to the defendant's position – that it was sufficient for the purposes of the time period starting to run that the injury was caused by an act or omission of the defendant.

Significantly, other sections of the Act used the phrase 'act or omission',[5] whereas in the applicable section denoting date of discoverability, the word 'fault' was used. At trial, the judge concluded that this difference was significant, and found in favour of the plaintiff.

This position was in contrast to earlier Court of Appeal authority, which had found that the words 'act or omission' did not mean negligent act or omission for the purposes of time starting to run.[6]

The legislation being considered in the current case, however, was after the earlier Court of Appeal authority and Parliament had chosen to specifically use the word 'fault'. Further, the 12-year long-stop period for such claims meant that such claims did have a final end point.

The decision is a good one for plaintiffs. While its application may be somewhat limited in terms of the claims that it may affect, it nonetheless provides leeway for those injured plaintiffs who, without the common sense approach taken by Parliament and subsequently by the court, would be statute-barred and possibly without access to justice as a result of circumstances out of their control or imputed knowledge that they couldn't reasonably be expected to have. ■

Notes: **1** Section 27D(1)(a) of the *Limitation of Actions Act 1958* (Vic). **2** Section 27F(1)(b) of the *Limitation of Actions Act 1958* (Vic). **3** *Spandideas v Vellar* [2008] VSC 198. **4** *Vellar v Spandideas* [2008] VSCA 139. **5** For example, ss27D(1), 27D(2) and 27E(1). **6** *Mazzeo v Caleandro Guastalegname & Co* (2001) 3 VR 172.

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Delayed diagnosis, peer professional opinion and causation

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

By Dimitra Agiannitopoulos

On 29 October 2008, Justice Hoeben of the NSW Supreme Court found BreastScreen NSW Sydney South West negligent for failing to recall the plaintiff, Christine O'Gorman, for further testing following a mammogram performed in February 2006. The plaintiff was awarded just over $400,000 in damages for the delayed diagnosis of breast cancer and its metastatic spread to her lungs and brain.

At the time the expedited proceedings were heard, the 57-year-old plaintiff was terminally ill, with only months to live.

When handing down his judgment, Hoeben J said he expected the case would almost certainly be appealed. And it was. The appeal is fixed for hearing on 4 June 2009.

THE FACTS

The plaintiff started undergoing regular two-yearly screening mammograms at BreastScreen in 1994. Prior to each examination, the plaintiff signed a form consenting to the mammogram being compared with previous mammograms and acknowledging that there remained a 'small risk' that cancer might not be detected with a screening mammogram.

Following the last screening mammogram performed on 23 February 2006, the plaintiff received a letter, as she had on each previous occasion, advising that there was no visible evidence of breast cancer, but that there remained a chance that cancer may not be seen.

In January 2007, the plaintiff felt a hard lump in her left breast. She underwent a mammogram and ultrasound, which revealed cancer in the left breast. The plaintiff underwent chemotherapy to shrink the tumour and then, later, a mastectomy. No lymph nodes were removed, as a biopsy had shown them to be cancer-free.

In May 2008, metastatic spread of the cancer to the lungs was diagnosed. Shortly thereafter, testing revealed the presence of brain tumours.

BREASTSCREEN PROCEDURE

Evidence was led in the case distinguishing screening mammograms from diagnostic mammograms. Screening mammograms are performed to detect unsuspected lesions on asymptomatic women, who are recalled for further testing as required. On the other hand, the purpose of diagnostic mammograms is to diagnose breast abnormalities previously detected clinically. A full report is provided in those cases.

The usual practice with screening mammograms is to

view the mammogram films together with the films from the penultimate visit (that is, the mammogram performed four years earlier). The films are to be read independently by two radiologists. They have three computer recording choices, either to:

- make a normal finding;
- recall for further assessment; or
- repeat the test where there are any technical difficulties.

The ability to make handwritten notations has not been available since 2000.

