

ASSESSING DAMAGES FOR A BREACH OF THE DUTY TO WARN: IS THE PATIENT COMPENSATED FOR THE LOSS OF A CHANCE, OR THE CHANCE OF A LOSS ?

In the 1992 case of *Rogers v. Whitaker*¹, the High Court of Australia may not have rendered asunder the floodgates which metaphorically hold back the tide of American-style malpractice litigation. But though the sluice has not yet been fully breached, the flow of “blame and claim” law-suits has increased from a steady trickle to a minor torrent. Many of these are in the nature of “failure to warn” claims, encouraged – if not inspired – by the decision in *Rogers v. Whitaker*.

It is common enough folklore that malpractice litigation is out of control in the United States. What is the hard evidence of this ? A report in the *New England Journal of Medicine*² concludes that there is no statistical correlation between the outcome of malpractice claims, and whether or not the medical practitioner was actually negligent. From a sample of 51 malpractice claims, the authors sought to distinguish those involving actual negligence by the treating physician, from those which involved no actual negligence. They concluded that the average pay-out in cases involving no actual negligence was 50% higher than the average settlement in cases where the treating physician had actually been negligent !

This paper is concerned with one specific area of medical malpractice litigation, namely the quantification of damages in cases where a practitioner is found negligent for failing to warn a patient of the risks inherent in a proposed course of treatment. Whilst at first sight this may not seem to be an issue of Earth-shattering significance, it is my contention that the principles developed by the courts to deal with such issues will have a significant impact on the future trend of medical malpractice litigation in this country. If the courts adopt a conservative approach to the quantification of damages, that may serve as a bulwark to sure up the fragile floodgates; an expansive approach will surely see it swept away by the raging maelstrom.

The opportunity for the High Court to lay down guidance on this issue may arise if special leave is granted for an appeal from the decision of the Queensland Court of Appeal³. That application is to be heard on the day preceding the conference at which this paper is being delivered, so the result will not feature in the printed version of this paper.

Failure to Warn: The Basis of Liability

It is trite to say that, generally speaking, medical practitioners are under a legal duty to warn patients of a material risk inherent in a proposed treatment⁴. The test to be applied in determining whether a particular risk is or is not “material” has been stated by a majority of five High Court Justices in these terms⁵:

“... 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.”

¹ (1992) 175 C.L.R. 479

² vol.335 (26 December 1996), pp.1963 *et seq.*

³ unreported decision of the Queensland Court of Appeal

⁴ *Rogers v. Whitaker, supra*

⁵ *ibid.*, p.490, per Mason C.J., Brennan, Dawson, Toohey and McHugh JJ.

As the High Court was at pains to point out in the leading case of *Rogers v. Whitaker*, the determination whether or not a risk is a “material one” – in the sense defined – does not depend upon the application of medical standards or practices⁶. Accordingly, at an evidentiary level, this issue does not fall to be determined on the basis of expert testimony as to whether a particular risk is one of which a patient should or should not be warned, or expert evidence as to ordinary medical practice in providing or refraining from providing a warning in such cases. Expert testimony will, however, be relevant in two ways. First, in order to determine whether a reasonable patient would be likely to attach significance to a risk of a particular kind, the court must be apprised of the degree of probability that a particular risk will materialise and, if so, of the consequences for the patient in that event. Secondly, expert testimony will be relevant in assessing whether the case falls within the limited category of cases where the duty to warn is overridden by therapeutic considerations, defined by the majority in *Rogers v. Whitaker* as⁷:

“... those cases where there is a particular danger that the provision of all relevant information will harm an unusually nervous, disturbed or volatile patient”

Thus, except in what might be regarded as “special cases” where the duty to warn is mitigated by therapeutic considerations relevant to the particular patient, the question whether or not the duty arises is a question for the tribunal of fact – that is to say, the jury if there is one, or otherwise the trial judge – attaching as much or as little weight to medical opinion as the tribunal of fact considers appropriate.

