

Naxakis v Western General Hospital – an addendum

(unreported Supreme Court of Victoria 15 October 1999)

BY IRENE LAWSON, MELBOURNE
.....

Since the last case note (*Plaintiff* October 1999) this case has been before the Courts for further judicial consideration.

Following the High Court of Australia decision to allow the Plaintiff's appeal against the trial judge's decision to take the case away from the jury and the finding that there was no evidence capable of sustaining allegations of negligence a new Trial was ordered.

The plaintiff subsequently made an application to amend the Statement of Claim to claim damages for loss of chance. This raised the issue whether lost chance recovery is arguable.

Hedigan J ruled that it was not arguable in the light of recent authority and refused the amendment.

The case concerns a claim for damages by an infant plaintiff who sustained head injuries as a result of two blows to his head from a schoolbag. He was admitted to Western General Hospital where he came under the care of neurosurgeon Mr Jensen. He diagnosed a subarachnoid haemorrhage. This diagnosis proved incorrect as the plaintiff had a cerebral aneurism which was surgically dealt with. Tragically the plaintiff suffered serious permanent physical and

intellectual impairment as a result of the bursting of the aneurism.

Hedigan J confirms that the general principle applies so that amendments of a pleading that are arguable will ordinarily be allowed unless some injustice to the opposite party would occur which cannot be compensated for by the imposition of terms.

While it is acknowledged that loss of chance claims may be compensable in certain instances, Hedigan J ultimately rejected the amendment on the basis of what he perceived as the High Court's unfavourable view of lost chance recovery in medical negligence proceedings arising out of treatment. Hedigan J founded his judgement on the High Court decisions of *Chappel v Hart* and *Naxakis* itself.

However, while he asserted that lost chance recovery was viewed as impermissible, it is arguable whether the High Court did in fact reject lost chance recovery in such categorical terms. Indeed, the notion was only considered by Gaudron and Callinan JJ, neither of whom made definitive statements.

While Gaudron J in *Naxakis* approved loss of chance recovery where no other loss is involved, "different considerations apply where the risk eventuates and physical injury ensues". Specifically, she noted that lost chance recovery does not necessarily work for the benefit of the individual plaintiff, as damages are assessed according to the value of the chance, not the injury.

Similarly, assessment of damages depends on speculation of statistical analysis, thereby depersonalising the valuation. Finally, as outlined in *March's case*, philosophical and scientific notions are discarded in favour of a commonsense approach which allows that "breach of duty coupled with an event of the kind which might thereby be caused is enough to justify an inference" of causation.

While acknowledging that the loss of chance approach is not without its difficulties, Callinan J appeared more amenable to lost chance recovery.

It remains, contrary to Hedigan J's view, to be judicially determined by the High Court of Australia whether the Court has dealt with the issue in such a way that it is reasonable to conclude that a clear majority of the Court is against lost chance recovery in medical negligence proceedings arising out of treatment.

The Victorian Court of Appeal refused leave to appeal against the interlocutory order of Hedigan J disallowing the amendment in respect of the claim for damages for loss of chance. The application came before Judges Winnecke and Buchanan who refused the application on the grounds that Hedigan J's decision was not manifestly wrong. The Court made no statement about the substantive issue whether loss of chance is a cause of action recognised by the law.

An appeal to the High Court may be considered. ■

Irene Lawson is a partner at Slater & Gordon, GPO Box 4864 Melbourne 3001, DX 229 Melbourne. PHONE (03) 9602 6888, FAX (03) 9600 0290, EMAIL ilawson@slatergordon.com.au