



EVERYTHING MATTERS

COMMENTS ON INFORMED CONSENT

VHA CLINICAL GOVERNANCE FORUM

Monday, March 30, 2009

Overview



- General Comments on Informed Consent
- Judicial Milestones in the Duty to Warn: Rogers v Whitaker; Rosenberg v Percival
- Case Study Hookey v Pertano – Court of Appeal 19 March 2009

General Comments on Informed Consent



Why is consent required?

What constitutes valid consent?

What constitutes informed consent?

When is consent not required?

Are there special circumstances for obtaining consent?

General Comments on Informed Consent



Provision of Information

“Material” risks

Pre-printed information brochures

NHMRC Guidelines

Judicial Milestones in the duty to warn



Rogers v Whittaker High Court 1992

"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."

Important as it rejected an English line of cases (Bolam, Sidaway – which said the test was whether there was a responsible body of professional opinion which supported the view that a warning was not required – ie left it to the doctors)

Judicial Milestones in the duty to warn



Rosenberg v Percival High Court 2001

- Australian law is committed to a subjective test in determining whether a patient would have refused to undergo a medical procedure if that person had been warned of the risk of relevant injury.
- The next question is whether the risk, in the above sense, was "material". Under the *Rogers* test ..., a risk is material if:
 - in the circumstances of the case, a reasonable person in the patient's position would be likely to attach significance to it ("the objective limb");
or
 - the medical practitioner was, or should have been, aware that the particular patient would be likely to attach significance to it ("the subjective limb").

Case Study: Hookey v Paterno



Norrie Ross Herald Sun

March 20, 2009 12:00am

- A woman who needed up to eight morphine injections a day after dental and facial operations went horribly wrong, can keep her million dollar compensation payout.
- The Court of Appeal on threw out an appeal by oral and maxillofacial surgeon Stephen Hookey against the award to mother-of-three Daniela Paterno, now 57.
- The court upheld an earlier County Court finding that Mr Hookey failed to adequately warn Mrs Paterno there was a rare possibility the operation could leave her with continuous pain.
- Mrs Paterno consulted Mr Hookey in 1997 over a malocclusion, where her upper and lower jaws became mismatched, leaving her with a "scissor bite". The appeal judges said she had three operations on her jaws and teeth but the procedures left her in severe pain which further surgery failed to cure.

Case Study: Hookey v Paterno



- Mrs Paterno has had five corrective dental procedures, including one where bone grafts were taken from her hips and placed in her lower jaw.
- There was evidence she needed significant morphine injections daily and that these had caused further medical problems.
- As a result of her continuing pain, she and her husband were forced to sell their Ascot Vale reception centre.
- Justices Geoff Nettle and Robert Redlich said that because of Mrs Paterno's age and the fact she was a smoker there was a high risk the treatment could cause permanent nerve damage.
- "In order to convey to the lay patient the gravity of the possible consequences of that risk, it was necessary to outline them in sufficient detail and simplicity to be comprehensible," they said.
- The court also dismissed an appeal by Mr Hookey against the compensation award, ruling it was not manifestly excessive.

Case Study: *Hookey v Paterno*



- SUPREME COURT OF VICTORIA
- COURT OF APPEAL
- No 3735 of 2007
- STEPHEN HOOKEY Appellant v
- DANIELA PATERNO Respondent
- JUDGES:NETTLE, REDLICH and NEAVE JJA
- WHERE HELD:MELBOURNE
- DATE OF HEARING:25 September 2008
- DATE OF JUDGMENT:19 March 2009
- CITATION:[2009] VSCA 48

Case Study: *Hookey v Paterno*



Two of the judges cited the comments of Santow AJA *Johnson v Biggs*:

- a duty to warn in relation to a prospective surgical operation encompasses both a duty to warn of the risks of proceeding *as well as* the risks of not proceeding, where the patient's physical well-being may be at stake in either case. Those risks need to be put in perspective. They require the clinician's overall assessment of their likelihood and gravity of consequence expressed so as [to be] intelligible to the lay patient...

Case Study: *Hookey v Paterno*



- In this case, the risk of permanent nerve damage needed to be given. In order to convey to the lay patient the gravity of the possible consequences of that risk, it was necessary to outline them in **sufficient detail and simplicity to be comprehensible**.

That does not mean that the appellant was bound to itemise every possible symptom, no matter how remote the chance of occurrence. But it does mean that he had to take care **not to mislead the respondent** as to the scope of the possible consequences. And, plainly, to refer to numbness or similar sensation without mentioning the possibility of other neurological consequence was likely to mislead. Such is the natural aversion to pain of most human beings that a patient could well take a different view of the risk of nerve damage according to whether it carried with it even an outside chance of causing permanent pain.

Consequently, like the judge we consider that the appellant was bound to warn the respondent that, although numbness or similar sensation was the most likely consequence of permanent nerve damage, it was not the only possible consequence of it; there was **also an outside chance** or, if you like, rare possibility, **of it resulting in continuing pain**.