One consequence of this is to remove from the hands of the medical profession the question of defining what is proper or acceptable clinical practice: this is now to be defined by the courts, including juries, comprising individuals whose involvement with the medical profession is almost invariably in the role of consumers rather than providers of medical services. Another consequence is that, because the test of “materiality” depends upon issues of fact which fall to be determined on a case-by-case basis, there can be no certainty as to what is proper or acceptable clinical practice. In one case, the trial judge or jury may consider that a risk was not a material one, because the evidence shows that the degree of probability attaching to the risk is very remote; but this will not prevent a different tribunal of fact, comprising a different judge or different jurors, arriving at a contrary conclusion in a subsequent case, even on the same evidence. So, even without taking into account considerations peculiar to a specific patient, one court may find that a risk of (say) one in ten-thousand is such that the hypothetical reasonable person would be likely to attach significance to it if a warning were given; in another case, involving precisely the same risk with precisely the same percentage probability of occurrence, the court may conclude that a hypothetical reasonable person would not be likely to attach significance to the risk if warned of it.

The most concerning feature of the High Court’s decision in *Rogers v. Whitaker* is, however, the fact that their Honours prescribed cumulative tests for determining the issue of materiality, one test being objective, the other being subjective. Even if a risk is not “material”, in the sense that a reasonable patient would be unlikely to attach significance to it, a medical practitioner may be held to be negligent in the circumstances of a particular case if the tribunal of fact is satisfied that the medical practitioner was aware, or ought to have been aware, that the particular patient would be likely to have attached significance to the risk. It may be that their Honours had in mind the types of cases which (I am sure) arise more frequently in fiction than in daily clinical practice – where, for example, the patient is a concert pianist, and would therefore attach more than usual significance to the risk of losing some degree of manual dexterity; or where the patient is a professional sportsman, and is therefore peculiarly sensitive to risks which may affect his ability to continue playing a particular sport. More often, however, this issue is going to arise where the patient claims (after the event) to have had an idiosyncratic

⁶ *ibid.*, pp.489-90

⁷ *ibid.*, at p.490

fear of sustaining a particular disability, so that even if the doctor was not aware of this circumstance, it may be open to contend that, by making prudent enquiries, the doctor ought to have discovered it.

What I have said to this point, concerning the nature of a medical practitioner's duty to warn, is largely uncontroversial. It is, however, an important background to the subject of present concern, which relates to the legal consequences where the duty to warn is breached. The fact that a medical practitioner has failed to give an appropriate warning in circumstances where the duty is held to arise is not, in itself, a sufficient basis to hold the medical practitioner liable for damages. Whilst the law characterises the failure to give an appropriate warning in such circumstances as negligent, negligence alone is not a basis for legal liability. For the plaintiff to succeed, it must be proved that the failure to warn was productive of loss or damage. And this is where the real problem lies. What does a plaintiff need to prove, in order to establish that a medical practitioner's negligent failure to give an appropriate warning was productive of loss or damage ?

Proof of Loss or Damage

Superficially, the answer to this question is simple and obvious: for the patient to establish that loss or damage was suffered as a result of the medical practitioner's failure to give an appropriate warning, two things must be shown. First, it must be shown that the patient would have acted differently if an appropriate warning had been given – for example, by declining to undergo the proposed treatment. And secondly, it must be shown that the patient would have been better off as a result of acting differently based on an appropriate warning.

Both of these questions are, obviously, hypothetical ones: since the patient never received the warning, it is not possible to say with any certainty what the patient would or would not have done had the appropriate warning been given; nor is it possible to say with any certainty how this patient's present circumstances might have differed if another course of action had been adopted. Our judicial system is not unfamiliar with the need to answer hypothetical questions of fact: in every personal injuries case, for instance, one of the issues which needs to be considered in determining the quantum of the plaintiff's lost future earnings is the course which the plaintiff's career is likely to have taken if the plaintiff had not sustained the injuries which are the subject of the plaintiff's claim. But the nature of the hypothetical questions which need to be resolved in order to determine liability in "failure to warn" cases makes such cases especially problematic.

