonsense causation", "foreseeability" and "remoteness of damage".

Wallace v Kam

In *Wallace v Kam*, Mr Wallace underwent a surgical procedure performed by Dr Kam to alleviate pain in his lower spine caused by a disc protrusion. There were two distinct inherent risks involved in the procedure that Mr Wallace was not advised of:

- temporary local damage to nerves within his thighs, resulting from lying down on the operating table for an extended period ("bilateral femoral neurapraxia"); and
- a one-in-20 chance of permanent and catastrophic paralysis resulting from damage to his spinal nerves.

The first risk materialised, and Mr Wallace sustained neurapraxia, which left him in severe pain for some time. The risk of paralysis did not materialise.

Accordingly, the central issue was that of causation: if Dr Kam had not negligently failed to warn Mr Wallace of the two risks, would Mr Wallace have suffered the injury he did?

At trial, the Supreme Court of New South Wales found that Dr Kam had been negligent in failing to inform Mr Wallace of the risk of neurapraxia. However, the Supreme Court also found that Mr Wallace would have elected to go ahead with the surgery even if he had been made aware of that risk. Accordingly, the surgeon's negligent failure to warn did not cause the patient's harm. The court declined to make any finding about whether Dr Kam had negligently failed to warn Mr Wallace of the risk of paralysis on the basis that the risk never manifested. On appeal, the Court of Appeal split 2:1, but the majority also considered that it was not appropriate to hold the surgeon liable for the patient's neurapraxia on the basis of negligence relating to a separate risk, being paralysis, which did not materialise.

The High Court upheld the decisions of both courts below. There was no question that Dr Kam owed Mr Wallace a duty to exercise reasonable care and skill and, further, no question that he breached that duty by failing to warn Mr Wallace of two material risks of injury. In relation to factual causation, the High Court emphasised that "the determination of factual causation in accordance with s 5D(1)(a) involves nothing more or less than the application of a 'but for' test of causation".[5] Taking that approach, the High Court held that factual causation was made out because Mr Wallace would not have chosen to undergo the procedure at all if warned of all material risks and, therefore, would not have sustained the neurapraxia.

In relation to the scope of liability, the High Court explained:

> Section 5D guides but does not displace common law methodology.
>
> …
>
> A limiting principle of the common law is that the scope of liability in negligence does not extend beyond liability for the occurrence of such harm the risk of which it was the duty of the negligent party to exercise reasonable care and skill to avoid.
>
> …
>
> Within that limiting principle of the common law, the scope of liability for the consequences of negligence is often coextensive with the content of the duty of the negligent party that has been breached … However, the scope of liability in negligence is not always so coextensive … That is in part because the elements of duty and causation of damage in the wrong of negligence serve different functions (the former imposing forward-looking rule of conduct; the latter imposing a backward-looking attribution of responsibility for breach of the rule) with the result that the policy considerations informing each may be different.[6]

Applying this framework, the High Court held that it was not appropriate for the scope of Dr Kam's liability to extend to the physical injury sustained by Mr Wallace. It came to this conclusion by applying a hypothetical test to determine whether, hypothetically, if Dr Kam had warned Mr Wallace of the risk of neurapraxia, he would have undergone the procedure anyway. Applying the principle developed in *Rosenberg v Percival*,[7] the High Court considered Mr Wallace's position subjectively, on the evidence given, and confirmed that Mr Wallace's own evidence as to what he would have done was inadmissible unless it was against his own interest.

Accordingly, the High Court found that although Mr Wallace would not have chosen to undergo the surgical procedure had he been properly warned of all material risks (neurapraxia and paralysis), he would have chosen to undergo the surgical procedure had he been warned only of the risk that actually materialised (neurapraxia). On that basis, Mr Wallace should not be compensated for the materialisation of a risk that he would have been prepared to accept.

The High Court clarified that the conception of a duty to warn was not intended to protect a person's right to choose, or to protect a person from exposure to all unacceptable risks. Rather, the policy is to protect a person from a particular injury or injuries, the risk of which is unacceptable to them.

Implications for product liability cases

Although *Wallace v Kam* dealt with a medical practitioner, the decision necessarily has implications for product liability failure-to-warn cases. Just as medical

practitioners have a duty to their patients to warn of all "material risks" of injury inherent in any treatment that they propose, a manufacturer has a similar duty to warn consumers of any known risks of using a product. *Wallace v Kam* clarifies that the scope of liability in failure-to-warn cases is limited to whether the defendant failed to warn of a particular risk that in fact eventuated, and does not extend to a failure to warn of different risks that the plaintiff either accepted or would have accepted.

In a product liability sense, this is significant. For example, a certain drug may have a number of side effects, but its manufacturer only warns of a handful. A consumer could purchase that product, and suffer an undisclosed side effect. However, if the evidence shows that the consumer, on a subjective and hypothetical approach, would have purchased the drug even if he or she knew of that side effect, a court applying the High Court's reasoning in *Wallace v Kam* cannot extend the manufacturer's scope of liability to loss or damage suffered as a result of that side effect.

