

MEDICAL NEGLIGENCE

ANNUAL CASE REVIEW MEDICAL NEGLIGENCE 2009/2010

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GETT V TABET (2010) 265 ALR 227

No damages for loss of chance for personal injury following negligence

Need for expert evidence of sufficient quality and reasoning to allow Court to find causation on the balance of probabilities

1. The Plaintiff child was admitted to hospital with previous chickenpox and had developed headaches, nausea and vomiting. The provisional diagnosis was chickenpox. On one day, nursing staff noted unequal pupils. The trial judge found that a CT scan ought to have been performed but was not. This would have shown a tumour. The next day, with the tumour not yet diagnosed, the child had a seizure and deteriorated. Surgery was performed but brain damage had been suffered.
2. Part of the brain damage was held to be due to the tumour and the surgery but 25% was due to the events on 14 January. Possible treatment on 14 January would have been a drainage procedure or the use of steroids to reduce the swelling. The trial judge found that the surgery would not have been performed at first so it all depended upon what the steroids would have achieved.
3. Expert evidence on came from 2 neurosurgeons. Although there was evidence as to the effectiveness of steroids in reducing swelling, one expert said it was speculative, he could not say what would have happened. The other expert also gave evidence about the use of steroids but he did not say would have happened in this case. So the Plaintiff had no expert evidence to say that probably the steroids would have made a difference. The trial judge did find that steroids were useful and would have had a beneficial effect, but did not find they would have made a difference. So the Plaintiff had to rely on a “loss of chance” case ie that they might have.
4. Judge found that the delay between 13 and 14 January led to a loss of 40% chance that that the 25% could have been minimized or avoided. He had no expert evidence at all to justify that figure. He awarded damages for this lost chance. So altogether, the value of the lost chance was calculated by reference to 10% of the overall brain damage.

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5. The Court of Appeal had found that “loss of chance” only was not actionable damage for negligence in such cases.
6. The High Court judges were of the view that the expert evidence was too speculative to even allow any conclusion that the effect would have been to reduce the chance of brain damage.
7. But the main holding was that mere “loss of chance” was not actionable damage. The Plaintiff has to prove damage on the balance of probabilities, not possibilities, and “loss of chance “ is not such damage. Its reasons included:
 - UK and Canadian authority;
 - It had not been accepted by the High Court till now;
 - Overturning the traditional standard of proof –balance of probabilities was not justified;
 - Policy reasons- it may lead to defensive medicine

SYDNEY SOUTH WEST AREA HEALTH SERVICE v STAMOULIS [2009] NSWCA 153

1. The Plaintiff alleged delay in diagnosis of breast cancer caused by misinterpretation of a mammogram. The relevant lesion shown on the scan, of itself, it was agreed by the experts, would have warranted follow up. But previous mammograms had shown the lesion and it had waxed and waned over previous years. According to the Plaintiff’s it had increased in size but the Defendants’ disagreed and said it was consistent with benign cysts. Because of lack of follow-up and thus diagnosis at the time of the mammogram, there was effectively a 10 month delay before the cancer was diagnosed. It metastasised and the Plaintiff was to die.
2. What was not in issue is that the 10 month delay in diagnosis meant that the chance of metastasis increased from 38% to 42%. This amounted to a 10% increase. The following issues were discussed by the Court of Appeal.

Use of statistical evidence to establish causation

3. The Court restated the law that it is not sufficient for a Plaintiff to prove only that negligence led to an increased risk of harm happening and that harm did in fact occur. The Plaintiff must prove that *in his/her case*, it was the negligence that caused the risk to come home². However, in particular circumstances, that increase in risk will suffice and statistical evidence on can be used to establish this³. Beazley JA noted that medical science’s limitations may be such that epidemiological studies are all that is available. Also, given those limitations, a

² . Para 29ff. See *Bendix Mintex Pty Ltd v Barnes* (1997) 42 NSWLR 307

³ Para 37ff , 138ff . See *Seltsam v McGiness* (2000) 49 NSWLR 262

Court can only act on its own intuitive inferences⁴. In this case, the Court found that causation was established noting such matters as the fact that the increase in likelihood moved the Plaintiff closer to a point where there was a likelihood of metastasis, section 5E (4) of the *Civil Liability Act* which provides that the court is to consider (amongst other relevant things) whether or not and why responsibility for the harm should be imposed on the negligent party, previous authority stating that even if experts do not incur causation on a balance of probabilities, that does not mean a Court may not⁵ and the simple point that, without negligence, the Plaintiff had a 62% chance (ie over 50%) chance of not suffering metastasis. Also the Court may well have been influenced by the fact that the Defendant at the trial had accepted that the plaintiff's risk was increased by 10%⁶. Ultimately, it essentially found that the risk had been increased to an extent that was not negligible and applied the "commonsense" test on causation.

Admissibility as expert opinion of the opinions of doctors actually involved

4. Two radiologists involved in the initial interpretation of scans had provided statements which were tendered during the trial. The trial judge rejected their tender although exactly why he did so was not completely clear. The Court of Appeal made a finding as to the apparent reasons for this; the principle reasons being that the doctors had no independent recollection of what happened and were reconstructing, which would inevitably involve ex-post facto exculpatory justification. Also they were giving expert evidence which was not independent.
5. The Court noted the Code of Conduct for expert witnesses and statements as to the duties owed by expert witnesses to the court. However the content of that duty and the powers of the court to enforce that duty are yet to be determined. However it found that notwithstanding the rules for experts, expert evidence of witnesses who have an interest in the proceedings is still admissible⁷.
6. The Court found that the trial judge was wrong to exclude the evidence of the two radiologists and ordered a retrial. The Appeal was heard by Grove J on limited issues. He preferred the Plaintiff's expert witnesses to those of the Defendant's expert witnesses (including the treating radiologists) and found for the Plaintiff⁸.

