Opinion

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ROGERS V WHITAKER: DUTY OF DISCLOSURE

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A Comment on the [Australian] High Court's decision in Rogers v Whitaker (1992) 175 CLR 479.

Facts: The respondent, Maree Whitaker, had been almost totally blind in her right eye for nearly 40 years since suffering a severe injury to the eye at the age of nine. Despite the injury she had lived a substantially normal life. She consulted the appellant, Christopher Rogers, an ophthalmic surgeon, who advised her that an operation on the injured eye would not only improve its appearance but would probably restore sight to it.

Following the surgery, which was conducted with the required skill and care, the respondent developed a condition known as 'sympathetic ophthalmia' in her left eye. In the end she lost all sight in her left eye, and as there had been no restoration of sight in her right eye, she was almost totally blind.

She sued the appellant alleging his failure to warn her of the risk of sympathetic ophthalmia was negligent. She had not specifically asked whether the operation to her right eye could affect her left eye but she had incessantly questioned the appellant as to possible complications. The appellant said in evidence, "sympathetic ophthalmia was not something that came to my mind to mention to her". Evidence given at the trial was that the risk of sympathetic ophthalmia was about one in 14,000 and even then not all cases lead to blindness in the affected eye.

The appellant relied on the principle used in UK cases, (the "Bolan" principle), that a medical practitioner is not negligent if he acts in accordance with a practice accepted at the time as proper by his peers, even though other medical practitioners adopt a different practice. In other words, the standard of care owed to a patient in all things is determined by medical judgment.

High Court Decision: The six High Court judges agreed that except in cases of emergency or necessity, all medical treatment is preceded by the patient's choice to undergo it. The choice is meaningless unless it is made on the basis of relevant information and advise. "The Law should recognise that a medical practitioner has a duty to warn a patient of a material risk inherent in the proposed treatment; a risk is material if, in the circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it or if the

medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it." (page 490)

Five of the judges held this duty is subject to therapeutic privilege. Gaudron J does not agree to this exception. This distinction is not relevant in this case.

All judges reject the USA concept of 'informed consent' as misleading.

The Court drew a clear distinction between the test to be applied as to whether the operation has been done with the necessary skill (the "Bolan" principle applies here) and the duty to warn a patient of material risks.

Comment: The decision is an important one, not only because it is the first time the High Court has considered this type of case but also because it affirmed the reasoning applied in some South Australian cases and affirmed the decisions of the original trial judge in the Supreme Court of NSW and the judges in the Court of Appeal. There is now little room for doubt in Australia as to the legal principles to be applied in similar cases. It leaves open how emergency or non-elective surgery will be dealt with by the courts.
However, there are some substantial practical problems flowing from the legal principles. Those medical practitioners who have not already done so will be required to accept that their patients have a right to be warned of material risks according to the patient's perspective. As in this case, what may seem immaterial to skilled medical practitioners because of the unlikelihood of the problem arising (1 in 14,000 is, I suggest, a very low risk numerically) may be material because of the nature of the risk.

The decision in this case should end any paternalistic attitude of medical practitioners about what is best for the patient in the matter of choice to undergo surgery. It also puts the responsibility for taking the risks (once they have been explained) with the patient.

In my view, the decision is correct. It reflects the growing community attitude that individuals are responsible for making their own decisions. It is also a warning to professionals, outside the medical profession, that an important part of their duty to their client or patient is to advise properly. In ordinary circumstances, the client or patient then has the right to decide whether to take the advice or not.

The High Court is also being consistent in its approach in this case and its approach in constitutional cases where it is recognising inherent individual and community rights in the Constitution. (see MABO V Queensland (No2) (1992) 175 CLRI; Nationwide News Pty Ltd V Wills (1992) 108 ALR 681; Dietrich V R (1992) 109 ALR 385).
Finally, despite the fears of some commentators on the decision, I do not think it is a first step leading to a huge growth in patients suing medical practitioners. In my view, it provides the balance mentioned earlier between the duty of the medical practitioner to disclose material facts and the patient's right and responsibility to make a decision based on the information provided and bear the non negligent risks arising from that decision.

(For a more detailed analysis of the judgments, see Ian Dunn's article "What should Doctor tell you? Law Institute Journal, April 1993, pp 268-271).