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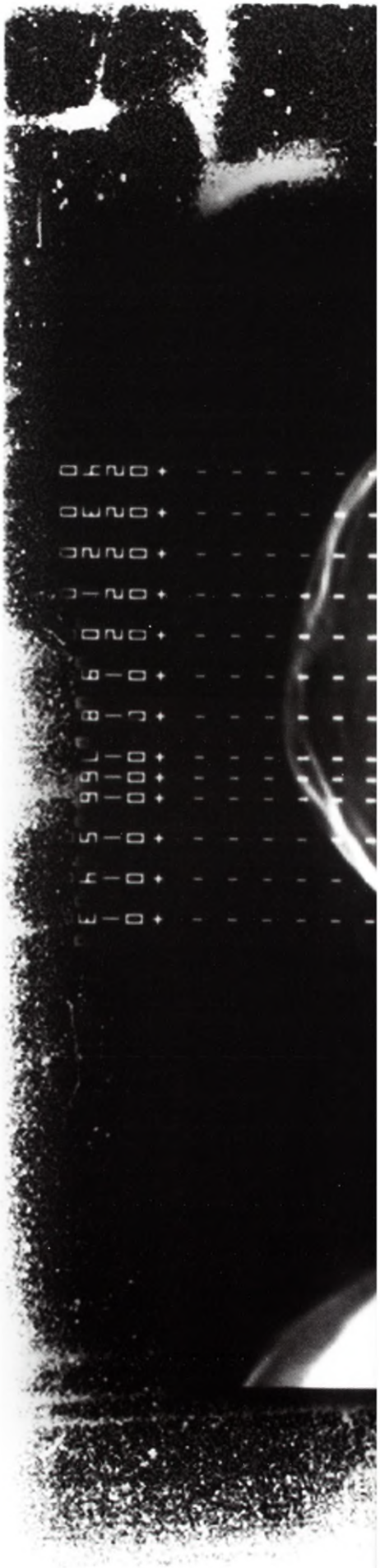
Loss of a chance in medical negligence: UPDATE



The recent Victorian Court of Appeal case of *Gavalas v Singh* may have finally laid to rest the long-running debate over whether damages can be recovered for a lost chance of successful treatment in medical negligence. Caution is necessary, however, until the High Court finally pronounces on the matter.

It has long been recognised in contract that damages can be awarded for loss of a chance even where that chance is less than 50%. Since at least 1994 there has also been little drama in claiming for a valuable lost commercial opportunity in tort but lost chance cases in medical negligence have continued to have uncertain prospects.

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The general principles

Sellars v Adelaide Petroleum Nt[1] was the High Court case that laid down the legal principles to be applied where misrepresentation, or other wrongful conduct, by the defendant caused the plaintiff to lose a valuable commercial opportunity. It required the plaintiff to establish, on the balance of probabilities, that he or she had sustained a valuable loss. The valuable loss could be a lost commercial opportunity even if the chances of the opportunity coming to fruition were less than 50% – as long as the value of the lost chance was not so

low as to be negligible. Once a valuable loss of this nature had been established, its actual value could be assessed according to the degree of probability that the event would have occurred.[2] Damages would then be adjusted accordingly. So, for example, a 30% chance of success would result in damages of 30% the full amount that would have been awarded had the plaintiff been able to prove that the event would have occurred.

The principle as enunciated in *Sellars* was carefully confined to lost commercial opportunities. However, it seemed the Court had laid down a principle of general application and it was not suggested that it could not be extended to personal injury in appropriate cases. Nevertheless since *Sellars*, continual doubts have been expressed about the viability of claims against doctors for the lost chance of successful treatment.

Why the fuss about medical negligence?

Why indeed? There would seem to be little justification for treating medical negligence as a special case. If a lost opportunity to enter a commercial contract has value so too does a chance to have a serious illness treated which has been lost due to negligent delay in diagnosis. Many patients would value the opportunity of a better outcome even where the chances of success were less than 50%.

However, prior to *Gavalas* the weight of authority was probably against such plaintiffs. Actually there are surprisingly few cases but High Court dicta was discouraging and the House of Lords case of *Hotson v East Berkshire Health Authority*[3] was considered a considerable barrier. In *Hotson* the plaintiff was a boy who fell from a tree and fractured his hip. The condition was not correctly diagnosed for several days resulting in delayed treatment, avascular necrosis[4] and permanent disability. The trial court found that the plaintiff had a 25% chance of making a complete recovery had the injury been correctly diagnosed when he first presented to hospital. Accordingly he was given 25% of the ▶

full compensation value of the disability at first instance.[5]

When the matter reached the House of Lords it rejected the applicability of the loss of a chance doctrine to the facts and held that the plaintiff had failed to prove that he would have had any chance of recovery. Their Lordships reasoned that patients in the plaintiff's situation fell into two groups: 25% could recover if treated in a timely fashion whilst the unlucky majority could not recover as they did not have sufficient blood vessels left intact. The crucial question then became whether the plaintiff had sufficient blood vessels left to recover. As it was a matter of past fact it had to be decided on the balance of probabilities and it was more likely than not that he fell into the larger group. Therefore he had lost nothing, having had no chance to start with.

