

PARTIES: ANNE ELIZA JESSIE WOLF
v
MARY PUNITHAM
and
THE FAMILY PLANNING ASSOC
OF THE NT (INC)
and
COMMERCIAL UNION ASSURANCE
COMPANY OF AUSTRALIA LTD

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY exercising
TERRITORY JURISDICTION

FILE NO: 8810003 47/88

DELIVERED: 29 May 1998

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CATCHWORDS:

Damages – general principles – assessment – personal injuries – cancerous invasion of uterus – hysterectomy – psychological damage – loss of libido – ugly and extensive scarring – pain and suffering and loss of amenities of life \$40000 – special damages \$5078.91.

Damages – general principles – assessment – personal injuries – negligent failure to action pap smear result – whether hysterectomy operation could have been avoided but for the 14 month delay in diagnosis and treatment – degree of probability.

Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, applied.

Poseidon Ltd v Adelaide Petroleum NL; Sellars v Adelaide Petroleum NL (1994) 68 ALJR 313, applied.

Graham v Baker (1961) 106 CLR 340, applied.

Williamson v Commissioner for Railways (1960) SR (NSW) 252, applied.

De Girmolano v South Australia (1991) 56 SASR 40, referred to.

REPRESENTATION:

Counsel:

Plaintiff:	J. Reeves QC
Second Defendant:	S. Gearin

Solicitors:

Plaintiff:	Morgan Buckley
Second Defendant:	De Silva Hebron

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(tho98006)
IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 8810003

BETWEEN:

ANNE ELIZA JESSIE WOLF
Appellant

AND:

MARY PUNITHAM
First Defendant

and:

**THE FAMILY PLANNING
ASSOCIATION OF THE
NORTHERN TERRITORY (INC)**
Second Defendant

and:

**COMMERCIAL UNION
ASSURANCE COMPANY OF
AUSTRALIA LIMITED**
Third Party

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 29 May 1998)

This is a claim in negligence against the second defendant. The plaintiff obtained judgment against the second defendant on 15 June 1993. Liability not being in issue the matter proceeded as an assessment of damages.

At the commencement of the hearing of these proceedings on 28 October 1997 the Court was advised that the issue between the plaintiff and the first defendant had been resolved and consent orders were reduced to writing and filed.

Following the making of these consent orders Mr Mueke, counsel for the first defendant, was granted leave to withdraw and the first defendant took no further part in the proceedings. Mr Bell, counsel for the third party, also sought leave to withdraw and the third party took no further part in the proceedings.

Accordingly, the assessment proceeded solely between the plaintiff and the second defendant.

On 24 May 1985 the plaintiff, Mrs Wolf, attended the Family Planning Association of the Northern Territory at the Flynn Drive Medical Centre in Alice Springs to have a pap smear. Mrs Wolf was examined by Dr Punitham who told her if she didn't hear from the doctor in about ten days, she would know everything was fine. Mrs Wolf heard nothing further and returned to the Family Planning Association on 18 August 1986 for her next annual pap smear test. It took a little while to locate her file. When it was located Dr Punitham advised Mrs Wolf that the report on her pap smear test undertaken in May 1985 had not been drawn to the attention of Dr Punitham until the date of Mrs Wolf's attendance at the clinic on 18 August 1986. Dr Punitham then advised Mrs Wolf that the test results indicated carcinoma cells were present. The

result of the pap smear test conducted in May 1985 had not been communicated to Mrs Wolf prior to her attendance at the clinic on 18 August 1986.

Mrs Wolf was immediately admitted to hospital for a cone biopsy. The result of this indicated a cancerous invasion of her uterus. A few weeks later on medical advice Mrs Wolf underwent a hysterectomy. This operation had certain consequences and the effects of such operation are included in her claim for damages.

The claim for damages is in three categories.

- (1) Damages for pain, suffering and loss of amenities of life including the physical effects of the operation and the mental anguish flowing from the late notification of her condition.
- (2) Special damages including loss of wages.
- (3) Interest on economic loss and on non economic loss.

The major issue on the assessment of damages is whether or not the hysterectomy operation could have been avoided if Mrs Wolf had been told in May or June of 1985 the result of her pap smear and had other preventative medical procedures been put in place.

Mrs Wolf was born in Edinburgh Scotland on 24 May 1938. The date of her pap smear on 24 May 1985 was her 47th birthday. She is now 59 years of

age. Mrs Wolf travelled to Australia at the age of 17 years and came to the Northern Territory to live in 1965. Mrs Wolf married and between 1958 and 1967 gave birth to six children. She and her first husband divorced in 1976. In 1980 Mrs Wolf married her present husband. In 1979 Mrs Wolf commenced employment as a Wards Clerk at the Alice Springs Hospital and remained in that employ until 1989 when she and her husband moved to Tennant Creek. Between 1989 and 1996 Mrs Wolf and her husband lived in Tennant Creek where Mrs Wolf had employment as a nurse's assistant at a nursing home. This employment continued until 1996 when the couple moved to Streaky Bay in South Australia, where they now live.

On 24 May 1985, Mrs Wolf had an appointment at 7.30pm with Dr Mary Punitham at the Family Planning Association of the Northern Territory Inc. in Alice Springs. Dr Punitham conducted a pap smear and said 'if you don't hear from me in 10 days you'll know everything is fine.' Mrs Wolf did not hear anything, although she did see Dr Punitham every day in the ward at Alice Springs Hospital. Mrs Wolf returned to the Family Planning Association on 18 August 1986 for her next pap smear. Mrs Wolf (p39) said it was 2-3 years prior to 24 May 1995 that she had her previous pap smear. At the appointment with Dr Mary Punitham on 18 August 1986, Dr Punitham told her she had not been handed the previous report before. The result of the pap smear taken on 24 May 1995 indicated that Mrs Wolf had cancer of the cervix. Mrs Wolf was in a state of shock and thought she was going to die. The following morning she had an appointment with Dr George Blumer. Dr Blumer informed her she needed to have a cone biopsy immediately. The cone biopsy was conducted

the same day. Mrs Wolf remained in hospital for ten days. During this period she felt scared and had feelings that she wanted to die. She was also fearful because her own mother had died of bowel cancer at the age of 54. She was then informed that she would need to have a hysterectomy in approximately six weeks. Mrs Wolf was off work from 18 August 1986 for a period of approximately 3 months. During this time she had a hysterectomy.

