Claim investigation and legal advice

Nigam v Harm (No. 2) [2011] WASCA 221, 18 October 2011

By Tracey Carver

Without doubt, solicitors owe their clients a duty to take reasonable care in carrying out the terms of their retainer.[1] Recently, in *Nigam v Harm (No. 2)*, this duty was considered in the context of a solicitor's liability to a former client for an alleged failure to advise them that a possible medical negligence claim had a reasonable prospect of success. Accordingly, this case sheds light on the obligations of legal practitioners to properly investigate the existence, and merits, of causes of action proposed. In doing so, it also highlights the potential for judicial discretion and divergence, both in the application of principles and evidence relevant to tests of causation, and in the assessment of damages for the loss of a chance of securing civil compensation.

FACTS

The respondent, over many years, had suffered from various gynaecological and other problems, including intermittent stabbing pain on the right-hand side of her stomach, for which she initially consulted Dr Hastwell (a gynaecologist) in May 1990. A retroverted uterus, congestion and possibly endometriosis were diagnosed as the cause[2] and the doctor subsequently performed a diagnostic laparoscopy and a ventrosuspension of the uterus in February 1992. Following the surgery, the respondent experienced pain in the right iliac fossa,[3] and Dr Hastwell then arranged for her to undergo an appendectomy in May 1992. Although the respondent assumed this would be performed laparoscopically, the appendectomy was instead performed through an extended Pfannenstiel incision.[4] Post-operative examination of the appendix found it to be normal.

After this second surgery, the respondent alleged that she suffered from severe unabated pain from the area of the incision which was caused by Dr Hastwell's negligence, and in September 1997 'retained the appellant to investigate and advise on the merits of an action for damages'.[5] To prevent the action from becoming statute-barred in February 1998,[6] a writ was issued against the doctor. However, the writ was never served, nor was an application made to extend its validity pursuant to O7 r1 of the *Rules of the Supreme Court* 1971. Rather, the respondent accepted the appellant's advice that this should not occur 'until the appellant had conducted further enquiries into the claim and obtained medical evidence to support it'.[7] Ultimately, the action became statute-barred.

The respondent, therefore, commenced proceedings against the appellant for negligence in failing to properly investigate the merits of her claim and in failing to keep the action alive.[8] She alleged that she had thereby lost the chance of prosecuting a claim against Dr Hastwell. The appellant argued that, 'consistent with the respondent's instructions', it had not taken steps either to serve the writ or extend its validity 'because on the material reasonably available to it the claim had no reasonable prospect of success'.[9]

DECISION AT TRIAL[10]

Scott DCJ found the appellant negligent in not making further enquiries as to whether the appendectomy was necessary. His Honour also held that the appellant had breached his duty of care by not advising the respondent that there was an arguable cause of action on the basis that:

1. if necessary, the appendectomy should have been performed laparoscopically (and not by Pfannenstiel incision);
2. Dr Hastwell had failed to warn the respondent of the risk of nerve entrapment associated with a Pfannenstiel incision; and
3. the nerve entrapment following the second surgery caused her continuing pain.

Consequently, in those circumstances, the appellant was also negligent in not taking steps to prevent the respondent's claim against the doctor becoming statute-barred. For, 'had the respondent been offered the chance to pursue an action against Dr Hastwell she would have taken it'.[11] Damages of $200,000 (representing 40 per cent of the amount the plaintiff was likely to recover if successful at a notional trial, or the loss of a 40 per cent chance of claiming against the doctor), were then awarded.

DECISION ON APPEAL

The appellant appealed against both liability and assessment of damages. The respondent cross-appealed, arguing that the assessment of damages at 40 per cent was 'so low as to be beyond the limits of a sound discretionary judgment'.[12]

In relation to the general duty of care owed by the appellant in investigating the merits of a client's claim and advising them on it, the court confirmed that the starting point in determining a solicitor's negligence was scope of their retainer.

