

CULPABILITY: CAUSATION AND REMOTENESS

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Introduction

- Culpability
- Not just a question who is culpable
- Also a question of what they are culpable for
- Raises questions of causation and remoteness

Introduction

- Review of principles of causation and remoteness in *Clarice Wright v Cambridge Medical Group*
- Consideration of those principles in light of *Meadows v Khan*
- Factors to consider when approaching those principles (esp. scope of duty) in practice

Clarice Wright v Cambridge Medical Group: Facts

- Matter of fact
- Did breach cause or contribute to injury?
- See JT and RBS talks on causation & risk and material contribution at May 2016 seminar

Remoteness

- Matter of law
- Does the damage fall within the scope of duty?
- Is it fair, just and reasonable to impose liability for the damage?

Clarice Wright v Cambridge Medical Group: Facts

- CW developed undiagnosed bacterial superinfection causing osteomyelitis of hip
- GP practice negligently failed to refer to hospital for 2 days
- Hospital negligently failed to diagnose for further 3 days

Clarice Wright v Cambridge Medical Group: Facts

- CW left with permanent restricted movement and mobility and leg length discrepancy

Clarice Wright v Cambridge Medical Group: First Instance

- CW sued GP practice only
- Judge held negligence of GP practice caused no loss
- Even if GP practice had referred 2 days earlier then hospital would not have treated properly
- So CW would have had same permanent damage

Clarice Wright v Cambridge Medical Group: Appeal

Causation:

- GP and hospital negligence both causative factors of injury
- ‘Synergistic interaction’: each makes the other worse
- Hospital negligence not so egregious as to break the causative link

Clarice Wright v Cambridge Medical Group: Appeal

Remoteness

- CW permanent injury was within scope of GP duty
- It is fair, just and reasonable to hold GP liable for it

Addendum

- To join or not to join?

Meadows v Khan [2017] EWHC 2990 (QB)

- C tested as to whether she was a carrier of the haemophilia gene.
- GP interprets tests as saying that she is not.
- She goes on to have baby with both autism and haemophilia.
- Admitted that but for D's negligence, her son would not have been born.
- Agreed that she can recover the additional costs associated with haemophilia.
- Can she recover the costs for autism also?

The ‘central issue’

‘2. Put simply, the legal issue I must decide is this: Can a mother who consults a doctor with a view to avoiding the birth of a child with a particular disability (rather than to avoid the birth of any child) recover damages for the additional costs associated with an unrelated disability?’

Causation as fact

- Agreed that standard 'but for' causation was made out.
- Had the diagnosis been made, the foetus would have been terminated.
- C could not claim for having a child per se, but could claim for the disabilities that ensued.
- The disputes were around: the assumption of responsibility, the scope of the duty, and whether it was fair, just and reasonable to hold D liable.

The scope of the duty?

Lord Bridge in Caparao Industries Plc. V Dickman [1990] 2 A.C. 605 at 627:

*“It is never sufficient to ask simply whether A owes B a duty of care. It is always necessary to determine the scope of the duty **by reference to the kind of damage** from which A must take care to save B harmless.”*

See South Australia Asset Management Corporation v York Montague [1997] AC 191 (‘SAAMCO’)

The scope of the duty?

Claimant's argument

- The '*kind of loss*' that may be recovered in wrongful birth cases was losses linked to disability.
- The purpose of the duty was to allow a mother to take steps to terminate a pregnancy.
- No rational distinction between woman who did not want any pregnancy and one who did not want a particular pregnancy.
- It is no less fair, just and reasonable to impose responsibility for all the disability-related consequences than in *Parkinson* or *Groom*

The scope of the duty?

Defendant's argument

- The loss contended for (losses linked to autism) are not losses which were referable to the defendant's duty, which was to inform the claimant that she was a carrier of the haemophilia gene.
- Furthermore, there is a distinction between this case and the sterilisation cases.

The scope of the duty?

- Furthermore, there is a distinction between this case and the sterilisation cases.
- Where parent wants **no** child, no question about parent wanting to bear the normal risks of pregnancy.
- Where parent wants **a** child, she is specifically consenting to run the usual risks associated with doing so.
- Not fair, just and reasonable to impose liability to transfer the burden of those usual risks onto D



Judgment – Yip J

- The scope of the duty was to provide C with the necessary information to allow her to terminate the pregnancy.
- The assumption of responsibility was for all disabilities that flowed from the unwanted pregnancy.

Judgment – Yip J

- What is fair, just and reasonable is difficult.
- Principles of distributive justice are relevant.
- Rising cost of professional indemnity for general practitioners is a matter of legitimate public concern, but floodgates argument rejected.

Conclusion

- Approaching scope of duty
- Value judgement / Informed common sense?
- What factors should we consider, as litigators, when approaching the issue?

Thank you



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