Rogers v Whitaker - [1992] HCA 58

HIGH COURT OF AUSTRALIA

Mason CJ, Brennan, Dawson, Toohey, Gaudron and, McHugh JJ

ROGERS v. WHITAKER
(1992) 175 CLR 479
19 November 1992

Negligence

Negligence—Breach of duty—Medical practitioner—Duty to warn of possibility of adverse effect of proposed treatment—Extent of duty.

Decisions

MASON C.J., BRENNAN, DAWSON, TOOHEY AND McHUGH JJ. The appellant, Christopher Rogers, is an ophthalmic surgeon. The respondent, Maree Lynette Whitaker, was a patient of the appellant who became almost totally blind after he had conducted surgery upon her right eye. The respondent commenced proceedings against the appellant for negligence in the Supreme Court of New South Wales and obtained judgment in the amount of $808,564.38. After an unsuccessful appeal to the Court of Appeal of New South Wales ((1) (1991) 23 NSWLR 600), the appellant now appeals to this Court.

Following paragraph cited by:

Fallas v Mourlas (16 March 2006) (Ipp, Tobias and Basten JJA)
Rogers v Nationwide News Pty Ltd (11 September 2003) (Gleeson CJ,Gummow, Hayne, Callinan and Heydon JJ)

3. The first is a famous case in the law of professional negligence. It received wide publicity in the legal and medical professions, and was extensively reported in the general press, including publications of the respondent. The appellant was sued for damages by a patient, Mrs Whitaker. The case ultimately came to this Court under the name *Rogers v Whitaker* [2] . The importance of the case turned upon the aspect of the appellant's conduct which was held to involve a breach of his duty of care. Mrs Whitaker, who for many years had been almost totally blind in her right eye, consulted the appellant, who advised surgery on that eye. After the operation, she lost the sight of her left eye, without any improvement to the right eye. This was not the result of any lack of care or skill in the performance of the operation. The procedure that was undertaken involved an inherent risk, a risk said to occur only once in approximately 14,000 such procedures, of a development of sympathetic ophthalmia [3] . The appellant had failed to warn Mrs Whitaker of that possibility. He argued that, in so doing, he was acting in accordance with the standards of the medical profession generally; but the Court held that those standards were not determinative, that he should have warned the patient, and that he was liable to compensate her.

via

[3] (1992) 175 CLR 479 at 482.

Rogers v Nationwide News Pty Ltd (11 September 2003) (Gleeson CJ,Gummow, Hayne, Callinan and Heydon JJ)
Rosenberg v Percival (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

149. It is not the case that the risks of which a patient must be warned are confined to those that are commonplace (such as anaesthesia). The risks of quadriplegia in *E llis v Wallsend District Hospital* [123] , of mediastinitis in *Chappel* , of impotence and bladder malfunction considered in *Smith v Tunbridge Wells*

Health Authority [124] or of sympathetic ophthalmia examined in *Rogers* itself [125] , were all rare outcomes. As found, the relevant risks existed and were undisclosed to the respective patients. In *Rogers* , according to the evidence, the risk involved was "once in approximately 14,000 such procedures, although there was also evidence that the chance of occurrence was slightly greater when, [as in that case], there had been an earlier penetrating injury to the eye operated upon" [126] . The importance of all of these cases is that they emphasise that it is the patient who ultimately carries the burden of the risks. Therefore, unless such risks may be classified as "immaterial", in the sense of being unimportant or so rare that they can be safely ignored, they should be drawn to the notice of the patient. Only then can an informed choice be made by the person who alone, in law, may make that choice, namely the patient.

via

[126] *Rogers* (1992) 175 CLR 479 at 482.

Rosenberg v Percival (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)
Elliott v Bickerstaff (16 December 1999) (Handley, Stein and Giles JJA)

2. There is no question that the appellant conducted the operation with the required skill and care. The basis upon which the trial judge, Campbell J., found the appellant liable was that he had failed to warn the respondent that, as a result of surgery on her right eye, she might develop a condition known as sympathetic ophthalmia in her left eye. The development of this condition after the operation and the consequent loss of sight in her left eye were particularly devastating for the respondent as she had been almost totally blind in her right eye since a penetrating injury to it at the age of nine. Despite this early misfortune, she had continued to lead a substantially normal life: completing her schooling, entering the workforce, marrying and raising a family. In 1983, nearly forty years after the initial injury to her right eye and in preparation for a return to the paid workforce after a three year period during which she had looked after her injured son, the respondent decided to have an eye examination. Her general practitioner referred her to Dr Cohen, an ophthalmic surgeon, who prescribed reading glasses and referred her to the appellant for possible surgery on her right eye.

3. The respondent did not follow up the referral until 22 May 1984 when she was examined by the appellant for the first time. The appellant advised her that an operation on the right eye would not only improve its appearance, by removing scar tissue, but would probably restore significant sight to that eye. At a second consultation approximately three weeks later, the respondent agreed to submit to surgery. The surgical procedure was carried out on 1 August 1984. After the operation, it appeared that there had been no improvement in the right eye but, more importantly, the respondent developed inflammation in the left eye as an element of sympathetic ophthalmia. Evidence at the trial was that this condition occurred once in approximately 14,000 such procedures, although there was also evidence that the chance of occurrence was slightly greater when, as here, there had been an earlier penetrating injury to the eye operated upon. The condition does not always lead to loss of vision but, in this case, the respondent ultimately lost all sight in the left eye. As the sight in her right eye had not been restored in any degree by the surgery, the respondent was thus almost totally

blind.

Following paragraph cited by:

Fuller v Australian Capital Territory (05 July 2024) (McCallum CJ; Baker and Taylor JJ)

90 An assessment of what constitutes reasonable care can include a consideration of evidence in relation to standards accepted to be competent medical practice, but is ultimately a question for the judge. While the standard of care is that of the ordinary skilled person exercising the special skill in question, "that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade": *Rogers v Whitaker* [1992] HCA 58; 175 CLR 479 (*Rogers*) at 483. While we do not consider that the primary judge applied s 5O of the *Civil Liability Act* as the appellant asserted, in that it is apparent from the reasons that the primary judge identified ss 42-44 of the *Wrongs Act* as the applicable provisions, we do consider that the primary judge approached the expert evidence as determinative of the assessment that his Honour was required to perform for himself.

Manny v David Lardner Lawyers (No 4) (04 April 2024) (Loukas-Karlsson, McWilliam and O'Sullivan JJ)
Austen v Tran (29 November 2023) (McCallum CJ; Wheelahan J; Crowe AJ)
Queensland v Masson (13 August 2020) (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ)
Phelan v Melbourne Health (02 October 2019) (Tate AP, Kaye JA and Zammit AJA)
Sparks v Hobson (01 March 2018) (Basten, Macfarlan and Simpson JJA)
Sparks v Hobson (01 March 2018) (Basten, Macfarlan and Simpson JJA)
Badenach v Calvert (11 May 2016) (French CJ, Kiefel, Gageler, Keane and Gordon JJ)

57. Subject to statutory or contractual exclusion, modification or expansion, the duty of care which a solicitor owes to a client is a comprehensive duty which arises in contract by force of the retainer and in tort by virtue of entering into the performance of the retainer [48] . The duty is to exercise that degree of care and skill to be expected of a member of the profession having expertise appropriate to the undertaking of the function specified in the retainer [49] . Performance of that duty might well require the solicitor not only to undertake the precise function specified in the retainer but to provide the client with advice on appurtenant legal risks [50] . Whether or not performance of that duty might require the solicitor to take some further action for the protection of the client's interests beyond the function specified in the retainer is a question on which differences of view have emerged [51] . That question was not addressed in argument, and need not be determined in this appeal.

via

[50] *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at 53-54 [147] ; *Rogers v Whitaker* (1992) 175 CLR 479 at 483.

Badenach v Calvert (11 May 2016) (French CJ, Kiefel, Gageler, Keane and Gordon JJ)

Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Waller v James (13 August 2015) (Beazley P, McColl and Ward JJA)
Howe v Fischer (26 August 2014) (Beazley P, Macfarlan and Barrett JJA)
Odisho v Bonazzi (18 February 2014) (Nettle, Beach JJA and McMillan AJA)

10. In *Rogers v Whitaker* ,[4] the plurality[5] described the duty of care owed by a medical practitioner in the following terms:

> The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a 'single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgement'; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case. It is of course necessary to give content to the duty in the given case.
>
> The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill … .[6]

via

[6] (1992) 175 CLR 479 , 483 (citations omitted).

Paul v Cooke (19 September 2013) (Basten, Ward and Leeming JJA)
Donnellan v Woodland (18 December 2012) (Beazley, Basten, Barrett and Hoeben JJA, Sackville AJA)
Australian Capital Territory v Crowley (17 December 2012) (Lander, Besanko and Katzmann JJ)
Wallace v Kam (13 April 2012) (Allsop P, Beazley and Basten JJA)

6. The duty is that described by Mason CJ, Brennan J, Dawson J, Toohey J and McHugh J in *Rogers v Whitaker* [1992] HCA 58; 175 CLR 479 at 483 :

> "to exercise reasonable care and skill in the provision of professional advice and treatment ... [being] a 'single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment'; it extends to the examination, diagnosis and treatment of the patient and the provision of information in the appropriate case. It is of course necessary to give content to the duty in the given case."
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> (Citations omitted.)

See also at 489:

> "Acceptance of this approach does not entail an artificial division or itemization of specific, individual duties, carved out of the overall duty of care. The duty of a medical practitioner to exercise reasonable care and skill in the provision of advice and treatment is a single comprehensive duty."

Sullivan Nicolaides Pty Ltd v Papa (27 September 2011) (Margaret McMurdo P and Margaret Wilson AJA and Martin J)

Basha v Vocational Capacity Centre Pty Ltd (15 December 2009) (Tobias JA at 1; McColl JA at 2; McClellan CJ at CL at 130)
Juengling v Wells (17 July 2009) (McLure JA)

> 59. That is not an accurate statement of the law. It is not the case that because the risk of harm is reasonably foreseeable and reasonably preventable that a finding of negligence must follow. It is necessary to ask the further question of whether the appellant's failure to eliminate or reduce the relevant risk showed a want of reasonable care and skill in the provision of specialist anaesthetic services: ***Tame v New South Wales*** (2002) 211 CLR 317 [98] [99] (McHugh J); ***Rogers v Whitaker*** (1992) 175 CLR 479, 483.

