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# Tabet v Gett: The end of loss of chance actions in Australia?

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*This article critically analyses the recent High Court decision in Tabet v Gett (2010) 84 ALJR 292; [2010] HCA 12 which considered whether a person should be able to obtain compensation on the basis of a loss of a chance of a better medical outcome. The appellant argued that the High Court should regard a plaintiff as entitled to compensation when a breach by a defendant of their duty of care causes the plaintiff to lose a possibility, but not a probability, of a better medical outcome. The High Court held that it was not possible for a person in the position of the appellant to obtain compensation for the loss of a chance of a better medical outcome.*

## INTRODUCTION

Loss of chance actions arise in a medical setting when a plaintiff claims that the defendant's breach of their duty caused the plaintiff to lose a possibility, but not a probability, of a better medical outcome. As the plaintiff is only able to prove that the chance of obtaining the better medical outcome was a possibility rather than a probability, the plaintiff is unable to satisfy the standard test for causation that requires a plaintiff to prove on the balance of probabilities that the defendant's breach of their duty caused the plaintiff's harm or injury. The appellant in the High Court case of *Tabet v Gett* (2010) 84 ALJR 292; [2010] HCA 12 commenced legal proceedings in an attempt to obtain compensation on a variety of grounds, including on the basis that the defendant's negligence caused her to lose a chance of avoiding part of her brain damage.

This article discusses the decision in *Tabet v Gett* and evaluates the likely impact that the case will have on future loss of chance actions in Australia. It begins with a discussion of the background to the case, addressing both the facts and procedural history of the case up until it was heard by the High Court. It then discusses the High Court decision and summarises each judgment and the reasons of the judges. Finally, it assesses the likely impact of the case on future loss of chance actions in Australia, and discusses whether such actions have been completely abolished by *Tabet v Gett* or whether there might still be some opportunities for plaintiffs to receive compensation when they have lost a chance of a better medical outcome.

## FACTS

The appellant, Reema Tabet, a six-year-old girl, was admitted to hospital on 11 January 1991. She had recently been diagnosed as suffering from chickenpox which had resolved, but both before and after that illness she had suffered from headaches, nausea and vomiting which caused her to be admitted to the hospital on 11 January. The appellant was placed under the care of Dr Gett, a paediatrician, who made a provisional diagnosis that the appellant was suffering from chickenpox, meningitis or encephalitis.

On 13 January 1991 at 11am, the father of the appellant drew to the attention of the nursing staff that the appellant's pupils were unequal and her right pupil was not reactive. The respondent, Dr Gett, after examining the appellant, ordered a lumbar puncture to be performed. On 14 January 1991, after the appellant suffered a seizure, a CT scan and EEG revealed that she had a brain tumour (a medulloblastoma).

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The appellant subsequently received medical treatment which included surgery to remove the tumour, chemotherapy and radiotherapy treatment. She suffered irreversible brain damage resulting from the tumour itself, an excess of spinal fluid in the cranial cavity (hydrocephalus), the surgery which was required to remove the tumour, and subsequent chemotherapy and radiotherapy. The appellant also claimed that part of her brain damage was caused by the failure of the respondent to order a CT scan on 13 January.

## PROCEDURAL HISTORY

### Supreme Court of New South Wales

The matter was initially considered by Studdert J in *Tabet v Mansour* [2007] NSWSC 36 in the Supreme Court of New South Wales.<sup>1</sup> The appellant's statement of claim pleaded negligence against the respondent on the basis that the CT scan should have been performed on 13 January which would have detected the brain tumour and allowed for appropriate medical treatment to commence earlier which, on the balance of probabilities, would have resulted in the appellant avoiding some of her injuries.<sup>2</sup> By an amended statement of claim, the appellant also pleaded a claim for damages in the alternative for "loss of an opportunity to avoid injury, loss and damage" on the basis that the respondent's failure to perform a CT scan on 13 January caused her to lose a possible chance of a better medical outcome (at [354]).

Studdert J held (at [193]) that Dr Gett breached his duty by failing to order a CT scan after the nurses' observations about the unusual condition of the appellant's pupils at 11am on 13 January. However, his Honour held (at [306]) that it had not been proven on the balance of probabilities that if a tumour had been discovered through a CT scan on 13 January, the appellant would have been treated in such a way that would have prevented the seizure and the deterioration of her health on 14 January. Instead, the appellant was found to have lost a chance of a better medical outcome: Studdert J held that, on the balance of probabilities, if a CT scan had been performed on 13 January it would have been performed urgently, medical treatment would have commenced earlier, and the tumour would have been treated, probably by steroids rather than by drainage, which would have reduced the intracranial pressure which partially caused the appellant's brain damage (at [376]-[377]).

