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case study

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Gett v Tabet [2009] NSWCA 76

The New South Wales Court of Appeal's ("the Court") unanimous decision in Gett v Tabet [2009] NSWCA 76 (delivered 9 April 2009) is significant in that the Court did not follow existing Australian case law authority which permitted an award of damages for the loss of a chance of a better medical outcome and stated that to do so in the circumstances would be "plainly wrong".

The well-reasoned and considered decision of the Court, although not binding on Western Australia courts, is very persuasive in denying plaintiffs the capacity to obtain damages for loss of a chance of a better medical outcome (in circumstances where the physical injury suffered is not shown to have been caused or contributed to by a negligent party).

Relevant Facts

The relevant facts of the case were as follows.

- A then six year old girl was admitted to hospital on 28 December 1990 with a history of headaches and vomiting since about 18 December 1990. At this time, the girl was in the incubation and prodromal phases of chicken pox that she had contracted on or about 16 December 1990 from her sibling.
- The girl was diagnosed by Dr Mansour as having a streptococcal infection and was prescribed penicillin.
- The girl was discharged later that same day.
- The girl was again admitted to hospital under the care of Dr Mansour on 29 December 1990 since the headaches and vomiting persisted.
- The girl was discharged on 31 December 1990 with all neurological examinations done up to that date being normal.
- Between 31 December 1990 and 11 January 1991, the girl was visibly suffering from chickenpox.
- On 11 January 1991, the girl was seen by the Appellant doctor (who was caring for Dr Mansour's patients whilst he was away) in his rooms and his neurological examination revealed no evidence of raised intracranial pressure. She was later admitted to hospital that day. The Appellant doctor diagnosed the girl as having post-chickenpox meningitis. The Appellant doctor ordered a lumbar puncture be performed that day to confirm/negative that diagnosis but this could not be done due to the girl's distress concerning the procedure.

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- On 13 January 1991, the girl had a neurological episode in that her pupils were observed to be unequal and her right pupil was not reactive. The Appellant doctor ordered a lumbar puncture be performed urgently and it was so.

- On 14 January 1991, the girl's condition deteriorated. She suffered a seizure. A CT scan was performed urgently revealing a brain tumour, known as a medulloblastoma. A right front intraventricular drain was inserted by Dr Maixner to relieve intracranial pressure.

- On 16 January 1991, Mr Johnston and Dr Maixner removed the brain tumour. The removal was only partially successful.

- Between 26 February 1991 and 7 May 1991, the girl underwent chemotherapy.

- Between 20 May 1991 and 2 July 1991, the girl underwent radiotherapy.

- The girl now suffers some brain damage.

Issues considered by the Court

The Court considered six issues.

The first two issues dealt with questions of breach of duty by the Appellant doctor in making an incorrect initial diagnosis (of post chickenpox meningitis), failing to consider other possible diagnoses (i.e. a brain tumour) and failing to order a CT scan earlier than when actually performed. The Court held that the trial judge did not err in concluding that the Appellant doctor was not negligent in diagnosing post-chickenpox meningitis on 11 January 1991 given that the earliest opportunity he would have had access to the records of the history of prechickenpox headaches was on 12 January 1991 (paragraph 197) and the evidence did not establish that a CT scan should have and would have been carried out earlier than 13 January 1991 (paragraph 200). Further, with respect to the second issue the Court held that the trial judge did not err in concluding that the Appellant doctor was negligent on 13 January 1991 in relation to his response to the girl's neurological episode in that he should have considered alternative diagnoses given the girl's history of pre-chickenpox headaches (by which time he should have been aware of the pre-chickenpox headaches) and that a CT scan should have been ordered at that point (paragraphs 191 and 193).

The last issue concerned the question of entitlement to damages for the loss of pecuniary benefits that might be expected to accrue on marriage. The Court considered and applied existing authority and so this issue raised no points of specific interest.

The remaining three issues concerned questions of causation and damages for loss of a chance of a better medical outcome. These three issues involved questions of:

- Whether the Appellant doctor's negligence (in failing to order a CT scan on 13 January 1991) caused the whole of the brain damage referable to the seizure and deterioration suffered on 14 January 1991?

- Whether the Appellant doctor's negligence caused any loss recognised by the law? (ie. whether damages may be awarded for "the loss of a chance of a better medical outcome"?)

- Assuming damages for "the loss of a chance of a better medical outcome" may be awarded, whether the trial judge's approach to its calculation was correct?

In relation to the first of the three issues outlined immediately above, the Court found that the Appellant doctor's negligence did not cause the whole of the brain damage for numerous reasons. The evidence before the trial judge was general in nature and there was no specific evidence given as to what damage might have been caused particularly by the delay in performance of a CT scan which may have led to alternative treatment (paragraph 258).