In saying that these hypothetical questions are "problematic", I am not for the moment particularly concerned with the practical and evidentiary problems, although these are significant. In the first place, the court is called upon to consider what a particular individual may have done on a specific past occasion, if that individual had received an appropriate warning. The patient will doubtless assert in evidence, with the benefit of hindsight and the potential of recovering damages, that he or she would never have consented to the treatment if an appropriate warning had been given. But courts should be, and usually are, skeptical of such assertions. This leaves the court in the difficult position of assessing, as an objective fact, a patient's subjective reaction in circumstances which never occurred. There is a famous saying of Lord Justice Bowen that "the state of a man's mind is as much a fact as the state of his digestion". But the issue which the court has to grapple with is not the state of the patient's mind, either at trial, or at the time when the patient consented to the treatment in question, but rather what the state of the patient's mind would have been in entirely hypothetical circumstances. Nor is it always a simple case of determining, in retrospect, whether the patient might or might not have consented to a particular form of treatment had the risks been adequately explained. It may be, for example, that a number of different forms of treatment were available to the patient, and the court is called upon to decide which (if any) of these treatments the patient would have consented to had there been adequate disclosure of the risks associated with each of them.

Nor do the hypothetical questions end with a determination of what the patient might or might not have done in light of an appropriate warning. The court must also determine, generally on the basis of expert medical testimony, how much better or worse off the patient might have been if the relevant treatment had not been undertaken. Needless to say, and leaving aside instances of cosmetic and other forms of elective surgery, people do not ordinarily undergo medical treatment unless they are ill. So the court must consider the prognosis of the patient's then illness, and weigh that against the consequences which have been manifested as a result of the treatment which the patient actually received. If an alternative form of treatment was available, not involving the same risks as the treatment which was undertaken, it may be necessary to consider both the prospects of the alternative treatment being successful, and also the prospects of the alternative treatment producing other undesirable consequences.

You might think that, except in very rare cases, none of these hypothetical issues is likely to produce a definite answer one way or the other. At best, a court may be able to say that there is a greater or less than 50% probability that the patient would have submitted to a particular form of treatment if warned of the risks involved, and a greater or less than 50% probability that the patient's condition would be better if the proposed treatment had not been undertaken, and either the patient's condition had remained untreated, or some alternative treatment had been undertaken.

Findings of Fact Where the Issue is Hypothetical

One of the shibboleths of the legal profession is the phrase "balance of probabilities". This phrase is used to distinguish the standard of proof in civil cases from that applying in criminal cases, where guilt must be proved beyond reasonable doubt. Where, in a civil case, the issue is one of historical enquiry – whether or not a specific event occurred in the past – the tribunal of fact (judge or jury) is required to decide whether it is more likely than not that the event did occur. So in a "failure to warn" case, where there is an issue whether or not a particular warning was in fact given, the question for the court is whether the evidence that a warning was given is more credible than the evidence that it was not; and even if the court considers there is a 49% probability that an appropriate warning was given to the patient, the 51% probability that the warning was not given is sufficient to found a finding to that effect.

The methodology of fact-finding is different, however, where the factual issue to be determined does not involve an historical enquiry. As the majority of the High Court observed in the 1990 case of *Malec v. J.C. Hutton Pty. Ltd.*⁸:

"When liability has been established and a common law court has to assess damages, its approach to events that allegedly would have occurred, but cannot now occur, or that allegedly might occur, is different from its approach to events which allegedly have occurred. A common law court determines on the balance of probabilities whether an event has occurred. If the probability of the event having occurred is greater than it not having occurred, the occurrence of the event is treated as certain; if the probability of it having occurred is less than it not having occurred, it is treated as not having occurred. Hence, in respect of events which have or have not occurred, damages are assessed on an all or nothing approach. But in the case of an event which it is alleged would or would not have occurred, or might or might not yet occur, the approach of the court is different. The future may be predicted and the hypothetical may be conjectured. But questions as to the future or hypothetical effect of physical injury or degeneration are not commonly susceptible of scientific demonstration or proof. If the law is to take account of future or hypothetical events in assessing damages, it can only do so in terms of the degree of probability of those events occurring. The probability may be very high – 99.9 per cent – or very low –

⁸ (1990) 169 C.L.R. 638, 642-43, per Deane, Gaudron and McHugh JJ.

0.1 per cent. But unless the chance is so low as to be regarded as speculative – say less than 1 per cent – or so high as to be practically certain – say over 99 per cent – the court will take that chance into account in assessing the damages. Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring. Thus, the court assesses the degree of probability that an event would have occurred, or might occur, and adjusts its award of damages to reflect the degree of probability.”

