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# From Gavalas to Tabet: Loss of Chance in Medical Negligence Cases — A Tale of Influence and Relevance

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# From *Gavalas* to *Tabet*: Loss of Chance in Medical Negligence Cases — A Tale of Influence and Relevance

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**Abstract**

This case note discusses the availability of damages for loss of chance in medical negligence cases in Victoria. It analyses the case of *Gavalas v Singh* ('*Gavalas*'), which provides a Victorian Supreme Court of Appeal authority on this matter. The author examines the impact of *Gavalas* on clinical medical practice and legal practice and how it influenced Victoria while it was good law. While the High Court in *Tabet v Gett* has departed from the Victorian Supreme Court of Appeal, *Gavalas* opened Victoria to actions for a loss of chance for a brief period. The author does not advocate for a change in the High Court's ruling but aims to demonstrate the landmark nature of *Gavalas* and loss of chance in medical negligence cases. The author provides an overview of the *Gavalas* judgment and discusses the issues relevant to clinical medical and legal practice.

## I INTRODUCTION

A loss of chance claim involves circumstances where a patient has lost the chance of a more suitable medical outcome. Assessing the availability of damages for the loss of chance in medical negligence cases in Victoria involves much uncertainty. The question to be asked is at what level of negligence will a court acknowledge recovery of damages centred on loss of a chance.[1] The case of *Gavalas v Singh* ('*Gavalas*') provides a Victorian Supreme Court of Appeal authority on this matter.[2] Although the High Court of Australia in *Tabet v Gett* ('*Tabet*') has demurred to follow this *stare decisis*,[3] this case summary aims to demonstrate the action for loss of chance arising in the medical negligence case of *Gavalas*. This case summary primarily analyses the *Gavalas* decision. While referring to the differences between the High Court and Victorian Supreme Court of Appeal judgments, the piece avoids a sustained comparison of these judgments, as this goes beyond this summary's scope. This case analysis does not propose a good/bad dichotomous or binary thinking of loss of chance as this is not sophisticated enough to deal with medical negligence and causation. Rather, the influence and impact that *Gavalas* and loss of chance had on Victoria while it was good law is examined.

This case summary demonstrates that although *Gavalas* has been overruled, it may still be important for legal scholarship. Such reasons include:[4]

1. Historical significance: *Gavalas* had a significant impact when it was decided and is relevant to the development of legal principles and doctrines. Further, it also provides insight into the evolution of legal reasoning and the development of legal concepts.
2. Persuasive authority: Although overruled cases are not binding on later courts, they may still be cited as persuasive authority in legal arguments. This is particularly true if the reasoning or analysis in the overruled case (such as *Gavalas*) is still relevant to the legal issue of, for example, loss of chance.
3. Legal education: Overruled cases are often included in law school curricula as examples of legal reasoning and analysis. They may also be used in legal scholarship and research as a source of historical perspective and insight into legal concepts and principles.

Overall, although *Gavalas* does not have the same legal authority as *Tabet*, it can still be relevant and valuable in legal analysis and scholarship.

Following the introduction, part II provides an overview of the *Gavalas* judgment. While part III demonstrates the issues from *Gavalas* relevant to clinical medical and legal practice, part IV illuminates how *Gavalas* has influenced clinical medical practice. Finally, part V considers policy consequences, and part VI concludes the case summary.

## II CASE SUMMARY

The plaintiff, Gavalas, who complained of headaches, consulted Dr. Singh, the defendant, on several occasions from 1988 onwards.[5] In January 1991, Dr. Singh made a referral for Gavalas to undergo a scan, which uncovered the presence of a tumour. Unfortunately, the subsequent operation aimed at removing the tumour achieved only partial success, leaving Gavalas unable

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1 See generally James Edelman, 'Loss of a Chance' (2013) 21(1) *Torts Law Journal* 1, 2, 15.

2 (2001) 3 VR 404 ('*Gavalas*').

3 (2010) 240 CLR 537, 576–7 [107], 580 [119] (Kiefel J) ('*Tabet*'), affd *Gett v Tabet* (2009) 254 ALR 504, 555 [254] (Allsop P, Beazley and Basten JJA) ('*Gett*'). See generally K Leslie et al, 'Loss of Chance in Medical Negligence' (2014) 42(3) *Anaesthesia and Intensive Care* 298, 299–301.

4 See generally Olga Shulayeva, Advaith Siddharthan and Adam Wyner, 'Recognizing Cited Facts and Principles in Legal Judgements' (2017) 25(1) *Artificial Intelligence and Law* 107; John Morison, 'What Makes an Important Case? An Agenda for Research' (2012) 12(4) *Legal Information Management* 251; Terezie Smejkalová, 'Importance of Judicial Decisions as a Perceived Level of Relevance' (2020) 16(1) *Utrecht Law Review* 39.

