Failure to warn revisited

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Chappel v Hart
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After the High Court's decision in ***Rogers v Whitaker***[1] *in 1992 many doctors were worried that the floodgates of litigation would be opened and that there would be a spate of cases of patients suing for the failure to warn of risks. Whilst many cases were filed alleging failure to warn of the risks of particular procedures, claims based on this alone were rarely successful. That is because it was considered essential to a successful claim that the court be satisfied that, if warned of the risk, the plaintiff would have opted not to have the procedure.*

This commonsense check on liability - based on the notion that the failure to warn would only cause harm if the plaintiff would have foregone the procedure - has been revisited by the High Court in the recent decision in *Chappel v Hart*.[2]

It can be confidently predicted that doctors will be unhappy with this decision and worried that, if the floodgates did not open after *Rogers v Whitaker*, they may well after *Chappel v Hart*.

The facts

In *Chappel v Hart* the NSW Supreme Court was faced with an unusual fact situation.

Mrs Hart had a pharyngeal pouch which was interfering with her ability to swallow. She consulted Dr Chappel who recommended surgery. Mrs Hart asked many questions about what could go wrong and even told Dr Chappel that she did not want to end up "like Neville Wran". She worked in the school system and enjoyed her job. Being able to speak clearly was important to her both personally and professionally.

Unfortunately, Dr Chappel damaged Mrs Hart's oesophagus during the procedure and this led to infection and mediastinitis. This in turn led to paralysis of a vocal cord and Mrs Hart did end up "like Neville Wran". She sued Dr Chappel for negligence in the manner in which he did the operation and also for not warning her of the risk of damage to her voice.

The decisions of the Courts

The trial judge found that the operation was not negligently performed. Dr Chappel did, however, fail to warn Mrs Hart of the risk of damage to her voice through mediastinitis. It was accepted that this was a well-known, if rare, complication and Dr Chappel should have warned her. It followed that Dr Chappel was negligent.

Mrs Hart could not say, however, that if she had been warned she would never have had the operation. The judge found that she probably would have had the operation at some point since her condition was *relentlessly progressive*. But Mrs Hart said that, if warned of the risk of damage to her voice, she would have deferred the operation, obtained other opinions, and sought a more experienced surgeon.

There was evidence that the risk of perforation of the oesophagus during the kind of procedure Mrs Hart had can happen to any surgeon. But experience reduced the likelihood of the risk eventuating.

It could scarcely be disputed that surgeons with more experience are less likely to cause harm than are less experienced surgeons. It is well accepted, for example, that there is a "learning curve" in performing laparoscopies or blind, nasal intubations. Most adverse outcomes in these kinds of procedures are attributable to insufficient skill, and skill comes with experience. It was not unreasonable, therefore, for a person like Mrs Hart, for whom the risk of damage to her voice would be especially problematic, to want to take steps to minimise the likelihood of the injury occurring.

Because Mrs Hart was unaware of the risk of damage to her voice she consented to have Dr Chappel perform the operation. The issue facing the court was whether the failure to warn Mrs Hart of the risk was the *cause* - from a legal point of view - of the damage to her voice.

It is an inescapable conclusion that had Mrs Hart deferred the operation and had it done some other time with a more experienced doctor, she still ran the risk of injury to her voice. But the risk of injury at any one time was extremely low. In fact, Dr Chappel's legal advisers argued that the risk was "random". It necessarily followed that, on any other day, Mrs Hart would probably not have suffered the injury that she did.

It was argued on behalf of Mrs Hart that Dr Chappel's failure to warn of the risk of damage to her voice resulted in her submitting to an operation in which she did, in fact, suffer injury to her voice. According to her, Dr Chappel's negligence *caused* the damage in the sense that *but for* the warning she would probably not have been injured.

Dr Chappel argued that since Mrs Hart would have had the operation at some point, she would have accepted the risk of injury to her voice at some point. The only loss that Dr Chappel's negligence caused, therefore, was the loss of an opportunity to run the same kind of risk on a different day.

The trial judge found in favour of Mrs Hart and Dr Chappel, through his defence organisation (the Medical Defence Union) appealed the decision to the NSW Court of Appeal. All three judges in the Court of Appeal found against Dr Chappel and upheld the trial judge's decision.