What is the situation, then, when the issue is whether or not a patient would have declined treatment – or would have chosen a different treatment – if warned of a particular risk ? Does the court decide such a question on the balance of probabilities, so a finding that there was a 51% chance of the patient’s declining treatment is regarded as the equivalent of certainty; or is it a case for an adjustment of damages, so that a patient who is \$100,000.00 worse off as a result of the treatment, recovers \$51,000.00 as compensation for the loss of the 51% chance to decline treatment ?

The approach of the Queensland Court of Appeal in *Green v. Chenoweth*⁹ suggests that, at least at the threshold point of determining whether or not a medical practitioner has been negligent, one applies the balance of probabilities. This is despite the High Court’s salutary observation in *Malec v. Hutton*¹⁰ that:

“Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring.”

The reasoning which led the Court of Appeal to this view deserves some analysis. Put in very simplistic terms, their Honours considered that *Malec v. Hutton*¹¹ was only concerned with quantifying damages once liability has been established; it has no application to the question whether or not the defendant is liable. To establish that a medical practitioner is liable for negligence, it must be proved – on the balance of probabilities – that the practitioner’s negligent failure to warn caused some loss or damage. And a plaintiff does not discharge that onus of proof, without establishing a greater than 50% probability that, had the appropriate warning been given, the patient would have refused the proposed treatment.

To those who are not familiar with the level of sophistication involved in legal reasoning at an appellate level, it may seem surprising that the Queensland Court of Appeal interpreted the decision of the High Court in *Malec v. Hutton*¹² as meaning this: that if the question is whether a plaintiff has suffered any loss or damage by reference to an hypothetical enquiry, you apply the balance of probabilities; and it is only once you have established on the balance of probabilities at least a 51% chance that the plaintiff suffered loss or damage as a result of the defendant’s negligent acts, that you then award damages referable to a percentage probability falling between 1% and 99%. All other considerations aside, if the Queensland Court of Appeal is correct, one must assume that the members of the High Court have some difficulty with basic arithmetic, since their Honours said that, unless the chance is less than 1% or greater than 99%, it must be taken into account in assessing damages. The reasoning of the Queensland Court of Appeal leads necessarily to the conclusion that one can never take into account a percentage probability of less than 50% for the purpose of quantifying damages, because, unless the plaintiff has established a greater than 50% chance that he or she would have declined treatment if an appropriate warning had been given, the plaintiff’s action fails *in limine*.

⁹ *Ibid.*

¹⁰ *op. cit.*

¹¹ *op. cit.*

¹² *op. cit.*

Loss of a Chance

However, there is (in my respectful opinion) a more fundamental flaw in the reasoning of the Queensland Court of Appeal. Where a medical practitioner has negligently failed to give an appropriate warning concerning a particular risk which may flow from a proposed course of medical treatment, the patient is immediately and inevitably deprived of something of value. What the patient loses is a chance: the chance of considering his or her options; the chance of making an informed choice based on all relevant information; and the chance of, perhaps, deciding not to undergo the proposed treatment. The Queensland Court of Appeal says that such a chance is a thing of no value, unless it was a greater than 50% chance of the patient's declining the proposed treatment. What I suggest to you is that the loss of a chance is, in itself, the loss of something valuable; the percentage probability attaching to that chance is relevant only in quantifying its worth. The notion that a person who has been deprived of a chance has lost nothing of value, if the percentage probability attaching to the chance is less than 50, is – in my respectful submission – contrary to both logic and the law.

In other branches of the law, it is well-settled that the loss of a chance is the loss of something valuable, although the value is to be ascertained having regard to the probability that the chance will eventuate. Consider a lottery ticket, which represents nothing more than the chance to participate in a prize if the number corresponding with the number on the lottery ticket is drawn from a barrel. The ticket has no worth other than the chance which it represents. The chance which it represents is, on any view, a very remote one: it may be one in 500,000, or perhaps one in a million. Yet can it be said that, if my lottery ticket is stolen, I have suffered no loss or damage ?

