



BreastScreen held negligent to woman for failure to further investigate mass
O’Gorman v Sydney West Area Health Service Judgment dated 29 October 2008

Justice Hoeben of the Supreme Court of NSW has awarded Christine O’Gorman over \$400,000 plus costs in relation to a claim brought against BreastScreen NSW Sydney South West (Sydney West Area Health Service) in relation to a failure to recall her for further investigation following a mammogram on 23 February 2006.

In January 2007 she was diagnosed with breast cancer which has subsequently metastasised into her lungs and brain. Ms O’Gorman’s prognosis is presently expected to be limited to 2 months.

Background

Ms O’Gorman was born on 18 March 1951 and spent most of her working life as a secretary and clerk within the legal profession. The plaintiff first attended breast screening in 1994 as part of the free breast screening mammogram service. Thereafter, she attended for mammograms in 1996, 1998, 2002, 2004 and 2006.

In her evidence, Ms O’Gorman agreed that at no time before February 2006 had she attended her doctor to have annual clinical examination of her breast. She used to check her breasts for lumps at approximately monthly intervals. On 1 January 2007 she scratched her left breast and felt a hard lump which she had not been aware of before. The plaintiff underwent treatment for removal of the lump, chemotherapy and finally a mastectomy which took place on 23 August 2007. In May 2007 Ms O’Gorman came under the care of Dr Goldrick, oncologist, who referred the plaintiff to Professor Friedlander in relation to a trial of a new drug. As part of the screening for the trial, a brain scan was conducted on 11 June 2008 which showed tumours in Ms O’Gorman’s brain.

BreastScreen NSW is a state and federal government funded program that provides free breast screening mammograms to women aged 50-69

years who are invited for a screening every two years. A distinction between screening and diagnostic mammograms, was noted by the Judge.

The mammogram films were always read by at least two radiologists. They would separately and independently read the films and each make his or her assessment. The radiologists had three choices on the computer:

1. To record a normal finding;
2. To record a need for recall for further assessment;
3. To record that due to technical difficulties a mammogram was needed to be repeated.

Evidence was given by the two radiologists who undertook the screening, Dr Rooijen and Dr Varnava, on behalf of the defendant.

Dr Varnava stated that, on average, he would see films for 60 patients per hour. On some days it would be 30-40 patients per hour if the breast were very dense, large breasts. On other days, it may 70-80 patients in an hour.

Decision

Duty of Care

Justice Hoeben found the defendant’s duty of care was an obligation to provide that level of care and skill in the interpretation of mammograms to be expected for a reasonably competent radiologist in the context of a mammogram screening program.

He accepted the submission of the defendant that there was a proper distinction to be drawn between the diagnostic mammogram and a screening mammogram. He also rejected the submission made on behalf of the plaintiff that a higher standard of care should be applied due to the catastrophic consequences which follow from a failure to detect the breast cancer and the reliance of the accuracy and reliability of the screening process.

Justice Hoeben also stated that the plaintiff could not rely upon any symptomatic deficiencies in the breast screen program to make out her case. She had to establish a failure by the radiologist to recognise that there were suspicious features in the 2006 mammogram which were sufficiently serious by reference to the defendant's own standards, as to require a recall of the plaintiff for further investigation.

The issue came down to the size of the mass in the 2006 mammogram compared to the size in the 2004 film. Justice Hoeben noted from his simple visual comparison that the 2006 mass was significantly larger than the 2004 mass. Further, the plaintiff served an oncologist report which noted the measurements of the mass was 3 by 3.5 centimetres in 2006 and the mass was obvious.

His Honour did not accept the defence evidence that the size of the mass in 2006 was probably the same as in 2004.

In relation to causation, two issues were raised:

1. Whether the diagnosis would have been made if an ultrasound had been undertaken in March 2006 following the 2006 mammogram.

The plaintiff's expert evidence was that the tumour would almost certainly have been discovered and assessed this likelihood at 90%. This was preferred over that of the defence expert who was of the opinion that an ultrasound may have discovered the tumour by way of accidental finding but could not be more definite than that.

2. What, if any, difference the diagnosis in 2006 would have made to the plaintiff's outcome?

Justice Hoeben found the evidence was that the delay in diagnosis increased the risk of metastasis by 10%. The development of tumours in the plaintiff's lung and brains was found to have occurred within the

very area of risk which had been increased by the delay in diagnosis.

The award of just over \$400,000 plus costs, comprised mainly general damages and loss of wages, given the decreased life expectancy attributed to the negligence. \$247,500, or 56% of a most extreme case, was awarded for general damages, (pain and suffering, loss of enjoyment of life, etc).

Comment

In the end, the case turned upon a factual finding of whether or not the mass on the films in 2006 had increased in size since those of 2004 which would have required the radiologist to report that further examination and assessment was required, whereupon it was found that the diagnosis would likely have been made.

It is relevant that the Court noted that the plaintiff had to do more than to suggest that the procedure was inadequate. She needed to prove, and did prove, that the radiologists should have categorised her for re-assessment.

The defendant sought to rely upon the fact that, each time the plaintiff underwent a breast screen she signed a disclaimer form, notifying patients that there was a "small risk" that it might not detect an existing cancer. However, Doctors should remember that, whilst the process of informed consent and written disclaimer forms play a vital role in educating the patient and obtaining consent to any procedure or treatment, they do not provide a defence in cases where diagnosis and treatment is found to have been negligent.

Interestingly, Justice Hoeben has stated to the media that he expects the decision to be appealed. Any developments in this regard, will be reported.

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