

case study

Date: 27 April 2010

Tabet v Gett [2010] HCA 12 (21 April 2010)

The members of the High Court unanimously (albeit in separate judgments) dismissed an appeal which sought the Court's recognition of the loss of a chance of a better medical outcome as actionable damages in circumstances where medical negligence had been found. All members of the Court barring Heydon J determined that the 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, cannot be the subject of compensable damages in a negligence action. Heydon J did not decide that issue.

Relevant Facts

The relevant facts were as follows:

- The appellant was six years old when she was readmitted to hospital on 11 January 1991 with symptoms of vomiting and headaches. She had recently suffered from chickenpox. The respondent diagnosed the appellant as having post-chickenpox meningitis. The respondent 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.
- On 13 January 1991, the appellant had a neurological episode in that her pupils were observed to be unequal and her right pupil was not reactive. The respondent ordered a lumbar puncture be performed urgently and it was done so.
- On 14 January 1991, the appellant's condition deteriorated. She suffered a seizure. A CT scan was performed urgently revealing a brain tumour, known as a medulloblastoma. A right frontal intraventricular drain was inserted by Dr Maixner to relieve intracranial pressure.
- At trial, it was held that the respondent was negligent in not having ordered a CT scan on 13 January 1991 after the neurological episode became evident. This finding was not the subject of this appeal.
- 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 appellant underwent chemotherapy.

- Between 20 May 1991 and 2 July 1991, the appellant underwent radiotherapy.
- The appellant now suffers some brain damage.
- At trial, the trial judge did not find on the balance of probabilities that if the respondent had ordered a CT scan on 13 January 1991 and the appellant was treated upon the discovery of the tumour, the brain damage that occurred would have been avoided. However, the appellant argued that she had been deprived of the chance of a better medical outcome by reason of the delay in the treatment that she could have received and was entitled to compensation for that loss. The earlier detection of the tumour would have allowed for treatment to reduce the intracranial pressure which would have had some beneficial effect. The trial judge had made an award for this so called loss of chance of a better medical outcome, whilst the Court of Appeal had refused such an award.

Issue Considered by the Court

The principal issue (and that of most relevance) considered by the Court was whether the law of negligence in Australia recognises the loss of a chance of a better medical outcome as actionable damage in circumstances where the physical injury suffered is not shown to have been caused or contributed to by a negligent party.

Analysis of Issue by the Court

Five separate judgments were written by the members of the Court. Although all members of the Court concluded that the appeal ought to be dismissed and there were some similarities in their reasoning, there are sufficient differences in approach to warrant a separate analysis of each judgment. The judgment of Kiefel J will be discussed first as several other judgments endorsed Her Honour's views.

Kiefel J

Kiefel J commenced by discussing the general elements of a negligence action and then focusing on the element of causation.

It was noted that the current law of causation requires that it merely be established that the more probable (on the balance of probabilities) inference to be drawn from the evidence (as opposed to as a matter of certainty) is that the defendant's negligence caused the loss. However, it then follows that the law allows the plaintiff to recover the entire loss, treating the loss as a certainty. This rule was said to reflect the certainty that the law requires when attributing legal responsibility for harm caused.

Kiefel J considered strong policy considerations would be required to do away with the present requirement that causation be proven on the balance of probabilities (with a lesser standard being imposed). Moreover, Her Honour considered that reliance simply on proof of breach of duty of care for compensation is inappropriate. Her Honour did not believe that denying an award of damages for loss of chance of a better medical outcome in cases where the physical injury suffered is not shown to have been caused or contributed to by a negligent party would "fail to deter medical negligence or ensure that patients receive an appropriate standard of care". It was noted that to allow damages in the present case would require "a fundamental change to the law of negligence".

Her Honour also distinguished loss of better medical outcome cases to commercial cases involving loss of opportunities. The point of distinction was namely that the commercial interest lost in commercial cases has inherent value and can be regarded as an item of property, as opposed to a chance of a better medical outcome which cannot generally be so considered.

Hayne and Bell JJ

Their Honours agreed with Kiefel J in that the appellant failed to prove that the respondent's negligence was the cause of the brain damage suffered.

Hayne and Bell JJ then made further comments regarding the nature of "damage" required by the law of negligence, stating that the "damage" needed to be a detrimental difference suffered by a plaintiff of which the defendant's negligence was a probable cause. Furthermore, the law of negligence requires that a plaintiff prove that the defendant's negligence was more probably than not a cause of the damage suffered.