Moreover, evidence was given to the effect that the seizure followed by the insertion of a drain could have occurred despite alternative treatment being instituted as a result of an earlier CT scan (paragraph 259). Moreover, there was no argument made that part of the damage caused by the seizure could be seen as divisible and attributable to the delay in performance of a CT scan (paragraph 260).

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Turning to the third of the three issues outlined above, the Court found that the trial judge made an error in reaching an assessment of a 40% chance as such a figure was based on an assumption that the likely treatment would have been a drain to reduce intracranial pressure.

However, the Court found that implicit in the trial judge's reasons was a finding that the likely treatment would have been the use of steroids rather than a drain. Hence, the Court found that the trial judge's assessment of a 40% chance was incorrect and ought to have been no greater than a 15% chance of avoiding the overall 25% of the brain damage (paragraph 245).

As alluded to earlier, the most significant issue considered by the Court in this case was the second of the three outlined above, namely, whether damages may be awarded for "the loss of a chance of a better medical outcome". This is considered below.

Can damages be awarded for "the loss of a chance of a better medical outcome"?

In short, the Court held that damages cannot be awarded for the loss of a chance of a better medical outcome. The Court identified a number of reasons for this, the principal reasons being:

- The conceptual basis of damages for the loss of a chance of a better medical outcome is not consistent with traditional common law tortious principles. In cases of physical injury or harm, the law of torts traditionally awards damages for physical injury or harm where the breach of duty has caused that damage on the balance of probabilities. However, damages for the loss of a chance of a better medical outcome is more properly racterised as damages for an increased risk of harm (paragraph 377). The existing authority that permitted damages for the loss of a chance of a better medical outcome did not award damages by reference to the increased risk of harm but rather by reference to the physical harm suffered which was not established to have been caused by the breach of duty (paragraph 375).

- Similarly, the Civil Liability legislation of the various States (including the Civil Liability Act 2002 (WA)) require that there be a causal link established on the balance of probabilities between the negligence of the defendant and the plaintiff's injury. Further, the Civil Liability legislation would not recognise loss of a chance of a better medical outcome as an appropriate "harm" within the meaning of the legislation. Consequently, it is clear that the basis of the recognition of damages for loss of a chance of a better medical outcome is inconsistent with the traditional principles of tort law reflected in the legislation (paragraphs 383 to 385).

- The conceptual difficulties associated with awarding damages for the loss of a chance of a better medical outcome in circumstances where the defendant is not shown to have caused the physical injury were not considered by the existing decisions of Rufo v Hosking (2004) 61 NSWLR 678 and Gavalas v Singh (2001) 3 VR 404.

- Extrapolating a plaintiff's ability to recover damages for the loss of a chance of a better medical outcome from cases that permitted recovery of damages for the loss of an opportunity to obtain a commercial benefit or advantage was flawed (paragraphs 338, 360 and 389). Such cases are inapplicable in the personal injury context. In Sellars v Adelaide Petroleum NL (1994) 179 CLR 332, the importance of establishing causation prior to the recovery of any damage for the loss of a chance (of a commercial opportunity) was noted and thus such cases are inconsistent with permitting the recovery of damages for the loss of a chance outside the realm of loss of a commercial opportunity.

- The award of damages for the loss of a chance of a better medical outcome in circumstances where the defendant is not shown to have caused the physical injury is a matter for the High Court of Australia to consider and establish.

Comment

The unanimous decision by the Court in Gett v Tabet [2009] NSWCA 76 to not follow existing authority concerning the award of damages for the loss of a chance of a better medical outcome was not a decision that "turned on the facts of the case". Rather, it was a decision based on a

comprehensive and well-reasoned critique of the conceptual basis of such an award. Consequently, the decision's conclusions as to damages for loss of chance have potential application to all future cases concerning an award for damages for loss of a chance of a better medical outcome (in circumstances where the physical injury suffered is not shown to have been caused or contributed to by a negligent party).

Although the Court's decision in Gett v Tabet [2009] NSWCA 76 is not binding on Western Australian courts, it certainly represents persuasive authority. The criticisms made by the Court appear to be well researched and founded.

The result is that the capacity for a plaintiff to successfully seek damages for loss of a chance of a better medical outcome is now at best the subject of legal uncertainty in all jurisdictions (other than New South Wales where the Court's decision in Gett v Tabet clearly refutes the existence of the entitlement). If the entitlement to such an award is to be clarified, a determination by the High Court will be required.

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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