

# WHAT CHANCE for loss of CHANCE?

By JULIE HUGHES

Solicitors may need to consider other causes of action and a conceptual shift to pursue redress for negligence.

**T**HE LONG-AWAITED DECISION of *Tabet v Gett*<sup>1</sup> was delivered in April this year, and it would seem that the High Court has ended the flirtation with loss of chance of a better outcome being a recognised head of damage in negligence cases.<sup>2</sup> In the face of various examples of international support of the concept,<sup>3</sup> and an affirmation by the NSW Court of Appeal in *Rufo v Hoskings*,<sup>4</sup> the High Court has rejected the notion where the chance represents a mere possibility.

## The issue

In the context of medical negligence, loss of chance is based on an attempt by a plaintiff to receive damages where a health professional's breach of duty of care has caused the plaintiff to lose the 'chance' of a more favourable outcome. There is a conceptual difference between awarding damages for 'loss of chance' as opposed to damages for 'loss of outcome'. Damages for loss of outcome flow when the plaintiff can establish on the balance of probabilities that the defendant's breach has caused them to lose a positive result. Loss of chance argues that an opportunity of a better result, perhaps a small possibility in some cases, has been lost due to the defendant's breach. The

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plaintiff will never have the opportunity of discovering whether their chance would have been realised. Various means of calculation of damages have been touted, but on one view damages might be awarded calculated on the amount of damages for loss of outcome, reduced by the percentage that the chance (for example, recovery, reduced side effects, etc) would not have come to pass.

The central question of law that was resolved by the High Court in *Tabet* was expressed thus in the NSW Court of Appeal by Santow JA in *Rufo v Hoskings*: "should medical negligence cases allow a remedy to the plaintiff whose injury, more likely than not, would have occurred without any negligence on the part of the doctor, but where that negligence nonetheless denied the plaintiff a material chance of a better outcome?"<sup>5</sup>

The Court of Appeal in *Rufo* had answered this question in the affirmative. Such legal argument has been made in cases where the plaintiff was facing

rather dire medical prognosis, and a slim possibility of a better result has been lost by a breach of duty of care. They cannot argue on the balance of probabilities that, but for the breach of duty of care, the plaintiff would have, say, recovered. As in the *Tabet* case, one might be arguing that, but for the breach of duty of care, the plaintiff may have had a slim chance that brain damage would have been less than occurred. The outcome cannot be proved and the plaintiffs are asking the court to recognise that even a faint chance has some value. The essence of the difficulty is that typically the chance that is lost is one with less than a 50 per cent chance of realisation.<sup>6</sup> In *Tabet*, the High Court was asked to put a value on a slim hope of a better outcome that was allegedly lost or diminished by a negligent omission. Ultimately, the court found that the standard of proof for causation to be too great a stumbling block to overcome.

## The facts

The plaintiff/appellant, Reema Tabet, was six years old at the time of the injury. She was admitted to hospital on 11 January 1991, having recently contracted chickenpox. She was experiencing headaches, nausea and vomiting. The defendant/respondent doctor's provisional diagnosis was that the child was suffering from chickenpox, meningitis or encephalitis. The plaintiff subsequently suffered a seizure on 14 January 1991, and a CT scan and EEG were performed that day. This led to diagnosis of a brain tumour. It was estimated that the brain tumour had been growing for over two years. The events that



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ensued, coupled with the tumour itself, resulted in irreversible brain damage.

#### The plaintiff's argument

It was argued by the plaintiff (and accepted at trial) that the child would have had a chance of a better outcome if a CT scan had been performed on 13 January 1991, particularly since nursing staff had observed that her pupils were unequal and the right pupil was unreactive. The CT scan would have revealed the tumour and may have afforded the chance to use steroids first, rather than a drain to reduce the intracranial pressure. Further, the urgent surgery would not have been delayed by the time taken to do the CT scan on 14 January 1991. The trial judge accepted this argument, in part, finding the delay in the CT scan had caused the plaintiff to lose a chance of a better medical outcome had the brain tumour been detected on 13 January 1991. His Honour was not persuaded by the plaintiff's primary argument that the discovery of the tumour by scan on 13 January 1991 would have led to treatment which would have avoided the seizure of 14 January 1991 and the subsequent deterioration.

This finding was subsequently quashed

on appeal to the NSW Court of Appeal. It was by this route that the High Court had the opportunity to consider loss of chance. The appellant's chief appeal ground was that the Court of Appeal erred in holding that the causal effects of the negligence should be assessed on the balance of probabilities alone, rather than on the basis of loss of chance of a better outcome.<sup>7</sup>

#### The High Court decision

The judges were unanimous in their decision to dismiss the appeal with costs, albeit with some slightly different points of emphasis. Gummow ACJ gave considerable weight to the evidence of the neurosurgeon that it was "entirely speculative" as to whether the use of steroids would have been successful in the treatment of the intracranial pressure. This evidence afforded insufficient support for the appellant's contention. Further, he was not prepared to sanction a weakening of the causation requirement "such that the plaintiff should have the benefit and the defendant the detriment of an easier proof of actionable damage."<sup>8</sup>

The Chief Justice refuted the worthiness of any analogies with contract law,

reasoning that an action for breach of contract is enlivened by occurrence of the breach, while in negligence the action only lies if and when damage is sustained.<sup>9</sup> Nor did he recognise analogies with actions under s.52 of the *Trade Practices Act 1974* (Cth).