They went on to observe that in the present case the identified loss of a chance of a better medical outcome presupposed that it was not established by the appellant that the respondent's negligence was a probable cause of any part of her brain damage (ie the traditional notion of "damage" in negligence cases). To hold that the loss of a chance of a better medical outcome in this case was a form of actionable damage would necessitate the respondent being held liable for possibly (as opposed to more probably than not) increasing the severity of brain damage suffered by the appellant. Their Honours stated that such a finding would have lessened the burden of proof borne by the plaintiff in establishing actionable damage (on the balance of probabilities) and thereby shifted the balance struck in negligence law between the competing interests of plaintiffs and defendants.

Gummow ACJ

Gummow ACJ similarly dismissed the appeal on two grounds. First, the evidence presented in the case was at best speculative as to whether in fact the appellant did lose a less than even chance of having a better medical outcome as a result of the respondent's negligence.

The second ground of decision was that the common law of Australia does not entertain as a head of damage, the loss of a chance of a better medical outcome in circumstances where such damage is not said to have been caused or contributed to by the defendant. His Honour distinguished breach of contract cases awarding damages for lost opportunity from negligence cases seeking damages for lost chance. The action for breach of contract was said to lie upon the occurrence of the breach of contract, whilst in negligence the action lies only if and when damage is sustained. Moreover, in contract cases, causation and the existence of compensable loss can be established by the breach of a promise to afford an opportunity, whilst in negligence cases the lost chance needs to fall within the description of compensable "loss or damage".

His Honour recognised that whether the lost chance in negligence cases falls within the description of compensable "loss or damage" leads to further considerations. A principal consideration discussed by Gummow ACJ was the rationale that has been advanced for the recognition of loss of a chance in circumstances

where a plaintiff cannot prove traditional damage in negligence cases. The rationale discussed by His Honour was that the chance of obtaining a benefit or avoiding a harm has value in itself and destruction of these chances ought to be seen as compensable damage. However, His Honour observed that the creation of a risk of harm or a risk of loss of benefit (argued approach) is easier to prove than the creation of the harm or benefit itself (traditional approach). This difference necessarily would mean that the current requirement for proving causation is weakened and thereby benefits the plaintiff to the defendant's detriment. It was further noted that the recognition of the loss of a chance as actionable damage would represent a shift in the balance struck by negligence law between the competing interests of the plaintiff and defendant towards the plaintiff. Moreover, His Honour touched upon another consequence of the recognition of a loss of a chance of a better medical outcome as actionable damage, namely, the prospect of a growth in defensive medicine practices by medical practitioners.

Crennan J

Crennan J likewise agreed with the reasons of Kiefel J in answering the question of whether the law of negligence in Australia recognises the loss of a chance of a better medical outcome as actionable damage. Crennan J noted similarly as did Gummow ACJ, Kiefel, Hayne and Bell JJ that the acceptance in personal injury cases of "loss of a chance" as a basis of liability would require a major development in the common law of negligence, namely that the respondent would be held liable for possibly as opposed to more probably than not causing the appellant to suffer more severe brain damage.

Crennan J explained without extensive elaboration that the current common law requirement that causation be proved on the balance of probabilities in personal injury cases exists in order to draw boundaries which are different to those drawn and existing in pure economic loss cases.

Further, numerous policy factors which go against the alteration of the present requirement of proof of causation in medical negligence cases were identified. Those policy factors were said to be:

- (a) the prospect of thereby encouraging defensive medicine;

- (b) the impact of that on the Medicare system and private medical insurance schemes; and
- (c) the impact of any change to the basis of liability on professional liability insurance of medical practitioners.

Ultimately, Crennan J felt that the alteration in the law of causation that the appellant was requesting was too “radical” such that it could only be sanctioned by Parliament through legislative change, as opposed to case law development of the law of negligence by the courts.

Heydon J

Heydon J did not ultimately offer any views on how the question of whether the law of negligence in Australia recognises the loss of a chance of a better medical outcome as actionable damage ought to be answered. Rather, His Honour concluded that the appellant did not in fact lose a less than even chance of having a better medical outcome as a result of the respondent’s negligence, and thus the question of law did not need to be decided.

CONCLUSION

The High Court has now explicitly determined that the 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, cannot be the subject of compensable damages. As noted by Crennan J, any change to the current position would need to be the subject of legislative amendment.

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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