Perhaps a better example is that of a race-horse; specifically, a gelding, which has no commercial value beyond its potential for winning races. Anyone who has ever invested in a race-horse will know that horses which makes money for their owners are greatly outnumbered by those that don't. Still, people pay large sums of money for unproved blood-stock, which has no greater value than the chance which it represents of earning prize-money which exceeds stable and training fees. If a gelding is run-down and killed through the negligence of a motorist, or dies through the negligence of a veterinarian, the reasoning in *Green v. Chenoweth*¹³ would suggest that, for the owner to succeed in an action for damages, it would have to be proved that there was a greater than 50% chance of the horse's having a successful turf career. Yet the authorities are quite to the contrary¹⁴. The case of *Howe v. Teeffy*¹⁵ makes this point well: in that case, the evidence showed that prize money which the plaintiff could reasonably expect to obtain from racing his horse was less than the cost of training, but the plaintiff's case was that he would have made additional profits from betting on the horse. An award of £250 – a large sum in 1927 – was upheld by the Full Court in New South Wales, and the Chief Justice made the following pertinent observations¹⁶:

“How can it be said ... that that right was incapable of estimation in money, and that the assessment of damages was not a matter for the jury ? The calculation which they had to make was not how much he would probably have made in the shape of profit out of his use of the horse, but how much his chance of making that profit, by having the use of the horse, was worth in money. He was willing to pay for the right when he entered into the agreement, and, though the subsequent failure of the horse to win races was an element to be taken into consideration in calculating the value of the chance or right of which he was deprived, I do not think that it can be said that by him being deprived of that right he did not suffer an injury which was capable of being calculated in money. I think that he did, and I think that the jury's award cannot be interfered with.”

¹³ *ibid.*

¹⁴ *Howe v. Teeffy*, (1927) 27 S.R.(N.S.W.) 301 and *Electricity Trust of South Australia v. O'Leary*, (1986) 42 S.A.S.R. 26

¹⁵ *ibid.*

¹⁶ *ibid* at pp.307-8, per Street C.J..

An extreme illustration of the principle that a chance is a valuable thing, even if the percentage probability attaching to the chance is less than 50, is the English case of *Chaplin v. Hicks*¹⁷. In that case, the plaintiff entered a competition promoted by a newspaper, by which twelve women were to be selected and offered theatrical engagements. The plaintiff made the “short list” of 50, from whom the final selection of 12 were to be drawn. Through the defendant’s negligence, she was deprived of the opportunity to attend an audition. Nothing in the evidence indicated that the plaintiff’s chances of being chosen were greater than the statistical probability of 24%; yet she was awarded £100, and the verdict in her favour was confirmed by the English Court of Appeal.

In the light of such authorities, one might be forgiven for wondering why the chance of electing not to proceed with a particular form of treatment – even if the percentage probability of such an election is less than 50% - is, in the eyes of the law (at least as pronounced by the Queensland Court of Appeal) somehow less significant than the loss of a chance to win the lottery, or the loss of a chance to make prize money and successful bets on a horse, or the loss of a chance to secure a theatrical engagement.

Anomalous Outcomes

Yet another objection to the approach taken by the Queensland Court of Appeal in *Green v. Chenoweth*¹⁸ is the fact that it is capable of producing very unsatisfactory results in its practical application. To illustrate this point, I propose to develop two parallel examples which – I should like to emphasise – are purely hypothetical, although sharing features with cases which have previously arisen for determination in Queensland and elsewhere.

Let us start with an orthopaedic surgeon – we will call him Dr. Orange – who, coincidentally, is consulted by two patients – Mr. Yellow and Mr. Pink – both of whom are suffering from equinus deformities following strokes. In each instance, the patient is caused to walk on the toes of his right leg, with his heel lifted off the ground. In each instance, Dr. Orange knows that there are two possible methods of treatment for this condition: one is a soft-tissue operation, an elongation of the Achilles tendon; the other is a bone operation, an Arthrodesis, involving removal of a wedge of bone from the patient’s ankle, and fusion of the remaining bones. The Arthrodesis is the longer and more difficult procedure, but Dr. Orange is satisfied that, having regard to the severity of each patient’s equinus deformity, it is the preferred treatment. There is also associated with it a well-documented risk of failure due to nonunion of the fused bones – a risk which is manifested in a small proportion of cases.

Dr. Orange fails to inform either patient of this risk. For present purposes, we will assume that this failure was negligent. In each instance, the Arthrodesis fails, and the patient is effectively crippled. The medical evidence, we shall assume, is unanimous. Without treatment, both patients would have been able to continue walking, albeit with significant difficulty. The soft tissue operation offered only a 60% chance of recovering normal walking functions, but involved no significant risks. Save for the risk of non-union, which occurs in only a tiny percentage of cases, the Arthrodesis is invariably effective in such cases to restore the patient to full walking mobility.