Following the cone biopsy Mrs Wolf was informed she would have to have her uterus removed and that she had cancer. Mrs Wolf felt frightened and scared. Following the hysterectomy she had to wait on the results of specimens to ensure all the cancer had been removed. Following the operation, the scarring was extensive and ugly. Mrs Wolf refused a further operation to tidy up the scarring. She went home and rested, feeling weak and cheated. These operations took up her full sick leave, she had no sick leave available for a subsequent gall bladder operation.

On her return to work at the Alice Springs Hospital, she was not able to do any of the heavy work, or assist with the making of beds. This continued until she left her employment at Alice Springs Hospital in 1989.

One of the noticeable effects after the hysterectomy operation was a lack of interest in sexual intercourse. Mrs Wolf said she had no sex drive at all. Mrs Wolf consulted with Dr Anderson, who prescribed an injection to assist to bring the libido back. Mrs Wolf had an injection of testosterone, but nothing happened. Mrs Wolf was not offered any other treatment.

Within two weeks of the hysterectomy operation, she was having hot flushes and suffered violent headaches. The doctors advised her this occurred because her ovaries had been removed. She was started on a course of hormone replacement tablets, taking them for about six months. Subsequently she was given a hormone implant into her stomach. These hormone implants are now necessary approximately every twelve months.

Following the operation, Mrs Wolf was required to undergo further tests, and every 3 months had a volt smear until she was told everything had cleared up; she was then required to have a volt smear every 12 months. She has undergone a volt smear every 12 months since then. There has been no recurring cancer. There has been no change to her loss of libido. Mrs Wolf has endeavoured, unsuccessfully, to have sexual intercourse with her husband. Attempts at sexual intercourse were painful and caused spasms. There were no feelings of pleasure. This has had a drastic affect on their relationship. Mrs Wolf's husband is six years younger than she, and she feels "very bad" that she cannot do anything. She felt she was no good to her husband, and that he would leave her because she could not satisfy him. Mrs Wolf is still with her husband. Last year they moved from Tennant Creek to Streaky Bay in South Australia. They are still not able to have intercourse. Her husband is not drinking as much and they are a lot happier than they had been in Tennant Creek. They are fishing and doing a lot of things together.

During their time in Tennant Creek they had very little social life because of their respective work commitments. Before the hysterectomy operation they

were living in Alice Springs, they had a very close and happy life together which involved camping trips and dinner parties, an active social life and a good sex life. Between the pap smear in May 1985 and August 1986, Mrs Wolf noticed a change in her health. She obtained vitamin tablets, but did not seek medical assistance. In about June/July 1985, she started to feel tired and lethargic; she took some holidays, but felt even worse on her return. There is no medical evidence to support a finding that these feelings of tiredness and lethargy were associated with the cancer of the cervix. Dr Glenning specifically states that these were not relevant symptoms.

Mrs Wolf agreed in cross-examination that hot flushes and headaches are a symptom of menopause. She also agreed that 6 weeks after major surgery she was not surprised as to the feelings of loss of libido. However, this lack of feeling continued, and has continued up to the present time.

Mrs Wolf also agreed, under cross-examination, that 6 months after her operation her husband started to drink heavily. He became an alcoholic and this impaired his ability to have sexual intercourse.

In January, 1987, Mrs Wolf was told by her treating doctor who examined her, that everything was fine after the hysterectomy.

It is Mrs Wolf's evidence that, had she been told in May 1985 that she had cancer, she would have been shocked and upset. However, it was worse to be told in August 1986 about the result of the pap smear because of the

passage of time and her fear that she would be too far gone to be saved. Under cross-examination Mrs Wolf agreed that had she been advised in May 1985 to have a hysterectomy, she would have proceeded to have a hysterectomy.

I accept the evidence given by Mrs Wolf as to the effects upon her of the late notice of the result of the pap smear. I also accept her evidence as to the effects upon her of the subsequent operation and treatment.

Dr Peter Glenning is a specialist in obstetrics and gynaecology. Dr Glenning prepared a report on Mrs Wolf dated 9 March 1990 from other reports given to him. This report was tendered as Exhibit P1. His evidence is that the purpose of the pap smear is to detect abnormalities at an early stage, before invasion has occurred, so that the treatment can be far less radical. In the case of Mrs Wolf, at the hysterectomy her womb was removed as were her ovaries and there was a vaginal cuff, which means the cuff of the vagina is removed. The pathology reports indicated there was moderate dysplasia. There was no evidence of invasive cancer. Dr Glenning stated the results of the cone biopsy indicated there was minimal invasive cancer. The hysterectomy was performed because the cone biopsy did not excise all of the abnormal tissue. Dr Glenning stated that in all probability the stromal or micro invasion of cancer would not have been present at the time of the pap smear. The result of the pap smear was tendered as Exhibit P2, the cone biopsy report Exhibit P3 and the hysterectomy report Exhibit P4. It is Dr Glenning's evidence that there is a variable rate of progression from pre-

invasive to invasive cancer. It was not possible to state what the rate would have been in Mrs Wolf's case. Dr Glenning confirmed the statement in his report that his opinion was that "it is very likely that a hysterectomy would have been avoided had appropriate action been taken when the cytology results were first known to be abnormal." Dr Glenning does not have formal qualifications in oncology. He stated that based on his experience as a specialist, it was his opinion that because of the early extent of the invasion that was present at the time of the cone biopsy, then on the balance of probabilities it would not have been present at the time of the pap smear 14 months earlier.