Hayne and Bell JJ, agreeing with Kiefel J that the appellant was unable to prove the respondent's negligence was a cause of damage, emphasised that a defendant should not be required to pay damages for the loss of a chance that represented a mere *possibility*, rather than a *probability*, of a better medical outcome. Damage, for the purposes of causation, should represent a detrimental difference to a plaintiff as a result of a defendant's negligent act or omission.

Heydon J hinted that the facts of the case were not conducive to arguing loss of chance, and mused on the value of the decision itself in resolving the issue.<sup>10</sup>

Crennan J, also concurring with the reasoning of Kiefel J, emphasised that the appellant was asking the court to make a "radical", not "incremental", development in the common law. Such a profound alteration to the causation element should only be the "business of Parliament."<sup>11</sup> ☛

Kiefel J stamped a foot in support of the requirement in negligence claims to satisfy the general standard of proof on the balance of probabilities with respect to causation. As the appellant was unable to prove that it was probable that earlier use of steroids would have avoided or reduced the brain damage, the appeal, she affirmed, must fail. Mere possibility of a better outcome is insufficient.

#### Other expressions of loss of chance

It is noteworthy that the law has not experienced difficulty accommodating compensation for loss of chance in other areas. Australian courts are clear that damages can sound for a breach of contract that results in a lost chance of an opportunity or benefit,<sup>12</sup> albeit that this comes into play with respect to calculation of damages. This is even so where the realisation of the benefit is dependent upon a contingency rather than simply on proper performance of the contract. Even though a plaintiff may not be able to prove on the balance of probabilities that they have lost a benefit due to the breach, they may argue loss of chance of obtaining a benefit. There has been a breach of contract and the question is how far the defendant should be liable for the breach. Similarly, the concept can be accommodated in actions under s.52 of the *Trade Practices Act 1974* (Cth).<sup>13</sup>

#### The way forward?

One might ask whether the decision is making the statement that people who face dire medical prospects may lawfully receive a lower standard of care that patients who face reasonable prospects.<sup>14</sup> Rather than being seen as a gate to excessive compensation for remote possibilities, application of loss of chance to medical negligence matters could be seen as an economically effective mechanism for making damages awards that reflect the realities of the chances faced by a plaintiff – truth in damages.

Gummow ACJ noted that the action was brought in negligence alone, and not in contract. Perhaps this is a flag that such cases may more comfortably be accommodated by contract actions.

Undoubtedly, lawyers will consider other ways to obtain pro rata damages in



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such cases. Solicitors advising clients in such cases may need to consider alternate causes of action, such as breach of contract, misrepresentation, or breach of s.52 of the *Trade Practices Act 1974*. A possible conceptual shift was presented by Duncan Graham to the 2010 Australian Lawyers Alliance NSW State Conference.<sup>15</sup> He postulated that the solution in such cases may be in addressing whether the harm may be considered divisible: “One can see that the question of divisibility depends on whether each exposure to

for indivisible injuries.<sup>17</sup> Although one may consider that this is simply inviting in loss of chance by another door, it should be noted that the argument cuts both ways, and may also be employed by defendants in an effort to reduce the degree of liability. Under such reasoning, even if the High Court has cast aside loss of chance as an affront to the doctrine of causation, plaintiffs may still have redress for negligence that, combined with other events, has arguably contributed to a significantly compromised state of health. □

#### ENDNOTES

1. HCA 12 (21 April 2010). The case was decided on pre-*Civil Liability Act 2002* (NSW) common law principles.
2. Australian courts are clear that damages can sound for a breach of contract that results in a lost chance of an opportunity or benefit, albeit that this comes into play with respect to calculation of damages. Similarly, the concept can be accommodated in actions under s.52 of the *Trade Practices Act 1974* (Cth).
3. M.A. Meldrum, “Loss of chance in medical malpractice litigation: Expanding liability of health professionals versus providing justice to those who have lost” (Nov 2001) 9(2) *JLM* 133 at 213. The United Kingdom does not recognise loss of chance as a head of damage in medical negligence cases.
4. [2004] NSWCA 391.
5. *Ibid* at [17].
6. Arguments have been made that the issue should be whether the chance ‘exists’ on the balance of probabilities.
7. *Tabet v Gett* *Ibid* at [11].
8. *Ibid* at [58].
9. *Ibid* at [47].

10. *Ibid* at [97].
11. *Ibid* at [102].
12. See *Sellars v Adelaide Petroleum NS & ors; Poseidon Ltd v Adelaide Petroleum NS & ors* 179 CLR at [139] to [352] per Mason CJ, Dawson, Toohey and Gaudron JJ. Also, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64.
13. *Ibid*. The plaintiff successfully argued that the defendant’s misleading and deceptive conduct caused the plaintiff to be robbed of a valuable commercial opportunity. The majority was prepared to recognise lost commercial opportunity as representing loss, even if the chances of realisation of the opportunity were less than 50 per cent.
14. See Luntz, “Loss of chance” in *Causation in Law and Medicine*, edited by I. Freckelton and D. Mendelson (1992) at 183, quoted by Santow JA in *Rufo v Hoskings* op cit, at [25].
15. See D. Graham, “Divisibility, indivisibility and lost chances”, 26 February 2010, Australian Lawyers Alliance NSW State Conference, 19-20 March, 2010.
16. *Ibid* at p.8.
17. *Dingle v Associated Newspapers Ltd* [1961] 2 QB 163 at 188. □