Marko v Falk (10 November 2008) (McColl JA; Campbell JA; Bell JA)

> 19. The primary judge referred to the duty the respondent owed the appellant, whether expressed in tort or as breach of an implied term of contract, as stated in *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 (at 483):
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> "The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a 'single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment'; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case. It is of course necessary to give content to the duty in the given case.
>
> The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill …"

South Eastern Sydney Area Health Service v King (01 March 2006) (Mason P, McColl JA and Hunt AJA)
Mulligan v Coffs Harbour City Council (21 October 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)
Strempel v Wood (29 August 2005) (Malcolm CJ, McLure JA, LE Miere AJA)
Hunter Area Health Service v Presland (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)
Hunter Area Health Service v Presland (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)
Sheppard v Swan (22 September 2004) (Malcolm CJ, McLure J, EM Heenan J)
Harvey v PD (30 March 2004) (Spigelman CJ, Santow and Ipp JJA)
Harvey v PD (30 March 2004) (Spigelman CJ, Santow and Ipp JJA)
Mouratidis v Brown (07 November 2002) (Wilcox, Higgins and Gyles JJ)
Rosenberg v Percival (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)
Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd (21 December 2000) (Malcolm AJA at 1; McPherson AJA at 360; Ormiston AJA at 455)

> **McPHERSON AJA:** These are appeals from a judgment given in the Commercial Division of the Supreme Court (Giles J) on 13 May 1999 for an amount of $21,193,828 together with interest in action 50257 of 1995 claiming damages for professional negligence. The respondents to the appeal, who are the plaintiffs in the action, are NRMA Limited, NRMA Insurance Limited, and NRMA Holdings Limited. The

appellants are the defendants Mr J D Heydon QC, who was then a practising barrister, and two solicitors and their partners, Mr J K Morgan and the firm of Allen Allen & Hemsley (AAH); and Mr G A T Bateman and the firm of Abbot Tout (AT). There are cross-appeals by the three NRMA companies against the dismissal of some of their other claims for damages based either on common law negligence or on statutory causes of action under the *Trade Practices Act* 1974 (Cth) , the Fair Trading Act 1987 (NSW) and the Corporations Law . On the hearing of the appeal, Mr Bathurst QC appeared, with Mr Meagher SC and Mr Gleeson of counsel for Mr Heydon; Mr Ellicott QC and Mr Barton for Abbot Tout (AT); and Mr Oslingon QC and Mr Speakman for Allen Allen & Hemsley (AAH). Mr Sher QC, with Mr McDougall SC, Mr N J O'Bryan and Mr Nugent, appeared for the three plaintiff companies. They are collectively designated NRMA, although their rights of action, losses, and claims are not necessarily identical. 361 The reasons for judgment of the learned judge at first instance are over 700 pages in length, resulting from an action that occupied some six months of court sitting time, and generated over 5000 pages of transcript of evidence together with many volumes of documentary evidence. Because, whatever the result, an appeal was always predictable, his Honour's reasons are comprehensive. This has the advantage of relieving this Court of much of the burden of restating in detail all of the facts, evidence, issues and submissions that took up much of the trial, enabling attention to be focussed on the principal questions of liability now calling for decision. There are three. They have been called: (1) the *Gambotto* question; (2) the Free Shares question; and (3) the statutory claims. 362 Before considering them, it will avoid repetition later in these reasons if some general observations are made now about the duties and standards of care imposed by law on practising barristers and solicitors, and the kind of conduct that may constitute a breach of them. Both branches of the profession owe a duty of care to their clients, in this instance to NRMA, that may be summed up by saying that they are bound to have and to exercise a degree of skill and care that is to be expected of persons professing and practicing in their area of expertise. See *Rogers v Whitaker* (1992) 175 CLR 479, 483. In terms of reputation and prominence, the defendants were and are among the leaders of the profession in the field of company law, and especially, in Mr Heydon's case, trade practices law. This, it was submitted by Mr Sher QC, had the consequence that they were to be judged by more exacting standards than others of lesser ability in the same field of expertise; but that is plainly neither good law nor sound policy. It would penalise those who were better at doing the same work, and reward increasing proficiency with progressively heavier liabilities. There is only one standard, which is the standard appropriate to a member of the profession with the relevant specialist skills: *Duchess of Argyll v Beuselinck* [1972] 2 LL R 179, 183; *Rogers v Whitaker* (1992) 175 CLR 479, 483. 363 There is occasion here to bear in mind that the liability in question is limited to negligent acts or omissions, and that is so whether it arises out of contract, as it does for a solicitor, or is based in tort, as it is for a barrister in New South Wales. In a contract for legal services, the implied undertaking is no more nor less than to have and to use the requisite degree of skill and care. The same duty is imposed by the law of tort. In giving advice, a lawyer does not warrant or guarantee the soundness of his or her opinion but only that the requisite degree of skill and care has been used in arriving at it: *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209, 272, col 1 E-G. In the present proceedings, where the professional negligence is alleged to consist, at least in part, in failing to warn of a risk that legal advice given to a client might turn out to be mistaken, a lawyer is not normally required to warn experienced business clients of the possibility that his opinion, though firmly

held, may not in fact prevail. See *Ormidale Holdings Pty Ltd v Ray* (1982) 36 BCLR 378, 387, quoted with approval by McClelland CJ in Eq in *Trust Co. of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237, 247. 364 Finally, reference must be made to the limits of the duty to advise. At one time a solicitor's duty was considered to be limited by the terms of the retainer from the client, there being no affirmative legal obligation to give advice going "beyond the specifically agreed task or function". Then, in *Hawkins v Clayton (*1988) 164 CLR 539, 585, it was held that there was no justification for imposing a contractual duty of care that was co-extensive with the parallel duty independently imposed in the law of negligence. It followed that an obligation might arise requiring a solicitor to take positive steps, beyond the specifically agreed professional task or function, to avoid a real and foreseeable risk of economic loss being sustained by the client, or even by others who were not the clients who had retained the solicitor. The result was that in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642, 652, a majority of this Court held that an affirmative duty to advise might exist in relation to matters that were not directly within the ambit of the retainer from the client. The decision on this point in *Waimond Pty Ltd v Byrne* has since been followed on several occasions. More recently, however, in *Henderson v Merrett Syndicates Limited* [1995] 2 AC 145, 193-194, the House of Lords rejected the reasoning of Deane J in *Hawkins v Clayton* , holding instead that there was "no sound basis for a rule which automatically restricts a claimant to either a tortious or a contractual remedy", and that it was "the contract that defines the relationship of the parties", so that ordinarily "the parties must be taken to have agreed that the tortious remedy is to be limited or excluded". In *Astley v Austrust Ltd* (1999) 51 ALJR 403, the High Court decided to follow the reasoning in *Henderson v Merrett Syndicates Limited* , in preference to that of Deane J in *Hawkins v Clayton* . The result, in my respectful opinion, is that what was said by Deane J in *Hawkins v Clayton* has ceased to be good law in Australia. Because it formed the or a pivotal point in the reasoning in *Waimond Pty Ltd v Byrne* , it is no longer possible to say that there is a "penumbral" duty in tort requiring a solicitor to advise on matters going beyond the limits of his or her retainer. On that aspect, the decision in *Waimond Pty Ltd v Bryne* is inconsistent with the reasoning in *Astley v Austrust Ltd* , and should, in my opinion, no longer be followed. It had the effect of enlarging or extending the range of matters on which a solicitor, and possibly also a barrister, might be required by the law of tort to advise a client or other persons. 365 Not being in a contractual relationship with the client, the liability of a barrister for giving negligent advice has always been a product of the law of tort, and in that form it survives the decision in *Astley v Austrust Ltd* . However, the task of a barrister in giving opinions, was, before *Hawkins v Clayton* and *Waimond Pty Ltd v Byrne* , widely regarded as being to answer the specific questions on which he or she was briefed for advice. Counsel was not expected to go beyond matters on which the opinion was sought, although he or she might, and generally would, do so on noticing something material that might have been overlooked by those instructing. If, the principle referred to in *Waimond Pty Ltd v Byrne* is no longer good law, then, as I see it, it now no longer applies to barristers any more than to solicitors so as to impose a legal duty of advising on matters on which advice has not been sought. The decision in *Astley v Austrust Ltd* was delivered after the trial of this action had ended. In the reasons for judgment, the learned judge relied to some extent on the decision in *Waimond Pty Ltd v Byrne* in making some findings against the defendants of negligently failing to warn the NRMA plaintiffs of risks with respect to questions on which they were not retained or

instructed to advise. Not for the first time, therefore, the liabilities of parties to this action have been affected by a decision that altered the law.

Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd (21 December 2000) (Malcolm AJA at 1; McPherson AJA at 360; Ormiston AJA at 455)
Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd (21 December 2000) (Malcolm AJA at 1; McPherson AJA at 360; Ormiston AJA at 455)
Studer v Boettcher (24 November 2000) (Handley, Sheller and Fitzgerald JJA)

2. cf Rogers v Whittaker (1992) 175 CLR 479 , 483.

Johnson v Biggs (24 November 2000) (Giles and Fitzgerald JJA, Santow AJA)
Sauer v Pashley (22 February 2000) (de Jersey CJ, McPherson JA, Byrne J,)
Elliott v Bickerstaff (16 December 1999) (Handley, Stein and Giles JJA)
Tai v Hatzistavrou (25 August 1999) (Priestley, Handley and Powell JJA)
Eagle & ANOR. v Prosser (04 June 1999) (Spigelman CJ, Priestley and Powell JJA)
Scrase v Jarvis (22 December 1998)

see Rogers v. Whitaker (1992) 175 C.L.R. 479 at 483 , another warning case. The proper

Breen v Williams (06 September 1996) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

71 Sidaway (1985) AC 871 at 903. See also Rogers v Whitaker (1992) 175 CLR 479 at 483.

72 Liverpool City Council v Irwin

Breen v Williams (06 September 1996) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)
Breen v Williams (06 September 1996) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)
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4. In the proceedings commenced by the respondent, numerous heads of negligence were alleged. Campbell J. rejected all save the allegation that the appellant's failure to warn of the risk of sympathetic ophthalmia was negligent and resulted in the respondent's condition. While his Honour was not satisfied that proper medical practice required that the appellant warn the respondent of the risk of sympathetic ophthalmia if she expressed no desire for information, he concluded that a warning was necessary in the light of her desire for such relevant information. The Court of Appeal (Mahoney, Priestley and Handley JJ.A.) dismissed all grounds of the appellant's appeal from the judgment of $808,564.38 on both liability and damages; the Court also dismissed a cross-appeal by the respondent on the question of general damages. The respondent does not pursue the latter issue in this Court but the appellant has appealed on the questions of breach of duty and causation.

Breach of duty

5. Neither before the Court of Appeal nor before this Court was there any dispute as to the existence

of a duty of care on the part of the appellant to the respondent. The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a "single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment" ((2) Sidaway v. Governors of Bethlem Royal Hospital (1985) AC 871, per Lord Diplock at p 893); it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case ((3) Gover v. South Australia (1985) 39 SASR 543, at p 551.). It is of course necessary to give content to the duty in the given case.

