

Loss of chance in cases of medical negligence: *Tabet v Gett* [2010] HCA 12

On 21 April 2010 the High Court (Gummow ACJ, Hayne, Crennan, Kiefel and Bell JJ) upheld the decision of the NSW Court of Appeal in *Gett v Tabet* [2009] NSWCA 76. In a decision which again emphasises traditional tests of liability in tort, the High Court held that claims for the loss of a chance of a better medical outcome are generally unavailable under the common law¹.

Material facts

The appellant, six year old Reema Tabet, was admitted to hospital on 11 January 1991 suffering vomiting and headaches. The respondent (Dr Gett) a paediatric specialist, made a provisional diagnosis of chickenpox, meningitis or encephalitis.

On 14 January the appellant suffered a seizure. A CT scan was then taken. The scan revealed a large brain tumour. Surgery was performed on 16 January. However, a combination of the seizure, and other factors caused the appellant to suffer irreversible brain damage.

The appellant argued that a CT scan should have been performed prior to the seizure. Failure to do so had, it was said, deprived the appellant of the chance of a better medical outcome.

Decision at trial

The trial judge (Studdert J) was not persuaded, on the balance of probabilities that, if the respondent had ordered a CT scan on 13 January, the resulting brain damage would have been avoided. Studdert J, however, concluded that the failure to order the CT scan at that time deprived Ms Tabet of a 40% chance of a better outcome due to the delay in treatment. Studdert J assessed damages in the amount of \$610,000.

Court of Appeal's decision

The NSW Court of Appeal (Allsop P, Beazley and Basten JA) reversed Studdert J's decision and held that the appellant's action for loss of chance of a better outcome was not recognised in law. Moreover, the Court stated that if it were forced to calculate a percentage for loss of chance for a better medical outcome caused by the respondent that it would have been 15%. Leave to appeal to the High Court was granted.

High Court's decision

The central issue on appeal was whether the common law allows a plaintiff in a medical negligence action to succeed when there is only a "possibility" rather than a "probability" that the breach

¹ Heydon J did not consider the issue finding that any loss of chance was not proved on the evidence.

of duty caused the loss such that damages for that breach of duty could be awarded.

Essential ingredients for medical negligence cases

Of the elements necessary in a cause of action in tort: duty, breach and resultant damage the link between breach and damage was the focus to this case. The High Court held that, in order to maintain an action for damages in negligence, a causal link must be proved between the negligent act or omission and the resulting harm.

Once loss or damage is proved on the balance of probabilities to have been caused by a defendant's act or omission, a plaintiff can recover the entire loss under what has become known as the "all or nothing" rule. As Gummow ACJ noted:

"... if the likelihood of a better outcome had been found to be greater than 50 percent then on the balance of probabilities the appellant would have succeeded, not failed, on the main branch of her case in negligence. The question of principle thus becomes whether the law permits recovery in negligence on proof to the balance of probabilities of the presence of something else, namely a chance, opportunity or prospect of an outcome the eventuation of which, however, was less than probable."²

Appellant's inability to prove causation

The appellant was unable to prove that the delay in treatment by

the respondent was probably (as opposed to possibly) a cause of the brain damage suffered by the appellant. Expert evidence had been given that the treatment which would likely have been provided had the tumour been identified prior to 14 January (that being the prescription of steroids or the insertion of a drain) may not have avoided the seizure on 14 January. The High Court proceeded on the basis that it was more probable than not that the tumour would have caused the brain damage regardless of the respondent's negligence.

Refusal to redefine the concept of damage

The Court focused attention on whether the common law of Australia should recognise loss of a chance of a better outcome as a separate actionable claim in tort. The appellant attempted to justify such a claim by analogy to the recognised actions for loss of a commercial opportunity.

The Court did not accept that analogy and rejected the contention that loss of a chance of a better outcome was a kind of harm independent of the physical harm. If loss of chance were a truly independent type of injury, defendants may be forced to compensate a plaintiff even if the breach of duty resulted in no actual injury.

The Court restated the traditional requirement that the causal link between breach of duty and damages must be proved to be more probable than not before liability for damages can be attributed.

² Tabet v Gett [2010] HCA 12 at [31].

Standard of proof

In considering the viability of the appellant's claim for loss of chance, the High Court considered the standard of proof to be applied. Defining damage as a "chance" of a better outcome lowers the standard of proof to a possibility that the brain damage suffered by the appellant would have been less catastrophic than it was.

The Court agreed with Lord Hoffman's view in *Gregg v Scott*³ that the adoption of possible rather than probable causation as a condition of liability would shift the balance in the law of negligence between the competing interests of claimants and defendants.

Implications of the Court's decision

Each of Gummow ACJ, Crennan and Kiefel JJ commented that policy considerations weighed against altering the present standard of causation in medical negligence cases. The possibility of defensive medicine was raised as one reason against imposition of proportionate liability.

Nevertheless, the High Court was careful not to impose a blanket ban on all claims for loss of chance of a better outcome in medical negligence cases. It was

said that an appropriate situation to consider loss of chance may be those situations involving a diminution in life expectancy.

Justice Crennan noted that the alteration to the common law urged by the appellant was radical and was the kind of change which, generally speaking, is the business of Parliament.⁴

As a result, the High Court's decision may not be the last word on the actionability of loss of chance of a better medical outcome.

David Miller
Partner

T: 02 8281 4419
E: dem@cbp.com.au

Debbie Kaminskas
Senior Associate

T: 02 8281 4443
E: dlk@cbp.com.au

Michael Rumore
Solicitor

T: 02 8281 4409
E: mxr@cbp.com.au

³ *Gregg v Scott* [2005] 2 AC 176 at 198.

⁴ *Tabet v Gett* [2010] HCA 12 at [102].