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case study

Date: 19 October 2011

Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257

The Queensland Court of Appeal has dismissed an appeal by Sullivan Nicolaides Pty Ltd against a decision that it had been negligent in failing to correctly advise the Plaintiff's general practitioner about the risks of warfarin.

Facts

The Respondent (Plaintiff) had a mechanical heart valve inserted and, following the operation, she was required to take an anticoagulant medication for the rest of her life. The Respondent was prescribed warfarin and as a consequence, she had to have her blood monitored regularly. The Appellant is a firm of specialist medical pathologists which offered a warfarin care service where the Respondent attended for monitoring of her levels. In the period 13 to 25 February 2002, the Respondent had five blood tests which all showed her INR level as low, placing her at risk of developing thromboembolisms. On 27 February 2002, the Appellant advised both the Respondent and her GP that they would no longer monitor her blood levels. The reason for this was that the Appellant formed the view that the Respondent was not complying with the required treatment.

Decision

The Trial Judge found that the Appellant did not advise either the Respondent or her GP of the results of her recent blood tests and the increased risks associated with the low levels. On 1 March 2002, the Respondent suffered a stroke which was caused by a blood clot.

On appeal, the Appellant argued that the proper characterisation of the Respondent's claim was a loss of chance case, which was no longer permitted. However the Court of Appeal rejected the Appellant's appeal on the grounds that an analysis of the Trial Judge's reasons for decision demonstrated that he had not decided the matter on the basis of a loss of chance. Rather he had found, on the balance of probabilities that, had the Appellant given the Respondent the appropriate advice, then certain events would have occurred and she would not have suffered the stroke.

The Court of Appeal accepted the Trial Judge's findings that had the Appellant given advice to the Respondent and her GP consistent with its duty of care, the GP would have referred the Respondent to a cardiologist; the Respondent would have taken the treatment she was recommended; her INR would have been raised to a therapeutic level; and she would not have suffered a stroke. These findings were established on the balance of probabilities.

The Court of Appeal concluded that in accordance with recognised common law principles, when loss or damage is proved to have been caused on the balance of probabilities by a defendant's acts or

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omission, the plaintiff recovers the entire loss suffered, even if there was a forty-nine percent chance of it not occurring. Kiefel in *Tabet v Gett* referred to this as the 'all or nothing' rule. The Appellant's contention that the Trial Judge's findings on liability offended the principle in *Tabet v Gett* were therefore said to be baseless.

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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