6. The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill ((4) Bolam v. Friern Hospital Management Committee (1957) 1 WLR 582, at p 586 ; see also Whitehouse v. Jordan (1981) 1 WLR 246, per Lord Edmund-Davies at p 258 and Maynard v. West Midlands R.H.A (1984) 1 WLR 634, per Lord Scarman at p 638), in this case the skill of an ophthalmic surgeon specializing in corneal and anterior segment surgery. As we have stated, the failure of the appellant to observe this standard, which the respondent successfully alleged before the primary judge, consisted of the appellant's failure to acquaint the respondent with the danger of sympathetic ophthalmia as a possible result of the surgical procedure to be carried out. The appellant's evidence was that "sympathetic ophthalmia was not something that came to my mind to mention to her".

7. The principal issue in this case relates to the scope and content of the appellant's duty of care: did the appellant's failure to advise and warn the respondent of the risks inherent in the operation constitute a breach of this duty? The appellant argues that this issue should be resolved by application of the so-called Bolam principle, derived from the direction given by McNair J. to the jury in the case of Bolam v. Friern Hospital Management Committee ((5) (1957) 1 WLR 582). In Sidaway v. Governors of Bethlem Royal Hospital, Lord Scarman stated the Bolam principle in these terms ((6) (1985) AC, at p 881):

> "The Bolam principle may be formulated as a rule that 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. In short, the law imposes the duty of care: but the standard of care is a matter of medical judgment."

Before the primary judge there was evidence from a body of reputable medical practitioners that, in the circumstances of the present case, they would not have warned the respondent of the danger of sympathetic ophthalmia; there was also, however, evidence from similarly reputable medical practitioners that they would have given such a warning. The respondent, for her part, argues that the Bolam principle should not be applied if it entails courts deferring to the medical experts in medical negligence cases and that, in any event, the primary judge was correct in the circumstances of this case in not deferring to the views of those medical practitioners who gave evidence that they would not have warned the respondent.

8. The Bolam principle has invariably been applied in English courts ((7) Whitehouse v. Jordan; Maynard v. West Midlands R.H.A; Hills v. Potter (1984) 1 WLR 641 ; Sidaway; Blyth v. Bloomsbury Health Authority, unreported, Court of Appeal, 5 February 1987; Gold v. Haringey Health Authority (1987) 3 WLR 649 .). In decisions outside the field of medical negligence, there are also statements consistent with an application of the Bolam principle ((8) Mutual Life Ltd. v. Evatt (1971) AC 793, at p 804 ; Saif Ali v. Sydney Mitchell and Co. (1980) AC 198, at pp 218, 220.). At its basis lies the recognition that, in matters involving medical expertise, there is ample scope

for genuine difference of opinion and that a practitioner is not negligent merely because his or her conclusion or procedure differs from that of other practitioners ((9) See Hunter v. Hanley (1955) SLT 213, per Lord President Clyde at p 217); a finding of negligence requires a finding that the defendant failed to exercise the ordinary skill of a doctor practising in the relevant field. Thus, in Whitehouse v. Jordan ((10) (1981) 1 WLR 246), judgment entered for the plaintiff was set aside because, in the face of expert evidence that the defendant's efforts in delivering the plaintiff were competent, there was insufficient evidence upon which the trial judge could hold that there was negligence. Similarly, in Maynard v. West Midlands R.H.A ((11) (1984) 1 WLR 634), judgment entered for the plaintiff was set aside on the ground that it was not sufficient to establish negligence on the part of the defendant to show that there was a body of competent professional opinion that considered the decision to perform a particular operation was wrong when there was also a body of equally competent professional opinion which supported that decision as reasonable.

9. In Sidaway, the House of Lords considered whether the Bolam principle should be applied in cases of alleged negligence in providing information and advice relevant to medical treatment. The plaintiff underwent an operation on her spine designed to relieve her recurrent neck, shoulder and arm pain. The operation carried an inherent, material risk, assessed at between 1 and 2 per cent, of damage to the spinal column and nerve roots. The risk eventuated and the plaintiff was severely disabled. She sued in negligence, alleging that the surgeon had failed to disclose or explain to her the risks involved in the operation. As the speeches in the House of Lords make clear, the action was destined to fail because there was no reliable evidence in support of the plaintiff's central pleading that the surgeon had given no advice or warning. Nevertheless, the majority of the Court (Lord Scarman dissenting) held that the question whether an omission to warn a patient of inherent risks of proposed treatment constituted a breach of a doctor's duty of care was to be determined by applying the Bolam principle. However, the members of the majority took different views of the Bolam principle. Lord Diplock gave the principle a wide application; he concluded that, as a decision as to which risks the plaintiff should be warned of was as much an exercise of professional skill and judgment as any other part of the doctor's comprehensive duty of care to the individual patient, expert evidence on this matter should be treated in just the same way as expert evidence on appropriate medical treatment ((12) (1985) AC, at p 895). Lord Bridge of Harwich (with whom Lord Keith of Kinkel agreed) accepted that the issue was "to be decided primarily on the basis of expert medical evidence, applying the Bolam test" ((13) ibid., at p 900) but concluded that, irrespective of the existence of a responsible body of medical opinion which approved of non-disclosure in a particular case, a trial judge might in certain circumstances come to the conclusion that disclosure of a particular risk was so obviously necessary to an informed choice on the part of the patient that no reasonably prudent medical practitioner would fail to make it. Lord Templeman appeared even less inclined to allow medical opinion to determine this issue. He stated ((14) ibid., at p 903):

> "(T)he court must decide whether the information afforded to the patient was sufficient to alert the patient to the possibility of serious harm of the kind in fact suffered".

However, at the same time, his Lordship gave quite substantial scope to a doctor to decide that providing all available information to a patient would be inconsistent with the doctor's obligation to have regard to the patient's best interests ((15) ibid., at p 904). This is the doctor's so-called therapeutic privilege, an opportunity afforded to the doctor to prove that he or she reasonably believed that disclosure of a risk would prove damaging to a patient ((16) See Canterbury v. Spence (1972) 464 F 2d 772, at p 789 ; Sidaway (1985) AC, per Lord Scarman at p 889. See also Battersby v. Tottman (1985) 37 SASR 524, at pp 527-528, 534-535 .).

10. In dissent, Lord Scarman refused to apply the Bolam principle to cases involving the provision of advice or information. His Lordship stated ((17) (1985) AC, at p 876 .):

> "In my view the question whether or not the omission to warn constitutes a breach of the doctor's duty of care towards his patient is to be determined not exclusively by reference to the current state of responsible and competent professional opinion and practice at the time, though both are, of course, relevant considerations, but by the court's view as to whether the doctor in advising his patient gave the consideration which the law requires him to give to the right of the patient to make up her own mind in the light of the relevant information whether or not she will accept the treatment which he proposes."

His Lordship referred to American authorities, such as the decision of the United States Court of Appeals, District of Columbia Circuit, in Canterbury v. Spence ((18) (1972) 464 F 2d 772), and to the decision of the Supreme Court of Canada in Reibl v. Hughes ((19) (1980) 114 DLR (3d) 1), which held that the "duty to warn" arises from the patient's right to know of material risks, a right which in turn arises from the patient's right to decide for himself or herself whether or not to submit to the medical treatment proposed.

11. One consequence of the application of the Bolam principle to cases involving the provision of advice or information is that, even if a patient asks a direct question about the possible risks or complications, the making of that inquiry would logically be of little or no significance; medical opinion determines whether the risk should or should not be disclosed and the express desire of a particular patient for information or advice does not alter that opinion or the legal significance of that opinion. The fact that the various majority opinions in Sidaway ((20) (1985) AC, at pp 895, 898, 902-903), for example, suggest that, over and above the opinion of a respectable body of medical practitioners, the questions of a patient should truthfully be answered (subject to the therapeutic privilege) indicates a shortcoming in the Bolam approach. The existence of the shortcoming suggests that an acceptable approach in point of principle should recognize and attach significance to the relevance of a patient's questions. Even if a court were satisfied that a reasonable person in the patient's position would be unlikely to attach significance to a particular risk, the fact that the patient asked questions revealing concern about the risk would make the doctor aware that this patient did in fact attach significance to the risk. Subject to the therapeutic privilege, the question would therefore require a truthful answer.

12. In Australia, it has been accepted that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill ((21) Cook v. Cook (1986) 162 CLR 376, at pp 383-384 ; Papatonakis v. Australian Telecommunications Commission (1985) 156 CLR 7, at p 36 ; Weber v. Land Agents Board (1986) 40 SASR 312, at p 316 ; Lewis v. Tressider Andrews Associates Pty. Ltd. (1987) 2 Qd R 533, at p 542.). But, that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade ((22) See, for example, Florida Hotels Pty. Ltd. v. Mayo (1965) 113 CLR 588, at pp 593, 601). Even in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the Bolam principle has not always been applied ((23) See Albrighton v. Royal Prince Alfred Hospital (1980) 2 NSWLR 542, at pp 562-563 (case of medical treatment). See also E v. Australian Red Cross (1991) 99 ALR 601, at p 650). Further, and more importantly, particularly in the field of non-disclosure of risk and the provision of advice and information, the Bolam principle has been discarded and, instead, the courts have adopted ((24) Albrighton v. Royal Prince Alfred Hospital (1980) 2 NSWLR,

at pp 562-563 ; F v. R. (1983) 33 SASR 189, at pp 196, 200, 202, 205 ; Battersby v. Tottman (1985) 37 SASR, at pp 527, 534, 539-540 ; E v. Australian Red Cross (1991) 99 ALR, at pp 648-650) the principle that, while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to "the paramount consideration that a person is entitled to make his own decisions about his life" ((25) F v. R. (1983) 33 SASR, at p 193).

13. In F v. R. ((26) (1983) 33 SASR 189), which was decided by the Full Court of the Supreme Court of South Australia two years before Sidaway in the House of Lords, a woman who had become pregnant after an unsuccessful tubal ligation brought an action in negligence alleging failure by the medical practitioner to warn her of the failure rate of the procedure. The failure rate was assessed at less than 1 per cent for that particular form of sterilization. The Court refused to apply the Bolam principle. King C.J. said ((27) ibid., at p 194):

> "The ultimate question, however, is not whether the defendant's conduct accords with the practices of his profession or some part of it, but whether it conforms to the standard of reasonable care demanded by the law. That is a question for the court and the duty of deciding it cannot be delegated to any profession or group in the community."

King C.J. considered ((28) ibid., at pp 192-193) that the amount of information or advice which a careful and responsible doctor would disclose depended upon a complex of factors: the nature of the matter to be disclosed; the nature of the treatment; the desire of the patient for information; the temperament and health of the patient; and the general surrounding circumstances. His Honour agreed with ((29) ibid., at pp 193-194) the following passage from the judgment of the Supreme Court of Canada in Reibl v. Hughes ((30) (1980) 114 DLR (3d), at p 13):

> "To allow expert medical evidence to determine what risks are material and, hence, should be disclosed and, correlatively, what risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure, including the question whether there has been a breach of that duty. Expert medical evidence is, of course, relevant to findings as to the risks that reside in or are a result of recommended surgery or other treatment. It will also have a bearing on their materiality but this is not a question that is to be concluded on the basis of the expert medical evidence alone. The issue under consideration is a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing certain surgery or other treatment."

