

Perceptions of risk – a legal perspective

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SYNOPSIS

The decision whether or not to undergo medical treatment is usually that of the patient. In order to make such a decision the patient needs information about the risks and benefits of any proposed course of treatment. The High Court of Australia has said that the patient must be informed about material risks. It has said that material risks are those risks to which a reasonable person in the patient's position or that particular patient would attach some significance. Therefore in deciding which risks to disclose to the patient the doctor must attempt (as much as is practicable) to view the procedure from a patient's perspective. Necessarily this must be an individual judgement based on what is reasonably known about the person before them. This judgement must be made within the particular circumstances of the consultation.

Index words: adverse effects, informed consent.

(Aust Prescr 2002;25:114–5)

The 1992 decision in *Rogers v. Whitaker* (1992) 175 CLR 479 established in Australian law the standard of care required when a doctor gives information to patients about risks of proposed procedures (although '[t]he decision in *Rogers v. Whitaker* has been received with some consternation by the medical profession'¹).

In *Rogers v. Whitaker* the question to be decided by the court was whether an ophthalmic surgeon should have warned his patient of the one in 14 000 chance of a complication, sympathetic ophthalmia and subsequent risk of blindness, arising from a proposed procedure. The High Court affirmed the decisions of the New South Wales Supreme Court and the New South Wales Supreme Court of Appeal that the doctor should have warned his patient of this remote risk. In reaching this conclusion the High Court stated the standard to be adopted by doctors when advising patients of risk. The joint judgement of the majority of the court* stated:

'The law should recognize that a doctor 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.' (at 490)

This case confirmed that Australian courts would not be bound by common professional practice (evidence before the court revealed that many doctors in the ophthalmic surgeon's position would not tell their patients about the risk of sympathetic ophthalmia). The test then is 'what risks would a reasonable person in the patient's position want to be told about before they would undergo the procedure'. This is recognition that in the usual circumstances the choice of whether to undergo a procedure is that of the patient and in order to make this decision they need to know something about the risks that may be involved. Justice Kirby has pointed out that the Australian cases 'emphasise that it is the patient who ultimately carries the burden of the risks'².

The judgement also recognises that some patients may have special concerns, different perhaps from the 'reasonable' person. If this is known (or should have reasonably been known) by the medical practitioner then any additional risks should also be disclosed.

Recently the High Court has had an opportunity to review *Rogers v. Whitaker* in the case of *Rosenberg v. Percival* [2001] HCA 18 (5th April 2001). In this case a dental surgeon failed to warn his patient appropriately about risks associated with a sagittal split osteotomy. Following the procedure the patient suffered severe temporomandibular joint complications. In this case (as in *Rogers v. Whitaker*) the patient asserted that if she had been appropriately warned about the risks associated with the procedure she would not have undergone it at that time. Each of the High Court judges who decided this case (on appeal from the Western Australia Supreme Court of Appeal) delivered a separate judgement, but all affirmed the principle stated in *Rogers v. Whitaker*.

The cases also assume that the doctor will know something about the patient beyond, perhaps, the immediate complaint that brings the patient to the doctor. However, it should be noted that courts take into account the circumstances of the interaction between doctor and patient. In *Rosenberg v. Percival* the Chief Justice warned that:

[r]ecent judgments in this Court have drawn attention to the danger of a failure, after the event, to take account of the context, before or at the time of the event, in which a contingency was to be evaluated. This danger may be of particular significance where the alleged breach of duty of care is a failure to warn about the possible risks associated with a course of action, where there were, at the time, strong reasons in favour of pursuing the course of action.³

* Gaudron J delivered a concurring judgement.

If a patient were to decline to undergo the treatment because of their unwillingness to accept a risk (after being appropriately informed) then they must bear the consequences of such a decision. Doctors also have a responsibility to make it clear to the patient which of any alternative modes of treatment they recommend. They may do this forthrightly although not to the extent that the advice becomes coercive.

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REFERENCES

1. *Rosenberg v. Percival* [2001] HCA 18, at [214] per Callinan J.
2. *Rosenberg v. Percival* [2001] HCA 18, at [149].
3. *Rosenberg v. Percival* [2001] HCA 18, at [16] per Gleeson CJ. (It should be noted however that the Chief Justice's main concern was about causation – would Dr Percival have gone ahead with the treatment if she had been warned about the risks.)

FURTHER READING

Space does not permit a more extensive analysis of *Rosenberg v. Percival*, however the judgement is available from the web at: http://www.austlii.edu.au/au/cases/cth/high_ct/2001/18.html

For a critical view on the recent High Court cases, see Mendelson D. Liability for negligent failure to disclose medical risks. *J Law Med* 2001;8:358-67.

Conflict of interest: none declared

National Prescribing Service Medicines Line 1300 888 763

The National Prescribing Service has launched *Medicines Line*, a national telephone service providing information for the general public. For the cost of a local call, people will be able to ask questions about their medicines, including over-the-counter and complementary medicines.

Medicines Line is staffed by drug information specialists and will aim to provide independent evidence-based information. It will focus on information about drugs. *Medicines Line* will not give opinions on clinical management or the appropriateness of someone's medication.

Callers will be encouraged to discuss the information with their own general practitioner or community pharmacist, as they will be best placed to help interpret the medicines

information in the context of the person's health. When the caller gives permission, a copy of the information provided to them will also be forwarded to their general practitioner or community pharmacist.

The service will be operated from the Mater Hospital, Brisbane, by a consortium that includes the Pharmaceutical Society of Australia. *Medicines Line* will complement the existing NPS Therapeutic Advice and Information Service for health professionals.

Contact details for the two NPS telephone services are

for consumers: *Medicines Line* 1300 888 763

for health professionals: *Therapeutic Advice and Information Service* 1300 138 677

Patient support organisation

Retina Australia

Retina Australia is a national peer support organisation concerned with retinal diseases, including macular degeneration. Through its State and Territory branches Retina Australia offers voluntary peer support to sufferers of retinal disease. It publishes a wide range of information on retinal disease, some of which is available on its web site. Retina Australia also raises funds for scientific research into the causes, prevention and cure of retinitis pigmentosa and other retinal dystrophies.

The National President of Retina Australia has described living with a visual disability in *A degree of vision* (Personal paper), *Lancet* 2000;356:1517-9.

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