The two radiologists who reported on the February 2006 mammograms in this case gave evidence that they had no actual recollection of reading the plaintiff's films (hardly surprising, given the evidence that, on average, 60 patient films would be viewed in an hour) and that they would have looked at the plaintiff's previous films and file at the time of reporting.

SCOPE AND BREACH OF DUTY OF CARE

The plaintiff was undergoing screening mammograms, which Hoeben J accepted should be distinguished from diagnostic mammograms. He accepted that screening mammograms were part of a sequence of mammograms taken every two years in asymptomatic women. This, in turn, defined the scope of the duty of care the defendant owed to the plaintiff – that is, of a reasonably competent radiologist interpreting mammograms in the context of a mammogram screening program.

In considering the evidence called in the case, Hoeben J found that the mammograms showed that the mass in the plaintiff's left breast had approximately doubled in size between 2004 and 2006. It was principally this increase, together with a combination of other features, that raised the suspicion of malignancy that should have resulted in the plaintiff being recalled for further testing.

His Honour considered s50 of the *Civil Liability Act 2002* (NSW), which provides that a professional does not incur liability in negligence if they act in a manner widely accepted in Australia by peer professional opinion as competent professional practice.

His Honour found that the defence provided by that section was not available. The common expert evidence of both parties was that, *had there been* a significant increase in the size of the mass between 2004 and 2006, the plaintiff should have been recalled. The difference was that the defendant's expert was of the view that the mass was approximately the same size or '..marginally bigger..' in 2006. Since his Honour had already rejected that evidence and accepted that there had been a significant increase in the size of the mass in that period, the defence did not apply.

CAUSATION

Hoeben J found that, had the plaintiff been recalled in 2006 and an ultrasound performed, the tumour would have been diagnosed.

The expert evidence was that the risk of the plaintiff's breast cancer metastasising had increased by approximately 10 per cent as a result of the delayed diagnosis from March 2006 to January 2007.

The defendant submitted that the loss of a chance principle and the decisions of *Rufo v Hosking* [2004] NSWCA 391 and *Dobler v Halverson* [2007] NSWCA 335 should apply. The defendant suggested that the chance of a better outcome lost by the plaintiff should be assessed at 10.2 per cent.

The plaintiff's position was that the breast cancer and subsequent metastatic tumours should be regarded as separate injuries, as the metastasised tumours would not necessarily have developed had the cancer been diagnosed in 2006. Hoeben J accepted this submission and found that the evidence supported the application of the causation principle set out by McHugh J in *Chapppel v Hart* (1998) 195 CLR 232. In that case, McHugh J said:

> 'Before the defendant will be held responsible for the plaintiff's injury, the plaintiff must prove that the defendant's conduct materially contributed to the plaintiff suffering that injury....If a wrongful act or omission results in an increased risk of injury to the plaintiff and that risk eventuates, the defendant's conduct has materially contributed to the injury that the plaintiff suffers whether or not other factors also contributed to that injury occurring.'

His Honour found that there was no scope for the application of the loss of a chance principle. The defendant's conduct had caused the metastatic tumours by increasing the risk of them occurring as a result of the delayed diagnosis.

DAMAGES

Hoeben J awarded the plaintiff $247,500 for non-economic loss, after assessing her at 55 per cent of a most extreme case. The assessment of future loss of earnings was reduced to take into account living expenses, including mortgage payments, that would not be incurred following the plaintiff's death.

CONCLUSION

The decision confirms the Court of Appeal's finding in *Dobler* that s50 of the *Civil Liability Act* operates as a defence. It is therefore for the defendant to establish that the treatment provided is widely accepted as competent professional practice among their peers. However, this interpretation may be unique to NSW where the legislation refers to a professional *not incurring liability* as opposed to, for example, the equivalent Victorian provision (s59 of the *Wrongs Act 1958*), which refers to a professional *not being negligent* if they act in manner consistent with peer professional opinion.

It will be interesting to see what the Court of Appeal has to say about the provision and Hoeben J's rejection of the application of the loss of a chance principle. ■

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