The APLA Update

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Failure to Diagnose Cancer Condition: Bowel Cancer

Locher v Turner (unreported) Court of Appeal Queensland 21/4/95.

Peter Carter, Qld

Medical negligence - bowel cancer - failure to review provisional diagnosis - failure to elicit particulars of continuing symptoms - failure to counsel appropriate patient follow-up - failure to refer - contributory negligence.

Material facts

In May 1992 Mrs Locher (the first plaintiff) presented to her general practitioner (the defendant) with rectal bleeding. The general practitioner performed an anoscope in which she detected inflamed internal haemorrhoids. The doctor did not positively identify the haemorrhoids as having been the source of the bleeding.

In September 1992 Mrs Locher presented again complaining of stomach pain on sexual intercourse. It was in dispute as to whether she mentioned her continuing rectal bleeding on that occasion. No further examination was performed. The doctor made a provisional diagnosis of "irritable bowel syndrome" and the possibility of a colonoscopy being carried out in the future was discussed.

The bleeding recurred and although Mrs Locher consulted the defendant again twice in November 1992, it was not mentioned by her in either visit. Likewise, the defendant did not make any enquiries of Mrs Locher as to the then status of her condition.

In January 1993 the first plaintiff presented again to the defendant's co-practitioner with further symptoms of bleeding. The prospect of a colonoscopy was again mentioned in the notes.

On 1 December 1993, Mrs Locher consulted her GP's co-practitioner again with rectal bleeding. A colonoscopy was arranged.

As a result of biopsy performed by colonoscopy, a carcinoma of the sigmoid with metastases was diagnosed in March 1994. The cancer had by then spread to her liver.

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At the time of the trial in the Supreme Court at Rockhampton, Mrs Locher's life expectation was estimated to be no more than twelve months and she was receiving chemotherapy.

Mrs Locher sued Dr Turner for alleged negligence in failing to adequately investigate her bowel complaints when she first presented in May 1992 and also asserted that had a diagnosis been made then, her condition would have been treatable.

At trial

The defendant stated in evidence that in the examination in May 1992, although she had observed haemorrhoids in a red and friable condition, she had not observed them actually bleeding.

His Honour Demack J found that the defendant had apparently drawn a conclusion that the haemorrhoids were responsible for the bleeding but "what was seen on examination was [only] a possible explanation for the bleeding".

Although His Honour was not satisfied that there was a complaint of bleeding made by Mrs Locher in her September 1992 visit, he found as follows:

> "In my opinion the failure of Dr Turner to review the provisional diagnosis made on 16 September 1992 in which she was considering colonoscopy, deprived her of the opportunity of recommending further tests which should have led to the discovery of the tumour. By that time there should have been a malignant tumour in the colon according to Dr Olsen's estimate. I am satisfied that, in November 1992, Mrs Locher was still suffering from rectal bleeding, but did not say so. However, against the background of the examination on 25 May 1992 and the provisional diagnosis on 16 September 1992 the obligation to raise the issue did not remain upon Mrs Locher alone. Dr Turner was versed in the matters Dr Olsen referred to. I am satisfied that, if such review had taken place, there was a strong probability that surgery would have occurred twelve months before it did. I am satisfied that an ordinary competent medical practitioner exercising the ordinary degree of professional skill would have reviewed the provisional diagnosis and would have begun further investigations. Dr Turner's failure constitutes negligence on her part, which deprived Mrs Locher of a chance of undergoing favourable surgery."

His Honour accepted the evidence of specialists and general practitioners that "it is essential before making a diagnosis to identify the bleeding site" in cases of rectal bleeding. His Honour further found that a diagnosis of "irritable bowel syndrome" is merely a diagnosis of exclusion and that such diagnosis was in any event "left unresolved in the notes".

His Honour also accepted that the tumour had become malignant in early 1992 and its spread to the liver had occurred in about mid-1993 and that treatment as late as November 1992 would have left Mrs Locher with a chance of recovery.

Judgment was entered for the plaintiffs in December 1994. Damages were assessed at $150,000 and reduced to $120,000 by reason of the first plaintiff's 20 per cent contributory negligence. Mr Locher (as second plaintiff) was awarded $10,000 for loss of consortium.

