Naxakis v Western & General Hospital - [1999] VSC 389

SUPREME COURT OF VICTORIA

CAUSES JURISDICTION

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No. 4132 of 1986

PARASKEVAS NAXAKIS Plaintiff

v

WESTERN & GENERAL HOSPITAL
and
DAMIEN JENSEN Defendants

JUDGE: HEDIGAN, J.

WHERE HELD: Melbourne

DATE OF HEARING: 7 October 1999

DATE OF JUDGMENT: 15 October 1999

CASE MAY BE CITED AS: As Above

MEDIA NEUTRAL CITATION: [1999] VSC 389

MEDICAL NEGLIGENCE – Application to amend Statement of Claim to claim damages for loss of chance – Whether lost chance recovery arguable – Not arguable in the light of recent authority – Amendment refused.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr. N. Moshinsky, Q.C. Mr. V. Morfuni	Swersky & Velos
For the Defendants	Mr. B. Bongiorno, Q.C. Mr. F. Saccardo	Blake Dawson Waldron

NAXAKIS v. WESTERN GENERAL HOSPITAL

HIS HONOUR

1. The plaintiff in this proceeding has made application by summons of 24th September to amend his statement of claim.

2. It is not necessary for me to set out the lengthy history of this proceeding. I say no more than that the infant plaintiff sustained head injuries allegedly first in the school grounds of the school he attended and not long thereafter outside the school grounds, as a consequence of some schoolboy fight or violence which led to the plaintiff later being admitted to the Western General Hospital where he came under the supervision of a neurosurgeon Mr. Jensen. The plaintiff was diagnosed as having had a sub-arachnoid haemorrhage. This diagnosis proved to be incorrect as he had a cerebral aneurism which was surgically dealt with. Unhappily, the plaintiff sustained serious permanent physical and intellectual impairment as a result of the bursting of the aneurism. These events all took place in 1980. The infant plaintiff brought proceedings against a number of defendants including the State of Victoria, teachers and a doctor other than Mr. Jensen.

3. As is well known, at trial the plaintiff's case was taken away from the jury, the view of the trial judge being that there was no evidence capable of sustaining the allegations of negligence. This decision was appealed and upheld in the Court of Appeal. On the grant of special leave the High Court of Australia overturned both previous decisions and has remitted the proceeding for re-trial. The matter has come under my management in the Major Torts List.

4. The plaintiff has abandoned or discontinued proceedings against all defendants other than the Western General Hospital and Mr. Jensen. The plaintiff seeks to re-cast the statement of claim and have amendments made to limit the proceeding to the case against the fourth and sixth defendants. Essentially those application to amend the statement of claim are not opposed. The other main amendment sought by the amended statement of claim is to add a claim for the loss of a chance, a matter which was dealt with by two of the judges in the High Court of Australia on the Naxakis appeal to that Court.

5. I deal first with some particulars of negligence of the defendants that have been pleaded in paragraph 8A of the proposed amended statement of claim, the allowance of which has been opposed by the defendants. Those particulars are:

> "8A. Particulars of Negligence of the Fourth and Sixth-named Defendants.
>
> ...
>
> (e) failing to continue or maintain treatment of the plaintiff in the face of ongoing symptoms;
>
> (f) discharging the plaintiff in the face of ongoing symptoms without sufficiently diagnosing the same;
>
> (g) failing to consider an alternative diagnosis of aneurysmal haemorrhage."

Essentially the defendants' opposition to this amendment is a complaint that there are insufficient particulars of the treatment and ongoing symptoms referred to. However I view this aspect from the perspective that there has been already a substantial half-trial in which the plaintiff's medical evidence was called and cross-examined upon and that there have been exchanges of medical reports. I do not doubt that the defendant is well aware of the way in which the plaintiff proposes to put the case on the re-trial and is not at any disadvantage in terms of not knowing the case or not having access to appropriate particulars. It seems to me that what the defendants seek amounts to some indication of the evidence proposed to be called, to which the defendants are not entitled. I note that Mr. N. Moshinsky, one of Her Majesty's counsel with whom Mr. V. Morfuni appeared, stated in open court that the alternative investigations that the plaintiff will contend should have been undertaken were (i) failing to conduct an angiogram on the plaintiff (already pleaded) and (ii) failing to have a CAT-scan with contrast, a matter already ventilated in both the Court of Appeal and the High Court of Australia, according to counsel. Accordingly I propose to allow the amendments to paragraph 8A in their entirety and no request for further and better particulars will be allowed.