Unfortunately, there was only a limited amount of expert evidence on the value of the lost chance aspect of the case as this aspect of the appellant's claim was pleaded very late in the litigation and only as an alternative to the primary case (at [378]). Consequently, Studdert J, relying on the recommendation made by Campbell AJA in *Rufo v Hosking* [2002] NSWSC 1041 of using "a robust and pragmatic approach" to such issues, held (at [378], [381]) that there was a 40% chance that the appellant would have avoided some of the brain damage that she suffered if the CT scan had been performed on 13 January. His Honour reached the figure of 40% after taking into account a number of factors, including that a CT scan would likely have been performed urgently and would have detected the brain tumour, that steroids would have been administered on 13 January which would have some beneficial effect, and an intraventricular drain may have been inserted earlier on 14 January (at [378]).

His Honour assessed the appellant's damages relating to all of her brain damage at \$6,092,586, and held that 25% of these damages were attributable to the deterioration of the appellant's health on 14 January (at [220], [429]). Consequently, his Honour held that the appellant should be awarded \$610,000, which was 10% of the total amount of damages that his Honour held were referable to the brain damage that the appellant suffered (at [430]-[434]). This figure of 10% was reached by multiplying the 40% chance of the appellant avoiding the deterioration on 14 January by the finding by Studdert J that 25% of the appellant's damages were attributable to the deterioration of the appellant's health on that day (at [430]-[434]).

<sup>1</sup> Studdert J decided a number of other issues in the case relating to Dr Gett's liability for the appellant's injuries which are not discussed in this article as they are not directly relevant to the loss of chance action. The case also considered the liability of the first defendant in the case, Dr Mansour, who had previously treated the appellant. Dr Mansour was found by Studdert J to have not been negligent and there was no appeal from this decision by the appellant.

<sup>2</sup> The statement of claim included other particulars of negligence relating to the incorrect diagnosis and the decision to perform a lumbar puncture: *Tabet v Mansour* [2007] NSWSC 36 at [117] (Studdert J).

## **Court of Appeal of the Supreme Court of New South Wales**

The respondent was successful in his appeal to the Court of Appeal of the Supreme Court of New South Wales where Allsop P, Beazley and Basten JJA held in *Gett v Tabet* (2009) 254 ALR 504 at [389] that the appellant could not obtain compensation on the grounds of a lost chance of a better medical outcome. However, the Court of Appeal rejected a number of other grounds of appeal, including the respondent's claim that he should not have been found to have breached his duty of care, and the appellant's claim that Studdert J should have found, on the balance of probabilities, that the respondent's negligence had caused the whole of the brain injury referable to her seizure and deterioration on 14 January (at [193], [375]).

In reaching their conclusion that the law should not allow actions based on a loss of a possible chance of a better medical outcome, their Honours relied upon a number of reasons. These included that loss of chance actions are inconsistent with conventional authority regarding the nature of harm required, do not form a part of a recognised stream of authority, are inconsistent with the requirement that causation must be established on the balance of probability which is now expressly enacted in the Civil Liability Acts, and are matters of policy that are best left to be addressed by the High Court (at [389]). In deciding that the common law should not recognise loss of chance actions, the Court of Appeal also held that the previous decisions of *Gavalas v Singh* [2001] 3 VR 404; [2001] VSCA 23 and *Rufo v Hosking* (2004) 61 NSWLR 678, which had ruled in favour of the existence of a loss of chance action, had not been correctly decided and should not be followed (at [389]).

The Court of Appeal also held that, even if a loss of chance action did exist, the expert evidence before the Supreme Court could not justify a finding that the loss of chance should be set at 40%. After reviewing the expert evidence from the two witnesses who directly addressed this point, their Honours concluded (at [245]) that at most the appellant lost a 15% chance of avoiding the 25% of brain damage that the trial judge held was caused by the events on 14 January.

## **High Court of Australia**

The appellant appealed to the High Court which upheld the decision in the New South Wales Court of Appeal that the appellant could not be compensated on the basis of a loss of a possible chance of a better medical outcome. The High Court also held that, on the basis of the expert evidence, the assertion that part of the appellant's brain damage could have been avoided or reduced if the respondent had not been negligent was merely speculative and could not support a loss of chance action even if such an action existed under the common law.