The approach adopted by King C.J. is similar to that subsequently taken by Lord Scarman in Sidaway and has been followed in subsequent cases ((31) Battersby v. Tottman; Gover v. South Australia (1985) 39 SASR, at pp 551-552 ; Ellis v. Wallsend District Hospital, unreported, Supreme Court of New South Wales, 16 September 1988; E v. Australian Red Cross (1991) 99 ALR, at pp 649-650). In our view, it is correct.

14. Acceptance of this approach does not entail an artificial division or itemization of specific, individual duties, carved out of the overall duty of care. The duty of a medical practitioner to exercise reasonable care and skill in the provision of professional advice and treatment is a single comprehensive duty. However, the factors according to which a court determines whether a medical

practitioner is in breach of the requisite standard of care will vary according to whether it is a case involving diagnosis, treatment or the provision of information or advice; the different cases raise varying difficulties which require consideration of different factors ((32) F v. R. (1983) 33 SASR, at p 191). Examination of the nature of a doctor-patient relationship compels this conclusion. There is a fundamental difference between, on the one hand, diagnosis and treatment and, on the other hand, the provision of advice or information to a patient. In diagnosis and treatment, the patient's contribution is limited to the narration of symptoms and relevant history; the medical practitioner provides diagnosis and treatment according to his or her level of skill. However, except in cases of emergency or necessity, all medical treatment is preceded by the patient's choice to undergo it. In legal terms, the patient's consent to the treatment may be valid once he or she is informed in broad terms of the nature of the procedure which is intended ((33) Chatterton v. Gerson (1981) QB 432, at p 443). But the choice is, in reality, meaningless unless it is made on the basis of relevant information and advice. Because the choice to be made calls for a decision by the patient on information known to the medical practitioner but not to the patient, it would be illogical to hold that the amount of information to be provided by the medical practitioner can be determined from the perspective of the practitioner alone or, for that matter, of the medical profession. Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play; whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices. Except in those cases where there is a particular danger that the provision of all relevant information will harm an unusually nervous, disturbed or volatile patient, no special medical skill is involved in disclosing the information, including the risks attending the proposed treatment ((34) See Fleming, The Law of Torts, 7th ed. (1987), p 110). Rather, the skill is in communicating the relevant information to the patient in terms which are reasonably adequate for that purpose having regard to the patient's apprehended capacity to understand that information.

15. In this context, nothing is to be gained by reiterating the expressions used in American authorities, such as "the patient's right of self-determination" ((35) See, for example, Canterbury v. Spence (1972) 464 F 2d, at p 784) or even the oft-used and somewhat amorphous phrase "informed consent". The right of self-determination is an expression which is, perhaps, suitable to cases where the issue is whether a person has agreed to the general surgical procedure or treatment, but is of little assistance in the balancing process that is involved in the determination of whether there has been a breach of the duty of disclosure. Likewise, the phrase "informed consent" is apt to mislead as it suggests a test of the validity of a patient's consent ((36) Reibl v. Hughes (1980) 114 DLR (3d), at p 11). Moreover, consent is relevant to actions framed in trespass, not in negligence. Anglo-Australian law has rightly taken the view that an allegation that the risks inherent in a medical procedure have not been disclosed to the patient can only found an action in negligence and not in trespass; the consent necessary to negative the offence of battery is satisfied by the patient being advised in broad terms of the nature of the procedure to be performed ((37) Chatterton v. Gerson (1981) QB, at p 443). In Reibl v. Hughes the Supreme Court of Canada was cautious in its use of the term "informed consent" ((38) (1980) 114 DLR (3d), at pp 8-11).

16. We agree that the factors referred to in F v. R. by King C.J. ((39) (1983) 33 SASR, at pp 192-193) must all be considered by a medical practitioner in deciding whether to disclose or advise of some risk in a proposed procedure. 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. This duty is subject to the therapeutic privilege.

17. The appellant in this case was treating and advising a woman who was almost totally blind in one eye. As with all surgical procedures, the operation recommended by the appellant to the respondent involved various risks, such as retinal detachment and haemorrhage infection, both of which are more common than sympathetic ophthalmia, but sympathetic ophthalmia was the only danger whereby both eyes might be rendered sightless. Experts for both parties described it as a devastating disability, the appellant acknowledging that, except for death under anaesthetic, it was the worst possible outcome for the respondent. According to the findings of the trial judge, the respondent "incessantly" questioned the appellant as to, amongst other things, possible complications. She was, to the appellant's knowledge, keenly interested in the outcome of the suggested procedure, including the danger of unintended or accidental interference with her "good", left eye. On the day before the operation, the respondent asked the appellant whether something could be put over her good eye to ensure that nothing happened to it; an entry was made in the hospital notes to the effect that she was apprehensive that the wrong eye would be operated on. She did not, however, ask a specific question as to whether the operation on her right eye could affect her left eye.

18. The evidence established that there was a body of opinion in the medical profession at the time which considered that an inquiry should only have elicited a reply dealing with sympathetic ophthalmia if specifically directed to the possibility of the left eye being affected by the operation on the right eye. While the opinion that the respondent should have been told of the dangers of sympathetic ophthalmia only if she had been sufficiently learned to ask the precise question seems curious, it is unnecessary for us to examine it further, save to say that it demonstrates vividly the dangers of applying the Bolam principle in the area of advice and information. The respondent may not have asked the right question, yet she made clear her great concern that no injury should befall her one good eye. The trial judge was not satisfied that, if the respondent had expressed no desire for information, proper practice required that the respondent be warned of the relevant risk. But it could be argued, within the terms of the relevant principle as we have stated it, that the risk was material, in the sense that a reasonable person in the patient's position would be likely to attach significance to the risk, and thus required a warning. It would be reasonable for a person with one good eye to be concerned about the possibility of injury to it from a procedure which was elective. However, the respondent did not challenge on appeal that particular finding.

19. For these reasons, we would reject the appellant's argument on the issue of breach of duty.

Causation
20. Although the appellant's notice of appeal challenges the confirmation by the Court of Appeal of the trial judge's finding that the respondent would not have undergone the surgery had she been advised of the risk of sympathetic ophthalmia, counsel for the appellant made no submissions in support of it. There is, therefore, no occasion to deal with this ground of appeal.

Following paragraph cited by:

Seltsam Pty Ltd v Mcneill (26 June 2006) (Handley JA at 1; Tobias JA at 8; Bryson JA at 9)

Hoyts Pty Ltd v Burns (09 October 2003) (McHugh, Gummow, Kirby, Hayne and Callinan JJ)
Rosenberg v Percival (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)
Chappel v Hart (02 September 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

21. For the foregoing reasons, we would dismiss the appeal.

GAUDRON J. The facts and the issues are set out in the joint judgment of Mason C.J., Brennan, Dawson, Toohey and McHugh JJ. and I need not repeat them. Save for the comments which follow, I agree with the reasons set out in that judgment and I agree with their Honours' conclusion that the appeal should be dismissed.

2. There is no difficulty in analysing the duty of care of medical practitioners on the basis of a "single comprehensive duty" ((40) Sidaway v. Governors of Bethlem Royal Hospital (1985) AC 871, per Lord Diplock at p 893) covering diagnosis, treatment and the provision of information and advice, provided that it is stated in terms of sufficient generality. Thus, the general duty may be stated as a duty to exercise reasonable professional skill and judgment. But the difficulty with that approach is that a statement of that kind says practically nothing - certainly, nothing worthwhile - as to the content of the duty. And it fails to take account of the considerable conceptual and practical differences between diagnosis and treatment, on the one hand, and the provision of information and advice, on the other.

3. The duty involved in diagnosis and treatment is to exercise the ordinary skill of a doctor practising in the area concerned ((41) Lanphier v. Phipos (1838) 8 Car and P 475, per Tindal C.J. at p 479 (173 ER 581, at p 583); Bolam v. Friern Hospital Management Committee (1957) 1 WLR 582, per McNair J. at pp 586-587 ; F v. R. (1983) 33 SASR 189, per King C.J. at p 190). To ascertain the precise content of this duty in any particular case it is necessary to determine, amongst other issues, what, in the circumstances, constitutes reasonable care and what constitutes ordinary skill in the relevant area of medical practice. These are issues which necessarily direct attention to the practice or practices of medical practitioners. And, of course, the current state of medical knowledge will often be relevant in determining the nature of the risk which is said to attract the precise duty in question, including the foreseeability of that risk.

4. The matters to which reference has been made indicate that the evidence of medical practitioners is of very considerable significance in cases where negligence is alleged in diagnosis or treatment. However, even in cases of that kind, the nature of particular risks and their foreseeability are not matters exclusively within the province of medical knowledge or expertise. Indeed, and notwithstanding that these questions arise in a medical context, they are often matters of simple commonsense. And, at least in some situations, questions as to the reasonableness of particular precautionary measures are also matters of commonsense. Accordingly, even in the area of diagnosis and treatment there is, in my view, no legal basis for limiting liability in terms of the rule known as "the Bolam test" ((42) This test derives from the charge to the jury by McNair J. in Bolam v. Friern Hospital Management Committee (1957) 1 WLR, at p 587) which is to the effect that a doctor is not guilty of negligence if he or she acts in accordance with a practice accepted as proper by a responsible body of doctors skilled in the relevant field of practice. That is not to deny that, having regard to the onus of proof, "the Bolam test" may be a convenient statement of the approach dictated by the state of the evidence in some cases. As such, it may have some utility as a rule-of-

thumb in some jury cases, but it can serve no other useful function.

5. Diagnosis and treatment are but particular duties which arise in the doctor-patient relationship. That relationship also gives rise to a duty to provide information and advice. That duty takes its precise content, in terms of the nature and detail of the information to be provided, from the needs, concerns and circumstances of the patient. A patient may have special needs or concerns which, if known to the doctor, will indicate that special or additional information is required. In a case of that kind, the information to be provided will depend on the individual patient concerned. In other cases, where, for example, no specific enquiry is made, the duty is to provide the information that would reasonably be required by a person in the position of the patient.

6. Whether the position is considered from the perspective of the individual patient or from that of the hypothetical prudent patient and unless there is some medical emergency or something special about the circumstances of the patient, there is simply no occasion to consider the practice or practices of medical practitioners in determining what information should be supplied. However, there is some scope for a consideration of those practices where the question is whether, by reason of emergency or the special circumstances of the patient, there is no immediate duty or its content is different from that which would ordinarily be the case.

