# Gett v Tabet

## Does 'loss of chance' have a chance?

By David Hirsch

In *Gett v Tabet*,[1] the NSW Court of Appeal reconsidered the vexed question of whether damages were available to a plaintiff who could not prove on the probabilities that negligence caused injury but only that she was deprived of the chance of a better outcome. In a unanimous judgment, the court held that the 'loss of chance' doctrine was 'plainly wrong' in the context of personal injury cases.

The decision presented an open invitation to the High Court to consider loss of chance and, on 4 September, special leave was granted limited to the questions of the availability of such damages and, if so, its quantification in this case.

### BASIC FACTS

Reema Tabet was six years old when she was admitted to the Royal Alexandra Hospital for Children in Sydney on 29 December 1990 for investigation of a 10-day history of unexplained headache and vomiting. On 31 December, she developed a rash and was discharged home with a diagnosis of chickenpox. The time course of her chickenpox exposure and infection, however, was such that the headache and vomiting could not have been due to emerging chickenpox.

On 11 January 1991, Reema was back in hospital. Her chickenpox had resolved but her headache and vomiting continued. She came under the care of Dr Gett, who had not treated her in December and was initially unaware of the long history of headache and vomiting. He suspected a post-viral encephalitis. He ordered a lumbar puncture (LP) to investigate his hypothesis. A planned LP on 11 January was abandoned because of Reema's distress.

On 13 January, Reema had a transient neurological episode involving staring, unequal pupils, and her right pupil being non-reactive to light. Dr Gett was informed and directed an immediate LP. Over the next 24 hours Reema's condition deteriorated. A CT scan done on 14 January revealed a brain tumour.

As it turned out, the brain tumour had been the cause of Reema's headache and vomiting from the start; the chickenpox had nothing to do with it. Dr Gett should have known the history such that by 13 January he should have abandoned his LP plan, which was designed to test his post-chickenpox encephalitis hypothesis, and sought another cause for the clinical picture, which now included not only prolonged headache and vomiting but focal neurological signs being the episode of staring, unequal and non-reactive pupils. A CT should have been done for this purpose.

Dr Maixner, the senior neurological registrar at the hospital, told the trial judge that Reema's focal neurological signs indicated raised intracranial pressure (ICP) and urgent treatment was needed to relieve this or risk brain damage. She inserted an intraventricular drain on 14 January and, on 16 January, after Reema's condition had stabilised, Dr Maixner and senior neurosurgeon Dr Johnston operated to remove the tumour.

Reema was left with severe disabilities as a consequence of the raised ICP, the tumour, the surgery to remove it and the radiotherapy that followed.

### FINDINGS AT TRIAL

At trial, Studdert J found that Dr Gett was negligent in failing to order a CT scan on 13 January after he learned of the episode of staring, unequal and unreactive pupils. By that time, he should have known that the post-chickenpox encephalitis theory was untenable and that a brain tumour would explain the long history of headache and vomiting as well as the focal neurological signs seen that day. Proper investigation by CT scan would have revealed the tumour and no LP would have been done.

The difficult factual questions then became: *What would have been done had the tumour been discovered on 13 January rather than on 14 January? And what difference would this have made?*

Studdert J found that, on discovery of the tumour, urgent measures would have been taken to reduce the raised ICP. Dr Maixner said that she would have inserted a drain and that this would have had the immediately beneficial effect of preventing the deterioration that occurred between 13 and 14 January, which was found to have been caused by raised ICP. Dr Johnston, on the other hand, said that he would not have inserted a drain but rather given steroids. He added that the utility of steroids was quite a bit less than the utility of a drain, especially given that the raised ICP was due to a brain tumour rather than general brain swelling.[2]

Of these two possible treatments, Studdert J considered that on the probabilities the steroid option (with the less

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beneficial effect) would have been given rather than the drain option (with the more beneficial effect). This was on the basis that the final decision would have been made by Dr Johnston and not Dr Maixner.