The decision and reasoning of each of the judges in *Tabet v Gett* (2010) 84 ALJR 292; [2010] HCA 12 is now considered.

### ***Kiefel J***

Kiefel J, who wrote the lead judgment in the case, held (at [114]) that there was insufficient expert evidence to support the appellant's claim that the brain damage that the appellant suffered on 14 January may have been avoided or reduced by the administration of steroids on 13 January. As her Honour wrote (at [114]):

The difficulty which the appellant faced in this case was that the expert medical evidence did not establish the link between the omission of the respondent, with the consequent delay in treatment, and the brain damage which occurred on 14 January, necessary for a finding of causation. There was no evidence as to what harm might have been caused by the delay.

Kiefel J stated (at [116]) that, of the many medical experts who gave evidence in the matter, there were only two who gave evidence on this central issue. The first expert, Mr Johnston, held (at [116]) that steroids are not particularly effective when intracranial pressure is due to hydrocephalus and that it was entirely possible that the plaintiff would have sustained the injuries she did on 14 January even if steroids had been used on 13 January. The second expert, Mr Klug, simply stated that, in non-acute situations, high doses of steroids were very effective but he did not provide any additional information on the possible effect that the steroids may have had in preventing or reducing the brain damage suffered by the appellant on 14 January (at [117]).

Even if the evidence had adequately addressed the possible effect of the administration of steroids on 13 January, the appellant would still have been unsuccessful as Kiefel J rejected the appellant's central claim that the common law should recognise the loss of a chance of a better outcome as actionable damage (at [109]-[112]). Her Honour stated (at [143]) that

[e]xpressing what is said to be the loss or damage as a "chance" of a better outcome recognises that what is involved are mere possibilities and that the general standard of proof cannot be met.

Her Honour held (at [148], [151], [152]) that the adoption of possible, rather than probable, causation as a condition of liability would be a fundamental change that would require strong policy considerations which her Honour concluded were not evident.

In addition to the absence of persuasive policy considerations, Kiefel J also held that the change proposed by the appellant "would suggest, if not require, a degree of precision in the assessment of probabilities which is not part of the more liberal, commonsense, approach presently undertaken" (at [150]). Further, her Honour emphasised (at [148]-[149]) that the general standard of proof required in negligence actions was flexible and did permit a level of uncertainty in proof of causation, and that the common law had shown itself able to adapt appropriately to the challenges faced in a number of cases involving difficulties of proof.<sup>3</sup>

Kiefel J rejected the appellant's argument that the fact that Australia already recognises a loss of a commercial opportunity as actionable damage supported a finding by the court that a loss of a chance of a better medical outcome should also be considered actionable damage (at [122]). Her Honour held that, when a commercial opportunity has been lost, it will often be readily apparent that the opportunity lost was of value in itself so long as there was a substantial, rather than merely a speculative, prospect of acquiring a benefit (at [124]). However, a loss of a chance of a better medical outcome only has value in relation to the injury or loss ultimately suffered by the plaintiff (at [124]).

### **Gummow ACJ**

Gummow ACJ reached a similar conclusion to Kiefel J in holding that there was insufficient expert evidence on whether part of the appellant's brain damage would have been avoided or reduced by the administration of steroids on 13 January (at [43]-[45]). His Honour, after reviewing the evidence of Mr Johnston and Mr Klug, held (at [43]-[45]) that their evidence provided a basis for no more than speculation as to the loss of a chance of a better outcome. Consequently, his Honour held that the appeal to the High Court should fail on this ground alone (at [45]).

Despite his finding on the evidentiary problems facing the appellant, his Honour went on to consider the merits of the appellant's assertion that the common law should allow loss of chance actions. In his decision Gummow ACJ identified a number of the arguments that are typically relied upon to support loss of chance actions. His Honour discussed how allowing loss of chance actions would make it easier for many plaintiffs to be able to prove actionable damage (at [57]). Such actions would also avoid the injustice that can be inflicted on parties through the current "all or nothing" approach that the law adopts to issues of causation (at [59]). His Honour also considered the view that the proposed change in the law might assist in maintaining appropriately high standards in situations where there is a less than even chance of a cure (at [59]).

However, his Honour ultimately rejected the appellant's claim that the law in Australia should recognise loss of chance actions. In reaching this conclusion, Gummow ACJ held that the traditional legal approach to causation issues reflected a carefully considered compromise between the competing interests of parties and that allowing a loss of chance action would shift the balance towards claimants (at [59]). His Honour further considered the possibility that allowing such actions might increase the practice of defensive medicine in Australia and that this would involve costly testing procedures (at [59]). Another factor that he considered to be important was that loss of chance actions might remove analysis of the facts and law to a more abstract level, when the analysis should be focused on the actual harm suffered by the claimant and the possible causes of that harm (at [62]).