Although Dr Glenning does not have formal qualifications in oncology, he has 35 years' experience as a gynaecologist, which includes treatment of patients with cancer of the cervix.

I accept the opinion of Dr Glenning which is more fully expressed in his report (Exhibit P1):

"In my opinion, it is very likely that a hysterectomy would have been avoided had appropriate action taken place when the cytology results was (sic) first known to be abnormal. On the basis of the histology report on the cone biopsy specimen it would be reasonable to think that invasion had taken place only recently although nobody can state whether "recently" would be a matter of weeks or months or longer. It is possible that a hysterectomy would have been necessary even though immediate treatment had taken place but the balance of probability is that it would not."

In making this statement, Dr Glenning relied on his medical experience and his knowledge of the disease process. Dr Glenning stated that Mrs Wolf would have become menopausal eventually and it is a likely consequence that there would have been a loss of libido. There is nothing in the reports from the other specialists which alters his opinion. It is Dr Glenning's opinion that on the balance of probabilities, the treatment in May 1985 would not have been a hysterectomy had the results of the pap smear been made known.

Dr Albert Raymond Anderson is a medical practitioner practising in the Northern Territory. He has qualifications in obstetrics and gynaecology. His report dated 9 September 1997 was tendered and is Exhibit P6. In this report Dr Anderson gives a chronology of the treatment given to Mrs Wolf which included a cone biopsy, which showed invasive (micro) disease, an abdominal hysterectomy, bilateral salpingectomy and oophorectomy with vaginal cuff. Mrs Wolf was given a testosterone injection and when this was of no benefit, a testosterone implant. In his report Dr Anderson stated as follows:

“On the 19/8/86 she was seen by Dr G Blumer. The histology of the cone biopsy revealed micro invasive disease.

She is fortunate that this was not worse. However her disease now appears to be cured with no further evidence of recurrence.

She was advised to have regular smears for the rest of her life.

This delay and resultant hysterectomy and oophorectomy have had a disastrous effect on Mrs Wolf.

Her hot flushes are difficult to control and she needs implants for these. The testosterone has also had no effect on her libido.

If she had been treated earlier there is no doubt that her uterus and ovaries could have been saved with no problems of anxiety, hot flushes or lack of libido.”

I accept the evidence of Dr Anderson and his opinion as to the effect on Mrs Wolf of the delay and subsequent hysterectomy. Dr Anderson in cross-examination did agree with the opinion expressed by Dr Sweet at p4 in his report (Exhibit P12). Dr Sweet stated as follows:

“I find it very difficult to state one way or the other whether the 14 month delay in diagnosis of the carcinoma cells in the cervix would, or could have led to a simple cone biopsy management, and the avoidance of hysterectomy. In my opinion it is not really known the rate at which carcinoma progresses, and whilst it is certainly tempting to state that a cone biopsy performed in June of 1985 MAY have been curative, and avoided further therapy, it is in my view not possible to state this categorically. It is my view that if you wish to pursue this aspect that you seek an opinion from an acknowledged gynaecological oncologist, who may be able to help you arrive at some degree of relative risk one way or the other.”

In agreeing with this part of Dr Sweet’s report, Dr Anderson was saying no more than that it was not possible to be 100 percent sure that a hysterectomy could have been avoided had the result of the pap smear been made known at the time of the tests. However, the whole tenor of his evidence is that in Dr Anderson’s opinion there was a very strong probability a hysterectomy could have been avoided.

Dr Anderson stated from the results of the cone biopsy that Mrs Wolf had minimal invasive cancer. Fourteen months earlier when the pap smear was done her condition would have been better. If it had been treated earlier her

uterus would have been saved. Without being able to state categorically what the position was, in Dr Anderson's opinion there is no doubt Mrs Wolf's ovaries and womb could have been saved if the test had been actioned earlier.

Dr Ohn Kyaw is a psychiatrist working with the Mental Health Services, Darwin. Dr Kyaw examined Mrs Wolf on 2 December 1990 in Alice Springs and prepared a report (Exhibit P7). I refer to part of this report:

“On the day of examination Mrs Wolf suffered from Stress symptoms in the form of anxiety, depression and sexual inadequacy. These symptoms developed after major gynaecological operation. The contributing factors could be pain and dryness during sexual intercourse, subjective feeling of sexual inadequacy because of loss of reproductive organs, fear of losing her husband, fear of the possibility of recurrence of cancer somewhere in the body, and disruption in her family and occupational life.”

Under cross-examination Dr Kyaw agreed that Mrs Wolf had not told him her husband was an alcoholic. Dr Kyaw stated Mrs Wolf did not tell him that her husband's excessive drinking and loss of interest in sex led to severe marital problems. Dr Kyaw stated that his report relates to Mrs Wolf's subjective feelings of inadequacy which did not necessarily relate to whether at that time she and her husband were having sex. Dr Kyaw considered that as this examination was, at that time, an initial interview, it may be that Mrs Wolf would have gone into more detail at a subsequent interview. Mrs Wolf was referred to Dr Kyaw four years after her hysterectomy because she suffered psychological depression and psycho-sexual problems. The complaints that she made were all about her own condition.

Dr Tricia Nagel is a senior psychiatrist at the Darwin Urban Mental Health Services. A report dated 26 August 1996, prepared by Dr Nagel, is Exhibit P8. At the conclusion of her report Dr Nagel states:

“It is my belief that Mrs Wolf’s present unhappy relationship with her husband, and their limited social life, is attributable in part to the events of the Pap smear results which were not immediately made available to her, and which resulted in a major gynaecological operation.”