6. The principal issues that the parties addressed before me is the proposed amendment to add to paragraph 10 the following terms:

> "10. In the alternative, by reason of the defendants' breach of duty which is particularised in paragraph 8A(g) herein, the plaintiff lost a valuable chance that the defendants would have undertaken proper tests to establish aneurism or sub-arachnoid haemorrhage as the cause of the plaintiff's bleeding and further lost a valuable chance of proper treatment of his condition."

7. In support of this application, Mr. Moshinsky first submitted that the relevant principle and the claim for the loss of a chance were arguable. He relied upon various statements of legal principle, to the effect that if the facts alleged set up an arguable case for the cause of action the judge on interlocutory proceedings should not attempt to determine the result. Thus if the proposed amendment with its particulars raise an arguable case, that was sufficient. He relied upon *Woodhead Australia (South Aust) Pty. Ltd. v. The Paspalis Groups of Companies & Anor* (1991) 103 F.L.R. 122; and *Hall v. National and General Insurance Co. Ltd.* [1967] V.R. 355 at 367, Gowans, J. there stating "A claim sought to be raised by amendment may appear to have not much chance of success, but unless that is demonstrably so, the amendment should not be refused.". Also *The Commonwealth v. Verwayen* (1991) 70 C.L.R. 394, particularly statements of Dawson, J. at 456. I refer also to *Howarth v. Adey* [1990] 62 V.R. 535 and *State of Queensland v. J.L. Holdings Pty. Ltd.* (1997) 189 C.L.R. 146.

8. Thus the general principle is 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. In any event, Mr. Bongiorno, Q.C., who appeared with Mr. F. Saccardo for the defendants, did not dispute the principle referred to nor the power of the Court to amend, confining his submissions to the critical issue as to whether or not a case for the loss of chance in a medical negligence case concerning treatment could possibly succeed, having regard to statements by the High Court of Australia.

9. Thus the argument focussed primarily on recent statements of various members of the High Court of Australia and I commence with the decision in *Chappel v. Hart* (1998) 156 A.L.R. 517.

10. The appellant Chappel, in the course of an operation on Mrs. Hart, perforated her oesophagus so as to cause damage to it and her vocal chords, leading to voice loss. The evidence was that although that operation was elective, it would have had to be performed at some time in the future. The case was a case of failing to warn as to the possible consequences, and of infection. The plaintiff established at trial that if she had been warned of the risks of the operation, she would not have undergone the surgery when she did but would have taken steps to have the operation carried out by a highly experienced specialist surgeon. The trial judge held that Dr. Chappel was in breach of his duty owed to the respondent to warn of risks and that the breach of duty caused the injury. An appeal by the doctor to the Court of Appeal was dismissed and a further appeal to the High Court failed by a majority of three to two. The appeal was much concerned with the issue of causation. But the appellant contended that the damage sustained by the respondent was not physical injury, but the loss of the chance to have the surgery performed by somebody else at some other time and on the facts in this case the respondent did not lose a chance of any value. It was also argued there was no causal connection between the doctor's failure to give adequate warning and the damage suffered. By a majority, Gaudron, Gummow and Kirby, JJ. (McHugh and Hayne, JJ. dissenting) causation was held to have been established. Additionally, however, it would appear, that in the view of Gaudron, McHugh, Kirby and Hayne, JJ., it was not appropriate to analyse the case as one of loss of a chance. Gaudron, J. (see paragraphs 5 and 6) stated that that issue:

> "can be put to one side because, clearly, the damage sustained by Mrs. Hart was not the loss of a chance -–valuable or otherwise – but the physical injury which she in fact sustained.
>
> The argument that the damage sustained by Mrs. Hart was simply the loss of a chance must be considered in the context concerned with the assignment of legal responsibility. In that context, philosophical and scientific notions are put aside and causation is approached as a question of fact to be answered 'by applying common sense to the facts of the particular case'." (See *March v. E. and M.H. Stramare Pty. Ltd.* (1991) 171 C.L.R. 506.)

