

Difficulties in proving causation in delayed diagnosis of an emerging condition

*Thompson v Dr Haasbroek*¹

By Libby Brookes

This medical negligence case involved allegations against a general practitioner for negligently failing to diagnose cervical radiculopathy in a 59-year-old woman, which would have led to a referral for a CT scan resulting in an earlier diagnosis of cervical myelopathy and spinal surgery. It was alleged that the delay in diagnosis and treatment led to physical injuries, including incomplete quadriplegia.

All issues were in dispute and the case ran for three weeks in the NSW Supreme Court before his Honour Justice Davies, with judgment handed down on 29 March 2010. Several factual disputes were ventilated during trial regarding what was said over the course of a year during the plaintiff's multiple consultations with the defendant. Ultimately, emphasis was placed upon an entry made by the defendant in his clinical notes that, in June 2003, the plaintiff had complained of neck pain radiating down her right arm. The defendant did not refer the plaintiff for any investigations, nor did he diagnose the condition.

During the course of the trial, expert evidence was given concurrently by five experts in the fields of general practice. The weight of that opinion was essentially that if the plaintiff had presented to the defendant in June 2003 with neck pain radiating down her right arm, then competent professional practice would have been to refer her on for further investigations, including a CT scan of her neck.

Causation, however, was a more difficult issue. Expert evidence was given concurrently by five medical practitioners including neurosurgeons, neurologists and an orthopaedic surgeon. As the medical condition was an emerging one, it required the experts to consider the hypothetical situation of what would have happened had the plaintiff undergone a CT scan a year earlier; what management would have ensued; and whether such management would have made a material difference to the outcome.

Additionally, the plaintiff had a number of pre-existing medical conditions. In addition to those conditions, the court was required to decide whether appropriate management would have avoided all her permanent injuries. Expert evidence was given concurrently by two rehabilitation physicians regarding the nature and extent of the plaintiff's injuries, and what injuries and disabilities resulted from the negligence.

Ultimately, the court found in favour of the plaintiff. The defendant was unable to satisfy the statutory defence in s50 of the *Civil Liability Act 2002* (NSW) based on his entry in the clinical notes regarding the plaintiff's symptoms as at June 2003, concessions made by him under cross-examination,

and the evidence given concurrently by the general practitioners.

The following findings were made:

- Had the plaintiff undergone a CT scan in June 2003, it would have shown cord compression.
- The first sign of radiculopathy was in June 2003 and was referable to symptoms of pain in the neck radiating down the arm.
- Had the plaintiff been referred to an ordinary skilled neurosurgeon or neurologist or spinal surgeon, she would have been monitored closely but would not necessarily have undergone surgery.
- Close observation by a specialist would have led to earlier detection of myelopathic signs and symptoms and earlier decompression.
- Decompression had a greater than 50 per cent chance of leading to recovery of function and improvement, although not complete resolution of neurological symptoms.
- On the balance of probabilities, earlier decompression with close observation would have meant that the plaintiff would have avoided permanent cervical spinal cord damage.

This case is a classic example of the possible repercussions of delay in diagnosis of a condition. It also highlights the difficulties that arise when the condition emerges over time, with reasonable management being expectant rather than prescriptive. The medical experts were required to follow through with the hypothetical situation of what would have happened had the plaintiff been referred on earlier, and also to consider a number of factual scenarios as to the progression of the plaintiff's symptoms over the course of a year.

In regards to non-economic loss, the court assessed the plaintiff's situation as being 75 per cent of a most extreme case (\$355,000), under s16 of the *Civil Liability Act*. However, given the multiple causes of her injuries and disabilities, this assessment was reduced by 60 per cent to acknowledge pre-existing conditions, and those injuries likely to have resulted even without the negligence. Accordingly, the plaintiff was awarded \$142,000 for non-economic loss. With damages also awarded for medical expenses, past care and equipment, the total judgment was \$290,542. ■

Note: 1 [2010] NSWSC 111.

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