Causation – a potential defence in cases involving professionals’ duty to warn

Three recent cases, one involving a surgeon and the other two involving solicitors, have considered the failure of professionals to warn or properly advise their clients of certain risks.

For the plaintiff to succeed in a claim for professional negligence, it must satisfy the court that the defendant’s failure to warn or properly advise was a necessary condition of their loss.

The three cases discussed demonstrate that the court will consider causation as a question of fact subjectively in light of all the relevant circumstances, to determine what the person who suffered loss would have done if properly advised.

**Wallace v Kam [2013] HCA 19**

In *Wallace v Kam* the High Court considered whether a medical practitioner’s failure to warn of a material risk was a cause of the appellant’s injuries.

Dr Kam performed a surgical procedure on Mr Wallace which involved two inherent risks. The first was the risk of neurapraxia (temporary local damage to nerves) and the second was the risk of permanent paralysis.

As a result of the surgery, Mr Wallace sustained neurapraxia. Mr Wallace commenced proceedings against Dr Kam alleging he failed to warn him of the risk of either neurapraxia or paralysis and that, if warned of either risk, he would not have chosen to undergo the surgical procedure. The primary judge found Dr Kam had negligently failed to warn Mr Wallace of the risk of neurapraxia but that Mr Wallace would have chosen to undergo the surgical procedure even if he had been warned of the risk.

On appeal the High Court addressed firstly the scope of Dr Kam’s duty of care, and secondly whether any breach was causative of Mr Wallace’s injury. The High Court dismissed the appeal.

**Duty of Care**

Medical practitioners owe a common law duty to their patients to exercise reasonable care and skill in the provision of professional advice and treatment. A component of this duty is to warn the patient of inherent “material risks”.

An inherent risk is material if it is one to which a reasonable person in the position of the patient would be likely to attach significance, or is a risk to which the medical practitioner knows or ought reasonably to know the particular patient would be likely to attach significance. The policy underlying the imposition of the duty is to enable the patient to choose whether or not to accept those inherent risks and thereby potentially avoid the occurrence of the particular risk.

The duty will be breached where the medical practitioner fails to exercise reasonable care and skill to warn a patient of any material risk of physical injury inherent in a proposed treatment. The High Court held Dr Kam breached his duty by failing to warn Mr Wallace of two material risks, namely the risk of neurapraxia and the risk of paralysis.

**Causation**

Considering causation for the purpose of attributing legal responsibility requires two distinct questions: whether the negligence was a necessary condition of the occurrence of harm (factual causation) and whether it is appropriate for the scope of the negligent person’s liability to extend to the harm (scope of liability).

Factual causation is established where the patient proves, on the balance of probabilities, that they sustained injury as a consequence of choosing to undergo medical treatment which they would not have sustained if warned of all the material risks. What the patient would have done if warned is to be determined subjectively in light of all the relevant circumstances.
The scope of liability in negligence does not extend beyond liability for the occurrence of harm from the risk of which it was the duty of the negligent party to warn. A medical practitioner will therefore not be liable to a patient for physical injury that represents the materialisation of a risk which is beyond the duty of the medical practitioner to warn.

The High Court held that the failure to exercise reasonable care and skill on the part of Dr Kam was a necessary condition of the neurapraxia sustained by Mr Wallace. If Mr Wallace had been properly warned of all the material risks (neurapraxia and paralysis), he would not have chosen to undergo the surgical procedure and therefore would not have sustained neurapraxia.

The critical question before the High Court was whether the scope of Dr Kam’s liability could extend to physical injury sustained in circumstances where Mr Wallace would not have chosen to undergo the surgical procedure if properly warned of all risks, but where he would have chosen to undergo the surgical procedure had he been warned only of the risk which actually materialised.

To determine this question the High Court examined the nature of Dr Kam’s duty to warn and the policy that underpins its imposition. The underlying policy is to protect the patient from the occurrence of physical injury, the risk of which is unacceptable to the patient. The scope of liability for breach of duty therefore reflects this underlying policy so that a medical practitioner will be liable for the consequence of material risks that were not warned of and were unacceptable to the patient. Their liability will not extend to harm from risks that the patient would have consented to had appropriate warnings been given.

