A new window for plaintiffs in non-elective surgery

Chappel v Hart

Dylan McKimmie, Carew & Company, and Peter Carter, Carter Capner, Brisbane

In May 1983, Mrs Hart suffered a throat condition which caused her physical difficulties. She was referred for consultation to Dr Chappel, an ear, nose and throat specialist, who advised her to undergo surgery. At this stage surgery was elective but it would have later become necessary.

Dr Chappel gave Mrs Hart his usual warning in relation to the risk of perforation of the oesophagus during surgery.

Mrs Hart asserted, and it was accepted at trial (a finding not disturbed on appeal), that she told Dr Chappel that she "*did not want to wind up like Neville Wran.*" Dr Chappel disputed this.

On 10 June 1983, Mrs Hart underwent surgery performed by Dr Chappel for removal of a pharyngeal pouch in her oesophagus.

During surgery her oesophagus was perforated and mediastinitis ensued. It was ultimately accepted by Mrs Hart that Dr Chappel performed the operation with appropriate care and skill and that the perforation occurred notwithstanding this care and skill.

Mediastinitis was a rare complication caused by an infection resulting after the perforation and that infection caused damage to the laryngeal nerve.

Mediastinitis caused damage to vocal cords and loss of voice strength. Her right vocal cord was paralysed.

Mrs Hart subsequently underwent remedial surgery performed by Professor Benjamin who reported on 27 November 1984 that the plaintiff had, post surgery, "*obtained a very very good voice except for singing, shouting and at other times her voice would tire.*" There was no associated pain.

Mrs Hart sued Dr Chappel for negligence. At trial, Donovan AJ found that Dr Chappel had a duty to warn Mrs Hart, that he had failed to do so, and that as a result of that failure Mrs Hart suffered damage, such damage being assessed at $172,500.61.

Mrs Hart gave evidence that if she had known of the risk she would have deferred the operation, which was inevitable, and had a surgeon of greater competence, such as Professor Benjamin, perform the operation. Professor Benjamin had carried out 150 operations of the type Mrs Hart required without any perforations, while the evidence was that perforations generally occurred in 1 in 20 to 1 in 40 operations.

The trial judge held that the circumstances of the case imposed a duty upon Dr Chappel to warn Mrs Hart of the risk of damage to her voice and that the circumstance that imposed this duty was the remark made by Mrs Hart concerning Neville Wran.

The trial judge also held that Mrs Hart was more likely to recall making the Neville Wran remark because she had a memory of what was in her mind in addition to a memory of saying the remark. On the other hand, Dr Chappel would only have had a memory of what was said to him and he would not have had the matter in his mind in any other way. The trial judge held that it was more likely that the words and issue would remain in Mrs Hart's memory than they would in Dr Chappel's memory. On several other points in dispute the trial judge expressly preferred the evidence of Dr Chappel over that of Mrs Hart.

Dr Chappel appealed the finding of negligence. Mrs Hart cross-appealed contending that the award of general damages ($30,000) was inadequate.

The issues on appeal were (ignoring the cross-appeal which was ultimately unsuccessful):

(a) whether Mrs Hart sought advice from Dr Chappel in a form such as imposed on him a duty of care to warn her of the relevant risk;
(b) if she did not, whether otherwise the circumstances imposed on him a duty to warn her of that risk; and
(c) if Dr Chappel owed Mrs Hart a duty to warn her of the risk, and failed to do so, whether that failure caused the damage for which she sought compensation.

On the question of whether a duty to warn arose, the matter essentially turned on whether the Neville Wran remark was made by Mrs Hart. She said it was and Dr Chappel said it wasn't.

It was not contested by Dr Chappel that if the Neville Wran remark was made then a duty to warn arose.

The Court of Appeal held that the trial judge's findings of fact and judgment ought not be disturbed. In doing so, Mahoney P expressly rejected a submission by Dr Chappel's counsel that it was dangerous to find against a doctor on the sole basis of the plaintiff's recollection of a conversation some years ago as to do so would cause damage to a doctor's reputation and standing. Mahoney P dismissed this submission saying that "*there is something of unreality in a law which hazards the whole of the damage suffered by the plaintiff upon the hazard that the plaintiff may be able to recollect, and to recollect accurately, a conversation or remark of this kind.*"

Mahoney P agreed that the damage was not caused by any negligence or lack of skill during surgery. It was not caused by the mere fact that the operation was carried out and the evidence did not disclose why the damage occurred in one case and not another.

Dr Chappel's counsel submitted that as the operation did not always produce, or was not always followed by, the damage in question, and where that damage only

follows infrequently then in that sense it is not caused by the operation but is in fact a mere coincidence. The court rejected this submission.