7. Leaving aside cases involving an emergency or circumstances which are special to the patient, the duty of disclosure which arises out of the doctor-patient relationship extends, at the very least ((43) In Canterbury v. Spence (1972) 464 F 2d 772, at p 781, other matters identified as being within the duty of disclosure were the duty to alert the patient to bodily abnormality, the failure of the patient's ailment to respond to the doctor's ministrations, limitations to be observed for his or her welfare, precautionary therapy for the future and the need for or desirability of alternative treatment promising greater benefit.), to information that is relevant to a decision or course of action which, if taken or pursued, entails a risk of the kind that would, in other cases, found a duty to warn. A risk is one of that kind if it is real and foreseeable, but not if it is "far-fetched or fanciful" ((44) Wyong Shire Council v. Shirt (1980) 146 CLR 40, per Mason J. at p 47. See also Gala v. Preston (1991) 172 CLR 243, at p 253). Certainly, the duty to warn extends to risks of that kind involved in the treatment or procedures proposed.

8. Again leaving aside cases involving a medical emergency or a situation where the circumstances of the individual require special consideration, I see no basis for treating the doctor's duty to warn of risks (whether involved in the treatment or procedures proposed or otherwise attending the patient's condition or circumstances) as different in nature or degree from any other duty to warn of real and foreseeable risks. And as at present advised, I see no basis for any exception or "therapeutic privilege" which is not based in medical emergency or in considerations of the patient's ability to receive, understand or properly evaluate the significance of the information that would ordinarily be required with respect to his or her condition or the treatment proposed.

9. The appeal should be dismissed.

Orders

Appeal dismissed with costs.

Cited by:

Shari v Marshall Jovanovska Ralph Criminal Lawyers [2025] VSCA 54 -
Shari v Marshall Jovanovska Ralph Criminal Lawyers [2025] VSCA 54 -
Shari v Marshall Jovanovska Ralph Criminal Lawyers [2025] VSCA 54 -
Shari v Marshall Jovanovska Ralph Criminal Lawyers [2025] VSCA 54 -
Shari v Marshall Jovanovska Ralph Criminal Lawyers [2025] VSCA 54 -
Fuller v Australian Capital Territory [2024] ACTCA 19 (05 July 2024) (McCallum CJ; Baker and Taylor JJ)

> 90 An assessment of what constitutes reasonable care can include a consideration of evidence in relation to standards accepted to be competent medical practice, but is ultimately a question for the judge. While the standard of care is that of the ordinary skilled person exercising the special skill in question, "that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade": *Rogers v Whitaker* [1992] HCA 58; 175 CLR 479 (*Rogers*) at 483. While we do not consider that the primary judge applied s 5O of the *Civil Liability Act* as the appellant asserted, in that it is apparent from the reasons that the primary judge identified ss 42-44 of the *Wrongs Act* as the applicable provisions, we do consider that the primary judge approached the expert evidence as determinative of the assessment that his Honour was required to perform for himself.

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Fuller v Australian Capital Territory [2024] ACTCA 19 -
Fuller v Australian Capital Territory [2024] ACTCA 19 -
Gladstone Ports Corporation Limited v Murphy Operator Pty Ltd [2024] QCA 74 -
Manny v David Lardner Lawyers (No 4) [2024] ACTCA 12 -
Kitoko v Sydney Local Health District [2024] NSWCA 49 (12 March 2024) (Ward P and Gleeson JA)

> 72. Mr Kitoko then addresses (both in his submissions and his draft notice of appeal) the issues he identifies as remaining for determination in relation to his medical negligence claims (breach, injury and causation), characterising his claim as being that there was a breach of duty by a failure to give him of the risks of the surgery performed (see at [86] of the draft notice of appeal), although elsewhere his complaint appears to be that he was not warned of the risks of low potassium. To that end, Mr Kitoko refers to well-known authorities such as *Rogers v Whitaker* (1992) 175 CLR 479; [1992] HCA 58 . Mr Kitoko also makes allegations (see [92] of the draft notice of appeal) as to the failure of Dr Fatima (at Canterbury Hospital) to investigate his symptoms more thoroughly in order to achieve a diagnosis. While Mr Kitoko appears to accept that there is a dispute as to what he was (and should have been) told (see [88] of the draft notice of appeal) and complains that he was not given the opportunity to cross-examine the doctors and that the primary judge "failed to form impressions about the weight to give to different aspects" of the evidence (see at [93] of the draft notice of appeal), at the same time Mr Kitoko's summary judgment application seems to be predicated on his medical evidence being unchallenged.

Austen v Tran [2023] ACTCA 44 -
Russell v The King [2023] NSWCCA 272 (03 November 2023) (Bell CJ, Stern JA and N Adams J)

45. Importantly, and as noted in [40] above, it was also not in dispute that BB consented to the procedure the subject of Count 2 in the broad sense in which consent is used in the criminal law, as explained in *Rogers v Whittaker* (1992) 175 CLR 479 at 490 ; [1992] HCA 58 . In *Reeves v The Queen* [2013] HCA 57; (2013) 88 ALJR 215 at [35] , French CJ, Crennan, Bell and Keane JJ confirmed that:

> "The nature of the consent to a medical procedure that is required in order to negative the offence of battery is described in the joint reasons in *Rogers v Whitaker*. It is sufficient that the patient consents to the procedure having been advised in broad terms of its nature."

See also *R v Richardson* [1999] QB 444 (***Richardson***) at 450 where it was said that "the concept of informed consent has no place in the criminal law."

Ziaee v Rubino [2023] ACTCA 7 (15 February 2023) (McCallum CJ, Kennett and O'Sullivan JJ)

7 Referring to *Rogers v Whitaker* (1992) 175 CLR 479, her Honour observed that the statutory words "reasonable person in the defendant's position" were to be understood in the present context as referring to an ordinary skilled person exercising or professing to have the relevant professional skill: that is, the standard is that of an ordinary skilled general practitioner acting reasonably (at [24]).

Dean v Pope [2022] NSWCA 260 (14 December 2022) (Ward P, Macfarlan, Meagher, White and Brereton JJA)

297. The complaint in Ground 1(d) – to the effect that a defence under s 5O was not available in the absence of proof of a particular existing practice which Dr Pope claimed to be applicable in the circumstances – is founded on what was said by Macfarlan JA in *McKenna v Hunter and New England Local Health District* . [19] His Honour, with whom Beazley P, as her Excellency then was, agreed, held that in order to enliven the application of s 5O , a "practice" existing at the time of the conduct must be identified: [20]

> "[160] To establish a defence under s 5O a medical practitioner needs to demonstrate, first, that what he or she did conformed with a *practice* that was in existence at the time the medical service was provided and, secondly, to establish that that *practice* was widely, although not necessarily universally, accepted by peer professional opinion as competent professional *practice*. [Emphasis as per original]
>
> [161] One can see in the facts of the cases that I have mentioned the possibility that what was done accorded with a practice. For example, there may well have been a practice in some part of the profession, in *Bolam* to use electro-convulsive therapy to treat depression; in *Sidaway* to give or not to give a warning of risks in respect of the type of spinal operation in question; in *Rogers v Whitaker* to give or not to give a warning of risks in respect of the type of eye operation conducted on the plaintiff and in *Dobler* to refer or not refer a patient for an ECG and/or to a cardiologist on detection of a heart murmur."
>
> ...
>
> [165] In summary, the section is directed to something, namely a practice, that was in existence at the relevant time, here July 2004. Whilst at that time there were no doubt many practices in the medical profession concerning the manner in which operations were performed, the types of treatments that were administered, the circumstances in which tests were ordered, the circumstances in which warnings were given and other matters, the evidence here did not identify any such practice

that was relevant in the present case. In light of the wide variety of circumstances bearing upon the decision to discharge Mr Pettigrove, it would have been surprising if it had done so. It is unlikely, to say the least, that there would have occurred in or before 2004 a number of situations in which there were sufficient features in common with the present case to enable it to be said that there was a practice concerning how such a situation was to be dealt with by a competent medical practitioner."

Dean v Pope [2022] NSWCA 260 -
Dean v Pope [2022] NSWCA 260 -
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Dean v Pope [2022] NSWCA 260 -
Dean v Pope [2022] NSWCA 260 -
Herron v HarperCollins Publishers Australia Pty Ltd [2022] FCAFC 68 -
Kassam v Hazzard [2021] NSWCA 299 -
Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 -
Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 -
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Makaroff v Nepean Blue Mountains Local Health District [2021] NSWCA 107 -
Ethicon Sarl v Gill [2021] FCAFC 29 (05 March 2021) (Jagot, Murphy and Lee JJ)

545. Given the context, the concession must mean that each of the pleaded complications was, as the primary judge put it, a "material" risk. That is, each pleaded complication was of sufficient significance that a reasonable medical practitioner would or should be aware that a patient, if warned of the risk, would be likely to attach significance to it: *Rogers v Whitaker* at 490. The fact that senior counsel for the appellants then confirmed that he would identify "the limited occasions" in which "there is some relevant consideration of significance" merely reinforces the true effect of the concession. Each of the pleaded complications was a material risk in respect of each device.

Ethicon Sarl v Gill [2021] FCAFC 29 -
Queensland v Masson [2020] HCA 28 (13 August 2020) (Kiefel CJ; Bell, Keane, Nettle and Gordon JJ)

133. Following this Court's decision in *Rogers v Whitaker* [129] , and at all relevant times for the purposes of determination of the present appeal [130] , the standard of care to be observed by a person possessing special skills is that of "the ordinary skilled person exercising and professing to have that special skill" [131] . Although that standard is not to be determined solely, or even primarily, by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade [132] – in the sense that a court is not required to defer to the opinions of experts rather than determine for itself the applicable standard of care [133] – evidence of responsible professional opinion may nonetheless "have an influential, often a decisive, role to play" [134] . And where, as here, a body of professional opinion is relied upon as evidence that a particular course of treatment fell within the standard of care expected of a reasonable and competent practitioner, the body of opinion will generally be thought "reasonable", "responsible" or "respectable" provided it has a logical basis [135] . In particular, in cases involving, as the present case does, the weighing of risks and benefits, a body of opinion may be treated as responsible or respectable if it can be shown that the experts said to constitute that body of opinion have "directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter" [136] .

via

[129] (1992) 175 CLR 479 .

Queensland v Masson [2020] HCA 28 -
Queensland v Masson [2020] HCA 28 -
Queensland v Masson [2020] HCA 28 -
Queensland v Masson [2020] HCA 28 -
Queensland v Masson [2020] HCA 28 -
Queensland v Masson [2020] HCA 28 -
Singh v Lynch [2020] NSWCA 152 -
Phelan v Melbourne Health [2019] VSCA 205 -
Phelan v Melbourne Health [2019] VSCA 205 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Clare & Gilbert Valleys Council v Kruse [2019] SASCFC 106 -
Masson v State of Queensland [2019] QCA 80 -
Masson v State of Queensland [2019] QCA 80 -
Cam & Bear Pty Ltd v McGoldrick [2018] NSWCA 110 -
South Western Sydney Local Health District v Gould [2018] NSWCA 69 -
South Western Sydney Local Health District v Gould [2018] NSWCA 69 -
South Western Sydney Local Health District v Gould [2018] NSWCA 69 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Sparks v Hobson [2018] NSWCA 29 -
Pere v Central Queensland Hospital and Health Service [2017] QCA 225 (06 October 2017) (Gotterson and Morrison JJA and Applegarth J)

30. To similar effect, Mason CJ, Brennan, Dawson, Toohey and McHugh JJ observed in *Rogers v Whitaker* : [24]

> "In legal terms, the patient's consent to the treatment may be valid once he or she is informed in broad terms of the nature of the procedure which is intended."

via

[24] [1992] HCA 58 at [14] ; (1992) 175 CLR 479 at 489.