The High Court was satisfied that if Mr Wallace had only been warned of the risk of neurapraxia, being the risk that actually materialised, he would have chosen to undergo the surgery. Therefore, he could not be compensated for the occurrence of physical injury, the risk of which he was prepared to accept. The High Court held that as the failure of Dr Kam to warn Mr Wallace of the risk of paralysis was not the legal cause of the injury (neurapraxia) which materialised, Mr Wallace could not be compensated for it.

In Zakka v Elias the New South Wales Court of Appeal considered whether a solicitor failed to adequately warn her client of the risks inherent in entering certain transactions and whether this failure was causative of her client’s loss.

Ms Rahe, a solicitor, provided assistance to Mr Zakka (to whom she was related) in connection with his entry into various loan transactions. Ms Rahe was employed by Mr Elias. She was consulted by Mr Zakka in a family and social context. Mr Zakka did not consult Ms Rahe at Mr Elias’ office, no client file was opened and there was no written retainer or costs agreement between Mr Zakka and Mr Elias or between Mr Zakka and Ms Rahe.

Ms Rahe assisted Mr Zakka with his entrance into two loans, named the Permanent Loan and the First Mortgage Loan. Both loans were secured by a mortgage over Mr Zakka’s home. The proceeds of the Permanent Loan went to Mr Rahe (Mr Zakka’s brother) by way of an unsecured and undocumented loan. Ms Rahe did not know that the money was to be paid to Mr Rahe until receipt of directions for the settlement of the loan. Mr Zakka used the proceeds of these loans to lend money to a Mr Allem (referred to as the Alispur Loan). The Alispur Loan had a high rate of interest and was secured by an unregistered mortgage. Mr Rahe and Mr Allem failed to repay the amounts lent to them by Mr Zakka and he defaulted on his mortgage.

The District Court found Ms Rahe liable in respect of the Permanent Loan but did not find her liable for the First Mortgage and Alispur Loans. On appeal the Court of Appeal upheld the decision of the District Court with respect to the Permanent Loan but held Ms Rahe owed a duty of care with respect to the First Mortgage and Alispur Loans.

Duty of Care

The primary judge found Ms Rahe owed Mr Zakka a duty of care with respect to the Permanent Loan. Her Honour found an implied retainer existed between Ms Rahe and Mr Zakka on the basis that Mr Zakka consulted Ms Rahe because he needed a solicitor, she was aware this was the reason he consulted her and she undertook the tasks of a legal practitioner. Accordingly, Ms Rahe owed Mr Zakka the requisite duty of care. Her Honour held that Ms Rahe breached her duty once she became aware of her brother’s interest in the transaction because a competent solicitor in her position would have realised the potential of a conflict of interest, declined to assist further and advised Mr Zakka accordingly.

The Court of Appeal held there was no retainer between Mr Zakka and Ms Rahe in relation to the Alispur Loan because the loan documents were signed by Mr Zakka before he first consulted Ms Rahe and she was told by Mr Zakka the documents had been explained and he understood them. Nevertheless, the Court of Appeal was
satisfied that, once she read the Alispur loan documents, Ms Rahe was put on notice of matters that a reasonably competent practitioner would have seen as posing risks to Mr Zakka and she came under a duty to warn Mr Zakka of the risks involved in lending to Alispur.

The Court considered a competent solicitor in her position would have attached significance to the risk that if Alispur defaulted on the loan Mr Zakka would have difficulty enforcing the unregistered mortgage, hence Ms Rahe owed Mr Zakka a duty to draw to Mr Zakka's attention that he should consider or seek further advice as to whether the security for the Alispur loan would provide adequate protection. Although Ms Rahe provided a general warning in regards to Mr Allem's character, the Court accepted Ms Rahe breached her duty by failing to alert Mr Zakka to the prudence of investigating the adequacy of the security.

