Medical negligence: loss of a chance, causation and proportionate damages

Gregg v Scott [2005] UKHL 2; [2005] 2 WLR 268 UK House of Lords, 27 January 2005

By Penelope Watson

Gregg v Scott[1] concerned a claimant whose prospects of surviving cancer were substantially reduced by the defendant doctor's negligence, but which would have been less than 50-50 even without the negligence. The House of Lords considered whether he should recover a proportion of the damages he would have received had he been able to prove on the balance of probabilities that the defendant's breach of duty 'caused or materially contributed to'[2] his premature death. They further considered whether this should be done by recognising loss of chance as a compensable type of personal injury.

FACTS

The defendant general practitioner misdiagnosed a cancerous lump in the claimant's armpit as benign, and negligently failed to order routine follow-up tests. The resulting nine-month delay in obtaining treatment caused the claimant's prospects of a cure[3] to diminish from 42% at the date of consultation to 25% at trial. Judge Inglis found that prompt treatment would probably have prevented the cancer spreading and made high-dose chemotherapy unnecessary, at least initially. He also found, however, that a better long-term outcome was never a probability.

DECISION

The claim was dismissed at trial, based on the binding authority of *Hotson v East Berkshire Health Authority*.[4] The claimant lost his appeals to the Court of Appeal and the House of Lords, although both courts split,[5] confirming that the issue is still a live and controversial one in the UK, as it is in Australia. The House indicated that, had it been argued, they would have awarded damages for any extra pain and suffering, loss of amenity, financial loss and 'lost years' caused by the delay.[6]

QUANTIFICATION

The claimant characterised his loss in two ways; first, as physical injury (the spread of the cancer), with all other losses being consequential. Conceding that causation must be established on the balance of probabilities, he argued that quantification of future losses is normally decided on the evaluation of risks and chances,[7] and courts will take into account possibilities which fall short of probabilities. This was rejected as confusing the distinction between uncertainty of causation and uncertainty as to extent or measure of damages.[8]

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SCHOOLS

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LOSS OF A CHANCE AND CAUSATION

The alternative submission was that loss of a chance should be a recoverable head of damage, extending the *Chaplin v Hicks*[9] principle to clinical negligence. A distinction is usually drawn between pecuniary loss and personal injury.[10] The majority reasoned that extending *Chaplin* would require reconsideration of three key causation decisions: *Hotson v East Berkshire Area Health Authority*,[11] *Wilsher v Essex Area Health Authority*,[12] and *Fairchild v Glenhaven Funeral Services Ltd*.[13] In both *Hotson* and *Wilsher* the House reversed awards in favour of the claimant.

In *Hotson* there was a five-day delay in diagnosing the claimant's fracture. With prompt diagnosis, there would have been a 25% chance of avoiding avascular necrosis of the injured hip and certain future osteoarthritis. The House characterised the issue as one of causation, holding that the claimant must prove on the balance of probabilities that the negligent delay materially contributed to the osteoarthritis and necrosis, not to the loss of a chance to avoid it.

As the chance of the condition occurring without the negligence was 75%, *Hotson* was treated as a case in which the outcome (necrosis) had already been determined prior to the negligence.

In *Wilsher* the doctor's negligence was one of a number of possible causes of the baby's retrolental fibroplasia (RLF), but whether the negligence 'caused or substantially contributed to' the RLF could not be proved since the causal mechanism was unknown. In *Fairchild* the claimant had worked with asbestos for more than one employer, but was unable to prove which employer's fibre had caused his mesothelioma. The House constructed a narrowly confined exception to the normal rules of causation, imposing liability for conduct which materially increased the risk of disease, consistent with its earlier decision in *McGhee v National Coal Board*.[14]

The majority in *Gregg* thought that allowing the claim would constitute a 'radical departure from precedent'. It would mean abandoning the limits laid down in *Fairchild* and generalising the rule to allow damages in all cases in which the defendant *may* have caused an injury, and has increased the likelihood of injury.[15] In Lord Hoffman's view, '[a] wholesale adoption of possible rather than probable causation as the criterion of liability would be so radical a change in our law as to amount to a legislative act. It would have enormous consequences for insurance companies and the National Health Service.'[16]

PROPORTIONATE DAMAGES

Baroness Hale discussed the implications of accepting loss of a chance as personal injury,[17] including whether personal injury law 'should never be about outcomes but only about chances'. Would proportionate recovery 'cut both ways'? It is accepted that loss of a chance must be equated with a similarly discounted damages award, but would it also follow that a loss of outcome (cure) proved on the balance of probabilities should be discounted by the amount its proof falls short of 100%? Proportionate damages for personal injury do not and cannot achieve the overriding tort goal of *restitutio in integrum* compensation. If the two approaches are viewed as alternatives, the defendant will always be liable where breach of duty is established, on a 'heads you lose everything, tails I win something' basis.

Baroness Hale rejected this as 'a case of two steps forward, three steps back', concluding 'not without regret' that its introduction 'would cause far more problems in the general run of personal injury claims than the policy benefits are worth'. Both Lords Nicholls and Hope, who found for the claimant, appear to have favoured proportionate deductions.[18]

CONCLUSION

The High Court in *Malec v Hutton*[19] emphasised the need to distinguish between existing and past facts, which must be proved on the balance of probabilities, and future hypotheticals which are subject to the principles governing loss of a chance. Loss of a chance may be a useful alternative to causation especially in medical negligence cases,[20] and none of the reasoning in *Gregg* convincingly explains why loss of a chance should be confined to economic cases but exclude personal injury. The decision in *Hotson*, which laid the foundation for much of the reasoning in *Gregg*, is open to the criticism that it confuses causation and loss of a chance. Allowing gaps in evidence to be decided in a manner adverse to claimants by applying the balance of probability rule is grossly unfair where the gap stems from deficiencies in medical or scientific understanding. ■

Notes: **1** *Gregg v Scott* [2005] UKHL 2 (*Gregg*). **2** *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506; *Bonnington Castings v Wardlaw* [1956] AC 613. **3** Defined as disease-free survival for 10 years. **4** [1987] AC 750. **5** 2:1 in the Court of Appeal; 3:2 in the House of Lords (Lords Hoffman and Phillips and Baroness Hale in the majority, Lords Nicholls and Hope dissenting). **6** *Gregg*, [206], [207] (Baroness Hale). **7** *Mallett v McMonagle* [1970] AC 166, at 166, 176. **8** *Gregg*, [69] Lord Hoffman, citing Master J in *Kranz v M'Cutcheon* (1920) 18 Ontario WN 395. **9** [1911] 2 KB 786 (*Chaplin*), (damages for breach of contract leading to loss of chance to win beauty contest). **10** *Howe v Teefy* (1927) 27 SR 301; *Kitchen v Royal Air Force Association* [1958] 1 WLR 563; *Bennett v Minister for Community Welfare* (1992) 176 CLR 408; Tony Weir, *Tort Law*, Oxford University Press, 2002, at 76. **11** Above n 4. **12** [1988] AC 1074. **13** [2003] 1 AC 32. **14** [1973] 1 WLR 1. **15** *Gregg* [84],[85] (Lord Hoffman). **16** *Gregg* [90] **17** [225], [226]. **18** [44], [121]. **19** (1990) 169 CLR 638 **20** *Chappel v Hart* (1998) 195 CLR 232 (Kirby J).

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