Pere v Central Queensland Hospital and Health Service [2017] QCA 225 (06 October 2017) (Gotterson and Morrison JJA and Applegarth J)

30. To similar effect, Mason CJ, Brennan, Dawson, Toohey and McHugh JJ observed in *Rogers v Whitaker* : [24]

> "In legal terms, the patient's consent to the treatment may be valid once he or she is informed in broad terms of the nature of the procedure which is intended."

Pere v Central Queensland Hospital and Health Service [2017] QCA 225 -
FJ (a Pseudonym) v Commonwealth [2017] VSCA 84 (12 April 2017) (Tate, Santamaria and Beach JJA)

85. Seen in an even broader context, the cases to which the parties referred the Court also reflect the development of the law of negligence since *Donoghue v Stevenson.* [51] Originally, the courts recognised a non-contractual duty of care not to cause injury to the person or the property of the person. Compensation in the form of damages was payable in respect of such injuries. In addition, compensation is payable in respect of consequential pecuniary loss. The circumstances in which damage is recognised have increased greatly over the years and, now, in limited circumstances, damages are payable for what is described as 'pure economic loss', ie loss that is not consequential on personal or property damage. With the extension of the grounds of liability, courts have reconsidered the bases upon which it is said that a duty of care has arisen and its content in particular cases. For example, in *Rogers v Whitaker* [52] the question was whether the defendant failed to advise and warn the plaintiff of the risks inherent in the operation that she underwent. Accordingly, one sees cases in which the duty is conceived of in terms of an interest of the plaintiff that the defendant has negligently prejudiced rather than in terms of a negligent interference in the physical integrity of the person or property of the plaintiff. In *Cattanach v Melchior* ,[53] McHugh and Gummow JJ said that compensation is available where a dollar value can be placed on the negligent interference in some interest of the plaintiff be that interest a financial interest or an interest such as the right to plan one's family.

FJ (a Pseudonym) v Commonwealth [2017] VSCA 84 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
Optus Administration Pty Limited v Glenn Wright by his tutor James Stuart Wright [2017] NSWCA 21 -
As Bannister v Sirrom Enterprises Pty Ltd [2016] SASCFC 153 -
As Bannister v Sirrom Enterprises Pty Ltd [2016] SASCFC 153 -
As Bannister v Sirrom Enterprises Pty Ltd [2016] SASCFC 153 -
South Metropolitan Health Service v Westcott [2016] WASCA 225 (20 December 2016) (Newnes and Murphy JJA; Beech J)

119 *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479, 489.

120

South Metropolitan Health Service v Westcott [2016] WASCA 225 -
South Metropolitan Health Service v Westcott [2016] WASCA 225 -
South Metropolitan Health Service v Westcott [2016] WASCA 225 -
Redzepovic v Western Health [2016] VSCA 251 (19 October 2016) (Ferguson JA, Kaye JA and Beale AJA)

73. In *Rogers v Whitaker* , [16] the High Court was concerned with the content of the duty of a practitioner to warn the patient of risks associated with a proposed course of treatment. The court rejected the application of the '*Bolam* ' principle [17] namely, that a practitioner is not negligent if he or she acts in accordance with a practice accepted at the time as proper by a responsible body of medical opinion although other doctors may adopt a different practice. However in doing so, the court did not exclude, as relevant, responsible professional opinion, particularly in a case which is concerned with the question whether the diagnosis or treatment of a patient has been performed with reasonable care and skill. The plurality stated:

> The duty of a medical practitioner to exercise reasonable care and skill in the provision of professional advice and treatment is a single comprehensive duty. However, the factors according to which a court determines whether a medical practitioner is in breach of the requisite standard of care will vary according to whether it is a case involving diagnosis, treatment or the provision of information or advice; the different cases raise varying difficulties which require consideration of different factors. Examination of the nature of a doctor/patient relationship compels this conclusion. There is a fundamental difference between, on the one hand, diagnosis and treatment and, on the

> other hand, the provision of advice or information to a patient. In diagnosis and treatment, the patient's contribution is limited to the narration of symptoms and relevant history; the medical practitioner provides diagnosis and treatment according to his or her level of skill. However, except in cases of emergency or necessity, all medical treatment is preceded by the patient's choice to undergo it. ... Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play; whether the patient has been given all the relevant information to choose between undergoing and not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices. [18]

Redzepovic v Western Health [2016] VSCA 251 -
Redzepovic v Western Health [2016] VSCA 251 -
Redzepovic v Western Health [2016] VSCA 251 -
Morocz v Marshman [2016] NSWCA 202 (11 August 2016) (Macfarlan and Payne JJA, Emmett AJA)

115. The amount of information that a careful and responsible doctor is required to disclose depends on a complex of factors, the nature of the matter to be disclosed, the nature of the treatment, the desire of the patient for information, the temperament and health of the patient and the general surrounding circumstances: *Rogers* at 489 .

Morocz v Marshman [2016] NSWCA 202 -
Morocz v Marshman [2016] NSWCA 202 -
Morocz v Marshman [2016] NSWCA 202 -
Morocz v Marshman [2016] NSWCA 202 -
Biggs v George [2016] NSWCA 113 (17 May 2016) (Basten, Ward and Payne JJA)

20. In discussing duty, the trial judge commenced, in accordance with conventional statements in Australian caselaw, by referring to the "single comprehensive duty" owed by a medical practitioner to a patient. That language was accepted in *Rogers v Whitaker* . [4] The judgment in *Rogers* continued:

> "However, the factors according to which a court determines whether a medical practitioner is in breach of the requisite standard of care will vary according to whether it is a case involving diagnosis, treatment or the provision of information or advice; the different cases raise varying difficulties which require consideration of different factors. Examination of the nature of a doctor-patient relationship compels this conclusion. There is a fundamental difference between, on the one hand, diagnosis and treatment and, on the other hand, the provision of advice or information to a patient."

Biggs v George [2016] NSWCA 113 -
Biggs v George [2016] NSWCA 113 -
Biggs v George [2016] NSWCA 113 -
Biggs v George [2016] NSWCA 113 -
Biggs v George [2016] NSWCA 113 -
Badenach v Calvert [2016] HCA 18 (11 May 2016) (French CJ, Kiefel, Gageler, Keane and Gordon JJ)

57. Subject to statutory or contractual exclusion, modification or expansion, the duty of care which a solicitor owes to a client is a comprehensive duty which arises in contract by force of the retainer and in tort by virtue of entering into the performance of the retainer [48] . The duty is to exercise that degree of care and skill to be expected of a member of the profession having expertise appropriate to the undertaking of the function specified in the retainer [49] .

Performance of that duty might well require the solicitor not only to undertake the precise function specified in the retainer but to provide the client with advice on appurtenant legal risks [50] . Whether or not performance of that duty might require the solicitor to take some further action for the protection of the client's interests beyond the function specified in the retainer is a question on which differences of view have emerged [51] . That question was not addressed in argument, and need not be determined in this appeal.

via

[50] *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at 53-54 [147] ; *Rogers v Whitaker* (1992) 175 CLR 479 at 483.

Badenach v Calvert [2016] HCA 18 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
Waller v James [2015] NSWCA 232 -
White v Johnston [2015] NSWCA 18 -
White v Johnston [2015] NSWCA 18 -
White v Johnston [2015] NSWCA 18 -
Stewart v Ackland [2015] ACTCA 1 -
Kronenberg v Bridge [2014] TASFC 10 -
Curtis v Harden Shire Council [2014] NSWCA 314 -
Howe v Fischer [2014] NSWCA 286 -
Howe v Fischer [2014] NSWCA 286 -
Falkingham v Hoffmans (a firm) [2014] WASCA 140 (01 August 2014) (Pullin JA, Buss JA, Murphy JA)

276. In ***Rogers v Whitaker*** [1992] HCA 58; (1992) 175 CLR 479 , Mason CJ, Brennan, Dawson, Toohey and McHugh JJ held that a medical practitioner has a duty to warn a patient of a material risk inherent in a proposed treatment (490). A risk will be 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' (490).

Falkingham v Hoffmans (a firm) [2014] WASCA 140 -
Falkingham v Hoffmans (a firm) [2014] WASCA 140 -
Falkingham v Hoffmans (a firm) [2014] WASCA 140 -
ABN AMRO Bank NV v Bathurst Regional Council [2014] FCAFC 65 -
Campbell v Hay [2014] NSWCA 129 -
Campbell v Hay [2014] NSWCA 129 -
Odisho v Bonazzi [2014] VSCA 11 (18 February 2014) (Nettle, Beach JJA and McMillan AJA)

10. In *Rogers v Whitaker* ,[4] the plurality[5] described the duty of care owed by a medical practitioner in the following terms:

> The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a 'single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgement'; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case. It is of course necessary to give content to the duty in the given case.

> The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill ... . [6]

via

[6] (1992) 175 CLR 479 , 483 (citations omitted).

Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Odisho v Bonazzi [2014] VSCA 11 -
Prince v Malouf [2014] NSWCA 12 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
McKenna v Hunter & New England Local Health District [2013] NSWCA 476 -
Reeves v The Queen [2013] HCA 57 (18 December 2013) (French CJ, Crennan, Bell, Gageler and Keane JJ)

> 35. The Court of Criminal Appeal found, correctly, that it was an error to direct the jury in terms of "informed consent". Specifically, it was an error to direct that a medical practitioner must explain the "possible major consequences of the operation" together with "options" and "alternative treatments" before the patient's consent to the procedure will afford the medical practitioner lawful cause or excuse for performing it. The nature of the consent to a medical procedure that is required in order to negative the offence of battery is described in the joint reasons in *Rogers v Whitaker* [7] . It is sufficient that the patient consents to the procedure having been advised in broad terms of its nature [8] . Provided CDW was informed that the surgery involved the removal of her labia and clitoris, the applicant had a lawful cause or excuse for performing it. This was so regardless of any failure to inform CDW of its possible major consequences and any alternative treatments. A failure in either of these respects might be a breach of the applicant's common law duty of care exposing him to liability in negligence but it would not vitiate the consent to the surgery.

via

[8] *Rogers v Whitaker* (1992) 175 CLR 479 at 490 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ .

