What is a material risk in gynaecological cases?

Causer v Stafford-Bell

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A recent decision of the Supreme Court of the Australian Capital Territory shows how difficult it can be for a plaintiff to show that she should have been warned of certain risks of a procedure.

The wronged plaintiff seeking compensation arising out of medical negligence is always going to have a difficult time in the face of unlimited financial and specialist resources available to medical defendants.

Some of the factors apparent in the cases are, no doubt, common to many cases in this field:

- The steady and unswerving evidence of the highly respected and eloquent doctor vs the emotional and incomplete recollection of the offended plaintiff.
- The impossible task of dealing with assertions on the part of the plaintiff that a particular matter was, or was not discussed, relevant to the Rogers v Whittaker issue, in circumstances where there is no corroborative evidence and the issue boils down to a one on one duel of recollections.

The case under discussion is the decision of His Honour Mr Justice Gallop in Jill Causer v Dr Stafford-Bell (Supreme Court of the Australian Capital Territory, 14 November 1997, unreported). This was a classic medical negligence case pleaded in contract and tort. The plaintiff had consulted Dr Stafford-Bell for advice about heavy bleeding. She had previously undergone a tubal ligation. After discussions and investigations the defendant recommended hysterectomy. Although the plaintiff asked many questions about the procedure, her evidence was to the effect that she was not warned of the risk of a fistula occurring or any other complications (other than the usual risks associated with a general anaesthetic) and had she been given the option she would have tried any of the alternative treatments first. The doctor, on the other hand, without the benefit of notes, recounted a wide range of issues that he had warned her about. He conceded however, that he would not have discussed the risk of a fistula, as he had not encountered such a problem in any of the 500 hysterectomies he had performed, and from his knowledge the risk was less than one in 200.

The inevitable complication arose following the operation resulting in a fistula developing between Mrs Causer's bladder and vagina leading to leakage of urine of varying intensity for several years.

What happened during the operation? Who knows? Dr Bennett on behalf of the plaintiff, opined that trauma occurred to the bladder during the separation of the cervico vesical ligament, such as a nick from a scalpel or tear by a suture. The defendant and his expert supported the theory of a blunt trauma to the delicate bladder lining the operation without negligence, leading to necrosis and a fistula. His Honour preferred the defendant's hypothesis.

And what of the warning of the risk? His Honour Mr Justice Gallop found that the risk was minimal (between 0.1 percent and 0.01 percent). It was not a significant risk and he did not consider it to have been necessary for the defendant to have discussed it with the plaintiff to enable her to make an informed decision.

Frustratingly, this contrasts with the findings of the full Court of Western Australia in Dr Richard Teik Huat Tai v Saxo (delivered 8 February 1996, unreported), where the evidence was less specific: one in 500, one in 1000, something like that. It had never occurred in the experience of the defendant doctor and yet the court found (Pidgeon J, Franklyn J, and Ipp J) that the risks of the perforation of the bowel (which occurred during a vaginal hysterectomy combined with an anterior and posterior vaginal repair), and the development of a fistula was significant, and that it was incumbent on the doctor to disclose them to the patient.

Clearly in each case the presiding judge must weigh up the expert evidence, but it is hard to reconcile the conflicting results in these cases. ■

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