An application by Dr Chappel for leave to appeal to the High Court was allowed and the case was heard over a full day on 11 November, 1997. The Court reserved its decision until 2 September, 1998. Each of the five judges

wrote a separate judgment, each with a different emphasis. In the end the appeal was dismissed by a vote of 3 to 2. The decision of the trial judge and the Court of Appeal was upheld. Mrs Hart had won her case.

Discussion

This was not an easy case. The facts were unusual. There were compelling arguments of both principle and public policy supporting both Mrs Hart and Dr Chappel. But in the end the majority favoured the view that this case was not about a "loss of a chance" to have the operation done by another doctor on another day. It was about an injury to Mrs Hart's voice which happened because of Dr Chappel's operation. It was about an injury which almost certainly would not have happened had Mrs Hart been warned of the risks and had the operation been deferred.

The reasoning of the majority accords with common sense and basic fairness. When a person considers whether to undergo elective surgery, disclosure of material risks allows the person to make an informed choice about whether, when and under whose knife that operation should be performed. To negligently deprive a person of the opportunity to make an informed choice is to negligently deprive the person of an opportunity to avoid or minimise the risk of injury. If injury of the kind which the person would have avoided occurs, it seems only just that compensation should be given.

But on the other hand if the person was going to run a risk of injury anyway, what did the failure to warn *cause* but the opportunity to run the same risk on a different day? In circumstances where the doctor's surgical technique was not negligent, and the injury could occur with even a more skilled surgeon, it seems unfair to the doctor to be saddled with the responsibility of what might be called "bad luck".

To understand why the majority ruled as it did one needs to consider general principles and the purpose of tort law.

Tort law provides a system for deciding whether to shift the burden of a loss or to let the loss lie where it falls. If the loss could have been avoided by the exercise of reasonable care then the burden of the loss ought to be shifted to the person who should have been more careful. On this analysis one could hardly quibble with the decision to compensate Mrs Hart.

Causation for the purposes of tort law is a difficult concept. It is not the same as causation in philosophy or science. One must take a "*robust and pragmatic*"[3] approach to the problem. The High Court emphasised in this case what it articulated in an earlier case: that causation was a question of fact to be resolved as a matter of *common sense* but that "*value judgments*" and "*policy considerations*" do apply.[4]

Several members of the High Court referred with approval to a recent House of Lords decision[5] which considered the principles of legal causation. In that case is was said

"*...common sense answers to questions of causation will differ according to the purpose for which the question is asked.*"[6]

and

"*...one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of that rule.*"[7]

Mr Justice Kirby, who admitted to having been originally attracted to Dr Chappel's argument, ultimately decided in favour of Mrs Hart. He emphasised the policy considerations behind the duty of a doctor to warn of material risks. Justice Kirby said:

" *[T]he requirement to warn patients about the risks of medical procedures is an important one conducive to respect for the integrity of the patient and better health care. In Australia, it is a rigorous legal obligation. Its rigour was not challenged in this appeal. It must be accepted that, by establishing the requirement to warn patients of a risk to which they would be likely to attach significance, or of which they should reasonably be aware, the law intends that its obligations be carefully observed. Breaches must be treated seriously.*"[8]

Those who would have found in favour of Dr Chappel, Justices McHugh and Hayne, did not argue against the principles above. They found that, on the evidence in this case, the connection between Dr Chappel's negligence and the injury which Mrs Hart suffered was not such as to amount to causation in law.

Judge McHugh was not satisfied that the evidence supported the finding that, even if Mrs Hart had the operation done by a surgeon of greater skill, the risk of mediastinitis was significantly reduced.[9] Judge Hayne found that the only thing that Dr Chappel's negligence caused was that he put her *in harm's way*[10]. But she could just as well have been in harm's way in any procedure at a later date.

Conclusion

One cannot examine *Chappel v Hart* without a sense of deja vu. The *Rogers v Whitaker* case had the same history.

Rogers v Whitaker was another difficult case in which the doctor thought that he had a good defence. But he lost at trial, he lost before the NSW Court of Appeal and he lost before the High Court. The defence organisation responsible for that case, the NSW Medical Defence Union, has come under criticism for having pursued that case and delivering a legal precedent which, whilst welcomed by patients, has caused much consternation amongst the medical profession.