On appeal

The defendant appealed. It was argued that Mrs Locher's failure to disclose the frequency and seriousness of her rectal bleeding (particularly in November 1992) should have weighed more heavily in favour of the defendant, both insofar as the primary finding of negligence was concerned and also in relation to the extent of her contributory negligence.

The Appeal was dismissed with costs with the court generally agreeing with the principal observations as to duty and standard of care as made by the learned trial Judge.

His Honour, McPherson J.A. observed:

> "Having regard to the expert evidence stressing the need to identify the site of the bleeding, Dr Turner was in the circumstances not justified in letting the matter drop as she did in May 1992. She ought by then to have been alerted to the possibility that her earlier diagnosis or diagnoses might be wrong. She should not have been satisfied with the patient's own statement that her condition was "fine". The risk that the condition might be life threatening was too serious to pass over in this way. By the time Mrs Locher returned again to Dr Bartrum on 1 December 1993 with further complaints of bleeding, her condition had passed the point where it was capable of being effectively treated."

He further held:

> "It ought not to be assumed that a lay patient would appreciate the potentially lethal significance of a condition causing persistent bleeding from the bowel."

The plaintiffs initially appealed against the finding of contributory negligence but their appeal was not pursued.

Editorial

Once again I am happy to be able to report that APLA's membership has grown substantially since our last issue. We have now reached 330 members, well above our target for 1995 of 300 members. If you have colleagues who would benefit from APLA membership please pass on the enclosed membership forms.

Last issue we included a number of expert data base forms for you to complete and return. If you have not completed them as yet, it is not too late, please complete and return the forms to Anne Purcell at the APLA office. We still require experts to boost the numbers on our data base - To make it simple, just fax the forms back on (02) 262 6935.

I would like also to encourage the new members of APLA to join the many regular contributors to our newsletter. Please put pen to paper and write up cases which you believe would be of interest to our members. Alternatively, any changes to legislation or reform proposals that you believe APLA members should be aware of, can be written up.

If you wish to discuss possible articles or obtain further details about type specifications please call Anne Purcell on (02) 262 6960.

APLA has also held a number of very successful litigation at sunrise seminars around the country, if you would like to make suggestions regarding possible topics for future functions or know of speakers in your state who would be interesting to hear please, contact Anne Purcell to discuss.

Feedback is very important to APLA, if you have any comments or queries about our services please contact the APLA Office.

Personal Injury Claims - Are They Exempt From Capital Gains Tax?

Ronald Gorick, NSW

When someone gets injured in a motor vehicle collision everyone knows that upon recovery of damages for such personal injuries the capital gains tax provisions of the *Income Tax Assessment Act* are not attracted, but are you sure? My firm recently had an interesting matter, which was one of the old tail GIO 1942 Act motor vehicle damages claims.

The facts were reasonably straightforward - we acted for a pedestrian who was knocked down by a motor vehicle during 1986. At that time the provisions of the 1942 Act covered the collision. Proceedings were issued in the District Court claiming damages for personal injuries. Due to the plaintiff's movements, particularly overseas, the matter was delayed. Unfortunately the plaintiff passed away in 1994 due to causes that were unrelated to the injuries sustained in the collision. At that time the matter had not been determined.

The court and the government then decided to do their upmost to clear all the old 1942 tail matters. The matter then came before the court. An application was made substituting the legal personal representative of the plaintiff in the action. This occurred during early 1995. Thereafter, the matter was allocated a hearing date and was settled on the morning of the hearing.

Prior to the hearing the capital gains provisions of the Income *Tax Assessment Act* needed to be considered.

Upon the reading a section 160ZB(1) of the *Income Tax Assessment Act* damages recovered for personal injury is exempted from the imposition of capital gains tax. This exemption also extends to damages recovered in a *Compensation To Relatives Act* claim due to TD92/130 and also as proposed in TR94/D35. However, since the matter was taken over and pursued by the legal personal representative, it was necessary to consider whether a capital gain would accrue to the legal personal representative. Do section 1 60ZB(1) and the provisions of TD92/