In the witness-box, both patients claim – as one would expect – that if they had been adequately warned of the risks, they would either have chosen the soft tissue operation, or perhaps decided against any form of operative treatment. In Mr. Yellow’s case, the Judge – we will assume that the case is tried without a jury – is not so certain, finding that there was a 45% chance that Mr. Yellow would have proceeded with the Arthrodesis, even

¹⁷ [1911] 2 K.B. 786

¹⁸ *ibid.*

if he had been warned of the risk which it involved; a 30% chance that, if given an appropriate warning, he would have opted for the soft tissue operation; and a 25% chance that he would have declined treatment by either method.

In Mr. Pink's case, the Judge's findings are slightly different: a 55% chance that Mr. Pink would have proceeded with the Arthrodesis even if he had been warned of the risks which it involved, a 25% chance that he would have opted for the soft tissue operation, and a 20% chance that he would have declined either treatment.

In each case, damages are assessed on alternative bases. As a result of the Arthrodesis, both patients are crippled. Without any treatment, each would have been able to continue walking, albeit with significant difficulty. The Judge, in each case, attaches a monetary value of \$100,000.00 as compensation for the difference between being crippled, and being able to walk with considerable difficulty. But in each case, there was also a chance of undergoing an Elongation of the Tendo Achilles which – if it was successful, bearing in mind that (according to the evidence given in each case) such operations are successful in only 60% of cases – the patient would have been restored to normal walking function. In each case, a monetary value of \$200,000.00 is placed on the difference between being crippled, and being restored to normal walking function.

Let us deal, first, with Mr. Yellow. As can be seen, his situation is this. There was a 45% chance that he would have gone ahead with the Arthrodesis even if an appropriate warning had been given to him. There was a 30% chance that he would have opted for the soft tissue operation, and a 60% chance that it would have succeeded, producing an over-all 18% chance that his equinus deformity would have been successfully corrected. This leaves a 37% chance that he would still suffer from the equinus deformity, either because he opted for the soft tissue operation and it failed, or because he declined treatment altogether.

You might think it perfectly logical that, in these circumstances, Mr. Yellow should recover 18% of \$200,000.00, to compensate him for the loss of the chance to have his deformity corrected, and 35% of \$100,000.00 to compensate him for the loss of the chance to be able to walk, albeit with an uncorrected equinus deformity. On this basis, the award in favour of Mr. Yellow would be \$73,000.00.

However, the reasoning in *Green v. Chenoweth*¹⁹ would suggest that one does not apply percentage probabilities, but rather the balance of probabilities – the “all or nothing” approach. If this approach is pursued to its logical conclusion, the outcome in Mr. Yellow's case against Dr. Orange is very different. As there is only a 45% chance that Mr. Yellow would have proceeded with the Arthrodesis had he been given an appropriate warning, it is found as a fact that he would not have proceeded with that particular operation. As it is more likely that he would have opted for the soft tissue operation, rather than no operation at all, it is assumed that he would have done so. And as there is a 60% chance that this operation would have succeeded, it is presumed that the operation would have been a success. On this basis, the patient recovers almost three times the damages which he would have recovered based on the percentage probabilities methodology – the sum of \$200,000.00, representing his “best case scenario” of having undertaken the soft tissue operation, and of that operation's having been successful.

In Mr. Pink's case, the percentage probability method of quantifying damages leads to a marginally lower total award. This is only to be expected, since, on the findings made in his case, there was a 55% chance that he would have proceeded with the Arthrodesis even if he had been warned of the risks which it involved, only a 25% chance that he would have opted for the soft tissue operation, and a 20% chance that he would have declined either treatment. Even so, he has lost a 25% chance of opting for a soft tissue operation, which in turn offered him a 60% chance of correcting his deformity; so he is awarded 60% of 25% of \$200,000.00, for the

¹⁹ *ibid.*

loss of that chance. And he has also been deprived of the chance to retain his mobility, with an uncorrected equinus deformity, either because he might have refused any treatment, or because the soft tissue operation might have failed. Thus, by this methodology, he recovers \$60,000.00, compared with Mr. Yellow's \$73,000.00.

