INTRODUCTION

The problem:

"My doctor took too long to diagnose my breast cancer and now I have to have a mastectomy which I might not have needed."

This has also reduced my life expectancy statistically.

Is there a claim?

INTRODUCTION

Putting it another way:

D's negligence:

- increased C's risk of cancer by 40% and C goes on to get the cancer
- increased C's risk of cancer by 40% but C is still in good health
- causes C increased injury as well as a 40% chance of future cancer.

In principle C has suffered a loss in all 3 scenarios hasn't he?
GENERALLY

- Basic principles: the "but for" test
- Standard of proof: more likely than not
- Standard of proof: "all or nothing" nature
- The quantification argument – discrete injury PLUS loss of chance
- Loss of chance in professional negligence claims – Allied Maples Grp Ltd v. Simmons & Simmons [1995] WLR 1602

The context

Nat. Patient Safety Agency 2010

- 294,000 cancer diagnoses each year in UK
- 155,000 cancer deaths each year
- Cancer is the leading mortality in the under 75s
- 1,650 patient safety incidents concerning delayed diagnosis in 2008 alone – considered by the Agency as probably a considerable underestimate.

Loss of Chance in Clinical Negligence

  - C fell from tree and injured hip
  - Treatment delayed
  - Avascular necrosis (AN) developed
  - 75% chance that would have developed anyway
  - Trial judge and CA: damages for lost 25% of avoiding AN

  HL: “But for” test not satisfied – not a lost chance case

  Die was already cast when he fell from the tree
Wilsher and Fairchild

  - Excess oxygen during birth – blindness
  - 4 other equally likely but innocent causes
  - CA: damages for loss of chance of better outcome
  - HL: no claim – "but for" rule not satisfied

Fairchild v. Glenhaven Funeral Services [2002] UKHL 22

- Mesothelioma – potentially caused by any of multiple Defendants’ asbestos exposures
- Claimant could not prove which exposure – single fibre and the indivisible nature of the condition
- HL: exception to the "but for" rule in the special circumstances
- But why no exception to clinical negligence cases?

Gregg v. Scott [2005] UKHL 2

- GP’s negligence led to a 9-month delay before cancer diagnosed
- Delay significantly reduced chance of survival from 42% to 25%
- HL: reject claim (3/2 majority)
- Can there be a claim for loss of better outcome now in any clinical negligence case?
Discussion

• Recovery if some discrete injury?
• What if discrete injury just a hook on which to claim loss of a better outcome?
• What if the adverse outcome had eventuated by trial?
• Should damages be awarded in full or merely proportionate to the increase in the chance of adverse outcome?

Lord Nicholls in Gregg

"12. The role of the court in making an assessment of damages which depends upon its view as to what will be and what would have been is to be contrasted with its ordinary function in civil actions of determining what was. In determining what did happen in the past a court decides on the balance of probabilities. Anything that is more probable than not it treats as certain.

But in assessing damages which depend upon its view as to what will happen in the future or would have happened in the future if something had not happened in the past, the court must make an estimate as to what are the chances that a particular thing will or would have happened and reflect those chances, whether they are more or less than even, in the amount of damages it awards."

Wright v. Cambridge Medical Grp 2011

• 11 month old baby - superinfection - femur seeded - osteomyelitis
• Delayed referral to hospital by GP by 2 days
• Hospital fail to treat appropriately for 2 further days
• Had hospital treated her earlier - loss would have been avoided
• First instance: GP's negligence not causative since hospital would still have been negligent
• But hospital not sued by either C or D!
Wright v. Cambridge Medical Grp 2011

- CA: Allow appeal – D could not escape liability on the basis of another’s possible negligence
- D probably reduced the chance of recovery
- But could C win on the basis of lost chance short of 50%?
- Is there a distinction with Gregg and Hotson?
- In Wright the issue was what the third party (the hospital) should and would have done but for the negligence.

