Causation

Tabet v Gett [2010] HCA 12

Tabet v Gett[1] is concerned with causation and damage in medical negligence claims. In such cases, the issue of whether a negligent act or omission has caused the damage suffered by the plaintiff can be especially difficult. Having determined what should have occurred, the court must undertake a hypothetical inquiry as to what the participants would have done had there been no negligence and what, in the counter factual, the consequences would have been. The latter question may need to be determined on conflicting expert opinions in highly specialised areas of medical science.

What, then, is the position of a plaintiff who has established negligence on the part of a medical practitioner and has persuaded the court that there was a prospect, or a possibility, that, if the negligence had not occurred, she would have had a medical outcome better than the one she in fact had? Has she suffered any actionable loss if she cannot establish that, on the balance of probabilities, the loss for which she seeks compensation was caused by the negligence of the practitioner? In particular, can she overcome that difficulty by claiming damages, not for the injury itself, but for the loss of the chance to avoid that injury?

In *Tabet v Gett*, the High Court has answered these questions in the negative. It has confirmed that the common law of Australia does not recognise, as actionable damage, the loss of a chance of a better outcome, in cases where medical negligence has been found. The possibility of characterising loss in such cases as the loss of a chance would, in the opinion of the court, countenance a departure from the standard of proof that currently applies to causation and damages in negligence. It has decisively rejected any such departure.

Background

Reema Tabet was six years old when she was admitted to hospital on 11 January 1991, suffering from headaches and nausea. At about 11am on 13 January, nursing staff, alerted by Reema's father, observed that the she was staring and unresponsive. Dr Gett, who was a visiting medical officer at the hospital, ordered a lumbar puncture. On the following day, at 11.45 am, Reema suffered a seizure and, this time, a CT scan was ordered. The scan revealed the presence of a brain tumour. Two days later, Reema underwent surgery. However, she was left with irreversible brain damage.

The trial judge[2] found that Dr Gett departed from proper standards in failing to order a CT Scan on 13 January[3] and that, if one had been ordered, the tumour would have been discovered then, rather than the following day. Further, some of the brain damage from which Reema suffered (25 per cent of her total injury) was found to have been attributable to the decline in her condition on 14 January. The plaintiff claimed damages in respect of that injury. However, critically, his Honour was not persuaded that the evidence established, on the balance of probabilities, that the discovery of the brain tumour on 13 January would have resulted in any treatment that would have avoided the brain damage that Reema suffered on 14 January. On the application of the usual principles, this would have meant that the plaintiff's cause of action in negligence failed. However, the plaintiff advanced an alternative claim. She contended that the loss that she had suffered because her tumour had not been detected on 13 January, was the loss of the chance of avoiding the damage that she had suffered when her condition deteriorated on 14 January. That chance of a better medical outcome, even if it was less than 50 per cent, was, it was argued, something of value and the loss of it as a result of the conduct of Dr Gett gave her a claim against him in negligence. The plaintiff derived support for this submission from decisions of the NSW and Victorian Court of Appeal.[4]

The trial judge awarded the plaintiff damages based on this alternative claim, having determined that the plaintiff had lost a 40 per cent chance of a better medical outcome (that is, of avoiding the brain damage suffered on 14 January). The NSW Court of Appeal[5] upheld Dr Gett's appeal on the basis that the alternative claim on which the plaintiff had succeeded at trial amounted to a significant departure from the principles applicable to proof of causation of damage in negligence, (in so doing, the court overturned the intermediate appellate authority on this point).[6] It was, the court said, for the High Court, and only the High Court, to reformulate the law of tort in this way.

The argument in the High Court

Kiefel J delivered the leading judgment.[7] Her Honour reaffirmed the common law test of causation and the applicable standard of proof, noting that, once causation is proved to the general standard, the common law treats what is shown to have occurred as certain (the 'all or nothing' rule).[8]

Her Honour considered the evidence led at the trial relevant to the events of 13 and 14 January and agreed with the finding of the trial judge that, applying established principles, the failure of Dr Gett to order the CT scan on 13 January was not, on the balance of probabilities, the cause of the appellant's deterioration on 14 January. Indeed the evidence did not, in her Honour's opinion, enable the plaintiff to satisfy the 'but for' test as the minimum negative criterion for causation.[9] The issue, then, was whether damages could be awarded on the alternative basis of a loss of a chance of a better outcome, as found by the trial judge.