However, if the reasoning in *Green v. Chenoweth*²⁰ is applied in Mr. Pink's case, he does not recover a single cent. This is because there is found to be a 55% chance that he would have proceeded with the Arthrodesis, even if he had been warned of the risks; and, according to the "all or nothing" approach, a 55% probability – indeed, anything over a 50% probability – is assumed to be the equivalent of absolute certainty.

When these outcomes are compared, it seems absurd that, according to the reasoning of the Queensland Court of Appeal, Mr. Yellow should recover very substantial damages whilst Mr. Pink recovers nothing, merely because there was a marginally greater possibility that Mr. Pink would have proceeded with the Arthrodesis if warned of the risks involved, as compared with the possibility that Mr. Yellow would have done so. The reality is that, in each case, there was a real and distinct chance – a substantial chance – that the patient would be better off if it were not for Dr. Orange's negligent failure to warn the patient of the risks involved in undergoing a particular surgical treatment. The fact that a patient like Mr. Yellow can recover substantial damages, whilst a patient like Mr. Pink walks away empty handed, makes the law itself look very much like a game of chance.

It is appropriate, I think, to revisit the High Court's remark in *Malec v. Hutton*²¹:

“Where proof is necessarily unattainable, it would be unfair to treat as certain a prediction which has a 51 per cent probability of occurring, but to ignore altogether a prediction which has a 49 per cent probability of occurring.”

The fictional cases of *Yellow v. Orange* and *Pink v. Orange*, and the real case of *Green v. Chenoweth*, demonstrate how such unfairness is manifested when a patient is deprived of recovering any damages for a medical practitioner's proved negligence, merely because the court's estimate (or "guesstimate") of the percentage probability that the patient would have declined treatment, but for the medical practitioner's negligent failure to warn is less than 50%.

Chappel v. Hart

This brings me to the High Court's most recent pronouncement – at least, until yesterday – on this area of the law: the case of *Chappel v. Hart*²², in which judgment was delivered on 2 September 1998. It was a difficult case, in which the appeal was dismissed by a majority of three to two. Because of the nature of the case, the way in which it was argued, and perhaps the way in which factual findings were made at first instance, the specific issue canvassed by the Queensland Court of Appeal in *Green v. Chenoweth*²³ did not arise; indeed, it is notable that *Green v. Chenoweth* is not even cited in the Reasons for Judgment of the High Court.

Nonetheless, there are passages in some of the judgments which suggest that the High Court may not be averse to compensating a plaintiff for the loss of a chance, even if the chance is a less than 50% one: certainly, Justices Gummow²⁴ and Kirby²⁵ expressed themselves in language suggestive of a willingness to embrace such

²⁰ *ibid.*

²¹ *op. cit.*

²² [1998] H.C.A. 55

²³ *ibid.*

²⁴ [1998] H.C.A. 55, at para.76

²⁵ [1998] H.C.A. 55, at para.93, sub-para.(9)

an approach, whilst McHugh J.²⁶ (who was in the dissenting minority) was at pains to point out that the particular case under consideration was:

“... not a case concerned with ‘loss of a chance’ as that phrase is understood in the many cases that have come before the courts since [it was] authoritatively decided that a loss of chance or opportunity was compensable in damages.”

Conclusions

To this audience, it may appear that the decision in *Green v. Chenoweth* is a favourable one for members of the medical profession. In one sense, it is. If the principles which it enunciates become settled law, every plaintiff claiming damages in a “failure to warn” case will fail, unless the plaintiff can prove a greater than 50% chance that he or she would have declined treatment – or opted for different treatment – if an appropriate warning had been given.

What must be recognised, however, is that *Green v. Chenoweth*²⁷ was an unusual case. For one thing, it was tried by a Judge sitting alone, whereas many medical negligence actions are determined by juries. Another complication is the fact that counsel who appeared for the plaintiff at first instance conceded, and indeed conducted the plaintiff’s case on the footing, that he had to establish a greater than 50% probability that she would have declined treatment if warned of the relevant risks.

Assuming that the principles enunciated in *Green v. Chenoweth* become settled law, what will be its impact in other cases, not possessing these particular features? Frankly, I doubt that there will be many cases where a tribunal of fact – whether it is a judge or a jury – will find in favour of a medical practitioner on the basis that, although the medical practitioner was negligent in failing to warn the patient of a material risk, there is a less than 50% chance that the patient would have heeded the warning if it had been given. As Kirby J. remarked in *Chappel v. Hart*²⁸:

“Where a breach of duty and loss are proved, it is natural enough for a court to feel reluctant to send the person harmed (in this case a patient) away empty handed.”

