

of this may be sciatica (sharp, posterior lower limb pain) and/or paraesthesia ("pins and needles" or numbness) in the distribution of the affected nerve. When this is sufficiently severe and unremitting, surgical decompression (laminectomy, discectomy) may be required for its relief.

The question often arises as to when one can accept disc bulging as normal.

Unfortunately there is no clear answer in the absence of nerve root effect. Many studies have shown that asymptomatic adults in their fourth decade of life frequently have bulging discs.

On the other hand, bulging discs associated with a history of injury in those under the age of 30 are more likely than not to be a consequence of the described trauma.

#### Degenerative change

The presence of degenerative change or pre-existing pathology is very commonly a factor of some significance in the medico-legal assessment of injuries.

It is also an area heavily laden with mythology!

Degeneration is a part of the normal ageing process like greying of the hair and wrinkling of the skin.

Disc degeneration is part of this age-

ing process and in the normal course of events may well remain asymptomatic. It has in fact been widely acknowledged in the orthopaedic literature that there is no significant correlation between the radiological appearance of degenerative change, pain or employment. The most widely read and respected book on the subject, *Macnab's Backache*, 3rd Edition, 1997, p.217 when reporting on a survey of three hundred 40 year-old heavy labourers, states: "Indeed, some of the patients who had been employed in strenuous occupations all their lives without a twinge of back pain showed very marked degenerative changes on radiography."

He also showed that although degenerative change increased in a linear fashion throughout life, the incidence of backache peaked at 45 and tended to decline thereafter.

In other words - in spite of radiological evidence of worsening degeneration backache decreased in the latter half of life.

The term "degenerative disc disease" is inappropriate and, in my opinion, should not be used. It implies a progressive illness rather than the natural and inevitable consequence of ageing.

Disc degeneration, however, may render the spine more vulnerable to trauma and as

a result of this pain may arise from annular tears, ligament damage or from facet joint disruption, apart from the disc itself.

When this occurs it appears logical to conclude that the injury may well have induced some permanent deleterious change in the underlying pathology.

Assessment of the long-term prognosis therefore involves an estimation of the contribution made by the previous pathology, the change effected to that pathology by the injury, the body habits, lifestyle and employment of the patient. It is, at best, an educated guess dependent on the experience and attitude of the examiner as indicated in this quotation from an oration by the Governor of NSW, Gordon Samuels, AC, given in the Great Hall of the University of Sydney on June 17, 1997. His Excellency was quoting from *Taylor on Evidence* by expert witnesses.

"...witnesses are usually required to speak, not to facts, but to opinions; and when this is the case, it is often quite surprising to see with what facility, and to what extent, their views can be made to correspond with the wishes or the interests of the parties who call them." ■

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## Court gives patients more leverage in negligence cases

#### Fiona Buffini

Patients may become more litigious following a High Court finding that a doctor was negligent in failing to warn of a surgical risk - even though the patient would have eventually gone ahead with the operation, according to a lawyer involved in the case.

Before the decision in *Chappel v Hart*, patients had to argue that they would have forgone the operation had they been fully aware of the risks, said Mr David Hirsch of Sydney firm Cashman and Partners, who was junior counsel to the patient, Mrs Beryl Jean Hart.

"This is an extremely significant decision. This case may make it easier for patients to succeed in negligence claims against doctors for failure to warn of risks."

But the Medical Defence Union said the decision, handed down earlier this month, did not impose additional duties on doctors.

Tress Cocks and Maddox partner Mr Stephen Barnes, who was Dr

Clive Chappel's solicitor, said: "The law remains as stated by the High Court in *Rogers v Whittaker*, namely that a practitioner is under a legal obligation to warn patients of material risks."

Mrs Hart suffered a throat condition and underwent elective surgery by Dr Chappel without being warned of the possible consequences should her oesophagus be perforated. This happened, causing nerve damage and voice loss.

While Mrs Hart would have inevitably needed the surgery, she argued that had she been aware of the risk, she would not have had the surgery when she did, and would have had it performed by a more experienced surgeon.

Dr Chappel argued that there was no connection between the failure to warn and the damage suffered, as the surgery was inevitable and the risks inherent. The court held by a three-to-two majority that Mrs Hart would not have had the operation on the day, and on any given day she would not have been

injured, so Dr Chappel's failure to warn resulted in her injury.

Mr Hirsch said: "It now appears that if the patient were to say, 'if I had been warned I would have deferred the operation or thought about it, or got a better doctor', they may be able to succeed in a legal claim for negligence - unless the defence can show the injury would have happened even if the operation was deferred."

The MDU said the decision did not mean doctors had a legal duty to advise patients of the availability of more experienced surgeons: "As a number of judges were at pains to point out, the law only imposes upon a medical practitioner a duty of reasonable care, not a duty to ensure that the absolute optimal care is rendered to a patient by the best available surgeon."

Justice Michael Kirby said in judgement that in Australia, the requirement to warn patients about the risks of medical procedures "is a rigorous legal obligation. Breaches must be treated seriously".