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# Breast screening and failure to diagnose breast cancer

This article discusses a recent Supreme Court of NSW claim against a breast screening service alleging a failure to diagnose breast cancer.<sup>1</sup>

## Case study

The patient first attended BreastScreen NSW in 1994 as part of the free mammogram service. She was 43 years of age at the time. Thereafter, she attended BreastScreen for mammography in 1996, 1998, 2002, 2004 and on 23 February 2006.

On the occasion of each attendance at BreastScreen the patient filled out a document entitled 'screening consent form'. Apart from signing that document, the patient ticked various boxes which indicated her consent to undergoing the mammogram, that she had read and understood the information provided to her about screening mammograms, that she understood she would receive the results of the mammogram, that she agreed to have the results of her tests sent to her general practitioner and that she consented to previous mammograms being used for comparison.

One of the boxes, which the patient ticked affirmatively on each occasion that she attended BreastScreen for mammography, was in the following terms: 'I understand that while mammography is the best single method of detecting early breast cancer, there is a small risk that a breast cancer may not be detected by a screening mammogram. That is why I am encouraged to have an annual clinical examination of my breasts by my doctor and to examine my breasts monthly'.

The patient at no time before 23 February 2006 attended her GP to have an annual clinical examination of her breasts.

Following each attendance at BreastScreen, the patient received a proforma letter and a similar letter was sent to her GP. The letter which she received following her attendance in 2006 stated: 'Following your visit to BreastScreen NSW on 23 February 2006, I have been advised by the doctors who looked at your screening mammogram (breast X-rays) that there was no visible evidence of breast cancer. It is important that you know there is a chance that an existing breast cancer may not be seen on a screening mammogram. Also, new breast cancers can develop between screening visits. Therefore, we recommend that you have an annual breast

examination by your doctor. If you notice any unusual changes in your breasts you should contact your doctor without delay'.

On 1 January 2007 while the patient was reading in bed she scratched her left breast and felt a lump which she had not been aware of before. The patient identified the site of the lump as 3 cm above the nipple. The patient was on holidays at the time and she made arrangements to see her GP upon her return to Sydney. Subsequent investigations revealed a diagnosis of left breast cancer. The patient underwent chemotherapy, surgery and radiotherapy.

On 13 May 2008 the patient was diagnosed with metastatic disease in her lungs. She underwent further chemotherapy. However, in June 2008, the patient was diagnosed with metastatic disease in her brain.

The patient subsequently commenced proceedings against BreastScreen alleging a failure to diagnose her breast cancer on mammography on 23 February 2006. The matter proceeded to trial in October 2008 and judgment was handed down on 29 October 2008.

■ **At the trial, there was an important factual dispute between the plaintiff's and the defendant's radiology experts. This was in relation to the extent of the change in size of the lesion found in the 2006 mammogram, when compared with the same lesion in either the 2002 or 2004 mammograms. The plaintiff's expert, Dr Kitchener, stated that when one measured the dimensions of the lesion in the 2006 mammogram and compared its size with the dimensions of the same lesion in the 2004 mammogram, it had approximately doubled in size between 2004 and 2006. In his report, Professor Osborne, the defendant's expert, stated that the lesion in 2006 was approximately the same size as it had been in 2004 but that it was more dense in appearance. However, in his oral evidence at trial, Professor Osborne conceded that the lesion 'could be marginally bigger'. Professor Osborne noted that a screening mammogram is performed for asymptomatic 'well' women to detect unsuspected breast lesions. The emphasis is on mass**

**population screening to reduce overall mortality and morbidity. In contrast, a diagnostic mammogram is used for diagnosing breast changes or abnormalities that have been detected through breast self examination and/or clinical examination. The emphasis is on individual benefit. It was noted that the National Accreditation Standard specified that less than 5% of women who attend for their second or subsequent screen should be recalled for reassessment. Professor Osborne gave evidence that if the plaintiff had presented to him as a first visit for mammography in 1998, 2002 or 2004, then he would have recalled her and performed an ultrasound of the lesion in the left breast. He noted that on a first visit up to 10% of patients are recalled because there are no other films for comparison. However, when the 23 February 2006 mammogram was compared to those performed previously, he would not have recalled the plaintiff.**

Ultimately, the judge preferred the evidence of Dr Kitchener that the breast lesion had doubled in size since the 2004 mammogram. On this basis, the judge found that BreastScreen had breached its duty of care to the plaintiff in failing to recall the plaintiff for further investigation after the 2006 mammogram, despite the fact that it was a screening rather than a diagnostic mammogram.

The judge then considered the issue of causation. That is, did the defendant's breach of duty of care cause the plaintiff's injury? The first issue that the judge addressed was whether the plaintiff's cancer would have been detected if an ultrasound had been performed in March 2006. Dr Kitchener stated that there was a 90% chance that an ultrasound would have detected the plaintiff's breast cancer, while the defendant's expert concluded that an ultrasound 'may' have detected the cancer. The judge ultimately found that if an ultrasound of the plaintiff's left breast had been carried out in March 2006, it would have revealed the presence of the tumour. The second causation question that had to be considered was whether or not a diagnosis of breast cancer in March 2006, rather than January 2007, would have made any difference to the plaintiff's outcome. Expert evidence from two oncologists suggested that the risk of the plaintiff's cancer metastasising between March 2006 and January 2007 increased by approximately 10%. The defendant's solicitors submitted that any damages should be assessed on the basis that the plaintiff lost a 10% chance of a better outcome by the delay in diagnosis between March 2006 and January 2007. On the other hand, the plaintiff's solicitors submitted that the breast cancer and the metastatic disease should be regarded as separate entities. They accepted that the delay in diagnosis of the breast cancer increased the chance of the cancer metastasising by 10%. However, the plaintiff's solicitors argued that the delay materially increased the risk of the metastatic disease and that risk had then eventuated. Consequently, the plaintiff's solicitors argued that causation had been established so that the defendant should bear responsibility for the whole of the plaintiff's damage, not just a percentage of it. The judge found that this was not a case

where the 'metastatisation was likely in any event and the plaintiff had merely lost the chance of a better outcome'. He concluded that the plaintiff had established that the defendant's conduct had caused the metastatic disease. On this basis, the judge awarded the plaintiff full damages which amounted to \$405 990.15, plus legal costs.

## Discussion

This claim provides an interesting legal discussion about 'loss of a chance' in medical negligence claims. 'Loss of a chance' claims involve an allegation that the plaintiff (patient) lost the chance of a better outcome as a result of the defendant's (medical practitioner's) breach of duty of care and negligence. The plaintiff's loss is evaluated by comparing the chances of suffering harm against that which would have existed had the breach of duty of care not occurred. Many medical practitioners will be dismayed by the judge's finding that in this case a 10% greater chance of the cancer metastasising, resulted in an award of 100% of damages to the plaintiff.

One can also only wonder if there might have been a different outcome for the patient if she had seen her GP for annual breast examinations, as recommended by BreastScreen, in addition to her attendance for screening mammography.

Conflict of interest: none declared.

## Reference

1. O'Gorman v Sydney South West Area Health Service [2008] NSWSC 1127.

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