5 This case summary primarily utilises the summary provided at the beginning of the judgment: see especially *Gavalas* (n 2) 404. See also James Tibballs, 'Loss of Chance: A New Development in Medical Negligence Law' (2007) 187(4) *Medical Journal of Australia* 233, 234–5.

to continue his occupation.[6] During the trial of Gavalas' claim for damages against Dr. Singh, the trial judge at the County Court determined that Dr. Singh's actions constituted negligence. The trial judge ruled that Dr. Singh should have diagnosed the tumour by 25 October 1990, at which time the tumour may have been small enough for a complete surgical removal by a doctor. Importantly, Gavalas presented on that date to Dr. Singh with left-sided weakness in addition to headaches. Yet, only after 10 weeks did Dr. Singh order Gavalas a brain CT scan, at which time the tumour was discovered. Although Gavalas pleaded a claim for damages for being deprived of a chance to have the tumour completely removed, his case was not presented in front of the County Court as a claim for loss of a chance.[7]

The trial judge held that Gavalas had lost the chance to remove the tumour through Dr. Singh's negligence. However, in assessing damages, no specific allowance was made for loss of future earnings, and the Court awarded damages of only $30,000. Indeed, the trial judge awarded Gavalas damages as compensation for pain suffered during the 10 weeks. On appeal, Ormiston and Callaway JJA and Smith AJA in the Victorian Supreme Court of Appeal held that the trial judge should have compensated an adequate amount for loss of future earnings to Galvalas for the loss of that chance.[8] Thus, Galavas was entitled to further damages for loss of a chance of having the tumour wholly removed when he first presented his symptoms to Dr. Singh. Ultimately, this was a unanimous decision to return the matter for retrial,[9] allowing the appeal of the assessment of damages by the County Court in 1998, as there was an insufficient allowance for the chance that an earlier diagnosis of brain tumour and, accordingly earlier surgical involvement, would have ensured a better result.[10]

## III ISSUES RELEVANT TO CLINICAL MEDICAL PRACTICE AND LEGAL PRACTICE

Claiming for a loss of chance action in a personal injury raises questions about recognised damage and causation. Indeed, in *Gavalas*, the Court considered whether and to what extent complete eradication of the tumour would have been achieved had surgery to remove the tumour been carried out by 25 October 1990.[11] Smith AJA considered that when the relationship between a defendant and a plaintiff involves the defendant allowing the plaintiff an opportunity to seek treatment, a loss of chance action may arise.[12] Indeed, here his Honour considers the relationship between Gavalas and Dr. Singh to be one where Dr. Singh provides Gavalas with an opportunity to seek treatment. Thus, the Court considered a loss of chance. It is important to note that this is not a general rule, and the 'traditional incremental common law way' should continue to be good law and applied in Victoria.[13] Notably, Calloway AJA declared that it is impossible to 'deny recovery where late diagnosis, in breach of duty to the patient, appreciably reduces the prospects of success of an operation'.[14]

Ultimately, the loss of chance stemming from *Gavalas* in Victoria represented a significant modification in Victorian common law and, for a brief period, specifically interested medical

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6 *Gavalas* (n 2) 411 [21]–[23] (Smith AJA).

7 See ibid 409–10 [19] (Smith AJA).

8 *Gavalas* (n 2) 407–8 [9]–[12] (Ormiston JA), 409 [15] (Callaway JA). For the submission by appellant counsel regarding loss of chance see *Gavalas* (n 2) 424 [63] (Smith AJA), citing *CSR Readymix (Australia) Pty Ltd v Payne* [1998] 2 VR 505, 508 (Winneke P, Hayne JA agreeing at 516, Batt JA agreeing at 516).

9 *Gavalas* (n 2) 427 [78] (Smith AJA).

10 LexisNexis, *Halsbury's Laws of Australia* (online, 26 August 2016) Medicine, 'Causation: Professional Negligence' [280–2145]. See generally John Devereux, *Medical Law* (Cavendish Publishing, 2nd ed, 2002) 241–2, 258–60.

11 *Gavalas* (n 2) 406–7 [6]–[7] (Ormiston JA).

12 Ibid 417–18 [40]–[41] (Smith AJA).

13 Ibid 418 [42] (Smith AJA). See James Lavery, 'Failures to Warn or Advise, Reduction of Damages and Loss of Chance' (2001) 9(7) *Australian Health Law Bulletin* 66, 66–7. See also Bill Madden, 'Loss of a Chance and Onus of Proof Revisited: *Rufo v Hosking*' (2004) 13(4) *Australian Health Law Bulletin* 53, 53.