McHugh, J. [50] stated:

> "The plaintiff also sought to rely on an alternative case that she lost the chance of having the procedure performed without a perforation occurring. However, this is not a case concerned with 'loss of a chance' as that phrase is understood in the many cases that have come before the Court since *Chaplin v. Hicks* authoritatively decided that a loss of a chance or opportunity was compensable in damages. No part of the relationship between the plaintiff and the defendant involved her being given the opportunity to seek a higher standard of care or better treatment from another surgeon or opportunity to have the procedure carried out without perforation of the oesophagus. Her relationship with the defendant gave her a legal right to have her condition examined, diagnosed and treated with reasonable care

> and skill by the defendant and to be informed and advised by him of any material risk inherent in the proposed procedure. But nothing in that relationship required the defendant to provide opportunities of the kind to which I have just referred. The damage that the plaintiff suffered was physical injury, not loss of a chance or opportunity. That being so her claim stands or falls according to whether the physical injury that she suffered was causally connected for legal purposes with the defendant's failure to warn."

Gummow, J. at [76] stated:

> "... This is not a case in which Mrs. Hart seeks damages for the loss of an opportunity or a chance to acquire or receive a benefit with a value to be ascertained by reference to the degree of probabilities or possibilities. As it is as explained in *Sellars v. Adelaide Petroleum NL*, in Australia this generally is what is involved in the 'loss of a chance' cases. Similarly in *Athe y v. Leonati* the Supreme Court of Canberra observed:
>
> > 'The [loss of chance] doctrine suggests that the plaintiffs may be compensated where their only loss is the loss of a chance of favourable opportunity or of a chance of avoiding a detrimental event.'
>
> Rather, Mrs. Hart claimed damages for the injuries she sustained. To make good her case and to obtain the award of damages she recovered, Mrs. Hart was not required to negative the proposition that any later treatment would have been attended with the same or a greater degree of risk."

Kirby, J. [93.9] stated:

> "It is clearly laid down by the authority of this Court that, in some circumstances, a plaintiff may recover the value of the loss of a chance caused by a wrongdoer's act or omission. The approach also has some judicial support in the context of medical negligence in England, Canada and the United States."

After referring to various commentators and other considerations, Kirby, J. stated:

> "... the weight of judicial opinion in England and Canada, and some academic writing appears to be critical of the application of the loss of a chance theory to cases of medical negligence. In part this is because, where medical negligence is alleged 'destiny ..[has] taken its course', arguably making an analysis by reference to chance inappropriate or unnecessary in view of the critics of this approach.'

The academic writing referred to (see footnote 155) "*Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability"* Perrochet, Smith and Collela (1992) 27 Tort and Insurance Law Journal 615 strongly criticized the theoretical approach to the foundation of lost chance recovery, propounded by Professor King in his 1981 article "*C ausation, Valuation and Chance in Personal Injury Torts involving pre-existing Conditions and Future Consequences"* 90 Yale L.J. 1353, an approach followed by

superior courts in some U.S. States. But the majority of State jurisdictions in U.S.A. do not recognise lost chances as compensable interests and adhere to the traditional medical probability standard of causation. The thrust of the 1992 article is to caution against recognition of the lost chance as a compensable injury, on policy grounds.

11. Hayne, J. [134 to 144] exposed some of the inherent difficulties in the application of the loss of a chance principle to cases of medical negligence, by asking a series of rhetorical questions including the difficulties of assessment of the value of the chance that has been lost.

12. In *Naxakis* itself, (1999) 162 A.L.R. 540 , of the five judges constituting the Court (Gleeson, C.J., Gaudron, McHugh, Kirby and Callinan, JJ.) only Gaudron and Callinan, JJ. addressed the loss of a chance issue. Gaudron, J. ([28] and following) with respect to the argument that the appellant had lost a valuable chance of successful surgery, stated:

> "In the view that I take of the evidence in this case it is not strictly necessary to consider that ... argument. However, as there must be a re-hearing, it is appropriate that I express my view on the notion that, in a case such as the present, damages are recoverable for the loss of a chance."

