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Causation and the case of a delayed diagnosis of pancreatic cancer — Alrifai v ACT

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Introduction

The Australian Capital Territory (ACT) Court of Appeal, has upheld the ACT Supreme Court's decision in a case of medical negligence involving delays in diagnosing and treating a patient's pancreatic cancer during her treatment at the Canberra Hospital, (the Hospital). The plaintiff in the original case, Mrs Alrifai, claimed the ACT (being the entity vicariously liable for the Hospital) failed to promptly address her cancer and alleged that this breach was the direct cause of personal harm.

While an initial judgment found a breach of duty, the Supreme Court concluded that causation could not be substantiated regarding Mrs Alrifai's injury. Mrs Alrifai appealed, contending that the ACT Supreme Court erred in finding no causation between the breach and the harm suffered. The ACT Court of Appeal affirmed the initial ruling and dismissed the appeal, leaving Mrs Alrifai's claim unsuccessful.

Background/facts

On 25 December 2017, Mrs Alrifai presented at the Hospital's Emergency Department with central chest pain, associated shortness of breath and nausea.[1] Following initial tests, the plaintiff was tentatively diagnosed with gastro-oesophageal reflux disease or early pancreatitis and discharged on the same day.[2]

Over the next year, Mrs Alrifai repeatedly returned to the Hospital with similar symptoms. From the beginning of 2018 to around 26 April 2018, she underwent several diagnostic procedures including CT scans and an endoscopic ultrasound (EUS) which included a fine-needle aspiration.[3] It was the Hospital's response to the results of these tests that formed the basis of the plaintiff's claim.

Mrs Alrifai identified three critical instances where she alleged that the Hospital failed to meet its duty of care:

- after a CT scan on 1 January 2018;[4]
- after a CT scan on 6 April 2018;[5] and
- after a repeat CT scan on 22 April 2018[6] and an EUS on 26 April 2018[7]

Importantly, during these three critical instances, Mrs Alrifai was diagnosed with acute pancreatitis on 2 January 2018 and recommended an Magnetic Resonance Cholangiopancreatography (MRCP) to exclude other causes and look for pancreatic lesions.[8] Mrs. Alrifai did not follow through with the MRCP and missed subsequent medical appointments.[9] She had multiple further hospital visits in February and March 2018 for persistent pain, but often left against medical advice or experienced difficulties undergoing recommended tests, including an MRCP due to claustrophobia.[10] Despite attempts to manage her condition and advise her on necessary investigations, Mrs. Alrifai did not always adhere to medical advice or complete the suggested diagnostic procedures.[11]

Although Mrs Alrifai did not adhere to medical advice or complete suggested diagnostic tests, the scans did show a distinct pancreatic mass with biopsy findings revealing pancreatitis with "worrying architectural and cytological changes".[12] At a multidisciplinary meeting on 1 May 2018, where no surgeon was present, the mass was considered likely to be an inflammatory process. A follow-up CT scan was scheduled for 3 months later.[13] Mrs Alrifai's pancreatic cancer was ultimately diagnosed in November 2018, and despite surgery and chemotherapy and other treatments, the cancer reoccurred, leading to a terminal prognosis at the time of the initial hearing.[14] Mrs Alrifai submitted that the findings of the pancreatic mass warranted a surgical consultation, and had she received such a consultation, an earlier diagnosis and treatment plan would have been possible.

On 26 November 2018, Mrs Alrifai underwent a splenic artery angioembolism, and on 27 November 2018 she underwent surgery to remove sections of her pancreas and spleen to which the cancer had spread.[15] The Hospital conceded that failing to obtain a surgical opinion after the 26 April 2018 EUS constituted a breach of its duty, but argued that this breach did not affect the plaintiff's prognosis or cause her injury.[16] For all other instances, the Hospital maintained it had met its duty of care.

In the original decision,[17] the primary judge rejected every allegation of negligence, apart from the Hospital's admitted breach in failing to obtain the opinion of a

surgeon in light of the various test results that were available on 26 April 2018.[18] With respect to the primary judge's findings on causation, the primary judge rejected Mrs Alrifai's claim for failure to prove factual causation.[19] As a consequence, the primary judge was not required to consider the second limb of the claim which related to the scope of liability but considered the second limb for completeness.[20]

The appeal

At appeal, the matter was distilled to two main grounds with respect to factual causation. The first limb concerned whether Mrs Alrifai would have undergone surgery earlier than she did. The second limb concerned whether, had Mrs Alrifai undergone surgery earlier, she would probably have avoided the injuries particularised in the original pleadings.[21]

With respect to the first limb, the Court of Appeal was not persuaded that the primary judge's conclusion on factual causation was wrong. Specifically, it was not proven that the alleged acts or omissions caused Mrs Alrifai's surgery to be delayed until November 2018.[22] The Court of Appeal also declined to find that obtaining a surgical opinion in April 2018 would have prompted earlier surgery. The reasoning is set out below.