Although he found that brain damage caused by raised ICP was probably unavoidable, Studdert J considered himself bound by the Court of Appeal's decision in *Rufo v Hosking*,[3] and awarded damages for the value of the loss of a chance of avoiding the damage caused by raised ICP. His Honour found that the raised ICP contributed only 25 per cent to Reema's overall brain damage and the negligent failure to do a CT scan deprived Reema of a 40 per cent chance of avoiding the ICP-caused damage. In the finish, an award of $610,000 was made, representing 40 per cent of 25 per cent of agreed damages of around $6 million.

## DIFFICULT LEGAL ISSUES

Damages for loss of chance of a better outcome were first allowed by the NSW Court of Appeal in the 2004 decision in *Rufo*. In 2006, the same court in *New South Wales v Burton*[4] followed, without critical discussion, its decision in *Rufo* and awarded damages for loss of a chance of a better outcome. That case involved the failure to provide counselling to a police officer who could have suffered less PTST had counselling been given.

Even before these NSW Court of Appeal decisions, in 2001 the Victorian Court of Appeal considered loss of chance in *Gavalas v Singh*.[5] That was a medical negligence case involving the failure to diagnose a brain tumour with the possibility of growth during the period of delay and the possibility that the growth prevented the tumour from being more completely removed when it was belatedly discovered. The appeal was on quantum only, the parties, the trial judge and the Court of Appeal accepting in principle that damages for loss of a chance of a better outcome was available in a medical negligence case.

There had been *obiter dicta* in the High Court in *Naxakis v Western General Hospital*,[6] where Gaudran J was critical of loss of chance[7] and Callinan J supported it.[8]

Meanwhile, in England the majority of the House of Lords rejected loss of chance in *Gregg v Scott*.[9] That case involved medical negligence increasing the percentage risk of the plaintiff dying of cancer – but in which the plaintiff at trial, in the Court of Appeal and in the House of Lords, was still very much alive.

## THE COURT OF APPEAL DECISION

In the Court of Appeal, Dr Gett appealed the finding of negligence and Reema cross-appealed, claiming that she should have been awarded the full 25 per cent of the damages caused by the raised ICP rather than just 40 per cent of the 25 per cent of this awarded by Studdert J on the loss of chance basis. There were other appeal points but, for present purposes, and given the scope of the High Court's special leave, only the issues of the availability of damages for loss of chance and its quantification are relevant here.

The court expounded at great length on the position of appellate courts in the hierarchy of the common law system and considered in what circumstances it could properly depart from existing authority by refusing to follow its earlier decisions. After considering legal history and cases in the High Court and Federal Court, the Court of Appeal determined that it could refuse to follow its own previous decisions if those were 'plainly wrong'.[10]

The court found that *Rufo* and *Gavalas* involved departures from conventional legal principles and were 'plainly wrong' for the following reasons:[11]

1. Loss of chance did not form part of any recognised stream of authority.
2. The decisions were inconsistent with *Sellars v Adelaide Petroleum NL*,[12] which recognised loss of chance but only in a commercial context and required proof of causation of damages on the balance of probabilities.
3. They set the law of torts on a *new path of proof of causation*, which was based on *creation of risk and policy for fair recompense for loss* and so was a matter for the High Court.
4. The complexities and difficulties arising from permitting recovery for loss of chance, including the accrual of limitation periods, had not been considered by the previous cases.
5. There were no clear limitations to the loss of a chance doctrine – which could be seen to apply to all personal injury cases and not just medical negligence cases.
6. It was inconsistent with the *Civil Liability Act* 2002, which contemplates the kinds of harm required to justify liability in negligence, and this does not include harm caused by lost opportunities of better outcomes.
7. General principles of causation, now enacted in the *Civil Liability Act* 2002, required proof of injury on the balance of probabilities, not possibilities.
8. There was no evidence that insurance companies or other members of the public adapted their commercial relations in contemplation of possible liabilities for loss of a chance.

The court continued that if the loss of chance approach was available, Studdert J was wrong in having considered the possibility of the insertion of a drain in assessing the value of the lost chance at 40 per cent. Having determined on the probabilities that a drain would not have been inserted, and that steroids would probably have been given, and given the evidence that the drain would have been more efficacious than the steroids, the Court of Appeal

considered the value of the chance lost to be somewhere between 'speculative' and 'some chance' and assessed this as just 15 per cent.[13]

## DOES 'LOSS OF CHANCE' HAVE A CHANCE?

The High Court has agreed to hear the appeal on the issues of whether the loss of a chance doctrine should be accepted as good law in Australia and, if so, what the measure of damages should be.