> '[I]t was not in issue that the appellant's retainer required him to advise the respondent as to the merits of a claim against Dr Hastwell for negligence and for that purpose to take reasonable steps to ascertain full particulars of the treatment provided ... of the pain and suffering of the respondent by reason of that treatment, to investigate any >>

other damage suffered by the respondent by reason of that treatment, and to obtain expert medical advice on any other breach of duty by Dr Hastwell.'[13]

In discharging this duty, the skill expected was that 'of a qualified and ordinarily competent and careful solicitor in the exercise of his or her profession'.[14] However, this required only the making of 'reasonable enquiries in respect of the merits of the respondent's claim'.[15] Consequently, according to Newnes JA:

'...the appellant was not obliged to embark upon speculative enquiries or to pursue lines of enquiry for which there was no apparent basis. Nor was he required to pursue medical opinions until a favourable one was found. Considerations of time, cost and utility dictate that enquiries cannot be unlimited. A solicitor is entitled and, indeed bound, to use professional judgement in the lines of enquiry that are pursued. The question is not what might have been found had more extensive enquiries been made, but whether the solicitor made reasonable enquiries in the circumstances ...'[16]

The court also considered that an assessment of a claim's reasonable prospects of success (for the purpose of determining whether the appellant negligently failed to advise the respondent that she had a sustainable cause of action such that her action should have been kept alive), must be kept 'separate and distinct from [any] assessment of the value of [that] cause of action' (for the purpose of awarding damages based on the chance that such a claim would have succeeded).[17] Nevertheless, 'there could be no negligence in failing to advise a client to embark on litigation which was doomed, and nothing of value could be lost if such litigation were never commenced'.[18] 'It was never the respondent's case that she had lost the chance of pursuing a case without reasonable prospects of success for the purposes of obtaining a settlement.'[19]

The specific issues on appeal[20] were then dealt with as follows:

The appendectomy's necessity and method of performance

As elective surgery illustrates, treatment is not inappropriate simply because 'it is not, or turns out not to have been, "necessary" in the sense of being medically essential'.[21] Therefore, 'where a patient is suffering severe symptoms from an uncertain cause, a surgical procedure that is not otherwise medically necessary may be appropriate in an attempt to relieve the symptoms, although it cannot be known with certainty whether the procedure will in fact have that effect'.[22] Similarly, wrong diagnosis is not necessarily negligent.

Accordingly, Newnes JA (McLure P and Murphy JA agreeing) considered that the issue 'was not whether the appendectomy was "unnecessary",[23] but whether Dr Hastwell was negligent in diagnosing appendicitis and in advising' that procedure. Here, the appellant was not negligent for failing to make enquiries into the merits of such a claim, as there was nothing in the information or the reports of the three medical experts asked to advise on the appropriateness of the doctor's treatment, which raised it as an issue. There was also 'no evidence that the respondent had been misled as to the manner in which the appendectomy would be performed',[24] or that the method used was inappropriate,[25] such that a competent and careful solicitor could have advised that a claim for performing the surgery 'by Pfannenstiel incision rather than by a laparoscopy had reasonable prospects of success'.[26]

Failure to warn of risks and causation

Their Honours agreed that reasonable care required the appellant to investigate a cause of action against Dr Hastwell for failing to warn of the material risks inherent in the appendectomy's performance.[27] However, at the time the action became statute-barred; such enquiries had not been made:

'It is clear that the appellant did not consider a case based on a failure to warn. He did not ask the respondent whether she had received any warning about ... risk and he did not ask any of the medical experts he consulted about appropriate warnings.'[28]

Had sufficient enquiries occurred, there was evidence reasonably available that the doctor had not advised the respondent 'of any complications which might arise' from the surgery, including the material and 'increased risk of nerve pain involved in a Pfannenstiel incision'.[29]

Nevertheless, the issue of 'whether the appellant should have advised the respondent that she had reasonable prospects of making out a claim'[30] on this ground was also contingent on her prospects of proving that the doctor's failure to warn was a cause of her pain. This required a court to be satisfied, on the balance of probabilities, that firstly, 'the Pfannenstiel incision was the cause of the pain, and secondly, that if warned the respondent would have declined to undergo the appendectomy by Pfannenstiel incision'.[31] It was here that the opinion of the Court of Appeal diverged.