Dr Nagel stated that in her opinion the psychological effect on Mrs Wolf of the news of the result of her pap smear would not have been as great had she also been told at that time that she would only need a minor operation rather than a major operation. Dr Nagel refers in her report to the fact that Mrs Wolf had told her she believed her husband was drinking heavily to cope with Mrs Wolf’s operation. Mrs Wolf had not told Dr Nagel that her husband’s alcohol intake was one of the complicating factors with regard to their difficult sexual relationship. It is Dr Nagel’s opinion that the fact Mrs Wolf knew her mother died of cancer at a relatively early age would have added to her stress stemming from a fear of cancer. This fear increased because the information about her own condition was 14 months late. For Mrs Wolf the hysterectomy, involving removal of her uterus and ovaries, was a very stressful operation. There was also some level of stress because of the anger and disappointment Mrs Wolf experienced at the failure by the doctor to inform her of the positive pap smear result in 1985. When told of the result, she had only a short time to adjust psychologically to the necessity for a major operation.

All of these factors combined, resulted in a severe level of stress. The level of stress was more severe than if she had been informed at the appropriate time of the result of her pap smear. Dr Nagel stated it was Mrs Wolf's perception that her operation led to her husband's drinking, that they were not as intimate as previously and that this was related to the breakdown in their sexual relationship. Mrs Wolf had not reported her husband's alcoholism to Dr Nagel as being a significant factor in their failure to establish a satisfactory sexual relationship.

I accept the evidence given by Dr Nagel and Dr Kyaw as to the psychological effects upon Mrs Wolf of the lateness of the information about the result of her pap smear and the psychological effects of the hysterectomy.

Evidence was given by Malcolm Vincent Wolf, husband of the plaintiff. Mr and Mrs Wolf have been married since 1980, they lived and worked in Alice Springs and then in Tennant Creek and late in 1996 moved to Streaky Bay in South Australia.

I accept Mr Wolf's evidence that on the date in August 1986 when his wife was told the result of the pap smear, she came home crying uncontrollably. She was in this condition for some time. They both thought she was going to die. His wife appeared to have trouble concentrating and as he stated "appeared to be somewhere else". On the following day she underwent a cone biopsy operation. As the result of this she had to undergo a hysterectomy. Following the hysterectomy she was at home recuperating for

some months and then returned to work. Mr Wolf said that before the result of the pap smear was known he and his wife had a good sexual relationship and his wife appeared to be in good health. Following the operation they made attempts to return to their previous sexual relationship but this was not successful. They first attempted resumption of a sexual relationship a few months after the operation. Mrs Wolf was in pain. Mr Wolf felt he was just “using her to relieve himself”. Sex was not as frequent as it had been. They continued for a period to attempt to have sex but the situation did not improve. The frequency decreased to about every three months and it is now three years since he and his wife have attempted to have sex. The scar from the hysterectomy operation was obvious. Mr Wolf gave evidence relating to the couple’s move to Tennant Creek, they both worked long hours. Mr Wolf stated he was drinking heavily but not to the extent that it affected their sexual relationship.

Under cross-examination Mr Wolf gave evidence as to his drinking habits, that he drank half a dozen cans of beer a day, up to half a carton a day on the weekend with some whisky as well. He described himself as a moderate drinker. He stated his drinking had increased since he started drinking in his thirties and it increased again when they lived in Tennant Creek. Mr Wolf states he did not consider he had a drinking problem and had never sought any counselling. He has reduced his drinking considerably since the time they lived in Tennant Creek. In Tennant Creek he had been drinking up to 20 ounces of whisky a day. Mr Wolf stated he did not lose interest in sex because of his drinking. He stated the difficulty with their sexual

relationship was that his wife's vagina felt shorter and drier. Mr Wolf said he is now aware that his wife's vagina is not in fact shortened but at the time they attempted intercourse it appeared to him that his wife's vagina was shortened. They tried lubricants, but this did not help. He did not consider counselling would have been of any assistance.

I accept the evidence given by Mr Wolf as to his observations of the effect of the hysterectomy upon his wife. I do not accept Mr Wolf's assessment of the effect of his own heavy drinking upon the relationship. I did form the impression he downplayed, to the point of denial, the effect of his heavy drinking on his own ability to participate in a sexual relationship and the effect his heavy drinking had on the marriage relationship. Not all the problems within the marriage were related to Mrs Wolf's operation.

Evidence was given by Dr Robert George Blumer. Dr Blumer is a medical practitioner who practised in Alice Springs between 1986 and 1988. In the course of his practise he treated Mrs Wolf. Dr Blumer prepared a report dated 7 July 1988 which was tendered as Exhibit P10. Dr Blumer has practised as an obstetrician and gynaecologist for 24 years. Dr Blumer described Mrs Wolf's condition, the cone biopsy and the hysterectomy operation performed on Mrs Wolf. In the concluding paragraphs of his report Dr Blumer states at p3:

"The delay of 14 months between the abnormal Papanicolaou smear of June 1985, and the initial results being brought to the notice of the patient, and urgent investigation and treatment initiated in August 1986, is probably most significant. The carcinoma cells were demonstrated in the smear, and even at that stage cone biopsy was indicated. Fourteen

months later when a biopsy specimen was examined, and multiple foci of microinvasion were present in a number of sections. Despite the concern about possible extension beyond the lines of surgical excision both on the endo, and the ectocervix, the examination of the subsequent hysterectomy specimen in fact did not confirm this.

An abdominal hysterectomy, and bilateral salpingo-oophorectomy, with a wide vaginal cuff, was the operation advised, and performed six weeks after the initial cone. Microscopic examination of this specimen showed focal moderate dysplasia at the junction of the columnar and squamous epithelium in one block. This suggests total surgical excision, at that point, but there is no histological description of examination of the vaginal cuff itself. Subsequent smears have been all reported as no abnormal cells detected, that most recent examination being performed on 11/1/88.

Mrs. Wolfe's (sic) complaint of loss of libido, and sexual gratification, however have implications for the marriage. When previously described as being most satisfactory, concern has been expressed, particularly, her husband. There has been no anatomical, or hormonal basis demonstrated for these symptoms, the vaginal prolapse having been evident at the initial operation.