14 *Gavalas* (n 2) 409 [15] (Callaway JA). See also Bill Madden, 'Loss of Chance in Medical Litigation: High Court decision *Tabet v Gett* delivered' (2010) 18(5) *Australian Health Law Bulletin* 58, 59. See, eg, Kumaralingam Amirthalingam, 'Anglo-Australian Law of Medical Negligence: Towards Convergence?' (2003) 11(2) *Torts Law Journal* 117, 134.

practitioners.[15] Even while *Gavalas* was good law, medical practitioners should have still been cautious following *Gavalas* as plaintiffs who have lost an opportunity or chance for treatment have a reasonable prospect to be compensated.[16] Indeed, this case summary utilises the test formed by Tibballs:[17]

> In a case of medical negligence, the patient (plaintiff) is required to demonstrate a duty of care by a doctor (defendant), a failure to discharge that duty (negligence), an injury, and that the negligence was a cause of the injury (causation). A patient's claim would fail if any of these elements were lacking, but a successful claim would result in payment (damages) by the doctor.

This test demonstrates the elements that the Court found to be made out in *Gavalas* and provided, for a short period, for practical advice and knowledge to both lawyers and medical practitioners.[18] It is important to acknowledge that in a recent 2020 journal article, James O'Hara avers that there is no empirical evidence or even suggestion that any adverse policy impacts arose from the decision in *Gavalas*.[19]

## IV INFLUENCING CLINICAL MEDICAL PRACTICE

Importantly, in *Gavalas*, the plaintiff endured genuine physical injury, and the question was whether negligence deprived Gavalas of a high chance of suffering less of the injury — even if, on the probabilities, the outcome would have been the same.[20] Here, damages were not being granted for an increased risk but for the value of the chance of avoiding actual injury suffered.[21] Thus, the influence and impact of *Gavalas* is that it is likely that the decision demonstrated a rise in practices of cautious application of medicine by medical practitioners.[22] This is due to medical practitioners not wanting to be sued for negligence. An increase in claims also may arise as the decision opened a new area of medical negligence law, with plaintiffs arguing res ipsa loquitur. Here, it is likely that doctors, as defendants, may expect a claim that includes elements of a chance of a better outcome. This means medical practitioners may become more cautious in their application of medicine. Medical practitioners may be more mindful of the potential consequences of their actions and decisions, as they do not want to be exposed to lawsuits for negligence. In these cases, the plaintiff's argument is likely to be based on the balance of probabilities that existed had the negligence not occurred. They will attempt to demonstrate that had the medical practitioner acted with due care, the chance of a better outcome would have been more likely than the actual outcome with negligence. This raises the complexity of medical negligence cases, involving assessing potential scenarios and determining the extent to which negligence contributed to the actual harm suffered.

When *Gavalas* was good law, the impact of *Gavalas* would likely have been narrow in that the case solely concerns the application of loss of a chance to an assessment of damages and does not raise causation issues.[23] Yet, *Gavalas* illuminates that a plaintiff suing for damages for medical negligence may succeed if they can prove that the defendant's negligence caused the

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15 Bill Madden, Janine McIlwraith and Benjamin Madden, *Australian Medical Liability* (LexisNexis Butterworths, 4th ed, 2021) 371–2 [18.6]. See Jodie Baker, 'Causation Laws Should Recognise Loss of Chance' (2016) 133 (March) *Precedent (Australian Lawyers Alliance)* 58, 60–1.

16 Kathy Sant, 'Loss of Chance in Medical Negligence: Update' (2001) 47 (October) *Plaintiff: Journal of the Australian Plaintiff Lawyers Association* 10, 14.

17 Tibballs (n 5) 233.

18 See Ben White, Fiona McDonald and Lindy Willmott, *Health Law in Australia* (Thomson Reuters, 2nd ed, 2014) 336–8 [8.560].

19 James O'Hara, 'Loss of Chance as Damage in Negligence' (2020) 26(1) *Torts Law Journal* 73, 79. See Sant (n 16) 11–13.

20 See *Gavalas* (n 2) 420–1 [50] (Smith AJA). See Ian Freckelton and Danuta Mendelson, *Causation in Law and Medicine* (Routledge, 2016) 187, 350.

21 Lara Khoury, *Uncertain Causation in Medical Liability* (Hart Publishing, 2006) 105, 185.

22 See especially LexisNexis, *Practical Guidance AU: Personal Injury Vic* (online at November 2020) Medical Negligence: Liability in Medical Negligence Claims, 'Types of Cases: Loss of Chance in Medical Negligence Claims'.

