

case study

Date: 15 September 2011

King v Western Sydney Local Health Network [2011] NSWSC 1025

The recent New South Wales decision in *King v Western Sydney Local Health Network* outlines the principles relevant to determining liability for medical negligence under the *Civil Liability Act* (NSW). As the provisions discussed in the case mirror provisions found in the *Civil Liability Act* (WA), it may provide guidance for the interpretation of those provisions in this jurisdiction. The case involved alleged negligence by Western Sydney Local Health Network (the Hospital) against a plaintiff, Tamara King, who was born with Congenital Varicella Syndrome (CVS), caused by her mother contracting chickenpox during her pregnancy.

Relevant Facts

The relevant facts of the case were as follows.

- On 6 May 2002, the plaintiff's elder sister was diagnosed with chickenpox.
- Later that day, Mrs King, who was pregnant with the plaintiff, presented to the Hospital with vaginal bleeding, back pain and abdominal pain. She told the Triage Nurse that she was 12 weeks pregnant, but did not disclose contact with her daughter who was infected with chickenpox.
- Mrs King was then seen by Dr Jane Davidson. Mrs King told Dr Davidson of her exposure to chickenpox, but said that she believed she did not have chickenpox. Dr Davidson conferred with an obstetrician and gynaecologist and decided not to treat immediately with Varicella-Zoster Immunoglobulin (VZIG). Dr Davidson reassured Mrs King, took a blood sample and told her that an obstetrician and gynaecologist would review her on 9 May.
- On 9 May, Mrs King attended an ante-natal clinic at the Hospital, but there was no consideration or discussion of her exposure to chickenpox.
- Mrs King subsequently saw two general practitioners on 17 and 18 May, who both diagnosed her with chickenpox.
- On 19 May, Mrs King again attended the hospital emergency department. She advised the doctor that her rash had appeared on the 17 May 2002. There was no evidence to suggest that Mrs King had developed chickenpox symptoms before 17 May. She was admitted to hospital and remained there until 22 May 2002.
- Tamara was born on 1 November 2002 with symptoms of congenital varicella infection.

Evidence

The main evidence in the case was given by the parents of the plaintiff, and the contemporaneous hospital records. In some cases, the evidence of Mrs King conflicted with evidence in the hospital records, such as Mrs King's claim that hospital staff told her she was immune to chickenpox on 6 May. While the court did not doubt the honesty of Mr and Mrs King, it was held that, given the passage of time between the alleged negligence and the action, contemporaneous medical records were more accurate and reliable.

Duty of Care

The court held that the Hospital owed the Plaintiff a duty of care which became enlivened upon her birth. This duty required the Hospital to advise the plaintiff's mother of the potential beneficial effects of Varicella-Zoster Immunoglobulin (VZIG) in preventing or ameliorating chickenpox. The duty also encompassed offering to administer VZIG to Mrs King.

Breach of Duty

The court found that the hospital was in breach of its duty of care to the plaintiff because it did not administer VZIG to Mrs King on 6 May 2002. The court considered the issue of breach with reference to section 5B of the *Civil Liability Act* (equivalent provisions exist in WA) which states that a person is not negligent in failing to take precautions against a risk of harm unless:

- a) The risk was foreseeable
- b) The risk was not insignificant
- c) A reasonable person in the person's position would have taken those precautions

In this case, the risk of harm was identified as being the risk of the plaintiff being born with Congenital Varicella Syndrome. The court then considered each of the three elements in turn.

The 'foreseeable' element requires that the defendant must have had actual or constructive knowledge of the risk of harm. The court held that the defendant knew of the risk of harm, as this was the primary reason that Dr Davidson

consulted with an obstetrician and gynaecologist on 6 May 2002.

The defendant agreed that the risk of harm was not insignificant.

The court held that, although the risk of a baby being born with CVS is relatively low, the effects of CVS can be very serious. The features of CVS such as skin scarring, eye defects and neurological abnormalities can be permanent and disabling. The administration of VZIG can prevent the infection of the foetus. Therefore, given that Mrs King was 13.5 weeks pregnant and had come into contact with chickenpox, the court held that the risk of harm was one against which a reasonable person would take precautions.