After referring to *Sellars v. Adelaide Petroleum NL* (1994) 179 C.L.R., Gaudron, J. stated:

> "... there is no reason in principle why the loss of a chance or commercial opportunity should not constitute damage for the purpose of the law of tort where no other loss is involved. However different considerations apply where, as here, the risk eventuates and physical injury ensues."

She later stated [32 and 33]:

> "The notion that, in cases of failure to diagnose or treat an existing condition, the loss suffered by the plaintiff is a loss of a chance, rather than the injury or physical disability that eventuates, is essentially different from the approach that is traditionally adopted. On the traditional approach the plaintiff must establish on the balance of probabilities that the failure caused the injury or disability suffered, whereas the lost chance approach predicates that he or she must establish only that it resulted in a loss of a chance that was of some value. As already indicated, it has been suggested that the lost chance approach avoids problems of proof of causation. However, it may be that if damages were to be awarded for the loss of a chance the difficulties associated with proof of causation would simply re-appear as difficulties in establishing the value of the chance in question.
>
> Moreover, the lost chance approached is not one that necessarily works for the benefit of the individual plaintiff. If damages were to be awarded for the chance lost, rather than the actual injuries or disabilities suffered, consistency would require the damages be assessed according to the value of the chance, not the injury or disability. Thus, a chance which is 51 per cent

> or greater but less than 100 per cent must result in an award of damages than would be the case of damages that are ordered for the injury or disability which eventuates."

She went on to say [35]:

> "There is a further difficulty in allowing damages for the loss of a chance in a case such as the present. Assessment of the value of the chance must depend either on speculation of statistical analysis. And in the case of statistics, there is the difficulty that a statistical chance is not the same as a personal chance."

After referring to some statements of Croom-Johnson, L.J. in *Hotson v. East Berkshire Area Health Authority,* (1987) A.C. 750, she later said:

> "For the purpose of assigning legal responsibility, philosophical and scientific notions are put aside (citing *March v. Tramare* and *Chappel v. Hart*) in favour of a commonsense approach which allows that 'breach of duty coupled with an (event) of the kind that might thereby be caused is enough to justify an inference, in the absence of any sufficient reason to the contrary, that in fact the (event) did occur owing to the act or omission amounting to the breach'. For that reason, I am of the view that the notion that, in a case such as the present, a plaintiff can recover damages on the basis that what has been lost is a chance of successful treatment must be rejected."

Callinan, J. was the only other judge to address the matter of loss of a chance. Having expressed the view that the jury were entitled to hold that the failure of Dr. Jensen to undertake an angiogram or give any consideration to the undertaking of one materially contributed to the plaintiff's condition, his Honour went on to say [128]:

> "They would be also entitled to take an alternative view that the second respondent's conduct, although it might not be possible to say (on the balance of probabilities) that it definitely materially contributed to the plaintiff's final condition, at least caused him to lose a valuable chance (the value of which it was for them to assess) of avoiding being in the condition that he now finds himself. There is still, in my opinion, room for the operation of the loss of chance rule (particularly in cases involving the practice of what is even today said to be an art rather than a scientific skill) enabling a plaintiff to recover damages to be equated with, and reduced to the value of the chance he or she has lost, rather than the damages which would be appropriate if it has been proved on the balance of probabilities that the plaintiff's condition owes itself to the defendant's acts or omissions."

Callinan, J. stated [129]:

> "It must be acknowledged that this approach is not without its difficulties. If the chance that has been lost is a 51 per cent of greater chance, why should not the plaintiff be taken to have proved his or her case on the balance of probabilities? I think that in such a situation the plaintiff, has and should recover his or her damages in full."

He also acknowledged that there is a risk, perhaps almost in every case, that there might be said that there is a lost chance of some kind, even a one per cent chance but that such low level chances are so remote that the loss of a remote chance is not sufficient to attract an award of damages because the lost chance would not in those circumstances be a real one.