Newnes JA (McLure P agreeing), held that there was insufficient evidence that the incision caused the respondent's pain. Rather, the cause 'remained uncertain and unresolved'[32] and 'there was no evidence that any useful purpose would have been served by pursuing further enquiries'.[33] As stated by McLure P:

'Having regard to the respondent's pre-existing pain condition and complex medical history ... The medical evidence goes no further than that nerve entrapment [due to the Pfannenstiel incision] might be one of a number of possible (alternative) "but for" causes. A real possibility is that any surgical intervention may have triggered the alleged alteration in the respondent's pain state'[34]

Furthermore, the test of causation (being subjective), requires consideration in determining liability of what the claimant would have done had the defendant not been negligent. However, due to the potentially self-serving nature of such testimony,[35] a claimant's own evidence (if obtained)[36] of what they would have done if warned, 'would inevitably fall to be tested against relevant objective evidence'.[37] Their Honours therefore considered that, on the evidence before the appellant,[38] objective factors such as the respondent's:

- trust and confidence in Dr Hastwell's ability (given

that he was not equipped to perform the procedure laparoscopically); and
- desire for treatment to relieve her pain,

when coupled with the remoteness of the risk of increased pain,[39] indicated that it was also likely that, if warned, the respondent would have still proceeded with surgery via Pfannenstiel incision.

Murphy JA dissented, and found that 'the client had an arguable case on causation'.[40] Although recognising the case as one 'in which it could properly be concluded that difficult questions of fact would likely arise on causation, upon which different conclusions could fairly be open',[41] his Honour held it 'more probable than not that the Pfannenstiel incision performed by Dr Hastwell ... was a cause of, or materially contributed to, the client's pain thereafter'.[42] Furthermore, objective facts such as her risk aversion (given her level of pre-operative pain) indicated that, if properly warned, the respondent 'would not have consented to the surgery using a technique which involved a risk of nerve injury, and therefore additional pain'.[43]

Lost opportunity or chance

Due to their findings on causation, Newnes JA and McLure P concluded that while it was open to the primary judge to find that the respondent would have pursued a claim had she been advised that one was reasonably arguable,[44] on the material reasonably available such advice could not be given. Therefore, 'there was no breach of duty by the appellant in not advising the respondent to serve the writ or to apply to extend' its validity.[45] Conversely, Murphy JA (dissenting) held that 'although a cause of action for failure to warn of a material risk, which became statute-barred, was not without its difficulties, it could not be said that it was hopeless, or doomed to fail'.[46] As such, the appellant's negligence had, on the balance of probabilities,[47] caused the respondent to lose a 'chance of success in an action against Dr Hastwell' of some, not negligible value.[48]

Valuing the chance lost

The court agreed that as long as the notional damages likely to be awarded to the respondent upon a successful trial were reduced to properly allow for the uncertainty of outcome on breach and causation apparent on the facts and evidence available, 'it was not significant'[49] whether the percentage discount was calculated by taking into account, in a tiered manner, each element to be proved in turn,[50] or by an overall determination of 'the right percentage at which to establish the value of the claim'.[51] Nevertheless, Murphy JA preferred the application of the latter global discount which accounted for all contingencies as a whole.[52]

Difficulties often arise in determining the value of a client's loss when their legal practitioner's negligence deprives them of the opportunity to secure compensation. 'That is because the court must, in the professional negligence proceedings, necessarily engage in the speculative exercise of assessing the outcome of the original proceedings.'[53] Consequently, this was confirmed in *Nigam's* case, by the Court of Appeal's review of the primary judge's damages award. While Newnes JA and McLure P held that 'taking into account the respondent's difficulties in respect of both negligence and causation, an assessment of the lost chance at 40 per cent was much too high',[54] Murphy JA considered that although high, the 60 per cent discount was not 'outside the bounds of a proper award'.[55] ■