However the enormous anxiety engendered by the delayed diagnosis of carcinoma, the possible incomplete excision of the disease, the need to perform a major operation to be apparently cured of the disease must have a major role in the genesis of the problem. Although it is to be hoped that the condition has been cured a life long programme of surveillance, Papanicolaou smears, and clinical examinations is necessary to ensure her continuing good health."

In cross-examination Dr Blumer stated that it is not possible to know the progression of cancer cells. He gave evidence in cross-examination as follows (t/p 161-2):

"The point I'm trying to ask you, Doctor, is that if there hadn't been the delay in the advice in relation to the pap smear, it's not possible to know, is it, if Mrs Wolf's condition would have been the same as it was 14 months later?---I think we can assume because this was a significantly abnormal condition, that in the interval 14 months it must have progressed to a more advanced stage of malignancy and perhaps even a

greater extent. We just don't know to be perfectly frank. Only by this examination would we know. It's' quite possible.

But anything's possible, isn't it, Doctor? There's no evidence - - -?---
Well there's no evidence but this was certainly a – definitely a pre-malignant condition.

Yes, no question?---And the pre-malignant condition is known to extend and progress with time.

Yes, but the rate is unknown?---So the condition So the interval 14 months, the lesion may well have progressed significantly beyond what it was at the time of that initial examination. We don't for certain.

Well you don't know at all, Doctor, do you?---No.

And, in fact, there is just as much chance that the condition that was identified on a cone biopsy in 1986, it may well have been exactly the same as if she'd had the cone biopsy in 1985?---I don't think so. I think because we've said this is a progressive lesion. This lesion becomes more active and is likely to spread with the longer we wait which is the whole problems of delayed diagnosis in the treatment of cancer.

Yes but, Doctor, you're unable to say at what rate it has increased during that 14 month period?---It's not at all possible but we know that the condition can sometimes be quite fast.

And sometimes it can remain - - -?---And come on not so fast.

So it's not possible to say one way or the other what her condition was at the time of the pap smear result in 1985?---No, but it is possible to say that it must surely have progressed.”

Dr Blumer reported that Mrs Wolf had blamed her poor sex drive and lack of orgasm on the operation.

I accept the evidence of Dr Blumer which supports the opinions of Dr Glenning and Dr Anderson.

Dr Alan Cotton is a psychiatrist practising in North Adelaide. He interviewed Mrs Wolf on 16 October 1997 for the purpose of undertaking her psychiatric assessment and formulating a report. The report was tendered and is marked Exhibit P11. At the conclusion of his report, Dr Cotton states:

“With regard to your specific questions, in my view, although, of course, at times, particularly earlier, she was upset, distressed, frustrated, angry and despondent about what happened with regard to the delay in the diagnosis of her cancer, nevertheless, such has been her fortitude and excellent coping capacity, this has not led to overt symptoms of a disabling psychiatric illness, and has not necessitated any psychiatric treatment, this, in my view, manifestly being the case when one looks at her over-all level of functioning throughout that period in her work and offering support to her husband.

With regard to her loss of sexual interest, although, no doubt, the hysterectomy and cancer contributed, as did her resultant menopause, it seems likely that her husband’s drinking has significantly contributed to their lack of sexual activity, this also bringing to the surface unresolved emotional responses which, no doubt, she had with regard to her first husband’s such behaviour.

At this time then, apart from her loss of sexual interest, I think Mrs. Wolf is functioning extremely well and is looking forward to a very happy period of retirement at Streaky Bay.”

In cross-examination Dr Cotton stated he had seen Mrs Wolf on one occasion, being 16 October 1997, and spent a little over an hour with her. He gave the following evidence in cross-examination (t/p 178-9):

“Perhaps I might put your mind at rest, Doctor. It’s not suggested by the plaintiff in this matter that she had a disabling psychiatric illness – has now or has had a disabling psychiatric illness. What is suggested is that she suffered quite severe emotional pain over the years as a result of this particular matter. So it’s really the latter that we’re focusing on and not the former. So if you could just – looking at that aspect, would you agree with me that the history you obtained demonstrates that she did suffer

from degrees of emotional pain from severe emotional pain to less severe over the period of time that she accounted to you?---Yes.

And that was triggered off – I’ll rephrase that. That was caused by the aftermath of the failure of the defendant to notify her of the adverse pap smear result, wasn’t it?---Well, the history I obtained was that certainly she suffered considerable emotional distress and emotional pain as a result of that pap smear. But also she had other emotions: namely, she was – felt she was lucky that she’d almost by chance gone and had a second smear, which saved her life. So she felt a sense of relief from that, so she had other feelings. But also over the subsequent 12 years she had other causes for considerable emotional pain and distress mainly her husband’s excessive drinking, social problems. So everything that happened to her, namely all of the emotional pain and distress that she had over the next 12 years cannot be attributed solely to the delay of the pap smear.”

Under cross-examination Dr Cotton was asked many questions as to the accuracy of his report from the history given him by Mrs Wolf. Dr Cotton did not agree he had made any incorrect or unwarranted assumptions.

Dr Cotton stated he focused on making a comprehensive assessment of Mrs Wolf’s emotions over this period and whether there was a psychiatric illness or disability. He agreed she had emotional pain caused by the aftermath of the pap smear but that she also felt lucky she had a second pap smear when she did, which had saved her life. Dr Cotton stated Mrs Wolf also had emotional problems because of her husband’s heavy drinking. Dr Cotton stated many women have a lack of sexual interest after a hysterectomy. Her lack of libido could be a result of the psychological problems related to concern about her husband’s drinking problem. Her husband’s loss of sexual interest could be attributable to his excessive alcohol intake. Dr Cotton stated that, in his opinion, Mr Wolf’s alcoholism was self inflicted. It was not a

direct result of his wife's loss of libido. Dr Cotton did not accept that a hysterectomy had been the sole cause of Mrs Wolf's lack of interest in sex.