Did the alleged acts of negligence delay the plaintiff's surgery, and would she have undergone surgery earlier?

The primary judge did not accept the advice of Mrs Alrifai's surgical oncologist expert, Professor Morris, who was of the view that surgery was urgently needed after 26 April 2018.[23] At the multidisciplinary team meeting (MDT) on 1 May 2018, the specialists at that meeting arrived at the consensus that the findings of the fine-needle aspiration most likely indicated an inflammatory response.[24] Mrs Alrifai further challenged the finding that if a surgeon had become involved on 26 April 2018, they would have attended the MDT on 1 May 2018, and would have dissented from the consensus view formed.[25]

Mrs Alrifai further claimed that her condition should have been managed by a surgeon rather than a gastroenterologist after the detection of a mass on 26 April 2018.[26] It was argued that this change would have led to earlier surgery and a potentially better outcome.[27] Mrs Alrifai's experts, Professor Fox (retired haematologist and oncologist) and Professor Morris (surgical oncologist), testified that the CT scans from January 2018 revealed a mass which could have been recognised as cancerous, prompting diagnosis and treatment of the plaintiff's pancreatic cancer at that time, or at the latest by April 2018.[28]

On the other hand, the ACT's experts, Professor Katelaris (gastroenterologist) and Professor Richardson (laparoscopic and general surgeon), argued that the Hospital's investigations up to 26 April 2018, were appropriate and met the requisite standards of a tertiary hospital.[29] Additionally, Dr Burge, (oncologist specialising in gastrointestinal medical oncology), testified that an earlier diagnosis of pancreatic cancer in April 2018, instead of November 2018, would not have significantly altered the plaintiff's treatment, outcome or prognosis.[30]

Mrs Alrifai further argued that it was Professor Richardson's opinion that a surgeon was the appropriate specialist to manage the appellant/plaintiff's mass and not a gastroenterologist.[31] However, the Court of Appeal dismissed this line of reasoning as Professor Richardson did not state that gastroenterologists were inappropriate to manage the plaintiff's care; rather, he recommended a surgical opinion in addition to gastroenterological management.[32] The Court of Appeal found no error in maintaining that gastroenterologists were appropriate specialists during the relevant period.[33]

Professor Richardson and the defendant's other expert witnesses had argued that, even if a surgeon had been consulted, it would not have led directly to surgery without further investigation, due to the presence of pancreatitis.[34] Suggested further tests included tumour markers, a PET scan, and a biopsy.[35] Medical evidence showed these tests were either already done or deemed inappropriate at the time (eg, PET scans not useful in pancreatitis).[36] The primary judge found no substantial basis to conclude that earlier surgical intervention would have occurred with a surgeon's involvement.[37]

Her Honour declined to infer that the plaintiff would have opted for surgery based on hypothetical surgical advice without a diagnosis.[38] Evidence showed that the plaintiff had previously discharged herself against medical advice and maintained a history of not adhering to medical guidance, casting doubt on whether she would have consented to surgery without a confirmed cancer diagnosis.[39] The plaintiff's immediate consent to surgery after the definitive cancer diagnosis in November 2018 was contrasted with her likely response to equivocal results in April 2018.[40]

The findings of the primary judge, who did not accept the necessity of immediate surgery based on the CT scans and medical evidence up to 26 April 2018, were upheld.[41] No evidence supported the claim that the investigations conducted after 26 April 2018 were unreasonable or that a different outcome would have resulted from a surgical opinion at any later point.[42] In conclusion, the appeal was not successful in establishing that the management by gastroenterologists was inappropriate or that earlier involvement of a surgeon would have led to an earlier diagnosis and surgery, thereby altering the state of the plaintiff's condition.[43]

Could earlier surgery have prevented the injuries claimed by the plaintiff?

The primary judge found no need to address the second limb of factual causation (concerning whether earlier removal of a pancreatic mass would have changed the prognosis) because the first limb was resolved against Mrs Alrifai.[44] However, the primary judge still recorded hypothetical findings on the second limb for completeness.[45] No sufficient evidence could be found to conclude that earlier surgery would have improved Mrs Alrifai's prognosis or reduced the risk of recurrence.[46] Mrs Alrifai contested these hypothetical findings, arguing that earlier removal of the mass would have led to a better prognosis and extended life expectancy.[47]

Importantly, the primary judge preferred the evidence of Dr Burge, an expert in pancreatic oncology, over Professors Fox and Morris (Mrs Alrifai's experts).[48] Dr Burge's opinions were based on extensive clinical experience and relevant studies, while it was noted that Professors Fox and Morris relied on a study which considered the prognosis of pancreatic cancer determined by tumour location. It was considered that that the study had significant limitations.[49] Accordingly, Dr Burge concluded that even if the cancer had been diagnosed and treated earlier, it was not likely that the plaintiff would have avoided a terminal diagnosis due to the inherently poor prognosis of pancreatic adenocarcinoma.[50]

It was ultimately determined at trial that Mrs Alrifai would have undergone similar surgery and chemotherapy regardless of when the cancer was diagnosed.[51] Mrs Alrifai did not provide expert evidence to show that earlier surgery would have prevented her pain and suffering related to ongoing treatments and investigations which the Court of Appeal confirmed.[52]

Mrs Alrifai's arguments failed to demonstrate that the primary judge's findings were incorrect or unsupported by the evidence presented. No error was found in the primary judge's analysis of the expert evidence and conclusions on the hypothetical second limb of factual causation.