Notes: **1** See,for example, *Heydon v NRMA Ltd* (2000) 51 NSWLR 1. **2** *Nigam v Harm (No. 2)* [2011] WASCA 221, [10]. **3** The right-inferior part of the surface of the abdomen. **4** 'A long slightly curved horizontal abdominal incision made just above the pubic bone ... commonly used for a caesarean section:' *Nigam v Harm (No. 2)* [2011] WASCA 221, [12]. **5** *Ibid* [7]. See also [21], [82]-[83]. **6** The limitation period in Western Australia for personal injury actions discoverable before 15 November 2005 was six years: *Limitation Act* 2005 (WA) ss6, 55; *Limitation Act* 1935 (WA) s38(1)(c)(vii). **7** [2011] WASCA 221, [7]. See also [25], [31]-[35], [45], [56], [140]. **8** *Ibid* [57]-[60]. **9** *Ibid* [8]. See also [61]. **10** *Harm v Nigam* [2009] WADC 117. See also *Nigam v Harm (No. 2)* [2011] WASCA 221, [62]-[79]. **11** [2011] WASCA 221, [73]. **12** *Ibid* [168]. See also [80]. **13** *Ibid* [83]. See also [82] (Newnes JA), [3] (McLure P). **14** *Ibid* [85]. See also *Hawkins v Clayton* (1988) 164 CLR 539, 580. **15** [2011] WASCA 221, [85] (Newnes JA). **16** *Ibid.* See also [3]-[4] (McLure P), [173] (Murphy JA). **17** *Ibid* [5]. See also [87]-[88]. **18** *Ibid* [88] (Newnes JA). **19** *Ibid.* See also [146]-[147]. **20** *Ibid* [81]. On appeal, it was unsuccessfully argued that the appellant had also breached his duty of care by not advising the respondent that there was an arguable cause of action on the basis 'that the ventrosuspension, which had produced additional pain, should not have been performed': at [163]-[167], [267]. **21** *Ibid* [90]. **22** *Ibid.* **23** *Ibid* [94]. See also [95]-[102] (Newnes JA), [1] (McLure P), [171] (Murphy JA). **24** *Ibid* [105]. Indeed, the doctor did not have the equipment to perform a laparoscopic appendectomy. **25** *Ibid* [104]. **26** *Ibid* [110]. **27** *Ibid* [111]-[116] (Newnes JA), [1] (McLure P), [174]-[180], [242]-[247] (Murphy JA). In relation to a doctor's obligation to warn, see: *Rogers v Whittaker* (1992) 175 CLR 479; *Rosenberg v Percival* (2001) 205 CLR 434. **28** [2011] WASCA 221, [115] (Newnes JA). See also [174], [178] (Murphy JA). **29** *Ibid* [116]. **30** *Ibid* [117]. **31** *Ibid* [117]. See also [248]. **32** *Ibid* [129]. See also [122]-[128] (Newnes JA), [6] (McLure P). **33** *Ibid* [124]. See also [130]-[138]. **34** *Ibid* [6], referring to the High Court's decision in *Amaca Pty Ltd v Ellis* (2010) 240 CLR 111. See also [127] (Newnes JA). **35** See, for example, [145]. See also *Chappel v Hart* (1998) 195 CLR 232, 246; *Rosenberg v Percival* (2001) 205 CLR 434, 444, 463. **36** 'The respondent did not give evidence that, if warned, she would have declined to undertake the appendectomy by Pfannenstiel incision. She was not asked.' [2011] WASCA 221, [118]. See also [183]. **37** *Ibid* [118] (Newnes JA), aff'd [182] (Murphy JA). See now, for example, *Civil Liability Act* 2002 (WA), s5C(3). **38** [2011] WASCA 221, [119]-[120]. **39** The material increased risk of pain 'was not in respect of a Pfannenstiel incision itself but only where the incision was made too lateral': *Ibid* [119]. See also [113]. **40** *Ibid* [185]. See also [186]-[195], [254]-[257]. **41** *Ibid* [257]. **42** *Ibid* [185]. **43** *Ibid* [184]. See also [181]-[183], [214], [249]. **44** *Ibid* [149]. See also [203] (Murphy JA). **45** *Ibid.* See also [139]-[142]. **46** *Ibid* [202]. **47** See, for example, *Tabet v Gett* (2010) 240 CLR 537, 555, 581. **48** [2011] WASCA 221, [202]. See also [197]-[201], *Johnson v Perez* (1988) 166 CLR 351; *Kitchen v Royal Air Force Association* [1958] 2 All ER 241. **49** [2011] WASCA 221, [155] (Newnes JA). See also [1] (McLure P). **50** As occurred, for example, in *Harrison v Bloom Camillin (No. 2)* [2000] Lloyd's Rep PN 404. **51** [2011] WASCA 221, [154] (Newnes JA). **52** *Ibid* [260]-[266] (Murphy JA). **53** Stephen Walmsley, Alister Abadee and Ben Zipser, *Professional Liability in Australia* (Lawbook Co, 2002) 365. See also [2011] WASCA 221, [207], [259]. **54** [2011] WASCA 221, [162]. See also [150]-[161]. **55** *Ibid* [259]. See generally [204]-[259].

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