



Sara Bird

Lost: loss of chance

Loss of chance claims involve an allegation that a patient has lost the chance of a better medical outcome, in terms of treatment and/or prognosis, as a result of the negligence of the medical practitioner. A recent High Court of Australia judgment confirmed that monetary damages are not available for the loss of a chance of a better medical outcome.¹ This article discusses the judgment and its implications for medical practitioners in Australia.

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Case history

Miss Reema Tabet, 6 years of age, was admitted to hospital under the care of a paediatrician, Dr Mansour, on 29 December 1990 with a 10 day history of headaches and vomiting. Neurological examination was normal. On 31 December 1990, the patient developed chickenpox and she was discharged from hospital.

The patient was re-admitted to hospital on 11 January 1991 under the care of another paediatrician, Dr Gett. The chickenpox had resolved but the patient was still experiencing headaches and vomiting. Neurological examination was normal and Dr Gett made a provisional diagnosis of post-chickenpox viral encephalitis. He ordered a lumbar puncture but attempts to perform this procedure were unsuccessful because of the patient's distress. Dr Gett reviewed the patient again on 12 January 1991 at which time her condition was unchanged.

At about 11.00 am on 13 January 1991, the patient's father reported

that she was unresponsive and staring into space. The patient was reviewed by a nurse who found the patient was responsive, although her pupils were unequal, with her right pupil not reactive to light. The patient was seen some time later by Dr Gett who ordered an urgent lumbar puncture, which was performed later that afternoon.

On 14 January 1991, the patient had a prolonged seizure. An urgent brain computerised tomography scan was performed which revealed a large brain tumour with secondary hydrocephalus. An intraventricular drain was inserted. Two days later, the patient underwent surgery to remove the tumour, followed by chemotherapy and radiotherapy. However, as a result of the seizure, the surgery and subsequent medical treatment, the patient was left with significant brain damage.

The patient subsequently commenced proceedings against the paediatricians, Dr Mansour and Dr Gett, alleging that they had been negligent in their care by failing to diagnose and treat the brain tumour earlier. At trial, the judge found that Dr Gett had breached his duty of care by not ordering an urgent brain computerised tomography (CT) scan on 13 January 1991. The judge found that if a CT had been performed on 13 January 1991, treatment to reduce the intracranial pressure would have been commenced immediately, either by the prescription of steroids or the insertion of an intraventricular drain.

However, the judge was unable to find, on the balance of probability, that Dr Gett's breach of duty of care had caused or contributed to the brain damage that was suffered by the patient on 14 January 1991. Instead, he found that the patient had lost only a 40% chance of being treated in a way that would have avoided the brain damage that occurred on 14 January 1991. The judge also found that the seizure on 14 January 1991 had contributed to only 25% of her overall brain damage. The other 75% of the brain damage was found to have been caused by the surgery, chemotherapy and radiotherapy. Therefore, using a 'loss of chance analysis', the judge awarded the patient 10% of her total claim for damages (40% of 25%) on the basis that, due to Dr Gett's breach of duty of care, she lost the chance of a better medical outcome. She was awarded \$610 000 plus legal costs, this amount representing 10% of the total value of her claim.

Dr Gett successfully appealed to the New South Wales Court of Appeal, which found that allowing damages for loss of chance went beyond conventional tort law. Ultimately, the matter proceeded to the High Court of Australia, which handed down its decision on 21 April 2010. The High Court found that to hold Dr Gett liable for the patient's brain damage, which he almost certainly did not cause, would require a lowering of the standard of proof and a fundamental change to the law of negligence. The court stated that the patient had to be able to prove that the doctor's negligence was more probably than not the cause of her brain damage. She was unable to do so and therefore the patient's appeal was dismissed.

Discussion

The High Court of Australia's decision to reject claims for a loss of a chance of a better medical outcome is in line with other common law countries such as Canada and England. Indeed, the courts in England found that 'almost any claim for loss of an outcome could be reformulated as a claim for a loss of chance for that outcome' and equated this line of reasoning as saying that claimants could state 'heads you lose everything, tails I win something'.²

This is an important judgment for GPs because acceptance of 'loss of chance' in

medical negligence claims would have increased the complexity and cost of litigation. Up to 50% of the medical negligence claims against GPs involve an allegation of failure to diagnose, in which the patient claims to have lost the chance of a better outcome. In these cases, the patient must now be able prove, on the balance of probabilities, that he or she would have had a better outcome if the GP had not been negligent.

Author

Sara Bird MBBS, MFM(clin), FRACGP, Manager, Medico-Legal and Advisory Services, MDA National. sbird@mdanational.com.au.

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References

1. Tabet v Gett [2010] HCA 12.
2. Greg v Scott [2005] UKHL 2.

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correspondence afp@racgp.org.au