

Neville v Lam (No 3) [2014] NSWSC 607

Background

On 3 November 2004 the defendant, Associate Professor Alan Lam, operated on the plaintiff, Ms Lisa Neville. Amongst other procedures, he performed an endometrial ablation. This procedure was undertaken to treat her severe menorrhagia. On 24 August 2006, Ms Neville gave birth to a severely disabled baby boy. Ms Neville stated that, after she underwent the endometrial ablation and before she conceived Samuel, she believed it was not possible for her to become pregnant. She says that Associate Professor Lam was under an obligation to advise her of the risk that she could still conceive after she underwent the endometrial ablation, but he failed to do so and this failure constituted negligence. Associate Professor Lam maintained that he advised Ms Neville that there remained a risk of her falling pregnant following the procedure and of the ongoing need to use a safe and effective means of contraception.

The District Court dismissed the application on the basis that Ms Neville failed to discharge the onus she bore of proving that Associate Professor Lam did not provide the advice.

The Law

- Associate Professor Lam had a duty of care to take an appropriate “precaution” within the meaning of section 5B of the *Civil Liability Act 2002* (NSW). Section 5B(1) states that:
 - (1) “A person is not negligent in failing to take precautions against a risk of harm unless —
 - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known); and
 - (b) the risk was not insignificant; and
 - (c) in the circumstances, a reasonable person in the person’s position would have taken those precautions.”
- Three gynaecological experts were called by the parties all of whom agreed that a specialist in the position of Associate Professor Lam should have advised a patient in Ms Neville’s position that pregnancy was still a possibility after endometrial ablation, that such a pregnancy would be “high risk” and contraception was needed to prevent pregnancy. They maintained this view even if the patient’s personal circumstances as conveyed to the specialist suggest that there was little risk of pregnancy. They also agreed that such advice should be reinforced by the provision of written information.
- Ms Neville bears the onus of proof on the balance of probabilities. While that is an undemanding standard only requiring a “preponderance” of evidence, the Court must nevertheless “feel an actual persuasion” of the relevant fact’s occurrence before it is established, and that cannot be reached by a “mere mechanical comparison of probabilities [independent] of any belief in its reality”: *Briginshaw v Briginshaw* [1938] 60 CLR 336 at 361 per Dixon J.
- Nevertheless, it seems that probabilistic reasoning can lead to a Court being actually persuaded of the relevant fact: *Strong v Woolworths Ltd* [2012] 246 CLR 182 at [34] to [37] per French CJ, Gummow, Crennan and Bell JJ.

- Evidence of usual practice may be of assistance in circumstances where mechanical steps or routine tasks are in issue and the witness who supposedly undertook the task on a particular occasion has no recollection of the occasion. The weight to be given to such evidence will depend upon the possibility or likelihood of departure from such practice: *Elayoubi v Zipser* [2008] NSWCA 335 at [86] per Basten JA.

The Issues

The issues were as follows:

- Did Associate Professor Lam actually advise Ms Neville of the risk of her falling pregnant following the endometrial ablation and of the ongoing need to use a safe and effective means of contraception (factual issue);
- Did Associate Professor Lam breach his duty of care to Ms Neville (legal issue); and
- If he breached his duty of care, was the breach causative of Ms Neville's loss (legal issue)?

Application

A complicating fact in the present case was that Associate Professor Lam was aware that Ms Neville's husband had had a vasectomy but Ms Neville had not advised Associate Professor Lam that she was having an affair with a Greg Nowak or that she had any concern about her marriage at all. Ms Neville argued that, in those circumstances, it was likely that Associate Professor Lam assumed that any risk of a further pregnancy was removed and thus there was no need to give Ms Neville a warning that that risk still subsisted (if she were to change partners).

Associate Professor Lam denied that he adopted this reasoning. He argued that there were no circumstances in which he would ever fail to advise the patient of the possibility of a pregnancy following endometrial ablation, or the need to continue or choose a safe method of contraception, because circumstances can change in the future. Although Associate Professor Lam could not recall from memory the exact advice he provided to Ms Neville, he asserted that it was his usual practice to advise patients of available treatment options, the risks and benefits of the recommended treatment, and the expected outcomes from the treatment. He would also provide patients with written information as a means of reinforcing the verbal information that had been provided by him in consultation.

Beech-Jones J was inclined to agree with Associate Professor Lam as his assertions as to his invariable practice were supported by his publications on the subject of endometrial ablation. The advice suggested by Associate Professor Lam's publications to be given to patients, namely that there is a chance of pregnancy and a safe method of contraception should be adopted, was not said to be dependent upon the particular patient's circumstances. Thus, Associate Professor Lam was able to successfully argue that, if he wrote so clearly and emphatically in the publications about what a patient should be told in relation to the pregnancy risk following an endometrial ablation, then the likelihood is that he followed his own advice thereafter.

Conclusion

Beech-Jones J therefore concluded that:

- Although Ms Neville was an honest witness, her memory was fallible. He did not "feel an actual persuasion" that Associate Professor Lam did not advise her of the risk of pregnancy and of the need for ongoing contraception. On the other hand, although Associate Professor

Lam could not recall the advice he provided to Ms Neville, his invariable practice (which was supported by his publications) was to provide the aforementioned advice to patients. Therefore, on the balance of probabilities, it is unlikely that Associate Professor Lam failed to provide the said advice;

- The advice Associate Professor Lam provided to Ms Neville was in accordance with a practice that was accepted by three gynaecological experts as competent professional practice;
- It follows that Associate Professor Lam did not breach his duty of care to Ms Neville; and
- As Ms Neville failed to discharge the onus of proof, her case must fail.

As Ms Neville failed to prove that Associate Professor Lam breached his duty of care, it is not necessary to discuss whether any purported breach was causative of Ms Neville's loss. For an in-depth discussion of causation and damages, see paragraph [144] to [223] of the judgment.

Our Observations

The trial in this case occurred 10 years after Ms Neville's consultations with Associate Professor Lam. Therefore, a major obstacle to the resolution of the dispute was that the parties could not accurately recall what was said at the consultations. Beech-Jones J's application of the law and reasoning easily manoeuvre around this obstacle. He states that when a court finds itself unable to choose between competing versions of events, the party upon whom the burden of proof lies will have failed to discharge it. Although Beech-Jones J was also not entirely persuaded that Associate Professor Lam did advise the client of the risk of pregnancy and the ongoing need for contraception simply because it was his usual practice to do so, Beech-Jones J found that his version of events was more probable as it was supported by the two publications.

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