Several Australian cases are also usually said to be authority for denying compensation for lost chances in medical negligence: *Green v Chenoweth*;[6] *O'Shea v Sullivan*;[7] *Woods v Lowns*;[8] and *Kite v Malycha*.[9] However, on closer examination probably only *Woods v Lowns* and, arguably, *Green v Chenoweth* actually support the contention that one cannot successfully claim the value of a lost chance in medical negligence. The other cases were simply not ones in which what was lost was a valuable opportunity. In *O'Shea v Sullivan* what had been lost was not a chance but a near certainty.[10] *Kite v Malycha* was similar.[11] Arguably the reasoning in both assumes the existence of loss of a chance in an appropriate case but neither court considered it the appropriate approach on the facts and the pleadings. This may reflect judicial reluctance to reduce damages when in all probability a benefit or even cure could have been obtained had it not been for the defendant's negligence. This should prove reassuring to plaintiff lawyers worried that the acceptance of lost chance must inevitably mean their clients will receive less when it is clear that their actual physical injury or illness could probably have been avoided with proper treatment (rather than that they simply lost *some* chance of beneficial treatment).

On the other hand *Woods v Lowns*, a NSW Supreme Court case, is clearly contrary to loss of a chance in medical negligence.[12] It is equally clear that Badgery-Parker J resiled from this position in *Tran v Lam*,[13] following *Sellars v Adelaide* to allow a plaintiff's claim for damage for loss of a chance in a missed diagnosis of cancer.

The issue has not been raised squarely in the High Court as yet. However, obiter comments have revealed some resistance to accepting claims in this form. Gaudron J, in particular, has expressed strong reservations about the doctrine.[14] One of Her Honour's objections was her view that the doctrine could not be readily reconciled with the traditional balance of probabilities approach to causation. On the basis of *Sellars* what must be established is that a valuable opportunity has been lost. Yet the opportunity has no value "if the defendant could establish, on the balance of probabilities, that the pre-existing condition would have resulted in the injury or disability in question in any event".[15] With respect, this reasoning seems at odds with the clear statement of the majority in *Sellars* that the loss of a valuable opportunity must be established on the balance of probabilities with the value being established by reference to probabilities. The balance of probabilities standard is not applicable in actually valuing the opportunity.[16]

Apparently one of Her Honour's underlying concerns is that plaintiffs may not benefit overall.[17] While some plaintiffs will have their claims recognised others could have their damages decreased in recognition of the chance they *would not* have been successfully treated.[18] This understandable anxiety is shared by many plaintiff lawyers.

Gavalas v Singh

Gavalas v Singh[19] demonstrates the other side of the argument. In that case the defendant had negligently failed to diagnose a brain tumour at the appropriate time resulting in loss of some chance of a more favourable outcome from surgery. The trial judge described the chance as "not high but 'not so low as to be regarded as speculative'".[20] The Victorian Court of Appeal accepted the claim almost matter-of-factly although whether such a claim was open at law had not been fully argued at trial.

Callaway JA remarked that:

"No advanced system of law could now deny recovery where late diagnosis, in breach of duty to the patient, appreciably reduces the prospects of success of an operation."[21]

Smith AJA pointed out that awarding compensation for lost opportunities for more successful treatment in appropriate cases was consistent with the two of the important underlying purposes of tort law in compensating the injured and promoting reasonable conduct:

"It enables a plaintiff to obtain com-

pensation in circumstances where negligence has deprived that plaintiff of a real chance or opportunity while at the same time avoiding the potentially unreasonable result of excessive compensation or no compensation despite the negligence of the defendant."[22]

Rather sensibly, His Honour suggested that in practice the frequently discussed difficulties and complexities of such an approach would prove no greater than many other issues arising in complex litigation of this nature.[23] Moreover, one of the major difficulties in the instant case was estimating (or speculating) as to the size of the tumour when it would have been operated on but for the defendant's negligence. This evidentiary difficulty was created by the same negligence and should not mean the plaintiff was denied compensation.[24] Smith AJA also pointed out that it was very much part of the relationship between the plaintiff and the defendant as his medical adviser that he provide the opportunity to seek timely treatment and the opportunity for a more favourable outcome than that which eventuated.[25]

What price loss of a chance in 2001?

