Naxakis v Western General Hospital & ANOR (1999)

HCA 22 (13 MAY 1999)

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Any lawyer practising in the medical negligence area should take the time to read this decision. The case concerns the principles to be applied in determining whether a trial judge should direct the jury to return a verdict for the defendant in a civil trial by jury. It also decisively sets out the appropriate test to be applied by Australian courts when adjudicating what is the appropriate standard of care to be applied in medical negligence cases in the treatment and diagnosis situation.

The court has effectively rejected once and for all the application of the *Bolam* rule in Australian law. According to the *Bolam* rule, "a doctor is not negligent if he acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice."

This rule was rejected in *Rogers v Whitaker* in the context of appropriate pre-operative warnings. Some courts had interpreted *Rogers v Whitaker* as having limited application to failure to warn type cases and so allowed a variant of the *Bolam* rule to be applied in cases of allegedly negligent treatment.

It is now clear in Australia that the standard to be applied is the standard of the ordinary skilled person exercising and professing to have that special skill (in question) and that the standard is *not* determined solely or by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade.

Ultimately it is for the Court,or where appropriate the jury, to decide whether there is negligence in any given fact situation. The Court in *Naxakis* reinforced the view that in some situations questions as to the reasonableness or otherwise of particular treatments or precautionary measures are a matter of common sense. ▶

The facts

Paraskevas Naxakis, the appellant, was admitted to the Western Hospital (the hospital) on 14 July 1980. He was then 12 years old. He had been struck on the head by another schoolboy's bag, possibly twice, and had collapsed. He was taken to the hospital and admitted under the care of a senior neurosurgeon, Mr Jensen, who treated him for a subarachnoid haemorrhage. During the ensuing days there were unusual features of Paraskevas's condition but he gradually improved and was discharged on the 23 July 1980.

He collapsed at home on the 25 July and was then taken to the Royal Children's Hospital where it was found he had a major intracranial bleed from a burst aneurysm. He underwent surgery to clip the bleed but nonetheless suffered permanent physical and intellectual impairment.

The matter came on for hearing before Harper J and a civil jury. At the close of the evidence, the trial judge ruled that there was no case to go before the jury and judgment was entered in favour of the defendants. An appeal to the Victorian Court of Appeal was dismissed and the plaintiff then successfully appealed to the High Court.

The case against the hospital and the neurosurgeon was that the neurosurgeon had failed to consider an alternative diagnosis of aneurysm and that the neurosurgeon ought to have performed an angiogram to establish the cause of Paraskevas's condition.

The trial went for 14 days and evidence relating to the management was given by a number neurosurgeons including Mr Klug who undertook the surgery at the Royal Childrens Hospital.

Having regard to the evidence given by Mr Klug the Court held that there was sufficient evidence to go before the jury to allow it to decide whether the hospital and/or the neurosurgeon had been negligent. The suggestion by the expert medical witnesses that the neurosurgeon had not been negligent was not regarded as determinative.

Gaudron J set out the relevant test to be applied in a "no case" submission. Where there is a jury, the case must be left to them "[if] there is evidence upon which [they] could reasonably find for the plaintiff", or, as was said by Hayne JA in the Court of Appeal, the case can be taken away only if "there was *no* evidence on which the jury could properly conclude that the plaintiff had made out his case." That does not mean that the case must be left to the jury if the evidence is "so negligible in character as to amount only to a scintilla". However, if there is evidence on which a jury could find for the plaintiff, it does not matter that there is contradictory evidence or, even, as was said by Harper J at first instance, "that the overwhelming body of evidence points to the [contrary]"

Moreover, when considering whether there is some evidence upon which a jury could find for a plaintiff, it is important to bear in mind that the jury may properly accept parts of a witness's evidence and reject others. Thus, for example, a jury may believe what is said by a witness in examination-in-chief and reject apparent modifications or qualifications elicited in cross-examination.

Mc Hugh J considered on the evidence in this case, it was reasonably open to the jury to accept the evidence of Mr Klug that the plaintiff's subarachnoid haemorrhage, which was diagnosed on

The victim culture

HARDLY A DAY passes without further evidence that Britain is succumbing to the so-called "compensation culture" and its near relation, the "victim culture". Lawyers, doctors, travel agents, consumer groups and others are all sounding the alarm, warning that the British are learning from their American cousins to see every misfortune or wrong as a chance to make a fortune by going to law. This has implications far wider than its effect on insurance premiums.

Individuals may benefit, but the common good usually does not. It is reported that one hospital had to close down its mother-and-baby clinic because of the enormous damages it had to pay to the parents of a baby injured at birth. Employment tribunals have become a boom industry. Claims for medical negligence are causing doctors to avoid all treatment with an element of risk. When travelling by air they are said to be increasingly reluctant to respond to the plea "Is there a doctor on board?" in case things go wrong and they are sued. So much for the Good Samaritan – or perhaps he was insured.

