Absence of evidence

By David Hirsch

What happens where evidence critical to the plaintiff's case does not exist – due to the defendant's own negligence?

In *Gavalas v Singh*[1] the plaintiff alleged that the defendant failed to diagnose his brain tumour in a timely fashion. When the diagnosis was finally made, the tumour had grown to the point where it could not be completely cut out without risking damage to other brain structures. The residual tumour caused significant ongoing injuries to the plaintiff, including epilepsy.

The critical issue on causation was the likely size of the tumour at the time when it ought to have been diagnosed. The period of negligent delay was only 10.5 weeks.

The defendant's experts said that during the brief period of negligent delay it was *impossible* for the tumour to have grown from a size that would have been completely resectable to a size where it was not. The plaintiff's experts said that rapid growth during the 10.5-week period was *possible*, although unlikely. The trial judge found that the plaintiff had *lost a chance* of avoiding his ongoing injuries and awarded damages accordingly.

In an appeal limited to quantum of damages, Smith AJA observed that:

> 'It may also be said to be unjust and contrary to the underlying policy objectives [of tort law] for a plaintiff to be denied compensation because critical evidence is unavailable as a result of the negligence of the defendant. The present case is such a case. It was the negligence of the defendant that prevented the parties knowing what the size of the tumour was at 25 October 1990.'[2]

His Honour's comments, although clearly *obiter*, raise an issue often encountered in medical negligence cases: what does the plaintiff do when the defendant's negligence prevents facts from coming to light that are critical to establishing the cause of action?

In a case where there has been a failure to diagnose meningitis, for example, the plaintiff may allege a negligent failure to perform a lumbar puncture. Information about the cerebrospinal fluid (CSF) obtained from a lumbar puncture can be important to prove causation. A lumbar puncture could demonstrate that the plaintiff's CSF status was favourable and so antibiotics given at that stage would probably have prevented the poor outcome. Without this information the plaintiff's case can go no further than the general statement: '*The earlier the treatment, the better the chance of a good outcome.*' The defendant will counter that meningitis often spreads quickly and poor outcomes are common even with prompt treatment. The judge might decide that, on the issue of causation, the plaintiff's case does not go past *mere speculation*.

Another example is a case of birth trauma involving late delivery, hypoxic brain damage, and the failure to perform continuous CTG monitoring. The plaintiff asserts that if monitoring had been done, any foetal heart problems could have been detected earlier, leading to faster delivery and no brain damage. But in the absence of monitoring, the plaintiff cannot demonstrate what the foetal heart rate might have been. The defendant will say that reduced foetal heart rate leading to hypoxia can occur very quickly at the end of the labour without any warning signs that might have been detected by earlier monitoring. In such a case, the plaintiff cannot show that the failure to monitor the heart rate, though negligent, would have led to earlier delivery and avoidance of the brain damage.

Should negligent defendants be able to exploit the absence of evidence in the plaintiff's case, where it was their own negligence that prevented the evidence from coming into existence? According to Smith AJA, this would be unjust and contrary to the policy objectives of tort law.

But Justice Smith's comments cannot be read as giving the plaintiff licence to 'fill in the blanks' and invite the court to infer facts to his or her advantage. You cannot prove a fact by pointing to absence of evidence to the contrary.[3]

A plaintiff whose ability to prove a critical fact is hampered by the defendant's negligence must still lead evidence pointing to (at least) the possibility that the missing information could have yielded the desired information. Whether the possibility is found to have been slight or strong, or whether it could be elevated to a probability, may be influenced by the importance of the breach of duty in the overall context of the patient's care.

In the end, the consequences of the uncertainty created by the defendant's negligence might be resolved in an award of damages for *loss of chance*, as occurred in *Gavalas v Singh*.[4]

Plaintiff lawyers should remember this argument next time they find themselves unable to lead evidence on critical issues of fact because the negligence of the defendant has deprived them of the information they need. ■

Notes: **1** [2001] 3 VR 404 (Victorian Court of Appeal). **2** *Ibid* at 417. **3** In *Jones v Dunkel* (1959) 101 CLR 298 Kitto J said: "One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed." **4** The loss of chance analysis was approved in *Rufo v Hosking* [2004] NSWCA 391 and in *State of NSW v Burton* [2006] NSCA 12.

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