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<sup>3</sup> Kiefel J mentioned the cases of *Snell v Farrell* [1990] 2 SCR 311; *Adelaide Stevedoring Co Ltd v Forst* (1940) 64 CLR 538; *McGhee v National Coal Board* [1972] UKHL 7; and *Fairchild v Glenhaven Funeral Services Ltd* [2003] 1 AC 32 (although stating (at [149]) that the last two cases were "perhaps more controversial").

Gummow ACJ also rejected (at [47]) the argument that amending the law to recognise a loss of chance of a better medical outcome as actionable damage could be supported on the basis that the law already recognised that a loss of a commercial opportunity could be actionable damage. His Honour held that damage is essential in negligence actions while an action for breach of contract exists at the moment the contract is breached (at [47]). Consequently, in a negligence action the issues of the existence and the causation of compensable loss cannot be established by reference to a breach of a previous promise to provide an opportunity (at [47]).

### **Hayne and Bell JJ**

Hayne and Bell JJ held (at [65]) that the appellant did not satisfactorily demonstrate that the respondent's negligence was a cause of her damage and supported their finding by referring to the reasons given by Kiefel J. Their Honours added that loss of chance actions should not be allowed as they would alter the balance struck between the competing interests of claimants and defendants (at [68]). Thus they stated (at [69]) that

the language of loss of chance should not be permitted to obscure the need to identify whether a plaintiff has proved that the defendant's negligence was more probably than not a cause of damage ... The language of possibilities (language that underlies the notion of loss of chance) should not be permitted to obscure the need to consider whether the possible adverse outcome has in fact come home, or will more probably than not do so.

### **Heydon J**

Heydon J also held that there was insufficient expert evidence on the key question of whether the brain damage that the appellant suffered on 14 January would have been avoided or reduced if steroids had been administered on 13 January. His Honour stated that, on the basis of the expert evidence of Mr Johnston, "it was not possible to say that there was even a chance that steroid treatment may have prevented the episode" (at [90]). His Honour further held (at [92]) that the expert evidence of Mr Klug did not support any conclusion that the effect of the administration of steroids on 13 January would have been to reduce the chance of the brain damage which occurred on 14 January.

Heydon J also considered that it was significant that the trial judge assessed the loss of chance at 40% while the Court of Appeal assessed it at most at 15%, and argued that this significant difference in percentage figures suggested that the state of the evidence on this central issue permitted only speculative findings (at [96]). Consequently, his Honour found (at [93]-[94]) that the conclusion in the Supreme Court and Court of Appeal that there was a chance of avoiding the brain damage on 14 January had the defendant arranged a CT scan on 13 January could not be sustained.

Heydon J stated (at [97]) that, due to his findings on causation, he would not address the issue as to whether the law should permit a loss of chance action as such a resolution could not produce any consequences for the parties. His Honour argued that a consciousness that the resolution of a legal issue is decisively important to the interests of the parties before the court can significantly increase the quality of the judicial reasoning concerning how that issue should be resolved (at [98]). On this basis, his Honour declined to consider the loss of chance aspect of the case, stating (at [98]) that "to embark on difficult and doubtful inquiries in an attempt to answer the question without the assistance to be gained from that consciousness is a potentially very dangerous course".

### **Crennan J**

Crennan J held that Australian law should not permit recovery of damages where the breach of a duty of care results in the loss of a chance of a better medical outcome (at [100]). Her Honour supported her conclusion on the basis that loss of chance actions might encourage defensive medicine, that the increased practice of defensive medicine might adversely impact on the Medicare system and private medical insurance schemes, and that there might be a number of negative effects produced if there were to be a change to the basis of the liability of professional liability insurance of medical practitioners (at [102]). Crennan J further claimed that the change in the common law requested by the appellant was radical and was therefore the kind of change that should generally be made by Parliament (at [102]). Her Honour also supported her conclusion by referring (at [100]) to the reasons that Kiefel J relied upon in reaching the same conclusion.