Defence under s5O Civil Liability Act

In its defence, the Hospital raised s5O (the equivalent of WA's s5PB) in relation to the alleged breach of duty. Section 5O states that a professional will not incur liability where he or she acts in accordance with widely accepted peer professional opinion and competent professional practice. The court briefly outlined the history of the s5O defence, which the court described as the statutory embodiment of the *Bolam* principle.

The court stated that in determining the applicability of the s5O defence, one must question:

- a) Did the professional act in accordance with an identified practice?
- b) Was the practice widely, but not necessarily universally, accepted by peer professional opinion?
- c) Was the practice widely accepted as competent?
- d) Is the peer professional opinion irrational? (This exception was set out in cases such as *Sidaway* [1985] AC 871 and *Dobler v Halverson* (2007) 70 NSWLR 151).

The defence submitted two bases for concluding that Dr Davidson acted in accordance with competent, widely accepted professional practice:

1. The exposure of Mrs King to chickenpox had occurred more than 96 hours prior to

her attending at the Hospital, so widely accepted professional practice did not require the administration of ZVIG.

2. The defendant relied on a guideline of the Royal College of Obstetricians and Gynaecologists.

The court rejected the first argument on the grounds that there was no way for staff at the emergency department to know when Mrs King had been exposed to chickenpox. Furthermore, it was not proven as a matter of fact that she was exposed more than 96 hours before presentation on the 6 May.

The court rejected the second argument on the basis of expert evidence. Experts stated that it would only be competent professional practice to delay treatment if the results of the blood test were available within 6 hours. At the time that blood was taken, there was a wait of three days before the results could be obtained.

Therefore, the s5O defence was not made out.

Causation

The court then considered whether the breach of duty caused the plaintiff to suffer CVS. The court held that the statutory test under section 5D of the *Civil Liability Act* (the equivalent to s5C of the WA Act) was the relevant test, and not the common law (*Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 at [41]). The causation test under s5D requires a consideration of:

- a) Whether the negligence was a necessary condition of the occurrence of harm (factual causation)
- b) That it is appropriate for the scope of the negligent person's liability to extend to the harm so caused (scope of liability)

In this case, it was accepted that the scope of liability should extend to the relevant harm caused, and the issue therefore was one of factual causation. Factual causation is determined by the application of the "but for" test (*Adeels Palace Pty Ltd* at [55]). The issue relating to factual causation was therefore whether Mrs King would have contracted chickenpox on 16 May

2002 (leading to the infection of the plaintiff), if she had been given VZIG on 6 May 2002.

The central causation issue was the likely effectiveness of VZIG. Counsel for the plaintiff submitted that the fact that there were guidelines for the use of VZIG and the broad prescription of VZIG, suggested that the drug was likely to be efficacious. However, the court rejected these 'common sense' arguments. The court also considered a plethora of expert evidence on this issue. All the experts agreed that the likely effectiveness of VZIG was limited to 96 hours from the time of exposure. Only one of the six experts considered that, on the balance of probabilities, chickenpox would have been prevented. The evidence of this expert was rejected on the basis of other studies presented to the court. The court stressed the importance of considering the particular circumstances of the case, and not just accepting epidemiological evidence on the likelihood that the drug would work. However, the court was presented with no facts particular to Mrs King which would make the VZIG more likely to be effective in her case.

Therefore, the court concluded that factual causation was not established and judgment was given for the defendant.

Conclusion

King v Western Sydney Local Health Network provides a solid overview of the law regarding medical negligence liability under the *Civil Liability Act*. In particular, the case highlighted the importance of contemporaneous medical records to the determination of medical negligence claims, the nature of the duty of care owed to a foetal plaintiff, and the way in which the s5O (s.5PB in WA) defence should be determined. The court also clarified the role of 'common sense' arguments and epidemiological studies in determining causation of harm for negligence.

This publication is intended to provide a general outline and is not intended to be and is not a complete or definitive statement of the law on the subject matter. Further professional advice should be sought before any action is taken in relation to the matters described in this publication.



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