Reeves v The Queen [2013] HCA 57 -
Reeves v The Queen [2013] HCA 57 -
Reeves v The Queen [2013] HCA 57 -
Reeves v The Queen [2013] HCA 57 -
Reeves v The Queen [2013] HCA 57 -
Woodcroft-Brown v Timbercorp Securities Ltd [2013] VSCA 284 -
Paul v Cooke [2013] NSWCA 311 -
Paul v Cooke [2013] NSWCA 311 -
Paul v Cooke [2013] NSWCA 311 -
Cox v Fellows [2013] NSWCA 206 (09 July 2013) (Basten, Ward and Gleeson JJA)

164. The appellant's submissions acknowledged that the question of breach of duty is a matter for the Court, which is not bound by the opinion of the experts. It was submitted however that in the circumstances of this case the expert evidence should have had an influential, indeed a decisive role to play on the question of breach. See *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 at 487 ; *Rosenberg v Percival* [2001] HCA 18; (2001) 205 CLR 434 at 454.

Wallace v Kam [2013] HCA 19 (08 May 2013) (French CJ, Crennan, Kiefel, Gageler and Keane JJ)

8. The common law duty of a medical practitioner to a patient is a single comprehensive duty to exercise reasonable care and skill in the provision of professional advice and treatment [2] . A component of that single comprehensive duty is ordinarily to warn the patient of "material risks" of physical injury inherent in a proposed treatment [3] . A risk of physical injury inherent in a proposed treatment is material if it is a risk to which a reasonable person in the position of the patient would be likely to attach significance, or if it is a risk to which the medical practitioner knows or ought reasonably to know the particular patient would be likely to attach significance in choosing whether or not to undergo a proposed treatment [4] . The component of the duty of a medical practitioner that ordinarily requires the medical practitioner to inform the patient of material risks of physical injury inherent in a proposed treatment is founded on the underlying common law right of the patient to choose whether or not to undergo a proposed treatment. In imposing that component of the duty, the common law recognises not only the right of the patient to choose but the need for the patient to be adequately informed in order to be able to make that choice rationally. The policy underlying the imposition of that component of the duty is to equip the patient with information relevant to the choice that is the patient's to make [5] . The duty to inform the patient of inherent material risks is imposed to enable the patient to choose whether or not to run those inherent risks and thereby "to avoid the occurrence of the particular physical injury the risk of which [the] patient is not prepared to accept" [6] .

via

[4] *Rogers v Whitaker* (1992) 175 CLR 479 at 490.

Wallace v Kam [2013] HCA 19 -
Wallace v Kam [2013] HCA 19 -
Wallace v Kam [2013] HCA 19 -
Wallace v Kam [2013] HCA 19 -
Fry v Keating [2013] WASCA 109 -
Fry v Keating [2013] WASCA 109 -
Alcock v Commonwealth [2013] FCAFC 36 -
Reeves v R; R v Reeves [2013] NSWCCA 34 -
Reeves v R; R v Reeves [2013] NSWCCA 34 -
Reeves v R; R v Reeves [2013] NSWCCA 34 -
Reeves v R; R v Reeves [2013] NSWCCA 34 -
Reeves v R; R v Reeves [2013] NSWCCA 34 -
Reeves v R; R v Reeves [2013] NSWCCA 34 -
Reeves v R; R v Reeves [2013] NSWCCA 34 -
Nojin v Commonwealth of Australia [2012] FCAFC 192 -
Nojin v Commonwealth of Australia [2012] FCAFC 192 -
Donnellan v Woodland [2012] NSWCA 433 (18 December 2012) (Beazley, Basten, Barrett and Hoeben JJA, Sackville AJA)

173. McHugh J, in commenting upon the importance of the finality of litigation noted, at [144], that:

> "... [a] successful claim of negligence against a practitioner depends on demonstrating that at least one outcome of the principal litigation was wrong"

and therefore, the possibility of inconsistent outcomes arose. His Honour noted that the appellate system was the place where a lower court decision, otherwise final, fell for correction: see *Giannarelli v Wraith* at 595 per Dawson J. McHugh J dismissed argument that *D'Orta-Ekenaike* was distinguishable from *Giannarelli v Wraith* on the basis that it involved a failure to warn in the *Rogers v Whitaker* sense. His Honour stated, at [157] :

> "The issue is whether the relevant connection with the conduct of the litigation exists, not the form of the negligence. An integral part of the advocate's role is the giving of advice on the basis of which the client will give instructions that direct the course of proceedings. The advice is critical to and often determinative of the client's decision. There is no relevant distinction between instructions given on negligent advice and the negligent carrying out of instructions if both are intimately connected with the conduct of litigation."

Donnellan v Woodland [2012] NSWCA 433 -
Donnellan v Woodland [2012] NSWCA 433 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Australian Capital Territory v Crowley [2012] ACTCA 52 -
Town of Port Hedland v Hodder (No 2) [2012] WASCA 212 -
Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 -
Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 -
Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 -
Keddie v Stacks/Goudkamp Pty Ltd [2012] NSWCA 254 -
Dean v Phung [2004] NSWCA 223 -
Dean v Phung [2004] NSWCA 223 -
Dean v Phung [2004] NSWCA 223 -
Wallace v Kam [2012] NSWCA 82 (13 April 2012) (Allsop P, Beazley and Basten JJA)

Considered: *Rogers v Whitaker* ; *Rosenberg v Percival*

Wallace v Kam [2012] NSWCA 82 (13 April 2012) (Allsop P, Beazley and Basten JJA)

6. The duty is that described by Mason CJ, Brennan J, Dawson J, Toohey J and McHugh J in *Rogers v Whitaker* [1992] HCA 58; 175 CLR 479 at 483 :

> "to exercise reasonable care and skill in the provision of professional advice and treatment ... [being] a 'single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment'; it extends to the examination, diagnosis and treatment of the patient and the provision of information in the appropriate case. It is of course necessary to give content to the duty in the given case."
>
> (Citations omitted.)

See also at 489:

> "Acceptance of this approach does not entail an artificial division or itemization of specific, individual duties, carved out of the overall duty of care. The duty of a medical practitioner to exercise reasonable care and skill in the provision of advice and treatment is a single comprehensive duty."

Wallace v Kam [2012] NSWCA 82 (13 April 2012) (Allsop P, Beazley and Basten JJA)

138. That factual circumstance did not arise for consideration in the trilogy of High Court authority: *Rogers v Whitaker* , *Chappel v Hart* and *Rosenberg v Percival* , in which the parties respectively sought to find the principle which should govern such a case. In my opinion, the

references in those cases to the undisclosed risk materialising does not preclude, as a matter of principle, the existence of a causative link to the harm suffered, when an undisclosed risk, being one of two or more material risks, does not materialise.

Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
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Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Wallace v Kam [2012] NSWCA 82 -
Nigam v Harm (No 2) [2011] WASCA 221 (18 October 2011) (McLure P, Newnes JA, Murphy JA)

247. As to the materiality of the risk, the client was anxious and distressed with her pain and she had reasonable prospects of persuading a court that a reasonable person in her position, if warned, would be likely to attach significance to a procedure involving a risk of injury via nerve entrapment, and further pain on that account: ***Rogers v Whitaker*** (490).

Nigam v Harm (No 2) [2011] WASCA 221 -
Nigam v Harm (No 2) [2011] WASCA 221 -
Nigam v Harm (No 2) [2011] WASCA 221 -
Nigam v Harm (No 2) [2011] WASCA 221 -
Nigam v Harm (No 2) [2011] WASCA 221 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 (27 September 2011) (Margaret McMurdo P and Margaret Wilson AJA and Martin J)

136. The appellant also submitted that the duty of a medical practitioner (as enunciated in *Rogers v Whitaker*) is to warn a patient of a material risk inherent in the proposed treatment. But, in this case, his Honour was dealing with another area of the duty described in *Rogers v Whitaker* . He was concerned with the "duty ... to exercise ... skill and judgment' [in] the provision of information in an appropriate case." [85] The learned trial judge's reasoning was conditioned by the statement in that authority[86] that: "There is a fundamental difference between, on the one hand, diagnosis and treatment and, on the other hand, the provision of advice or information to a patient." The information which his Honour held should have been given to Ms Papa was with respect to her particular problem and with whom she should consult. The duty held to exist did not include a requirement for SNPL to advise on a particular treatment but to recommend that alternative forms of anti-coagulation be investigated. This is advice of a different nature to advice such as recommending a particular course of treatment.

Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
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Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Sullivan Nicolaides Pty Ltd v Papa [2011] QCA 257 -
Doolan v Renkon Pty Ltd [2011] TASFC 4 (24 August 2011) (Crawford CJ, Blow and Porter JJ)

Rogers v Whitaker (1992) 175 CLR 479 ; *Carradine Properties Pty Ltd v D J Freeman & Co* (1982) 126 SJ 157; *National Home Loans Corporation v Giffen Couch & Archer* [1998] 1 WLR 207; *Austrust Pty Ltd v Astley* (1993) 60 SASR 354, referred to.
Aust Dig Professions and Trades [1175]

Doolan v Renkon Pty Ltd [2011] TASFC 4 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Fugro Spatial Solutions Pty Ltd v Cifuentes [2011] WASCA 102 -
Palios Meegan & Nicholson Holdings Pty Ltd v Shore [2010] SASCFC 21 -
Palios Meegan & Nicholson Holdings Pty Ltd v Shore [2010] SASCFC 21 -
Palios Meegan & Nicholson Holdings Pty Ltd v Shore [2010] SASCFC 21 -
Palios Meegan & Nicholson Holdings Pty Ltd v Shore [2010] SASCFC 21 -
Erwin v Iveco Trucks Australia Ltd [2010] NSWCA 113 -
Erwin v Iveco Trucks Australia Ltd [2010] NSWCA 113 -
McLennan v McCallum [2010] WASCA 45 -
McLennan v McCallum [2010] WASCA 45 -
Hammond v Heath [2010] WASCA 6 (19 January 2010) (Martin CJ, Owen JA, Miller JA)

33. As I have foreshadowed, Mr Hammond's case with respect to the alleged duty to warn really comes down to the proposition that prior to conducting the surgery on 28 August 2001, Mr Heath should have advised him of the various decisions that might have to be taken during the course of surgery, such as whether the condition of his bowel was such that extending the surgery to remove the mesh was appropriate, and sought his views as to how such decisions should be taken should the occasion arise. The duty of care recognised in ***Rogers v Whitaker*** was a duty to warn of the risks if a surgical procedure is undertaken, and which are inherent in that procedure, in order that the patient may make an informed decision about whether to undertake the procedure. It is not a duty to delegate to the patient the responsibility for deciding, in advance of the surgery, the course that should be followed when any of the many contingencies which might arise during a surgical procedure eventuate.

