

WALLACE v KAM (S307/2012)

Court appealed from: New South Wales Court of Appeal
[2012] NSWCA 82

Date of judgment: 13 April 2012

Special leave granted: 5 October 2012

The Appellant underwent surgery to alleviate pain caused by an intervertebral disc protrusion in his lumbar spine. Afterwards he suffered from bilateral femoral neurapraxia, or local nerve damage to the thighs. The Appellant sued the Respondent neurosurgeon, seeking damages arising from his failure to warn him of the material risks of the operation. Those risks included bilateral femoral neurapraxia and a 5% risk of paralysis.

The trial judge, Justice Harrison, held that the Respondent had breached his duty of care by failing to warn the Appellant of the material risk of bilateral femoral neurapraxia. His Honour nevertheless found that the Appellant had not established that he would have declined the surgery had he been warned of that risk. Justice Harrison however failed to find whether the 5% risk of paralysis was a material risk, or whether the Appellant would have declined the operation if so warned. His Honour treated the risk which did not materialise as irrelevant.

The issues upon appeal were whether Justice Harrison had erred in failing to consider whether a paralysis warning might have led the Appellant into not having the operation at all. It was also alleged that Justice Harrison had erred in finding that the only relevant breach was the Respondent's failure to warn of the risk that in fact materialised. This is in circumstances whereby such a warning would not have led to the Appellant declining the operation.

On 13 April 2012 the Court of Appeal (Allsop P & Basten JA, Beazley JA dissenting) dismissed the Appellant's appeal. The majority held that the purpose of s 5D(1)(b) of the *Civil Liability Act 2002* (NSW) ("CLA") was to protect a patient from unacceptable material risks. They further found that where risks can be seen as separate and distinct, recovery is limited to those risks that were both material and which have materialised. These were the risks that should have been disclosed and were not acceptable to the patient.

Justice Beazley found that an undisclosed risk, such as occurred here, does not need to materialise in order to establish a causative link between the breach of the duty to warn of material risks and the harm suffered. Her Honour concluded that Justice Harrison had erred in finding that the duty to warn of material risks was confined to the risk of bilateral femoral neurapraxia.

The grounds of appeal include:

- The Court should have held that failure by a surgeon (the Respondent) to warn his patient (the Appellant) of the 5% material risk of a catastrophic outcome of permanent paralysis, paraplegia and death that was inherent in the proposed back surgery that the Respondent ultimately carried out on the Appellant on 22 November 2004, was, in itself, relevant to the determination of factual causation (s 5D(3)) and was a necessary condition of the occurrence of the Appellant's harm pursuant to ss 5D(1)(a) & 5E of the CLA.