Mahoney P held that it was "*the failure of Dr Chappel to warn Mrs Hart that, if she undertook the operation, she ran the risk that the damage would occur. It is the fact that she was not warned which is, in law, the cause of the damage and, as such, the basis for holding Dr Chappel responsible for the damage that she suffered.*"

Mahoney P held that even had the position been that it was inevitable that subsequently Mrs Hart would have had to undergo the same operation in the same circumstances, he did not think that that would mean that a causal relation did not exist between Dr Chappel's failure to warn and what in fact happened. The function of the warning, if it had been given, would have been to give her the opportunity to decide whether she should undertake a risk which she might not undertake. Because the warning was not given, she made the decision to undertake an operation which, unbeknown to her, involved a risk. Mahoney P found this to be within the concept of causality within the law.

Handley JA, dismissing the appeal, stated that the coincidence principle did not apply and depended on the risk being no greater when it materialised for the plaintiff than it would have been but for the negligence.

Handley JA found that because the risk of perforation to Mrs Hart during the actual surgery was greater than the risk during hypothetical surgery performed at a later date by Professor Benjamin (which would have been necessary if Mrs Hart had not had the actual surgery) then the coincidence principle, which Dr Chappel sought to rely upon, did not apply.

In the instant case he accepted the risks would not have been the same on the occasions of the actual surgery on the one hand and in the hypothetical surgery in the future on the other. He accepted that the risks would have been lessened in the hypothetical surgery performed by someone such as Professor Benjamin. Going further, Handley JA articulated that the negligence arising from the failure to warn in a circumstance such as the present case as being an exposure of the plaintiff to an increased risk of injury. In this regard he likened it to other areas of injury negligence, particularly industrial injuries.

Handley JA went on to hold that "in my judgment (Dr Chappel's) negligence should be accepted as a contributing cause of the damage which would not have occurred but for that negligence. The negligence exposed the plaintiff to an increased risk of suffering the complications."

Cohen AJA concurred with Mahoney P and Handley JA.

This case is clearly an important interpretation of causation under the *Rogers v Whitaker* principle. It should be noted that the issue of causation did not need to be addressed in *Rogers v Whitaker* as it was accepted that Mrs Whitaker simply would not have had the operation had she been warned. The procedure in that case was purely "elective".

Certainly *Chappel* would appear to open a window for plaintiffs in some non-elective procedures to bring failure to warn cases if that window was previously thought to be closed.

In our view *Chappel v Hart* won't however lead to a far wider class of claims for failure to warn as some commentators predict. The causation issue always was a block to instances where the therapy had to be undertaken in any event. *Chappel* simply provides an explanation as to how the failure to warn theory will work in a particular situation.

Each case will have to be considered according to its own facts and the criteria set out in *Rogers v Whitaker* itself will still have to be satisfied as to whether the particular warning was in the circumstances of that case required to be given.

To fall within the causation window opened by *Chappel*, the plaintiff will certainly have to show that there was a significant chance of a better outcome in the hypothetical future surgery. Something, such as a "Professor Benjamin" with a far better surgical record as well as a convincing plaintiff as to the issue the postponement of surgery and the seeking out of other options, will be needed.

Overall, the result on the causation issue appears to be an intellectually sound articulation of the practical consequences of a failure to warn of a complication which does in fact occur and cause serious consequences. This case is however on appeal having been expected to have been heard by the High Court by the time of printing.

Does the additional necessary element of "greater risk" which occurred in *Chappel* bring this class of failure to warn case perilously close to a negligence case per se?

Put another way, if the only reason the patient can succeed in this non-elective failure to warn situation is that there is a demonstrated difference in the risk exposures in the actual and hypothetical situation, is the patient required to make out two different standards? If so, this is exactly what any straight negligence case is all about.

In *Chappel v Hart*, no claim was made against the surgeon for negligence in the procedure. This was presumably because the patient would have been met with the defence that the perforation was "a recognised risk" ie that notwithstanding reasonable care and skill, the oesophagus was perforated.

The *recognised risk* defence is of course not available in *failure to warn* cases. In *Chappel v Hart*, have the lawyers succeeded at the same time in re-establishing some sort of defacto negligence standard and in eliminating any defence to it of recognised risk?

That may well be the case for that small class of situations which will be covered by this case. Such outcome will of course be pleasing to those who think the "recognised risk" defence is a device manipulated to the benefit of doctors to avoid liability where it should fairly fall and displeasing to those who think that "failure to warn" is a device engineered by lawyers to create liability where it shouldn't exist. ■

Dylan McKimmie is a solicitor with Carew & Company in Brisbane. Contact **phone** 07 3236 1528, or **fax** 07 3236 1628.

Peter Carter is National Vice-President of APLA, and a Partner with Carter Capner in Brisbane. Peter can be contacted at **phone** 07 3221 1833, **fax** 07 3221 6058, **email** p.carter@mailbox.uq.edu.au