Medical Negligence: Causation And Loss Of Opportunity

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On 1st and 4th July 1994 the decision in Halt v. Chappel was delivered by Donovan AJ. in the Supreme Court. The case involved a claim by the Plaintiff for damages from the Defendant for failure to warn her of complications which she alleged could occur in consequence of an operation to be carried out by the Defendant on her oesophageal pouch. The Plaintiff suffered some weakness of voice as a result of the operation. The evidence suggested that the likely cause of the weakness in her voice was a perforation followed by an infection known as medistanitis which in turn apparently caused some damage to the right vocal nerve. The medical expert who gave evidence on behalf of the Plaintiff noted that when he saw her she had recovered from the perforated oesophagus and medistanitis but specific examination of the larynx showed a paralysis of the right vocal cord.

This complication was rare. No calculations of its likelihood were available to his Honour. The injury was not in the class of injury and severity dealt with by the High Court in Rogers and Whitaker 175 CLR 479. His Honour concluded however, that the risk existed. His Honour said that while there may be no general duty on the doctor to warn the Plaintiff about it, in the circumstances of the present case there was such a duty because his Honour found as a fact that the Plaintiff had requested information.

Counsel for the Defendant submitted that the Plaintiff's loss following from the failure to warn was only a loss of opportunity. He said further that the opportunity was so minuscule that on the authority of Malec v. J.C. Hutton Pty. Limited (1990) 169 CLR 639 at 643, the opportunity which was lost was in effect worthless.

The Defendant's submission was that all the Plaintiff had lost was the chance to diminish the risk of an unknown, but in theory, possible risk of damage to the laryngeal nerve. It was submitted that this should not be regarded as a lost opportunity at all for a number of reasons. The Defendant said that regardless of who treated the Plaintiff the risk could never be totally eliminated. It was always there. It mattered not who carried out the operation or when, there was always a risk of perforation, medistanitis and consequent damage to the nerve. That risk it was said could not be diminished by changing any of those factors. His Honour concluded however that the Plaintiff was entitled not to go ahead with the operation although in due course it may have been necessary for her to have it. It was not necessary for her to have it at the time when she did. In theory the Defendant's argument was that the risk would have been the same and the injury would have happened anyway. His Honour said to support that conclusion there would have to be findings on the evidence. There was in fact no evidence that suggested the risk was such that the event was likely to occur at any future time. The risk was small whenever the operation took place and because it was a small risk, it was likely on the probabilities that the injury would not have occurred had the operation been carried out at a different time and place.

The above circumstances raised problems with causation. Did the failure to warn cause the damage? The argument as above was that the likelihood of the damage occurring would be the same whenever the operation was carried out. Did the mere failure to warn the Plaintiff create a chain of events which led to the injury. If one applied the traditional "but for" test then on the Plaintiff's evidence if she had been warned, she would not have gone ahead with the operation and the injury would not have occurred. While strictly that appears to be correct in law, philosophers may disagree about the existence of causation in such circumstances. Donovan AJ accepted the Plaintiff's evidence that she would not have had the procedure had she been warned. Accordingly, he found that causation was made out.

The case confirms the present state of the law which has rejected the idea of loss of opportunity as an issue in the question of liability. Loss of opportunity traditionally has been held to be a matter which could be raised in the issue of damages. In the UK there was one attempt to rely upon loss of opportunity or loss of chance on the issue of liability in Hodgson v. East Berkshire Area Health Authority (1987) 1AC 750. But the Trial Judge's approach was overruled by the House of Lords. A similar issue was raised by the Defendants in O'Shea v. Sullivan and rejected by Smart J. in his judgment on 6 May 1994.