**FORSTER V HUNTER NEW ENGLAND AREA HEALTH SERVICE [2010]
NSWCA 106**

Interim payments

⁴ Para 43. See *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 558 at 564

⁵ Para 138 ff

⁶ Ipp JA, Para 121

⁷ Para 211ff

⁸ *Stamoulis v Sydney South West Area Health Service* on [2010] NSWSC 585

1. The Plaintiff claimed nervous shock arising out of the death of his son. The Defendant had previously consented to an order for an interim payment of \$20,000. The Plaintiff sought a further interim payment under section 82 of the *Civil Procedure Act* which was opposed. At first instance, the application failed. The Court of Appeal discussed the legal considerations in relation to interim payments. In particular, it discussed the interpretation of the wording of the requirement that the Court be "*satisfied* that, if the proceedings went to trial, the plaintiff would obtain judgment for substantial damages against the Defendant". The parties had apparently agreed that consistent with previous authority the Court should be "*comfortably satisfied*"⁹.
2. The leading judgment was given by Macfarlan JA who stated that the Court must simply reach its conclusion based on the balance of probabilities having regard to the gravity of allegations made and to the seriousness of consequences that may flow. It was not true to say that the level of satisfaction and was towards "toward the top of the flexible scale", as stated by the primary judge citing previous English authority.
3. There had been expert evidence tendered by each party. At first instance, the judge had found that in light of the differing opinions of equally qualified experts and in light of the fact that further evidence would emerge at a hearing, he could not conclude "at the level of comfortable satisfaction that the Plaintiff would obtain judgment". However the Court of Appeal noted that the Defendant's expert's opinion had no reasoning whereas one (out of two) of the Plaintiff's reports did have reasoning and that therefore the only significant evidence on liability was that of the Plaintiff. Therefore the application was granted.

SYDNEY SOUTH WEST AREA HEALTH SERVICE v MD [2009] NSWCA 343

Need to plead Section 50 in Defence

1. In District Court proceedings, the Plaintiff sued an area health service and obstetrician alleging failure to perform a pregnancy test before gynaecological surgery. During the trial, after the close of the Plaintiff's case, the Defendant sought to tender reports seeking to establish a defence that the Defendant acted in a manner that was widely accepted in Australia by professional opinion as competent and professional practice.
2. Because this had not been pleaded in the Defence, the trial judge did not allow the tender. He also disallowed the Defendant's application to amend the Defence,
3. Consistent with previous authority, the Court found that section 50 was a defence not available at common law with an onus of proof lying on Defendant¹⁰. The

⁹ Matthews JA in *Matouk V Hungry Jack's Pty Ltd* [2009] NSWSC 176

¹⁰ *Dobler v Halverson* [2007] NSWCA 335.

Court found that it should have been pleaded. But amendment ought to have been allowed noting that in previous served reports, the substance of section 50 was set out.

Ambush not allowed

4. The Plaintiff's counsel had conceded that the reports which in substance supported the 50 defence had been in the Plaintiff's possession for some time and the Court found that the Plaintiff proposed to take the pleading point but did not convey this to the Defendant until the very end of the case.
5. The Court made references to previous statements in the Court of Appeal that "the ambush theory of litigation is dead in this state" and by inference was critical of the Plaintiff's conduct of the case. Costs orders reflected this.

SALZE V KHOURY [2009] NSWCA 195

Service of Rule 31.36 reports

1. The Plaintiff sued alleging negligence arising out of infection following fractures. Proceedings had been commenced without the expert report required by UCP Rule 31.36 an expert report that includes an opinion supporting the breach of duty of care alleged against each defendant, the general nature and extent of damage alleged, and the causal relationship alleged between such breach of duty and the damage alleged". Subsequently, the Registrar made orders concerning the service of reports and the Defendant later filed a Motion seeking to have the proceedings dismissed on the basis of failure to serve adequate reports. Although there was lengthy discussion by the Court of what was and was not argued before the Court, and various criticisms of the Registrar's findings, the most relevant findings concerned the requirements of UCP 31.36.
2. The Court found that any individual expert report did not need to include an opinion on all of the matters referred to. The requirements could be satisfied by a combination of several reports. Secondly, the experts reports merely have to "support" the matters, they do not have to "prove" anything. Thirdly, the reports are not "evidence" such as would be required to establish a prima facie case. Even if the reports were, as they were here, based on assumptions set out in a solicitor's letter, that did not prevent them "supporting" the matters. Fourthly, the report need not necessarily refer specifically to the Plaintiff's case and can be expressed in general or abstract terms. Fifthly, as previously noted by the Court, even if the opinions are expressed in terms of "possibilities", that does not mean a Court cannot infer causation on the balance of probabilities¹¹.
3. The Court noted the purpose of the rule which was included the desire to identify issues and potential evidence at an early stage which might lead to reducing legal

¹¹ See See *Seltsam v McGuinness* (2000) 49 NSWLR 262 at [143]. But cf *Gett v Tabet* (2010) 265 ALR 227

expenses ultimately. It should not be used as a hurdle in the path of those with legitimate claims¹².

Expert's reports to be produced by experts, not lawyers

4. Included as part of its reasons, the Court noted in passing that the UCP rule "contemplates the experts will prepare their own reports" and implied that the report should not be "statement of a witness prepared by a lawyer"¹³.

¹² Para 123

¹³ Para 63