This said, it is worth noting that in *Wallace v Kam*, the High Court did identify the fact that a number of failings to warn would have a cumulative effect, which may result in a finding of liability. This is ultimately something that would need to be considered on a case-by-case basis. In any event, the normative requirements posited by the scope-of-liability limb act as an impediment to any prospective plaintiff where the civil liability legislation applies.

The decision also has potential international ramifications. While a number of international jurisdictions have adopted similar distinctions at common law between issues of factual causation and "legal" causation,[8] the High Court has taken this one step further. For example, the most current Restatement of the Law of Torts in the United States[9] introduced the separate notions of "factual causation" and the "scope of liability" for the first time.[10] Previously, causation was dealt with under the heading of "legal causation", which covered both facts and scope, and was often further confused with the term "proximate causation", which alternatively refers to scope and facts, or scope individually.[11] The Supreme Court of Canada has also drawn a distinction between factual causation and scope of liability.[12] Indeed, in *Wallace v Kam*, the High Court made reference to this international jurisprudence,[13] and the fact that its decision was coming into line with the position overseas. While the High Court used the term "proximate causation",[14] it made clear that it was referring to US case law that specifies that causation can only be proved if an undisclosed risk manifests into an actual injury, and that absent the occurrence of the undisclosed risk, a practitioner or manufacturer's omission is "legally inconsequential".

The High Court has now gone beyond this, adding the further condition that the undisclosed risk must be one that a plaintiff is unwilling to hazard. The effect of this on individual claims is that plaintiffs have a higher hurdle to overcome. The effect on product liability class actions arising is more interesting, because it highlights the subjective, individual element that a court must consider in a failure-to-warn case. Many Canadian and US courts are already reluctant to allow failure-to-warn actions to gain class certification and proceed as a class action, given the unique issues of causation usually raised by individual class members.[15] Even in Australia, where formal certification is not necessary, attacking the lack of sufficient commonality between members in a group could prove fruitful for defendants faced with failure-to-warn class actions, on the basis that such cases require a thorough examination of the individual plaintiff's situation in constructing the hypothetical enquiry of whether, if the defendant had given an adequate warning of the product or procedure's risk, the plaintiff would have proceeded in undergoing the procedure.

For these reasons, the international and domestic implications of the judgment will be particular interesting to monitor. Watch this space.

James Whittaker
Partner
Corrs Chambers Westgarth
james.whittaker@corrs.com.au
www.corrs.com.au

Aditi Kogekar
Associate
Corrs Chambers Westgarth
aditi.kogekar@corrs.com.au
www.corrs.com.au

Footnotes

1. D A Ipp, P Cane, D Sheldon and I Macintosh, *Review of the Law of Negligence: Final Report*, 2002, available at www.revofneg.treasury.gov.au.
2. Civil Law (Wrongs) Act 2002 (ACT), Ch 4 Pt 4.3; Civil Liability Act 2002 (NSW), Pt 1A Div 3; Civil Liability Act 2003 (Qld); Civil Liability Act 1936 (SA), Pt 6 Div 2; Civil Liability Act 2002 (Tas), Pt 6 Div 3; Wrongs Act 1958 (Vic), Pt X Div 3; Civil Liability Act 2002 (WA), Pt 1A Div 3.
3. *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 296 ALR 3; 87 ALJR 505; [2013] HCA 10; BC201301509; *Strong v Woolworths Ltd t/as Big W* (2012) 246 CLR 182; 285 ALR 420; [2012] HCA 5; BC201200949; *Adeels Palace Pty*

Ltd v Moubarak; Adeels Palace Pty Ltd v Bou Najem (2009) 239 CLR 420; 260 ALR 628; [2009] HCA 48; BC200910035.

4. *Wallace v Kam* (2013) 297 ALR 383; 87 ALJR 648; [2013] HCA 19; BC201302166.
5. Above, n 4, at [16].
6. Above, n 4, at [22]–[26].
7. *Rosenberg v Percival* (2001) 205 CLR 434 at 214; 178 ALR 577; [2001] HCA 18; BC200101435 per Callinan J.
8. See, for example, the Supreme Court of Canada decision of *Mustapha v Culligan of Canada Ltd* (2008) SCC 27; 92 OR (3d) 799; 238 OAC 130; [2008] 2 SCR 114 and the concept of a "proximate cause" in medical failure-to-warn cases in the United States — for example, *Cochran v Wyeth Inc* (2010) 3 A 3d 673.
9. *Restatement of the Law, Third, Torts: Liability for Physical and Emotional Harm*, American Law Institute, 2011. In US jurisprudence, *Restatements of the Law* are treatises that inform judges and lawyers in relation to various principles of common law.
10. N Bodor, "A consideration of 'scope of liability' within the Restatements" (2012) 20 *Tort Law Review* 163, p 163.
11. Above, n 10, p 164.
12. Above, n 8.
13. Above, n 4, at [38].
14. Above, n 4, at [38].
15. See, for example, the recent refusal of the Quebec Superior Court to certify a class action brought against drug manufacturer Hoffmann-La Roche Ltd over a "failure to warn" of the side effects of using the anti-inflammatory drug Accutane.