In urging that damages could be awarded on that basis, the appellant relied on the availability of the loss of a commercial opportunity as damages in contract and for breach of section 52 of the *Trade Practices Act*. However, Kiefel J considered that cases involving lost commercial opportunities provided no relevant analogy. There was, in her Honour's opinion, a distinction between a commercial opportunity and the possibility of avoiding or lessening physical harm. In the former, her Honour said, what has been lost may readily be seen to be of 'value itself', whereas:

> the loss of a chance of a better medical outcome cannot be regarded in this way. As the assessment of damages in this case shows, the only value given to it is derived from the final physical damage.[10]

The appellant also sought to draw an analogy with the approach of the courts in assessing damages.[11] It is well established that, in assessing damages, the court may adjust its award to reflect the degree of probability of a loss eventuating. Why should not the same proportional approach be applied to causation?

However, both Kiefel J and Gummow ACJ noted that there was a fundamental distinction between the loss or damage necessary to found an action in negligence, and damages, which are awarded as compensation for that injury. [12] In the latter case, the permissibility of a proportional adjustment to reflect hypothetical occurrences follows from the requirement that the court must do the best it can in estimating damages.[13] The same approach could not be applied to the proof of loss or damage and causation.

Conclusion

It is now clear that, in the area of medical negligence, the characterisation of a plaintiff's loss as the loss of a chance cannot assist in overcoming difficulties in establishing, on the balance of probabilities, that the physical loss or damage suffered was caused by the negligent conduct.[14] As Kiefel J stated:

> The requirement of causation is not overcome by redefining the mere possibility that such damage as did occur might not eventuate as a chance and then saying that it is lost when the damage actually occurs. [15]

Such redefinition, in the opinion of Kiefel J, recognises that the general standard of proof cannot be met. The court has decisively rejected any lowering of that standard which, in the opinion of Gummow ACJ, strikes the appropriate balance between the competing interests of the parties.[16]

The decision will have implications for the manner in which medical negligence claims are framed in the future and may restrict the availability of claims in cases where there is doubt as to whether the appropriate treatment would have improved the patient's medical outcome.

The decision does not restrict the availability of claims for loss of a commercial opportunity in contract and under section 82 of the Trade Practices Act and its analogues. Nor, given the distinctions drawn by Kiefel J, should it affect the recoverability of such losses in claims in tort for pure economic loss.[17] However, the decision reinforces the applicability of the general standard of proof to all elements of the relevant cause of action, and to that extent is as relevant to cases of economic loss as it is to cases of personal injury.

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Endnotes

1. [2010] HCA 12, decision handed down on 21 April 2010.
2. Studdert J, *Tabet v Mansour* [2007] NSWSC 36.
3. Although other acts and omissions were alleged to have been negligent, this was the only negligence established.
4. *Rufo v Hosking* (2004) 61 NSWLR 678, *Gavalas v Singh* (2001) 3 VR 404
5. *Gett v Tabet* (2009) 254 ALR 504; per Allsop P, Beazley and Basten JJA.
6. The court also found, if it was necessary to do so, that on the evidence any chance that was lost did exceed 15 per cent.
7. With whom Hayne, Bell and Callinan JJ agreed. Gummow ACJ gave a separate judgment, dismissing the appeal. Heydon J also dismissed the appeal, but on different grounds.
8. At [111] to [113].
9. At [114]. The evidence established that, if the tumour had been discovered on 13 January, the treatment that would have been prescribed was the administration of steroids. However, the expert evidence did not support a finding that the steroids would have prevented the deterioration of the appellant's condition on 14 January. See also Gummow ACJ at [6] and [43] to [45]. Heydon J regarded the evidence as so inconclusive that it was not possible to arrive at any conclusion on the question of whether the negligence caused the plaintiff to lose a chance of avoiding or reducing the damage and dismissed the appeal on that ground alone; see [97] to [98].
10. At [124], adopting the words of Brennan J in *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332. See also Gummow ACJ at [54].
11. See *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638.
12. Kiefel J [135] and Gummow ACJ at [23].
13. Gummow ACJ at [39] and Kiefel J at [136] referring to *Malec v Hutton*.
14. Nor did the acceptance of a loss of a chance in medical negligence claims in some civil law countries and in US cases persuade the court to accept the approach for which the appellant contended. Both Kiefel J and Gummow ACJ preferred the reasoning of the majority of the House of Lords in *Gregg v Scott* [2005] 2 AC 176, see [59], [60] and [144] which has confirmed that the general standard of proof should be maintained with respect to claims for damages for medical negligence.
15. Kiefel J at [152]. See also [143] and Gummow ACJ at [46].
16. Gummow ACJ at [59].
17. See also Gummow ACJ at [27].