Discussion

As noted by the primary judge,[53] the common law does not permit an action for recovery (of damages) when the damage, for which compensation is awarded consequent upon breach of duty, is characterised as the loss of a chance of a better outcome. As discussed in *Tabet v Gett*,[54] 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.

To have succeeded in the original proceedings, Mrs Alrifai must have proven, on the balance of probabilities:

- but for one or more of the alleged negligent acts or omissions she would have undergone her surgery earlier than November 2018; and
- had she undergone surgery at that earlier time, she probably would have avoided the injuries particularised in her pleadings.

By upholding the judgement of the primary judge, the Court of Appeal emphasised the importance and nuance involved in analysing causation in medical negligence cases.[55] Even with timely intervention, the nature of some illnesses, like pancreatic cancer, means that earlier treatment may have no material effect on the patient's prognosis. Clear challenges exist in proving causation to the evidentiary standard required, particularly when the condition's severity complicates the predicted outcome.

The primary court's evaluation of expert testimony holds particular significance. The expert opinion of Dr Burge was preferred to that of Professor Fox and Professor Morris for several reasons, including that Professor Fox had not had any relevant clinical experience in treating patients with any form of cancer since 2006, and before that, he was not a specialist in pancreatic cancer.[56] Further, in forming their opinions, Professor Fox and Professor Morris had relied on a study which considered the prognosis of pancreatic cancer determined by tumour location. The primary judge did not accept Professor Fox's expert evidence with respect to the study, stating that "relying on a study to form an opinion about prognosis which has not allowed for the effects of chemotherapy is not persuasive in circumstances where there are other studies".[57]

Dr Burge, who actively treats patients with pancreatic ductal adenocarcinoma, was deemed both more credible and persuasive, as was the contemporary nature of his experience in pancreatic oncology.[58] Due to Dr Burge having significantly more expertise that Professor Fox as to current issues in pancreatic oncology,[59] his evidence was preferred in the circumstances where it conflicted with Professor Fox's evidence.

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Footnotes

1. *Alrifai v ACT* [2024] ACTCA 13; BC202404303 at [9].
2. Above.
3. Above n 1, at [2].
4. Above n 1, at [10].
5. Above n 1, at [17].
6. Above n 1, at [22].
7. Above n 1, at [25].
8. Above n 1, at [12].
9. Above n 1, at [13].
10. Above n 1 at [14]–[16].
11. Above n 1 at [16].
12. Above n 1, at [100].
13. Above n 1, at [27]–[28].
14. Above n 1, at [40].
15. Above n 1, at [37].
16. Above n 1, at [71].
17. *Alrifai v Australian Capital Territory* [2022] ACTSC 48; BC202201869.
18. Above n 1, at [43].
19. Above n 1, at [46].
20. Above n 1, at [50].
21. Above.
22. Above n 1, at [47].
23. Above n 1, at [107].
24. Above n 1, at [109].
25. Above.
26. Above n 1, at [101].
27. Above n 1, at [104].
28. Above n 1, at [95] and [80].
29. Above n 1, at [113] and [116].
30. Above n 1, at [143].
31. Above n 1, at [101].
32. Above n 1, at [105].
33. Above.
34. Above n 1, at [111].
35. Above n 1, at [116]–[18].
36. Above n 1, at [116].
37. Above n 1, at [122].
38. Above n 1, at [129].
39. Above n 1, at [119].
40. Above n 1, at [126].
41. Above n 1, at [134].
42. Above.
43. Above n 1 at [135].
44. Above n 1, at [136].
45. Above.
46. Above n 1, at [144].
47. Above n 1, at [138].
48. Above n 1, at [142].
49. Above.
50. Above n 1, at [143].
51. Above.
52. Above n 1, at [151].
53. Above n 17, at [116], citing *Tabet v Gett* (2010) 240 CLR 537; 84 ALJR 292; [2010] HCA 12; BC201002304 (*Tabet*) at [46] at Gummow ACJ; at [68] per Hayne and Bell JJ; at [100] per Crennan J; and at [152] per Kiefel J.
54. *Tabet*, above at [152].
55. Above n 1, at [148].
56. Above n 1, at [142].
57. Above.
58. Above n 1, at [142].
59. Above.