I would be very surprised if the MDU did not come in for similar criticism for pursuing *Chappel v Hart* to the High Court.

None of this is to detract from the fact that this was a difficult case. The decision could just as easily have gone the other way.

It is sad to think that the MDOs of Australia are likely to be incensed about this decision and will probably cite *Chappel v Hart* as another example of the law ruining medical practice. If only one judge had voted the other way, however, the MDOs would be claiming a well-deserved victory and would be praising our legal system for delivering justice.

There is a salutary lesson in this. The law is a blunt tool. It is often ill-suited to solving complex problems. Lawyers know that difficult cases make difficult law. Mrs Hart brought to the law a very difficult problem. Dr Chappel forced the law to make a difficult decision. And that is what the law did.

Perhaps in the wake of *Chappel v Hart* MDOs will reconsider their policy of fighting every case in which a credible defence is available. Sometimes even cases where there is a good argument for the defence - as there was here - would be ▶

better off settled than litigated. My guess, however, is that we will be in for another round of lawyer and judge bashing courtesy of the MDOs.

I would have thought that by now the medical profession in Australia would be getting tired of the old rhetoric. Maybe this time the profession will urge their MDOs to get out of the courtroom and into the negotiating room where difficult problems can be solved earlier, more cheaply and with far less risk. ■

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Notes:

1 (1992) 175 CLR 479
2 [1998] HCA 55 2 September 1998
3 *Wilsher v Essex Area Health Authority* [1988] AC 1074
4 *March v Stramare (E & MH) Pty Ltd* (1991) 171 CLR 506
5 *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1998] 2 WLR 350
6 Supra a page 356
7 Supra at page 358
8 *Chappel v Hart* p 41-42
9 *Chappel v Hart* at page 15
10 *Chappel v Hart* at page 56

Prosecutions under QLD Motor Accident Insurance Act

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Richard Carew

Recently the Insurance Commissioner prosecuted a plaintiff for an alleged offence under section 93 of the Motor Accident Insurance Act *1994.*

Plaintiff lawyers need to be aware of section 93 and should warn clients of its existence. The plaintiff, who was referred to me by his solicitor in the personal injuries action, was charged under section 93 (3) which states:-

"A person must not in connection with a motor vehicle accident claim give someone else a document containing information that the person knows is false, misleading or incomplete in a material particular without-

(a) telling the other person that the document is false, misleading or incomplete and the respect in which the document is false, misleading or incomplete; and
(b) giving the correct information to the other person if the person has, or can reasonably obtain, the correct information.

Maximum penalty- 150 penalty units or imprisonment for 1 year."

The plaintiff had brought an action in the District Court in Brisbane against Suncorp Insurance Ltd. claiming damages for personal injuries arising out of a motor vehicle accident in 1996. Proceedings were commenced in early 1997.

Briefly, the allegation was that the plaintiff had provided a letter to his solicitor, a copy of which had been passed to Suncorp's solicitors. The Insurance Commissioner, who brought the prosecution pursuant to section 98 of the Act, called evidence from the accused's former employers - a cleaning business operated by a husband and wife partnership- who said that the letter had been forged- including the signature of the wife- and that the contents were false. The Plaintiff was charged with giving the document to Suncorp's solicitors in that he procured his solicitors to give it to them.

The letter stated that the plaintiff had left their employment on 17 July, 1997 because of continuing back and neck problems whereas the employers swore this was untrue and that he had been sacked for poor work performance. The letter was faxed to the plaintiff's solicitors two days before a settlement conference was to take place and a copy provided to the defendant's solicitors the day before the conference. The contents were clearly relevant to his claim for economic loss.

Fortunately for the plaintiff, the Magistrate, at the conclusion of the prosecution case, found that he had no case to answer and discharged him. He did so on two bases. First, that the prosecution had failed to prove an essential element of the offence and second, that the prosecution witnesses (with the exception of the solicitor for Suncorp) had been so thoroughly discredited in cross-examination that a court could not accept their evidence.

Nevertheless, this won't be the last prosecution brought under this section. Clients should be advised of the contents of the section and the necessity to comply. Plaintiff lawyers also need to be careful because a charge could be laid against a legal representative who passes on a 'false, misleading or incomplete' document without complying with section 93(3) (a) and (b). ■

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