13. Essentially Mr. Moshinsky's argument was that although some observations unhelpful to the lost chance case had been made in *Chappel v. Hart*, the statements were not necessary for the decision and even then were made in a context different from the situation in *Naxakis*. He acknowledged that whilst Gaudron's, J.'s view as expressed in *Naxakis* to the contrary of a case for a loss of a chance in this case was strong and undoubted, it could not be said that the point was unarguable because it was supported by Callinan, J. and not necessarily rejected in *Chappel v. Hart* .

14. Mr. Bongiorno submitted that this Court's approach should not be governed by the necessities of seeking out absolutely binding authority, in the lawyer's precedent sense, if it was apparent that the weight of legal opinion was the contrary of the matter argued for. He submitted that the case against allowing the amendment was very strong and that, founded upon a practical approach and a common sense construction of what amounted to "arguable", the amendment ought not be allowed as it was likely to be rejected on any appeal, if a verdict were obtained.

15. I am mindful of the requirements of satisfaction denoted by superior courts in respect of this sort of issue. There is a natural inclination to allow an amendment (subject to prejudice and costs matters) that raises an arguable issue. What is unusual in this case is that the point of principle (although its application is not as clear cut) has been very recently considered, not only in *Naxakis* itself but in *Chappel v. Hart* , so that one has, in advance so to speak, some perspective as to how the final Court of Appeal in this country might view the additional cause of action for damage sought to be raised. Even allowing for some variants, it is difficult to resist the conclusion that with respect to a case of alleged medical negligence in the course of treatment (as distinct from advice) the law would not and should not entertain a claim for damages for loss of a chance. It is unnecessary, and perhaps in itself futile, for me to identify the reasons against allowing it, many of which have been identified in the learned judgments to which I have referred. Notwithstanding the statements of superior courts in *Howarth v. Adey, and J.L. Holdings*, (supra) there is an obligation on trial judges not to burden trials with unnecessary and barely arguable points, for the sake of obeisance to some principle that every issue that every litigant might want to raise must be entertained. I find it verging on the impossible to accept that in the case of emergency treatment by a medical practitioner of an injury that a claim for damages could be made on the basis that the chance of getting other and better treatment was lost.

16. As a number of the judgments to which I have referred indicate, the damage in such cases is not the loss of a chance but the injury that is sustained as a result of a negligence, if it is established, which occurred. It may well be that cases of advice by a medical practitioner as to a course which ought to be followed might stand in a different position, as the pursuit of the opportunity of alternative opinions is much more likely. It should be said, however, that having regard to statements made in the cases to which I referred, even in such cases there is a powerful argument against permitting it as a foundation to claim loss and damage. But the difficulties inherent in permitting a claim for lost chance in a case of a doctor making

decisions about the treatment and management of persons then and there presenting with symptoms from recent trauma are to my mind almost self-evident. A claim against the doctor founded upon an adjudged departure from the reasonable standards of professional negligence is another matter, and commonplace in the conduct of litigation of this kind.

17. To add to the debate within trial, and for the consideration by the jury, philosophical considerations or statistical risk analysis of the lost chance of getting different, and arguably better, medical decision-making is unacceptable and ought to be avoided. I do not devote detailed attention to the serious problems, adverted to in some of the judgments, that attend trial management in these respects. I raised some of these matters with counsel, such as the fashioning by trial judges of appropriate directions in such cases. The difficulties of moulding directions that do not confuse, in a case in which the allegation is of damage caused by the negligence of the medical practitioner, and a claim for damage for the loss of the chance of getting a better doctor, or a better diagnosis, or better treatment, should not be underestimated. As the decision in *March v. Stramare* and its subsequent applications consistently indicate, a common sense and practical approach to the resolution of the legal problems in relation to causation, liability and damage within this sphere (including loss and damage arising from professional negligence) is not only desirable but of considerable importance in the transaction of the legal business of Courts in all States. The difficulties of elucidation of these complex concepts to juries (the commonplace tribunal of fact in these cases) might be illustrated by simply considering how the jury will be asked to assess damages for the loss of a chance in the alternative, once it has rejected the case that the defendant medical practitioner's negligence caused the injury and loss complained of. It is likely that that task could only be performed by assessing the damages as though there was a right to them and then evaluating the lost chance in percentage terms, possibly after hearing actuarial evidence about chance.