Causation

With respect to the Permanent Loan, the primary judge held that Ms Rahe's breach of duty was causative of Mr Zakka's loss as an independent solicitor would have advised Mr Zakka against lending the money to Mr Rahe without security and without a loan agreement. Her Honour was satisfied that on the balance of probabilities Mr Zakka would have accepted such advice and the loan would either not have proceeded or would have been secured.

With respect to the Alispur loan, the Court of Appeal did not consider Ms Rahe's breach to be causative of Mr Zakka's loss. Mr Zakka expressed urgency in proceeding with the loan transaction. Ms Rahe advised him that Mr Allem was untrustworthy and warned Mr Zakka not to do any deals with Mr Allem or sign the loan documents because there was a risk he could lose his home. Despite these warnings Mr Zakka pressed ahead with the loan. Accordingly, the Court held that Mr Zakka would have proceeded with the Alispur loan even if he had been given appropriate advice to investigate the adequacy of the security by Ms Rahe.

Kambouris v Tahmazis [2013] VSC 271

The decision of Kambouris v Tahmazis also involved a solicitor (Mr Kiatos) failing to adequately advise their client of certain risks.

Mrs Kambouris participated in a property development joint venture with Mr Floros and Mr Kiatos. The business was initially carried out through BTC Developments Pty Ltd (BTC). Mrs Kambouris was induced by Mr Floros to mortgage her properties to the bank as security for the borrowings by BTC. An agreement was made between Mrs Kambouris, BTC and Mr Floros (the Agreement). Under the Agreement Mr Floros was to mortgage his property in favor of Mrs Kambouris.

Mrs Kambouris alleged that around the same time as the Agreement, Ms Papakostas (the wife of Mr Kiatos) agreed to indemnify Mrs Kambouris for any liability she may have to the bank and to secure that obligation by a mortgage over her property. A draft agreement was prepared between Mrs Kambouris, BTC and Ms Papakostas but was never executed. Mr Kiatos knew his wife had not signed the draft agreement and failed to notify Mrs Kambouris, as his client, of this.

Mr Kiatos made a series of assurances to Mr and Mrs Kambouris that Mrs Kambouris was protected by the Agreement and the mortgages, including the security provided by his wife. When the bank called in the security, Mrs Kambouris was unable to call upon the security she believed had been provided by Ms Papakostas.

Duty of Care

The Victorian Supreme Court held Mr Kiatos assumed the role of solicitor for Mrs Kambouris in his role as a joint venture partner with her husband and Mr Floros. Although he engaged an independent solicitor to undertake certain tasks, it did not relieve him of his overall duty to Mrs Kambouris when providing legal advice and assistance. Judd J accepted the evidence of Mrs Kambouris and her husband that Mr Kiatos made a number of assurances to them that Mrs Kambouris was legally protected by having two mortgages in place.

In these circumstances, Judd J held that Mr Kiatos was, at the very least, obliged to inform Mrs Kambouris of the fact his wife had not executed an agreement or given a mortgage and alert her to the risk that she only had recourse to the property of Mr Floros. By failing to inform Mrs Kambouris, Mr Kiatos breached his duty of care to make full disclosure of facts known to him and the associated risk.
Causation

Judd J was satisfied Mrs Kambouris suffered loss and damage by reason of Mr Kiatos’ breach in failing to advise her that she was not protected by the indemnity and mortgage she thought had been granted by Ms Papakostas. His Honor accepted the evidence of Mrs Kambouris and her husband that she gave her security to the bank based on assurances by Mr Kiatos that the security provided by Mr Floros and Ms Papakostas would continue to secure her exposure to the bank under her mortgages.

Conclusion

While the first two cases discussed above were favourable to the defendant on the causation issue, these cases show that the outcome of professional negligence cases will continue to very much depend on the facts of each case. Professional advisers and their insurers can take some comfort that a finding of negligence will not always result in a finding that the negligence was causative of loss, but a careful analysis of the facts underlying each case is necessary to ensure an appropriate resolution can be reached.

The High Court referred to s 5D(1) of the Civil Liability Act 2002 (NSW). The same provision is found in s 11(1) of the Civil Liability Act 2003 (Qld).

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