There is no reason in principle why the approach of *Sellars* should be confined to commercial opportunities or why medical negligence should be treated as a special case. This has finally been recognised in *Gavalas v Singh*. The weight of Australian authority has swung the plaintiff's way, at least for the moment.

Even this cautious optimism has some important riders, however. The first is that in some cases *Hotson* will continue to be a formidable barrier. If the possibility of a benefit from treatment depends on a past fact this will still be decided on the balance of probabilities, sometimes precluding the possibility of benefit as demonstrated in that case. Defendants will try to emphasise such facts while plaintiffs frame the question as concerning a hypothetical event. Perhaps fortunately, medicine is rarely this neat and frequently there are many factors, known and unknown, involved so that all that can be said is that patients in the position of the plaintiff have some chance (perhaps quantified) of successful treatment.

Secondly, it appears unlikely that loss of a chance applies to failure to warn cases. Full consideration of this aspect of the issue is beyond the scope of this article but it should be noted that its applicability was rejected in both *Green v Chenoweth*[26] and *Tran v Lam*.[27] This is probably of no consequence as most clients are adamant they would not have had the relevant procedure had they known the true risks and few practitioners would advise litigation if their instructions were that the client would probably have gone ahead with surgery (but would have liked to have had the choice).

Lastly, sometimes it is better to avoid the whole issue. It may be better not to plead it at all in cases like *O'Shea* where legal advisers are rightly confident, on the basis of expert opinion, that it can be established that negligence resulted in the actual physical injury rather than just a lost chance of a better outcome. Reliance on the approach suggested by McHugh J in *Chappel v Hart*[28] may also be considered. That is that if the defendant has negligently increased the risk to the plaintiff and the risk eventuates then the defendant is regarded as materially contributing to the injury unless a good reason to the contrary can be shown.

Conclusion

While High Court dicta mean that some uncertainty remains, plaintiffs who have lost a valuable opportunity for treatment now have reasonable prospects of being compensated. Plaintiff lawyers should welcome the prospect of telling the client with a life-ending malignancy (or other serious illness) negligently denied the only opportunity for a better outcome that his or her loss is valued in law. PL

Footnotes:

1. (1994) 179 CLR 332. The majority comprised Mason, CJ and Dawson, Toohey, and Gaudron, JJ
2. This approach to the assessment of damages when taking into account a hypothetical event was decided in the earlier High Court case of *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638.
3. [1987] AC 750
4. Death of the tissue due to inadequate blood supply.
5. The trial judge assessed the appropriate damages at £46,000 if the whole of the plaintiff's disabilities could be attributed to the defendant hospital's negligence. He was awarded 25% of this sum.
6. QldSC Court of Appeal, 11 November 1997, unreported
7. NSWSC, Smart J, 6 May 1994, unreported
8. (1995) 36 NSWLR 344
9. (1998) 71 SASR 321
10. This was the subject of an explicit finding with Smart J stating "I think she lost more than just the chance of being cured".
11. Although it is not clear in the judgment if the chances of cure were quite as strong as in *O'Shea*.
12. Putting aside failure to warn cases, it is probably the only Australian case of any authority that can be definitively cited against the doctrine.
13. NSWSC, Badgery-Parker J, 20 June 1997, unreported
14. *Naxakis v Western General Hospital* [1999] HCA 22 at [29]-[36]. On the other hand, Callinan J who also discussed the doctrine in the same case was quite attracted to it at [128]-[130].
15. At [34].
16. At 355
17. See Her Honour's remarks at [33] that individual plaintiffs will not necessarily benefit and also her preferred approach at [36].
18. This may depend on how the injury is characterised. Frequently it will be best characterised as the actual physical injury or illness (for example, the malignancy itself in a delayed diagnosis of cancer) rather than a lost chance for treatment. Loss of a chance will generally not be pleaded at all where there is confidence that negligence leading to the actual physical injury can be established on the balance of probabilities.
19. [2001] VSCA 23
20. Quoted at [25] of the Court of Appeal's judgment.
21. At [15].
22. At [38]. This was also the view of the majority in *Sellars v Adelaide Petroleum NL* at 355.
23. At [39].
24. At [38].
25. At [41]. His Honour was picking up on a comment of McHugh J in *Chappel v Hart* [1998] HCA 55 at [50]. In that case it was said to be no part of the relationship that the defendant provide the opportunity for the plaintiff to seek better treatment from another surgeon.
26. See also *Jang v Australia Meat Holdings Pty Ltd* [2001] QCA 51 at [27] and *Morrison v Wong & Anor* [2001] NSWSC 304 at [122].
27. However, see contrary dicta of Callinan J in *Rosenberg v Percival* [2001] HCA 18 at [221].
28. At [27].