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NewsFlash

12 October 2009

Can loss of chance be claimed in cases of medical negligence?

The New South Wales Court of Appeal recently delivered a unanimous decision in the matter of *Gett v Tabet* [2009] NSWCA 76 wherein the Court overturned previous authorities and did not allow an award of damages for the loss of a chance of a better medical outcome.

The facts

Reema Tabet, then aged 6 years old, was referred to Dr Mansour, paediatrician, for treatment on 28 December 2000 after experiencing persistent headaches and vomiting for 10 days. By the time of Dr Mansour's examination, Reema was in the incubation and prodromal phases of chicken pox which was contracted from her brother on about 16 December 2000. Dr Mansour diagnosed Reema as suffering from a streptococcal infection and treated her accordingly.

The following day, Reema was again admitted to hospital under the care of Dr Mansour and, following a number of tests, was discharged on 31 December 2000. By the date of her discharge, she had a chicken pox rash.

Reema's headaches and vomiting persisted following her discharge from hospital. She was again referred back to hospital on 11 January 2001, however, this time under the care of the appellant, Dr Gett. Dr Gett examined the respondent and made a provisional diagnosis of post-chickenpox meningitis.

Dr Gett ordered that a lumbar puncture be performed to confirm the provisional diagnosis. The procedure was abandoned on 11 January 2001 due to Reema's distress. Reema remained in hospital and the procedure was performed on 13 January 2001 following her suffering a neurological episode where Reema's pupils were unequal and her right pupil was not reactive.

On 14 January 2001, Reema suffered a seizure and an emergency CT scan was arranged. The CT scan revealed that the respondent was suffering a medulloblastoma (a type of brain tumour). A right frontal intraventricular drain was inserted to relieve intracranial pressure.

The tumour was surgically removed on 16 January 2001, however, the surgery was only part successful. Reema then underwent chemotherapy and radiotherapy.

As a result of the ordeal, Reema was assessed as having suffered 25% brain damage.

The decision at first instance

At first instance, Studdert J of the Supreme Court of New South Wales found that Dr Gett had breached his duty of care by failing to order the CT scan on either 11 or 13 January 2001 on the basis that had Dr Gett ordered the CT scan earlier than 14 January 2001, the brain tumour would have been detected. Studdert J found that as a result of the delay, Reema had lost a chance of a better medical outcome, that chance being assessed at 40%, of avoiding the brain damage sustained.

Issues and decision on appeal

Whether Dr Gett breached his duty of care *on* 13 January 2001 by failing to arrange a CT scan

The Court of Appeal (comprising Allsop P, Beazley JA and Basten JA) found that Dr Gett had breached his duty to Reema by not arranging for a CT scan to be performed on 13 January following the neurological episode. He also breached his duty by not considering alternative diagnoses in light of Reema's persistent headaches and vomiting which pre-dated the incubation and prodromal phases of chicken pox.

Whether Dr Gett breached his duty of care *prior* to 13 January 2001 by failing to arrange an earlier CT scan

The Court of Appeal found that Dr Gett did not breach his duty of care prior to 13 January 2001. The provisional diagnosis of post-chicken pox meningitis on 11 January 2001 was an appropriate diagnosis on the information available at that time. It was only following the neurological episode, in conjunction with the history of headaches, that the Doctor should have considered a different diagnosis.

Whether Dr Gett's negligence caused the brain damage referable to the seizure and deterioration suffered on 14 January 2001

There was no evidence to suggest that the brain damage was caused by Dr Gett's negligence. The evidence at trial was that had a CT scan been performed on 13 January, the likely procedure (depending on the severity of the tumour) would have been to either commence steroid treatment or insert a drain into the skull to reduce intracranial pressure.

It was found that the likely treatment in the circumstances would have been to commence steroid treatment which may not have prevented the seizure on 14 January. In addition, even if the drain had been inserted, it was found that it may not have prevented the seizure.

It was alleged that the lumbar puncture contributed to the seizure on 14 January, however, this was not proven on the balance of probabilities.

Whether the negligence caused damages that could be awarded for the loss of a chance of a better medical outcome

This was the central issue in the case and the Court of Appeal spent considerable time discussing the law surrounding a loss of chance. The Court essentially held that loss of chance cannot apply to medical negligence cases. This is discussed further (below).

Was the trial judge's calculation of damages correct (on the basis that a loss of chance could be awarded)?

The Court considered that the trial judge's calculation of damages (being an assessment of a 40% chance that Reema would have had a better outcome had a CT scan been performed on 13 January) was incorrect.

The Court found that the percentage ought to have been no greater than a 15% chance of avoiding the overall 25% brain damage. The trial judge's calculation of the award of damages was not by reference to the harm of suffering the increased risk, but by reference to the physical harm suffered which had not been shown to have been caused by the Doctor's breach of duty.

Loss of chance in medical negligence cases

As mentioned, this was the central issue to be determined by the Court of Appeal. In finding that loss of chance is not available in medical negligence cases, the Court of Appeal held that the previous New South Wales and Victorian decisions of *Rufo v Hosking* (2004) 61 NSWLR 678 and *Gavalas v Singh* (2001) 3 VR 404 departed from conventional principles and were plainly wrong.

In the Court's view, each of these cases (when discussing loss of chance of a better medical outcome) did not appropriately consider the common law tortious principles that damages are recoverable where the loss is caused by the negligent act. Instead, the respective courts considered whether damages could be awarded in the situation where the defendant's negligence was not causative of the actual injury. In this regard, the Court of Appeal found:

> *"The loss of a chance concept was inconsistent with definitions in tort reform legislation concerning the nature of harm required to justify a finding of negligence, and the appropriate test of causation to give rise to an obligation to pay damages."*

This finding is despite the ability to recover damages for the loss or an opportunity to obtain a commercial benefit as was seen in the case of *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. Instead, the Court found that loss of chance in personal injury proceedings is more akin to an increased risk of harm. The *Civil Liability Act* 2002 (NSW), however, does not include damages for a risk of physical or psychological injury and further, requires proof of causation in order to award damages.

Finally, the Court considered that awarding damages for loss of chance where the defendant's negligence was not causative of the loss was a matter for the High Court. A successful application for special leave to appeal the Court's decision was made to the High Court on 4 September 2009.

What this means for future medical negligence cases

Although the decision of the Court of Appeal is binding only on the District and Supreme Courts of New South Wales, it is highly persuasive for other jurisdictions around Australia. Given that leave for an appeal to the High Court has been granted we await the High Court's decision, which will be binding on all Australian jurisdictions, with great interest.

For the moment, however, *Gett v Tabet* is a welcome development for doctors and medical negligence insurers in light of the Court of Appeal's finding that loss of chance of a better outcome is not available in medical negligence (or personal injury) cases. Unless the failure to diagnose or failure to treat caused (on the balance of probabilities) the ultimate loss suffered, plaintiffs will not be able to recover on the basis that they could have received better treatment.

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