Wright v. Cambridge Medical Grp 2011

- LJ Neuberger, MR says:
  “I accept that the reasoning of the House of Lords on this point does not conclusively shut out, as a matter of strict logic, this court from applying a loss of a chance approach in this case, which is concerned with rather a different point. However, certainty and consistency are of great importance in this difficult area, and, while the question would be appropriate for reconsideration by the Supreme Court, I consider that, at this level, we should probably not expand the loss of a chance doctrine into the realm of clinical negligence. It is fair to add that we had relatively limited argument on the point.”

Quantum

- Claims for probable early death/worse outcome
- Lost years claims
- Future care
- General damages
Quantum
- Lost years – loss of reasonable expectation of a future pecuniary benefit
- Annual income less “saved expenses”
- Phipps v. Brooks Dry Cleaning PIQR [2006] Q130 – 50%
- Discount can be displaced with evidence - Shanks v Swan Hunter Group plc [2007] EWHC 1807 (QB)
- Problem with low incomes

Quantum
- Example
  - Failure to diagnose DCIS (Ductal Carcinoma in Situ)
  - Radical mastectomy instead of lumpectomy
  - Chemo as well as radiotherapy
  - Breach led to reduction in chance of survival after 10 years:
    - From 40% to 20% (D’s expert)
    - Or
    - From 60% to 40% (C’s expert)

Quantum
- Lost years sample calculation on C’s case
  - Claimant: Female aged 40 at trial
  - Normal life expectancy: Age 87
  - Breast cancer death: 50
  - Life multiplier age 50: 23.37 (Table 2)
  - Less early receipt by 10 yrs: 0.7812 (Table 27)
  - Net multiplier: 18.26
  - Assume lifetime income: £14k
  - Less saved expenses, net: £7k
  - £10k x 18.26: £127,820
Quantum

- Quantification basis – eg increased treatment but unlikely earlier death
- What is proper assessment of loss of chance of survival of 20%?

Is it 20% of £127,820: £25,564

or

Death assumed at mid-point of remaining life, say age: 63

- Life multiplier age 63: 17.49
- Less advanced receipt by 23 yrs: 0.5067
- Net multiplier: 8.86
- 8.86 x £7K: £62,020
- 10% of £62,020: £6,202

JD v. Dr Mather [2012] EWHC 3063 (QB)

Failure to diagnose a malignant melanoma by 6 months
Claim initially that prompt treatment would have led to a complete cure
Later amendment – in the alternative loss of life expectancy
Judge – primary cases dismissed – not probable that cure achievable even without the delay (Gregg v. Scott)
But – delay probably reduced life expectancy by 3 years
Adjourned for damages hearing

Loretta Oliver v. Dr Williams [2013] EWHC 600 (QB)

Delayed diagnosis of ovarian cancer by 6 months
Additional symptoms of bloating and diarrhoea, no time off work, 8/9 lites of ascites drained, coped less well with chemo than she would have, more fatigued
Severe/moderately severe psych injury – diagnosis on basis of report "difficult to determine" – depression and anxiety
Bulk of psych. impact would have been suffered anyway
PSLA: £2,500 for physical symptoms
£5,000 for psychological symptoms
Loretta Oliver v. Dr Williams [2013] EWHC 600 (QB), continued

C said her life expectancy was reduced.
Dispute about the effect of the increased presence of residual abnormal tissue.
Judge accepted that the evidence:
"tends to suggest that the volume of residual abnormal material does have an impact on survival".
So damages were recoverable for this weren't they?
No says the judge – only a chance of loss of life expectancy.
Was this correct?

Summary

• Can C show that the worse outcome would probably have been avoided?
• If not, can C show that there is additional pain and treatment which would probably not have been required?
• If so, the risk of a worse outcome (if it is not a probability) can be valued.
• There is such a thing as a lost chance head of damage but there is no such thing as loss of chance claim in CN cases.
• Don’t forget to sue the hospital!!!

CLAIMS FOR A LOSS OF A CHANCE

Stephen Glynn
Chambers of Andrew Ritchie QC
9 Gough Square
London
EC4 3DG
020 7 832 0500 (tel)
020 7353 1344 (fax)
DX: 439 Chancery Lane London
clerks@9goughsq.co.uk