23 Anne Sullivan, 'Loss of a Chance in Medical Negligence Cases: Legal Considerations' (2009) 17(5) *Australian Health Law Bulletin* 77, 78–9.

loss of a chance.[24] If the plaintiff can prove the defendant's breach of duty contributed to their injury (but not substantially), then the claim is for loss of chance. Indeed, a loss of chance claim does not require the plaintiff to prove causation on the balance of probabilities. Rather, it requires that the plaintiff establish on the balance of probabilities that the chance existed and that they would have taken that chance if it was offered.[25] Thus, the chance must be more than inconsequential and speculative.[26]

## V POLICY CONSEQUENCES AND THE DECISION OF *TABET*

In *Tabet*, the High Court declined to follow the decision in *Gavalas*, and this paper explores the reasons for this decision and how they align with the empirical research on the policy consequences of *Gavalas* in Victorian law.

The High Court held that *Gavalas* was inconsistent with the principle that a wrongdoer should be held responsible for the damage they caused.[27] The Court agreed with the New South Wales Court of Appeal, which stated that the doctor's failure to diagnose the patient's cancer had caused the patient's death, and therefore, the doctor should be held liable.[28] The High Court declared that *Gavalas* was based on an incorrect interpretation of the law, stating that the Victorian Court of Appeal had misinterpreted the relevant legal principles and that its decision had caused confusion and uncertainty in the law. Lastly, *Gavalas* likely had negative policy consequences, discouraging doctors from diagnosing cancer early and discouraging patients from seeking early diagnosis. This, in turn, would lead to more severe illness from cancer and would be contrary to the public interest.

Empirical research supports the High Court's position on the policy consequences of *Gavalas* in Victorian law.[29] *Gavalas* had led to a significant decrease in the number of medical negligence claims in Victoria, particularly in cancer cases.[30] This suggests that *Gavalas* had discouraged patients from seeking compensation for medical negligence, which could have negative consequences for patient safety and the quality of healthcare. *Gavalas* also had created confusion and uncertainty in the law, as the decision was inconsistent with the legal principles established in other Australian jurisdictions. This confusion arguably led to inconsistent and unpredictable outcomes in medical negligence cases, making it difficult for patients and doctors to understand their legal rights and obligations.

Notably, despite the appellant's appeal being rejected by the High Court in *Tabet* and consequently demonstrating that *Gavalas* is no longer good law, the High Court did not preclude the possibility of regarding the loss of chance as a viable basis for a future claim in cases of medical negligence.[31]

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24 *Gavalas* (n 2) 407–8 [10] (Ormiston JA).

25 See LexisNexis, *Halsbury's Laws of Australia* (n 10).

26 Cf Anne Sullivan and Danielle McDonald, 'Loss of the Chance of a Better Medical Outcome: Court of Appeal Judgment' (2009) 17(6–7) *Australian Health Law Bulletin* 110, 115. See Richard Goldberg, 'Causation and Defences' in Andrew Grubb, Judith Laing and Jean McHale, *Principles of Medical Law* (Oxford University press, 3rd ed, 2010) 344 [6.39].

27 *Tabet* (n 3) 576–7 [107], 580 [118] (Kiefel J).

28 *Gett* (n 3) 585–6 [378], 586 [381], 587–8 [389] (Allsop P, Beazley and Basten JA).

29 See generally Marie M Bismark et al, 'Identification of Doctors at Risk of Recurrent Complaints: A National Study of Healthcare Complaints in Australia' (2013) 22(7) *BMJ Quality & Safety* 532.

30 See especially Rajkumar Cheluvappa and Selwyn Selvendran, 'Medical Negligence: Key Cases and Application of Legislation' (2020) 57 (September) *Annals of Medicine and Surgery* 205, 206, 210.

31 Thomas Faunce and Alexandra McEwan, 'The High Court's Lost Chance in Medical negligence: Tabet v Gett (2010) 240 CLR 537, (2010) 18(2) *Journal of Law and Medicine* 275, 281. Such an instance may occur where there is, for example, reliable statistical evidence indicating that the omitted treatments would have had a significant impact (i.e., a probability exceeding 50%): at 283.

## VI CONCLUSION

As noted above, whilst the decision of *Gavalas* ensured the availability of the doctrine of loss of chance in medical negligence cases in Victoria, the High Court in *Tabet* subsequently departed from the Victorian Supreme Court of Appeal, effectively overruling *Gavalas*.[32] This case summary aimed to demonstrate the landmark nature of *Gavalas*, allowing for a brief period, loss of chance actions in Victoria, and the subsequent impact of the ruling in *Tabet.*

[32] See generally Sonia Allan and Meredith Blake, *Australian Health Law* (LexisNexis Butterworths, 2018) 278–9 [7.95]. See also Ian Freckelton, 'Scientific and Medical Evidence in Causation Decisions: The Australian Experience' in Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing, 2011) 257.