Dr Kyaw, Dr Nagel and Dr Cotton all gave evidence and included in their reports details of the emotional distress suffered by Mrs Wolf because of the delay in receiving notification of the result of her pap smear. All three doctors refer to her feelings of depression and psycho-sexual problems that followed upon her having a hysterectomy. The difference in the evidence of Dr Cotton is that he adverts to the heavy drinking of Mr Wolf as being a contributing factor to the difficulties in the relationship. Mrs Wolf did not discuss her husband's drinking problem with Dr Kyaw or Dr Nagel.

I accept that Mr Wolf's drinking habits caused difficulties within the relationship. I accept that Mr Wolf's problems with alcohol cannot be blamed upon his wife's hysterectomy. Neither can all the difficulties within the marriage be attributed to Mrs Wolf's hysterectomy. However, this does not diminish Mrs Wolf's subjective reactions to her hysterectomy operation. I accept the operation itself caused Mrs Wolf considerable distress and that she subsequently suffered a loss of libido and lack of interest in sex which was a consequence of the hysterectomy and unrelated to her husband's drinking problems. I also find that Mrs Wolf had feelings of inadequacy, that she was concerned she could not fulfil her husband's needs and that she may lose him. I accept that she is entitled to a measure of damages for her loss of sexual enjoyment. I am not persuaded that these damages should be diminished because in any event Mrs Wolf was approaching her menopausal years.

Summary of submissions for second defendant

Ms Gearin, counsel for the second defendant, submits that the plaintiff has failed to establish on the balance of probabilities that the delay which occurred following the pap smear caused Mrs Wolf to have a hysterectomy. It is the defence submission that the case against the second defendant should have been based on an omission or failure to act, rather than the doing of some positive act, because these are the facts that have emerged (*Bennett v Minister for Community Welfare* (1992) 176 CLR 408). The Court is looking at a past hypothetical situation. The question that has to be asked is, did the 14 month delay in diagnosis and treatment cause this woman to have a hysterectomy? The breach of duty in not following up on the pap smear demonstrated only that the breach by the second defendant increased the risk of harm. The degree of that increased risk of harm cannot be demonstrated. That is not sufficient to enable the plaintiff to prove on the balance of probabilities that the delay caused the hysterectomy. Until a cone biopsy was performed, it was not possible to know the degree of invasiveness nor the extent of the area affected.

What the plaintiff has suffered in this matter is a loss of opportunity to have a cone biopsy in June of 1995, which may have avoided a hysterectomy. What the Court has to determine is what damages flow from that loss of opportunity.

The appropriate test to apply is set out in *Malec v J.C. Hutton Pty Ltd* (1990) 169 CLR 638 at 642:

“When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring.”

This Court should assess the damages as if the delay totally caused the hysterectomy and then reduce it by the degree of probability e.g. 75% of the total award for damages. This approach was confirmed in *Poseidon Ltd v Adelaide Petroleum NL; Sellars v Adelaide Petroleum NL* (1994) 68 ALJR 313. In the defendant’s submission the plaintiff would have had to proceed to cone biopsy in any event. The results of that biopsy may or may not have required the plaintiff to proceed to a hysterectomy.

In respect of the various heads of damages, commencing with “Loss of Libido”, it is the defence submission that the evidence discloses many causes for this loss, including the plaintiff’s husband’s drunkenness. It is the defence

submission that the husband's drunkenness led to the difficulties in the sexual relationship (t/p 199). In addition, loss of libido is a natural consequence of menopause which would have occurred reasonably soon in any event. Counsel for the second defendant referred to the evidence of Dr Sweet in support of this argument. On the aspect of dryness, the evidence was that this was resolved by the use of creams. It is the defence submission that pain was only experienced in a period of six months after the operation. No attempt was made to mitigate the loss by seeking counselling. On Mr Wolf's evidence he had little knowledge of what was happening and chose not to gain any. On the aspect of scarring it is the defence submission that there has been no evidence as to the extent of the scarring; no evidence about remedial surgery. The only evidence is that it exists. With respect to the claim for damages under the heading of "Sexual Relationships" it is the defence submission that Mr Wolf's heavy drinking is a major factor in the problems of their relationship. When they moved to Tennant Creek they led different lives by choice. These were the factors that were the most significant in respect of the difficulties within the relationship.

Finally, counsel for the defence addressed on the question of interest and submitted that consideration be given to the delay in these proceedings occasioned by the plaintiff. The amount of interest is a discretionary matter and should be reduced by reason of the fact that the plaintiff has been very tardy in pursuing this claim.

Summary of submissions for the plaintiff

Counsel for the plaintiff, Mr Reeves QC, submits that judgment having been obtained against the defendant evidences the existence of a duty of care, the breach of duty of care and the plaintiff having suffered some damage. It is not a causation matter, but a matter for assessment of damages. This case then falls for an assessment of damages where possibilities and probabilities of events have to be taken into account.

The law relating to that assessment has been established in the decision of *Poseidon Ltd v Adelaide Petroleum NL*; *Sellars v Adelaide Petroleum NL* (supra):

“Damages in tort have also been assessed by reference to the probabilities or possibilities of what will happen or what would have happened. That approach has been frequently adopted in the assessment of damages for personal injuries where a court has been called upon to assess future possibilities and past hypothetical situations. In *Malec v Hutton Pty Ltd* [(1990) 169 CLR 638], this Court drew a distinction between, on the one hand, proof of historical facts – what has happened – and, on the other hand, proof of future possibilities and past hypothetical situations. The civil standard of proof applies to the first category but not to the second, particularly when it is necessary to determine future possibilities and past hypothetical situations for the purpose of assessing damages [ibid, at 639-640, per Brennan and Dawson JJ, at 642-643, per Deane, Gaudron and McHugh JJ].