It may sound cynical to suggest that, if courts have to find a greater than 50% probability that the patient would have declined treatment (or chosen a different treatment) if duly warned of the relevant risks, then that is what courts will find in such cases, especially when the tribunal of fact consists of a jury. Such cynicism is founded on the fact that juries have a long tradition of arriving at the findings which are necessary in order to support what they regard as a just result. In the Eighteenth Century, juries in theft cases regularly found that the value of the property stolen was four pounds, nineteen shillings, eleven pence and three farthings, because they knew that a conviction for stealing more than five pounds attracted the death penalty. One might also mention the famous incident when a Queensland jury, in a “cattle-duffing” case, returned the verdict: “Not guilty, so long as he gives the cattle back”. After angry remonstrations from the presiding Judge, they were sent away to give the matter further consideration, and returned with the verdict: “Not guilty, and he can keep the cattle”.

Paradoxically, I would suggest that the principle in *Green v. Chenoweth* – if it becomes settled law – will not significantly reduce the number of cases in which judgment is given against a member of the medical profession, but may significantly increase the damages awarded in such cases. If the “percentage probability” methodology is used, to compensate plaintiffs for the loss of the chance to decline treatment or opt for

²⁶ [1998] H.C.A. 55, at para.50

²⁷ *ibid.*

²⁸ [1998] H.C.A. 55, at par.93 sub-para.(1)

alternative treatment, the range of possible awards is anything from 1% to 100% of the plaintiff's "best case scenario". Applying the "all or nothing" methodology in *Green v. Chenoweth*²⁹, the minimum recoverable by a plaintiff is 50% of the "best case scenario", since a finding of less than 50% probability that the plaintiff would have declined treatment or elected for alternative treatment results in a judgment for the defendant. A court, and especially a jury, which is inclined to give a "sympathy verdict" for the plaintiff will have no option but to award the plaintiff at least 50% of the plaintiff's "best case scenario".

The other potential consequence, if the decision in *Green v. Chenoweth*³⁰ becomes settled law, is that the legal advisers to plaintiffs in medical negligence actions will look for new ways to circumvent this decision. At the heart of the reasoning in the Court of Appeal was the principle that tortious negligence is not actionable without proof that loss or damage was sustained as a result of the negligent conduct. This element is not present in other causes of action which may be pleaded against medical practitioners. If the plaintiff can sue for breach of contract – and in almost every instance, a medical practitioner's breach of a tortious duty of care also involves a breach of the practitioner's implied contractual duty of care – liability may be established without proof of loss or damage, leaving the court to assess damages in accordance with the "percentage probability" methodology discussed in *Malec v. Hutton*³¹. There is also the spectre that medical practitioners will more often be sued for trespass to the person – that is to say, assault and battery – as is the case in the United States. The argument which has some currency in American jurisprudence is that, unless the patient has been adequately warned of all risks associated with a particular treatment, the patient cannot give "informed consent" for the treatment; and in the absence of "informed consent", any form of medical treatment constitutes an assault. The cause of action for trespass to the person, like the cause of action for breach of contract – and unlike the cause of action for tortious negligence – is actionable *per se*: the plaintiff can succeed without proving, on the balance of probabilities, that the defendant's conduct was causative of any loss or damage.

It is, however, equally important that the law retain some degree of rational unity and logical consistency. These are not characteristics of a legal system which recognises the right of a race-horse owner to be compensated for the lost chance of winning prize-money or bets, but does not recognise a patient's entitlement to be compensated for the lost chance of electing not to be treated, or of electing for a different form of treatment, where a medical practitioner has negligently failed to warn the patient of the risks inherent in a proposed course of treatment. Nor are rational unity and logical consistency features of a legal system which, as I believe I have demonstrated, may provide either substantial compensation or nothing at all, depending upon whether the tribunal of fact finds that the plaintiff falls over the 50% threshold for recovering damages in "failure to warn" cases.

²⁹ *ibid.*

³⁰ *ibid.*

³¹ *op. cit.*