On the question of principle, the Court of Appeal has served up a list of reasons why loss of chance claims should not be allowed.

For the Court of Appeal, the central vice in loss of chance cases is, it seems to me, the proper characterisation of what it is that was lost. The court considered that these claims seek compensation for the *increased risk* of harm, whereas established tort principles (echoed in legislation like the *Civil Liability Act* 2002) proceeds on the basis of negligence having caused *actual harm*.[14]

In my opinion, this characterisation fails, with respect, to capture the wider dimensions of the loss of a chance doctrine.

In the English case of *Gregg v Scott*, relied on heavily by Dr Gett, the plaintiff never suffered the consequences of the negligent delay in the diagnosis of his cancer and the statistical increase in the risk of death; because he did not die. That was not a good test case for the loss of a chance doctrine.[15] But in *Rufo* and *Gavalas*, the plaintiffs did suffer real physical injury and the only question was whether negligence deprived the plaintiff of a valuable chance of suffering less of it – even if on the probabilities the outcome would have been the same. In these cases, damages were not being awarded for increased risk (which is what really was sought in *Gregg v Scott*) but for the value of the chance of avoiding real injury actually suffered.

Loss of chance also gives some voice to the policy considerations of tort law, which aim to sanction negligent conduct where the negligence deprives the plaintiff of a thing of value – even if injury would probably have occurred anyway. Further, in the context of medical negligence cases, liability for loss of chance may be seen as 'the corollary of a medical duty of care directed to achieving the best chance of a successful outcome'.[16]

If loss of chance survives, the next issue will be quantification of the loss. In *Gett*, the Court of Appeal found that Studdert J erred in taking into consideration the possibility of a better outcome with the insertion of a drain – having already determined on the probabilities that Reema would have had (less efficacious) steroids rather than a (more efficacious) drain. But in the successful application for leave, Bret Walker SC argued that Studdert J had not erred because the negligence deprived Reema of the 'armoury' of possible treatments; it was not necessary to choose which treatment – in this case steroids or a drain – was more likely to have been given in the hypothetical circumstances. Either or both may have been given at some time during the period of delay between 13 and 14 January.[17]

The High Court's consideration of loss of chance will certainly require a full examination of the many complex issues at play in personal injury claims generally and medical negligence claims in particular. For the moment, the law in NSW, at any rate, is that loss of chance claims are not recognised. But with the High Court's grant of special leave, plaintiffs have been given a chance to resurrect the loss of a chance doctrine. It remains to be seen whether this is a chance of any value. ■

**Notes:** **1** *Gett v Tabet* [2009] NSWCA 76 (9 April 2009) (Allsop P, Beazley and Basten JJA). **2** Which makes one wonder about why Dr Johnston would have advocated a less effective treatment; but Studdert J accepted his evidence completely. **3** *Rufo v Hosking* [2004] NSWCA 391; 61 NSWLR 678. **4** *New South Wales v Burton* [2006] NSWCA 12. **5** *Gavalas v Singh* [201] VSCA 23; 3 VR 404. **6** *Naxakis v Western General Hospital* [1999] HCA 22; 197 CLR 269. **7** Gaudran J at [29]-[30]. **8** Callinan J at [128]-[130]. **9** *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176. **10** *Gett* at [294]. **11** *Gett* at [389]. **12** *Sellars v Adelaide Petroleum NL* [1994] HCA 4; 179 CLR 332. **13** *Gett* at [245]. **14** *Gett* at [377]. **15** Indeed, Lord Philips, who was in the majority, did not rule out loss of chance in a proper case; but *Gregg v Scott* was not the right vehicle to test this proposition. [190] **16** *Rufo* per Santow JA at [25]-[26]. **17** Transcript of leave application http://www.austlii.edu.au/au/other/HCATrans/2009/209.html.

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