In *Malec*, Deane, Gaudron and McHugh JJ explained the way in which the matter is to be approached in these terms [ibid, at 643]:

‘If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. ... But unless the chance is so low as to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a

prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.”

and at p323:

“Notwithstanding the observations of this Court in *Norwest*, we consider that acceptance of the principle enunciated in *Malec* requires that damages for deprivation of a commercial opportunity, whether the deprivation occurred by reason of breach of contract, tort or contravention of s52(1), should be ascertained by reference to the court’s assessment of the prospects of success of that opportunity had it been pursued. The principle recognised in *Malec* was based on a consideration of the peculiar difficulties associated with the proof and evaluation of future possibilities and past hypothetical fact situations, as contrasted with proof of historical facts. Once that is accepted, there is no secure foundation for confining the principle to cases of any particular kind.”

Mr Reeves QC referred to parts of the medical reports. It is his submission on behalf of the plaintiff that the evidence of Dr Glenning deals mainly with the causation issue and his evidence is relevant to the assessment of damage as this Court is required to fix some percentage on the likelihood of the hysterectomy having been occasioned in these circumstances. The plaintiff seeks to rely on the evidence of her treating doctors who were Drs Blumer, Anderson and Kyaw, and submits their evidence should be accepted. The psychological aspect is the only area in which there is any dispute between the doctors and it is the plaintiff’s submission that the evidence of Dr Cotton should be rejected. The basis for rejecting the opinions expressed by Dr Cotton is essentially the difficulty placed on Dr Cotton to interpret the impact of events which occurred over 10 years prior to the date of his interview with Mrs Wolf and the consequent misinterpretation of the history of this matter, as relayed by Mrs Wolf.

Based on the decision in *Poseidon Ltd v Adelaide Petroleum NL; Sellars v Adelaide Petroleum NL* (supra), if the plaintiff is able to prove that some damage occurred then the assessment of damages proceeds on an assessment of the percentage of probability or possibility of that event occurring. It is known that at the time of the pap smear, the cancer was at the micro invasive stage. It was not to the frank invasive stage. It is known that the treatment at that stage does not normally require hysterectomy. With the assistance of the reports from Drs Glenning, Anderson and Blumer, this Court must make an assessment in percentage terms of the likelihood of Mrs Wolf being required to undergo hysterectomy.

On the question of damages it is the plaintiff's submission that the shock suffered by Mrs Wolf was greater because the cancer had been in her system for 14 months before she was told about it. There was the anxiety and fear associated with waiting for the results of the cone biopsy and the hysterectomy. The hysterectomy could have been avoided if the information was made available in 1985. It is the hysterectomy that caused the loss of libido and the problems with sexual performance. This caused an affect on the sexual relationship in the marriage. It affected the marriage relationship and caused an increase in consumption of alcohol by Mr Wolf, at least while he was living in Tennant Creek. Mrs Wolf has lost the opportunity to engage in sex with her husband on a satisfying basis for a large part of the rest of her married life.

There is no evidence to support the defendant's submission that the plaintiff had an opportunity to mitigate her damages by seeking counselling, and mitigation has not been pleaded in these proceedings.

On the issue of delay, Mr Reeves QC made certain submissions and subsequently advised these submissions were withdrawn and he referred to the following cases: *Ruby v Marsh* (1975) 132 CLR 642; *Andjelic v Marsland* (1966) 70 ALJR 435; *De Girlomano v South Australia* (1991) 56 SASR 40 at 44-45; *Boronia Park Properties Pty Ltd v Johnston C of A* NT 16/2/96; *Bennett v Jones* (1977) 2 NSWLR 355 at 370-1 and 375-6; *CF Steel v Bowen SC* (1990) ATR 67, 572 at 67, 573.

It is Mr Reeves' submission that delay may be relevant if it causes detriment to the defendant. However, there is no evidence of such detriment in this case. He maintains the submission that the defendant should have raised the issue in the pleadings and in cross-examination and therefore could not properly raise it for the first time in address.

Summary of findings

I accept the evidence of Dr Glenning supported by the evidence of Dr Anderson and Dr Blumer. Based on the evidence of these doctors, I am satisfied on the balance of probabilities that a consequence of the late notification as to the result of the pap smear meant Mrs Wolf had to undergo a full hysterectomy. This operation, with the resultant removal of her ovaries

and uterus and the other effects described by Dr Anderson, could have been avoided had she been advised of the results of the tests at the time of the pap smear. I accept the evidence of Dr Glenning who gave this opinion and Dr Blumer who gave evidence that in his opinion the disease of cancer would have progressed from the time of the pap smear during the 14 months before she was told the result of the tests. I am satisfied on the balance of probabilities that the progression of the disease meant it was necessary to have a full hysterectomy rather than just a cone biopsy, which is a less intrusive operation.

I find that as a consequence of the late notice of the result of the test, Mrs Wolf suffered greater distress than if she had been told the results at the time of the test. There would inevitably have been feelings of shock, fear and anxiety had Mrs Wolf been told the results at the time of the test. However, I accept her evidence, supported by Drs Glenning and Anderson, that her fears and anxieties were exacerbated by the concern that it may be too late to successfully treat her. I find that there was pain and suffering associated with the operation. A hysterectomy is an intrusive operation: the consequence is a removal of the womb and the uterus. Mrs Wolf suffered psychological damage as a consequence of such an operation.

I accept the evidence given by Mrs Wolf which is supported by the evidence of Dr Kyaw and Dr Nagel as to her feelings of stress and the psychological effects following the hysterectomy, which could have been avoided, if there had not been the delay relating to notification of the result of

the pap smear. I accept that following the hysterectomy operation, Mrs Wolf had feelings of inadequacy. She suffered ugly and extensive scarring to her body. I accept that she suffered a loss of libido and blamed herself for her husband's heavy drinking. I accept that the difficulties in their sexual relationship, for which Mrs Wolf blamed herself, placed strains on the marriage and that this was a source of distress to Mrs Wolf. Following the operation there was, for a period of time, some pain and discomfort. Mrs Wolf had to rest and recuperate before she was able to return to work. She utilised all of her sick leave entitlements whilst recovering from the operation.