18. However, it is not necessary for me to resort to practical considerations of that kind. In my view, the judges of the High Court have 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.

19. I have reached the conclusion that the proposed amendment of the plaintiff's statement of claim to add paragraph 10 should not be allowed and I reject it.

PARASKEVAS NAXAKIS

v.

WESTERN & GENERAL HOSPITAL & DAMIEN JENSEN

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CERTIFICATE

I certify that the preceding 11 pages are a true copy of the reasons for judgment of Hedigan, J. of the Supreme Court of Victoria delivered on 15 October 1999.

DATED this day of 1999.

.....
Associate

Cited by:

Rufo v Hosking [2004] NSWCA 391 (01 November 2004) (Hodgson and Santow JJA, Campbell AJA)

45 However, it would be productive of injustice if the plaintiff were to receive 100% of the loss where a chance or prospect exceeds 50% (say 51%) yet receive nothing at all if such loss were, say, 49%. The fairest solution is to base compensation on whatever be the percentage, whether above or below 50%, wherever one is dealing with future events or hypothetical ones. As Luntz (supra) at 195 puts it, referring to a 1992 article:

> "The article that Hedigan J in *Naxakis* 145 found persuasive does advance reasons of policy for denying the extension of liability to loss of chance. One is obviously spurious. The article refers to two commentators and two courts that have pointed out that loss of chance leads to statistically more wrong decisions than right ones. In a group of 99 cases, of which only 33 would have survived, allowing recovery for all 99 means that 66 are wrongly decided. This is like saying that a clock that has stopped is better than one that is a minute fast, since it is right twice a day, whereas the one that is fast is never right! Most people would prefer the fast watch to the stopped one as being much more useful. In this example, the defendant would, if loss of chance were denied, never pay any compensation despite repeated acts of negligence. By requiring the defendant to pay 33 per cent of the assessed damages to all, the defendant compensates exactly the total damage that has been caused by negligence."

138 L Perrochet, SL Smith & U Collelo, "Lost Chance Recovery and the Folly of Expanding Medical Malpractice Liability" (1992) 27 Tort & Ins LJ 615.
145 [1999] VSC 389 (Vic SC, Hedigan J, 15 October 1999, unreported, BC 9906720).

Gavalas v Singh [2001] VSCA 23 (22 March 2001) (Ormiston and Callaway, Jj.A and Smith, A.J.A)

40. A passage in the judgment of McHugh, J. in *Chappel v Hart* suggests a possible approach to the issue which may avoid some of the criticisms . His Honour, at the end of his judgment, stated that that case was not a "loss of chance" case. His Honour went on:

> "No part of the relationship between the plaintiff and the defendant involved her being given the opportunity to seek a higher standard of care or better treatment from another surgeon or an opportunity to have the procedure carried out without perforation of the oesophagus. Her relationship with the defendant gave her a legal right to have her condition examined, diagnosed and treated with reasonable care and skill by the defendant and to be informed and advised by him of any material risk inherent in the proposed procedures. But nothing in that relationship required the defendant to provide opportunities of the kind to which I have just referred. The damage that the plaintiff suffered was physical injury, not loss of a chance or opportunity."[31]

His Honour was there emphasising the importance of establishing whether the relationship carried with it an obligation to give an opportunity of the kind alleged. In that situation it may well be that the relationship carries an obligation to give an opportunity for timely treatment [32] . Often in the patient doctor relationship the relationship may be said to involve an obligation on the part of the doctor to give the patient certain opportunities such as the opportunity for timely treatment and, so, a better outcome – usually in the diagnosis of illnesses and the giving of advice. Where, however, the medical practitioner is negligent in administering an appropriate treatment or surgical procedure it may be inappropriate to speak of the relationship involving the giving of an opportunity for a better outcome.

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[32] Note, Hedigan, J in *Naxakis v Western & General Hospital & Anor* [1999] VSC 389 (15 October 1999) drew a distinction between loss of a chance in the course of treatment as distinct from advice.