## THE IMPACT OF TABEL V GETT ON LOSS OF CHANCE ACTIONS IN AUSTRALIA

The decision of the High Court in *Tabet v Gett* has been widely interpreted as a definitive statement that the common law in Australia does not allow a plaintiff to obtain compensation on the basis of a loss of chance action. However, there are a number of comments in the judgment which indicate that there may be some situations where a plaintiff may be able to be successful on a loss of chance action or at least be able to rely upon an alternative action to obtain compensation where previously they may have been able to rely on a loss of chance action. Some of these possible situations include actions based on increased risk, a contractual claim for a loss of chance, and a loss of a chance action in particular situations.

### Increased risk of injury

An action based on an increased risk of injury might be a way that a plaintiff can obtain compensation in circumstances where they may previously have relied upon a loss of chance action. Such a possibility was raised by Kiefel J where she referred to an article written by Professor Khoury which addressed this issue.<sup>4</sup> Her Honour stated (at [129]) that

Professor Khoury discusses whether an increase in the risk of injury, there being some cases of lost chance which come within this description, might be considered an independent head of damage. It is not necessary to further consider this question on this appeal.

However, any plaintiff who tried to rely upon an action based upon increased risk would need to demonstrate that it fell within the special category of cases

where the expert evidence falls short of demonstrating a probable causal link between breach and harm, but where an analysis of the surrounding circumstances (ie the nature of duty of care owed and breach, degree of increased risk, likelihood of the plaintiff falling within that class of increased risk and absence of other explanations for the injury) supports a causal link.<sup>5</sup>

### Contractual claim for loss of chance

Another situation where it might be possible for a plaintiff to succeed on the grounds of a loss of a chance of a better medical outcome is on the grounds of contract. Gummow ACJ recognised this possibility in his judgment (at [20]):

[I]n the British Columbia Court of Appeal it has been said by Southin JA that, in that Province, the relationship of patient and physician is essentially contractual. The patient has the right to performance of the contract on its terms and on that basis there might be recovery of damages representing the loss of a chance of less than 50 per cent of a better outcome. But, as indicated above, there was no contractual claim in this case and no occasion to consider the approach taken by Southin JA.

Consequently, in situations where there is a contract between the plaintiff and the defendant in a medical setting, it may be possible for the plaintiff to succeed on a loss of chance action.<sup>6</sup> However, a court may hold that a plaintiff will only be successful in such circumstances if the loss of a chance is of a financial character.<sup>7</sup> As Gummow ACJ stated (at [49]), “if a plaintiff, by the breach of contract by the defendant, has been deprived of something which has a monetary value, there is to be an assessment of damages notwithstanding difficulty in calculation or impossibility of making an assessment with certainty”.

Even if such a financial restriction did exist, it may still be possible for a plaintiff to be able to obtain compensation for a loss of a chance in a medical situation where there is a contract between the

<sup>4</sup> Khoury L, “Causation and Risk in the Highest Courts of Canada, England, and France” (2008) 124 LQR 103.

<sup>5</sup> Tynan S, Bowen T and Saxton A, *The Demise of Loss of a Chance Cases in Medical Negligence Claims* (2010), [http://www.dibbsbarker.com/publication/The\\_demise\\_of\\_loss\\_of\\_a\\_chance\\_cases\\_in\\_medical\\_negligence\\_claims.aspx](http://www.dibbsbarker.com/publication/The_demise_of_loss_of_a_chance_cases_in_medical_negligence_claims.aspx) viewed 7 June 2010.

<sup>6</sup> Pavlakis J, Mallon L and McMeniman C, “Professional Negligence: Damages for Loss of Chance of a Better Medical Outcome in *Tabet v Gett*” (2010) 6(10) *Australian Civil Liability* 250 at 254.

<sup>7</sup> For a more detailed discussion of loss of a chance actions in a commercial and medical context, see Freckelton I, “The Evolution of Loss of Chance” (1999) 7 JLM 5 at 5-8 (Editorial); Hamer D, “‘Chance Would Be a Fine Thing’: Proof of Causation and Quantum in an Unpredictable World” (1999) 23 MULR 557.

plaintiff and a health professional for the provision of services. For example, a plaintiff who works as an actor may enter into a contract with a plastic surgeon to undergo a particular cosmetic procedure on the understanding that the procedure is being undertaken in order to improve their chances of success at a forthcoming audition. If the plastic surgeon negligently performs the procedure in such a way that the physical improvement does not occur and the plaintiff is not injured by the negligently performed operation, then it may be possible in such circumstances for the plaintiff to be able to obtain compensation if it can be shown that the plaintiff lost a possible chance of securing a financial benefit. A court might hold that this kind of situation is not significantly different to *Chaplin v Hicks* [1911] 2 KB 786 which Gummow ACJ discussed in his judgment (at [48]-[49]). In this case, the plaintiff was awarded damages on the basis of a loss of a chance when the defendant breached their contract by failing to give the plaintiff an opportunity to be selected in a competition where the prize was a three-year theatrical engagement.<sup>8</sup>