It is not in dispute that Mr Wolf was, for some years after Mrs Wolf's operation, a heavy drinker. Mrs Wolf blamed herself for this. Following the operation she had feelings of inadequacy. I accept Dr Cotton's statement that persons with alcohol problems tend to blame superficial causes rather than the real problem, which is themselves. Mr Wolf has to take responsibility for his own drinking habits. I reject the suggestion that Mrs Wolf's hysterectomy was the cause of Mr Wolf's heavy drinking. Nevertheless, I accept that Mrs Wolf genuinely had a perception that her operation was the cause of her husband's heavy drinking and this gave rise to feelings of inadequacy and distress. Mrs Wolf is entitled to be compensated for the effects of the hysterectomy. She is not entitled to compensation for all the difficulties within their marriage relationship, some of which were as a result of Mr Wolf's drinking habits.

Mr Wolf gave evidence as to the distress of his wife when she learned of her condition and the subsequent trauma of a full hysterectomy. He confirmed

his wife's difficulty in resuming a sexual relationship and described the difficulties this caused within their marriage. I accept Mr Wolf's evidence on these aspects. I find Mr Wolf's heavy drinking had a detrimental effect on the marriage. This does not, however, diminish the fact that the consequences of the operation for Mrs Wolf were a reduced sex drive, feelings of pain, discomfort and dryness at the time of the sexual act and feelings of inadequacy that she could not satisfy her husband. These feelings were a source of stress for Mrs Wolf. These are all matters which I have included within the head of damages for pain, suffering and loss of amenities. The other matters I have included under this head of damage is the pain, distress and trauma associated with undergoing a full hysterectomy. The operation resulted in the removal of Mrs Wolf's uterus, ovaries and the cuff to her vagina. In addition she suffered scarring to her abdomen and was required to undergo a regime of treatment as chronicled by Dr Anderson.

I have covered the heads of damage and would assess the damages for pain, suffering and loss of amenities in an amount of \$50,000.

Applying the principle expressed in *Poseidon*, I assess the degree of probability that the hysterectomy would not have been necessary, had the plaintiff been advised at the time of her pap smear in 1985 as to the results, at 80%. Accordingly, the amount awarded under this head of damage is \$40,000, being \$30,000 for past pain and suffering and loss of amenities and \$10,000 for future pain and suffering and loss of amenities.

With respect to specific damages, the first amount claimed for sick leave is \$2333.92 net, \$3286.86 gross.

I apply the principles expressed in *Graham v Baker* (1961) 106 CLR 340 at 351:

“.... But before parting with the case it is desirable to point out that, in an appropriate case, the extinguishment or diminution of sick leave credits of the character in question here may, notwithstanding the view we have expressed, result in some damage. As *Windeyer J.* said in *Paff v. Speed* [(1961) 105 CLR 549]: ‘A plaintiff entitled to be paid by his employer (whether the payments be called sick pay is immaterial) while incapacitated, and who when he recovered returned to work in his old position, may nevertheless have suffered some compensable loss by his absence. If, for example, he was by the terms of his employment permitted only a certain number of days sick leave on pay during the year, he would incur some loss if those days were used up in an absence caused by the defendant’”.

On the issue of special damages, evidence was called for the plaintiff by Mary Helen Jane Hesling, who is the salaries clerk with Territory Health Services. Mrs Hesling had prepared documents from the records at the Health Department for the period Mrs Wolf was absent from work following the hysterectomy operation. The documents with the relevant calculations were tendered and marked Exhibit P13. An affidavit sworn by Mrs Hesling with the annexed documents was Exhibit P14. There is no issue as to the amount payable under the heading “sick leave”. That amount is \$2333.92 net and \$3286.86 gross.

I consider that in this case the plaintiff has incurred a compensable loss resulting from the use of all her sick pay entitlements and I award the amount of \$3286.86, being the gross amount (*Williamson v Commissioner for Railways* (1960) SR (NSW) 252).

The medical expenses are agreed at 4x\$120 for hormone implants: \$480.

The parties are also in agreement as to the amount of the claim for loss of wages. At the conclusion of the hearing on 31 October 1997, counsel for the parties stated they would be in a position to agree the amount of claim for loss of wages and would submit a letter signed by each of them as to the agreed amount. A letter dated 12 May 1998 and signed by Ms Gearin stated the agreed balance of the plaintiff's claim for Special Damages is \$1,312.05. A letter dated 20 May 1998 and signed by Mr Morgan, solicitor for the plaintiff, confirmed the agreed amount for loss of wages being the balance of the claim for special damage is \$1,312.05. Accordingly, this agreed amount is included in the award for Special Damages.

Interest

I do not accept the submission by counsel for the second defendant that interest should be reduced because of the delay in bringing this matter to court. There is no evidence before me about the causes of the delay. Neither is there any evidence that the delay caused a detriment to the second defendant (*De Giralomo v South Australia* (supra) at 44-5).

I assess interest on past non economic loss at 4% per annum from 18 August 1986 until date of judgment in an amount of \$14,130.00.

I assess interest on past economic loss at 12% from 1 January 1987 until date of judgment in an amount of \$6,954.04.

Summary of Assessment of Damages

Past pain, suffering and loss of amenities	\$ 30,000.00
Interest thereon	14,130.00
Future pain and suffering and loss of amenities	10,000.00
Special Damages	
- medical expenses	480.00
- loss sick pay entitlements	3,286.86
- loss of wages	1,312.05
Special Damages total	5,078.91
Interest on Special Damages	6,954.04

Total	\$ 66,162.95
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I make an order for judgment in favour of the plaintiff against the second defendant in the sum of \$66,162.95.

The parties have liberty to apply on the question of costs.