Every day the courts hand down new judgements stretching the limits of damages to new heights or the grounds for action into new areas. One of the factors which triggered this tide of litigiousness was undoubtedly the decision of the last Government, in an effort to liberalise the legal profession, to allow solicitors to advertise for clients. Now they tout for business ruthlessly, aided by the new no-win, no-fee system for paying legal costs. In so far as there in no element of personal merit in winning a large claim for damages, the legal system has come to resemble the national lottery.

There is a deeper spiritual malaise behind this desperate need to sue someone for every respect in which life falls short of the ideal. As Bishop Vincent Nichols said in a recent lecture at Salford University, the desire for compensation has taken over from the desire for a deeper understanding of life's ups and downs, an understanding which was once part of a person's spiritual quest. Life is increasingly regarded as meaningless and the eternal big questions as not worth asking. A fat cheque has been substituted for peace of mind or the wisdom of experience.

If somebody does somebody else harm, deliberately or negligently, they must do something to repair the harm. But this principle has been expanded too far. Recently a woman sued her doctor for failing to recommend an abortion when her unborn child was likely to be handicapped. Her action was indicative of the thought process which is becoming widespread.

The victim culture spreads the message that it is always someone else's fault when things go wrong. Victimhood leads to resentment, fatalism and passivity. It shouts about its rights and wallows in its grievances. These spiritual diseases are not yet so far gone as to be untreatable. But they can only become worse if public authorities – including legislators, judges and the legal profession – do not think through the consequences of all their actions.

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admission, was the result of a posterior fossa aneurysm. It was also reasonably open to the jury to conclude from Mr Klug's evidence that only by performing a cerebral angiogram was there any "way of defining whether or not there was another intracranial abnormality such as an aneurysm or other vascular malformation", that such an angiogram would have shown the presence of the aneurysm, and that a reasonably competent neurosurgeon would have considered performing an angiogram for that purpose.

He considered that it was open to the jury to find that, having regard to the history of the plaintiff's injuries and symptoms, a reasonably competent neurosurgeon *would* have performed an angiogram.

In cross-examination, Mr Klug said:

"I think, for instance, if ten neurosurgeons had faced this problem, a number may have said 'let's do [an] angiogram' and a number may have said it is not necessary. I think there would have been a difference of opinion here. In my opinion, from my analysis of the case, I felt that there was a reasonable ground to consider the undertaking of the angiogram."

McHugh J found that the jury was entitled to conclude from this evidence of Mr Klug that some, but not all, neurosurgeons in Mr Jensen's position would have concluded that an angiogram was required. Therefore in his opinion, that evidence of Mr Klug was sufficient to get the plaintiff's case to the jury, irrespective of whether Mr Jensen did or did not consider performing an angiogram.

Concerning the test to be applied his Honour stated:

"It is not to the point that immediately before giving this evidence Mr Klug said he did not think it careless not to conduct an angiogram. If there is evidence upon which the jury could reasonably find negligence on the part of a doctor, the issue is for them to decide irrespective of how many doctors think that the defendant was not negligent or careless. Nor is it to the point that this evidence of Mr Klug also shows that a respectable body of medical opinion would not have performed an angiogram in the circumstances of this case. To allow that body of opinion to be decisive would re-introduce the *Bolam* test into Australian law. In *Rogers v Whitaker*, this Court rejected the Bolam test and held that a finding of medical negligence may be made even though the conduct of the defendant was in accord with a practice accepted at the time as proper by a responsible body of medical opinion. To many doctors, judges and lawyers, it must seem unsatisfactory that a doctor can be condemned as negligent by a jury when he or she has acted in accordance with a respectable body of medical opinion. But as long as there is evidence that other respectable practitioners would have taken a different view concerning what should have been done by the defendant, the issue is one for the jury, provided of course the evidence is reasonably capable of supporting all the elements of a cause of action in negligence."

Mc Hugh J expressly rejected the findings made by Hayne JA (as he then was) in the Court of Appeal that the evidence established no more than that consideration should have been given to performing an angiogram. He considered that it was open to the jury to conclude from the above extract of evidence and other evidence of Mr Klug that, when he said that an angiogram should have been considered, he was intending to say that he himself would have performed one if he had had the plaintiff under his care at the time. That itself would have been enough to leave the case to the jury even if every other medical witness had testified to the contrary.

His Honour found that nothing in the further or earlier cross-examination of Mr Klug could be regarded as utterly destroying the effect of those parts of his evidence favourable to the plaintiff. That being so, the plaintiff's case should have been left to the jury.

This decision makes it clear that the *Bolam* principle has no application in Australian law. It firmly establishes the principle that the tribunal of fact, not the expert witness, has the role of determining whether the defendant has acted reasonably. Although the expert testimony will be influential, it is ultimately the province of the trial judge or jury (where appropriate) who must decide.

There will now be a new trial of this tragic case. ■

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