### Loss of chance in particular situations

There were a number of comments in *Tabet v Gett* where the judges indicated that the decision in the case may not have completely removed all possibility of a plaintiff being successful in the future on the basis of a loss of chance action in situations that are different in some significant respect from the circumstances of the appellant. For example, Gummow ACJ stated (at [27]) that the outcome in the appeal to the High Court

will not require acceptance in absolute terms of a general proposition that destruction of the chance of obtaining a benefit or avoiding a harm can never be regarded as supplying that damage which is the gist of an action in negligence.

Hayne and Bell JJ stated (at [69]) that

[i]t may be that other cases in which it might be said that, as a result of medical negligence, a patient has lost “the chance of a better medical outcome” (for example, a diminution in life expectancy) differ from the present case in significant respects. These are not matters that need be further examined in this case.

Consequently, it is possible that a variety of cases may arise in the future in which the plaintiff argues that their particular situation is significantly different from the circumstances in *Tabet v Gett* and that the court should award the plaintiff compensation for loss of a chance of a better medical outcome. A situation where this may occur could be in that suggested by Hayne and Bell JJ, where the plaintiff claims that due to the defendant’s negligence they lost a possible, but not a probable, chance of avoiding a reduction in their life expectancy.

An example of a situation where this could arise is where a patient sees their general practitioner who fails to diagnose that the patient is suffering from cancer which is subsequently diagnosed at a later appointment.<sup>9</sup> If expert evidence reveals that the patient has not suffered any additional physical harm by the delayed diagnosis but has suffered a reduction in their life expectancy, then this could be another situation where a plaintiff would be able to obtain a modest compensation payment on the basis of a loss of a chance of a better medical outcome.

This type of situation arose in the case of *Gregg v Scott* [2005] 2 AC 176 where there was a negligent misdiagnosis which resulted in a one-year delay in diagnosing that the plaintiff was suffering from cancer which resulted in a reduction in the plaintiff’s life expectancy. The majority of the House of Lords held that the plaintiff was not able to receive compensation on the basis of a loss of a chance of a better medical outcome.<sup>10</sup> There is little doubt that this and other similar cases would be relied upon by a defendant to try to defeat a loss of chance action in these circumstances; however, in light

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<sup>8</sup> For further details on the case and a general overview of loss of chance actions, see Meldrum M, “Loss of a Chance in Medical Malpractice Litigation: Expanding Liability of Health Professionals Versus Providing Justice to Those Who Have Lost” (2001) 9 JLM 200 at 201.

<sup>9</sup> Graham D, “Causation Problems in Medical Negligence” at [46], paper delivered at Medical Negligence Conference, Sydney, 26 May 2010.

<sup>10</sup> For a more detailed discussion of the case, see Peel E, “‘Loss of a Chance’ Revisited: *Gregg v Scott*” (2003) 66 Mod L Rev 623; Stapleton J, “Loss of the Chance of Cure from Cancer” (2005) 68 Mod L Rev 996.

of the reference by Hayne and Bell JJ in *Tabet v Gett* to a possible action existing in these circumstances, it may be that cases like *Gregg v Scott* will not be followed in Australia.

### **CONCLUSION**

The High Court in *Tabet v Gett* held that a person in the position of the appellant will not be able to obtain compensation for the loss of a possible chance of a better medical outcome. The court reaffirmed that a person will only be able to obtain compensation if they can satisfy the standard test for causation that requires a plaintiff to prove on the balance of probabilities that the defendant's breach of their duty caused or materially contributed to the plaintiff's harm or injury.

Although the claim for compensation for a loss of a chance was rejected in this case, there may nevertheless be a number of situations where a plaintiff might succeed in obtaining compensation either on a loss of chance action or on the basis of another action in circumstances where they may previously have tried to rely on a loss of chance claim. Some of these possible situations include actions based on an increased risk of injury, a contractual claim for a loss of a chance of a better medical outcome, and a loss of a chance action in circumstances that a court decides are significantly different to the situation confronted by the plaintiff in this case. Consequently, it will be necessary to await future litigation on these and other grounds before it will be possible to answer the question conclusively whether the High Court in *Tabet v Gett* did bring a conclusive end to loss of chance actions in Australia.