Tabet v Gett (2010) 240 CLR 537

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Facts

Reema Tabet was a six-year-old child who was admitted to hospital on 11 January, suffering from vomiting and headaches and having recently suffered from chicken pox. On 14 January, she suffered a seizure. Investigations concluded that she had a large brain tumour which was subsequently removed. The operation, brain tumour and seizure combined caused substantial disability.
Her family alleged that the doctor should have ordered a scan earlier, that may have detected the brain tumour and prevented the seizure, as they could have begun treatment. There was evidence that Tabet's pupils were dilated and as such it was negligent that the doctor did not explore further.
At trial, it was estimated that there was a 40% chance that an earlier scan would have improved Tabet's outcome (although not prevented the disability in entirety).

Issue

Could Tabet sue for the "loss of chance" of a better outcome, as a result of the doctor's negligence?

Held

Kiefel J acknowledged that the "loss of chance" doctrine in tort is one that has posed considerably problems for both common and civil law countries.
Kiefel J - with others agreeing - explained that 'mere negligence' is not enough, you must show that the negligence caused damage.
In this case, the difficulty is proving that the negligence actually caused the damage. It was actually more probable than not that the actions of the doctor made no difference. The chain of causation was broken.
Therefore it would be a different approach to negligence, and particularly the standard of proof, if the loss of chance doctrine was accepted.
While Kiefel J acknowledged that the "all or nothing" style of the standard of proof could be a blunt object, she was not convinced there were adequate policy reasons to change it. There were also policy considerations in the other direction.
As such, she - in the majority - held that Tabet could not recover for the loss of chance of a better outcome.

Quotes

- “Properly analysed, what is involved in the chance referred to in this case is the possibility, to put it at its highest, that no brain damage would occur or that it would not be so severe. They are the "better medical outcomes" involved in the chance. Expressing what is said to be the loss or damage as a "chance" of a better outcome recognises that what is involved are mere possibilities and that the general standard of proof cannot be met. Thus the appellant could only succeed if the standard of proof is lower than the law presently requires.” Kiefel J at [143]
- “The appellant is unable to prove that it was probable that, had treatment by corticosteroids been undertaken earlier, the brain damage which occurred on 14 January would have been avoided. The evidence was insufficient to be persuasive. The requirement of causation is not overcome by redefining the mere possibility, that such damage as did occur might not eventuate, as a chance and then saying that it is lost when the damage actually occurs. Such a claim could only succeed if the standard of proof were lowered, which would require a fundamental change to the law of negligence. The appellant suffered dreadful injury, but the circumstances of this case do not provide a strong ground for considering such change. It would involve holding the respondent liable for damage which he almost certainly did not cause” Kiefel J at [152]

Further reading

- Full text available here: http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA/2010/12.html
- An interesting journal article - Walsh, G and A, 'Tabet v Gett: An end of loss of chance actions in Australia?' https://www.mauriceblackburn.com.au/media/1551/tabet-v-gett-the-end-of-chance-actions.pdf

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