Hammond v Heath [2010] WASCA 6 -
Hammond v Heath [2010] WASCA 6 -
Hammond v Heath [2010] WASCA 6 -
Hammond v Heath [2010] WASCA 6 -
Hammond v Heath [2010] WASCA 6 -
Basha v Vocational Capacity Centre Pty Ltd [2009] NSWCA 409 -
Basha v Vocational Capacity Centre Pty Ltd [2009] NSWCA 409 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Drexel London (a firm) v Gove (Blackman) [2009] WASCA 181 -
Sydney South West Area Health Service v MD [2009] NSWCA 343 -
Sydney South West Area Health Service v MD [2009] NSWCA 343 -
Juengling v Wells [2009] WASCA 125 (17 July 2009) (McLure JA)

60. In ***Rogers v Whitaker*** , the court held that the *Bolam* principle (***Bolam v Friern Hospital Management Committee*** [1957] 1 WLR 582) does not apply in Australia. The *Bolam* principle provides that a doctor is not negligent if he or she 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. However, evidence of professional medical practice and opinion remains relevant to the issue of whether there has been a breach of duty but does not dictate the outcome. As stated by the High Court in ***Rogers v Whitaker*** :

> [W]hile evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care (487).

Juengling v Wells [2009] WASCA 125 (17 July 2009) (McLure JA)

59. That is not an accurate statement of the law. It is not the case that because the risk of harm is reasonably foreseeable and reasonably preventable that a finding of negligence must follow. It is necessary to ask the further question of whether the appellant's failure to eliminate or reduce the relevant risk showed a want of reasonable care and skill in the provision of specialist anaesthetic services: ***Tame v New South Wales*** (2002) 211 CLR 317 [98] [99] (McHugh J); ***Rogers v Whitaker*** (1992) 175 CLR 479, 483.

Juengling v Wells [2009] WASCA 125 -
Juengling v Wells [2009] WASCA 125 -
Juengling v Wells [2009] WASCA 125 -
Gett v Tabet [2009] NSWCA 76 -
Gett v Tabet [2009] NSWCA 76 -
Gett v Tabet [2009] NSWCA 76 -
Hookey v Paterno [2009] VSCA 48 (19 March 2009) (Nettle, Redlich and Neave JJA)

332. Counsel also submitted that her Honour had not taken sufficient account of the problem of hindsight bias in weighing Mrs Paterno's evidence. In support of that submission, he referred to Kirby J's discussion in *Chappel v Hart* [101] of the difficulties in ascertaining a particular patient's subjective response if they had been warned of relevant risks. Kirby J remarked that

> [t]he subjective criterion involves the danger of the 'malleability of the recollection' even of an upright witness. [102] Once a disaster has occurred, it would be rare, at least where litigation has commenced, that a patient would not be persuaded, in his or her own mind, that a failure to warn had significant consequences for undertaking the medical procedure at all [103] (where it was elective) or for postponing it and getting a more experienced surgeon (as in this case). [104]

via

[103] As in *Rogers v Whitaker* (1992) 175 CLR 479 and *Ellis v Wallsend District Hospital* (1989) 17 NSWLR 553.

Hookey v Paterno [2009] VSCA 48 (19 March 2009) (Nettle, Redlich and Neave JJA)

108. With respect, we agree. As the High Court said in *Rogers v Whitaker* , [19] in Australia the standard of care to be observed by a skilled professional is that of the ordinary skilled person exercising and professing to have that special skill. But that standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession; even though, in the area of diagnosis and treatment, it will often have an 'influential or decisive role to play'. [20] While evidence of acceptable professional practice is a useful guide, it is for the court to adjudicate on what is the appropriate standard of care, after giving weight to the paramount consideration that a person is entitled to make his or her own decisions about his or her life.

via

[19] (1992) 175 CLR 479 , 487.

Hookey v Paterno [2009] VSCA 48 (19 March 2009) (Nettle, Redlich and Neave JJA)

244. *Ainsworth v Levi*[66] does not assist Mr Hookey. In that case, the plaintiff appealed against the trial judge's decision to withdraw some questions of fact from the jury, and to direct the jury in relation to other questions of fact that if the defendant could show that there was a reputable body of opinion supporting his advice and the jury accepted that was the case, they could not find for the plaintiff. As Mahoney JA stated on appeal, the trial judge's jury direction was not a direction as to the principle of law in *Rogers v Whitaker* , but a direction as to the effect of the evidence and the issues of fact which had emerged at the trial. [67]

Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Hookey v Paterno [2009] VSCA 48 -
Kerr v Minister for Health [2009] WASCA 32 -
Kerr v Minister for Health [2009] WASCA 32 -
Kerr v Minister for Health [2009] WASCA 32 -
Kerr v Minister for Health [2009] WASCA 32 -
Rooke v Minister for Health [2009] WASCA 27 (30 January 2009) (Wheeler JA; Buss JA; Miller JA)

Rogers v Whitaker [1992] HCA 58 ; (1992) 175 CLR 479

Rooke v Minister for Health [2009] WASCA 27 (30 January 2009) (Wheeler JA; Buss JA; Miller JA)

42. As Gummow J observed in ***Rosenberg v Percival*** [2001] HCA 18; (2001) 205 CLR 434, 'in cases of a medical practitioner's failure to warn, the extent or severity of the potential injury is of great importance in applying the test in ***Rogers*** of "likely to attach significance to", as is the likelihood of the injury actually occurring' [77]. His Honour then said:

> These two matters, the extent or severity of the potential injury and the likelihood of it coming to pass, are to be considered together. A slight risk of a serious harm might satisfy the test, while a greater risk of a small harm might not. It is also important to note that, in considering the severity of the potential injury, that severity is judged with reference to the plaintiff's position. Thus, the risk of blindness in one eye would ordinarily be considered serious; if however, as in ***Rogers*** , the patient is already blind in one eye and stands to lose sight entirely, that risk becomes one of an altogether greater magnitude.
>
> These considerations need to be weighed against the circumstances of the patient. The patient's need for the operation is important, as is the existence of reasonably available and satisfactory alternative treatments. A patient may be more likely to attach significance to a risk if the procedure is elective rather than life saving. As will be seen, these factors merge with the issue of causation.
>
> The second, or subjective, limb of the test in ***Rogers*** for material risk requires further discussion. The second limb recognises that the particular patient may not be a 'reasonable' one; he or she may have a number of 'unreasonable' fears or concerns. These will be given full weight under the second limb if the medical practitioner was or should have been aware of them. One way of satisfying that condition is if the patient asked questions revealing the fear or concern. However, that is not the only means of satisfying the second limb. There are a multitude of potential circumstances in which a court might find that the medical practitioner should have

known of a particular fear or concern held by the patient. Courts should not be too quick to discard the second limb merely because it emerges that the patient did not ask certain kinds of questions.

The phrase 'likely to attach significance to' as it appears in both limbs does not present a threshold issue of the same nature as that presented by the issue of causation. In the authorities, reference has been made to 'information that is relevant to a decision or course of action' (*Rogers v Whitaker* (1992) 175 CLR 479 at 494 per Gaudron J) and 'matters which might influence the [decision]' (*F v R* (1983) 33 SASR 189 at 192 per King CJ). It is not necessary when determining materiality of risk to establish that the patient, reasonable or otherwise, would not have had the treatment had he or she been warned of the risk in question. The test is somewhat lower than that. However, it is necessary that the reasonable patient or particular patient respectively would have been likely seriously to consider and weigh up the risk before reaching a decision on whether to proceed with the treatment. The authorities referred to above should be read in that way [77] [80].

Rooke v Minister for Health [2009] WASCA 27 -
Rooke v Minister for Health [2009] WASCA 27 -
Rooke v Minister for Health [2009] WASCA 27 -
Rooke v Minister for Health [2009] WASCA 27 -
Rooke v Minister for Health [2009] WASCA 27 -
Marko v Falk [2008] NSWCA 293 (10 November 2008) (McColl JA; Campbell JA; Bell JA)

79. In my view the appellant has not demonstrated any error on the primary judge's part in dealing with the issue of liability. In my view this was a case where the plurality view in *Rogers v Whitaker* as to the often decisive role professional opinion may play has strong resonance.

Marko v Falk [2008] NSWCA 293 (10 November 2008) (McColl JA; Campbell JA; Bell JA)

19. The primary judge referred to the duty the respondent owed the appellant, whether expressed in tort or as breach of an implied term of contract, as stated in *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 (at 483):

"The law imposes on a medical practitioner a duty to exercise reasonable care and skill in the provision of professional advice and treatment. That duty is a 'single comprehensive duty covering all the ways in which a doctor is called upon to exercise his skill and judgment'; it extends to the examination, diagnosis and treatment of the patient and the provision of information in an appropriate case. It is of course necessary to give content to the duty in the given case.

The standard of reasonable care and skill required is that of the ordinary skilled person exercising and professing to have that special skill ..."

Marko v Falk [2008] NSWCA 293 -
Marko v Falk [2008] NSWCA 293 -
Marko v Falk [2008] NSWCA 293 -
Marko v Falk [2008] NSWCA 293 -
Marko v Falk [2008] NSWCA 293 -
Marko v Falk [2008] NSWCA 293 -
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Marko v Falk [2008] NSWCA 293 -
Marko v Falk [2008] NSWCA 293 -
Marko v Falk [2008] NSWCA 293 -
Imbree v McNeilly [2008] HCA 40 -
Hassan v The Minister for Health [No 2] [2008] WASCA 149 -
Hassan v The Minister for Health [No 2] [2008] WASCA 149 -
Leland & Seward [2008] FamCAFC 82 -
Jaber v Rockdale City Council [2008] NSWCA 98 -
Dobler v Halverson [2007] NSWCA 335 (26 November 2007) (Giles JA at 1; Ipp JA at 138; Basten JA at 139)

58 The *Bolam* principle was rejected in *Rogers v Whitaker* in relation to disclosure of risk and provision of advice and information, and it was said more generally that the standard of care to be observed by a person with some special skill and competence is "not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade" (at 487 per Mason CJ, Brennan, Dawson, Toohey and McHugh JJ ; see also per Gaudron J at 493 that even in the area of diagnosis and treatment there is no legal basis for limiting liability in terms of "the *Bolam* test"). The court determined the standard of care, although evidence of acceptable medical practice was "a useful guide" (at 487) and responsible professional opinion could "have an influential, often a decisive, role to play" (at 489).

Dobler v Halverson [2007] NSWCA 335 (26 November 2007) (Giles JA at 1; Ipp JA at 138; Basten JA at 139)
Rogers v Whitaker (1992) 175 CLR 479 ;

Dobler v Halverson [2007] NSWCA 335 -
Amaca Pty Ltd v AB & P Constructions Pty Ltd [2007] NSWCA 220 (29 August 2007) (Giles JA; Ipp JA ; Basten JA)

111. *Rogers v Whitaker* (1992) 175 CLR 479 is another case where the terms of the warning and how it should have been given were simple, and required little in the way of a *Shirt* evaluation. In that case, the High Court held merely that the respondent should have been warned of the risk of damage by sympathetic ophthalmia to her good eye.

C v Sheepvaartonderneming Ankergracht v Stemcor (A/sia) Pty Limited [2007] FCAFC 77 -
C v Sheepvaartonderneming Ankergracht v Stemcor (A/sia) Pty Limited [2007] FCAFC 77 -
Lanzer & Anor v Patterson [2007] VSCA 45 (22 March 2007) (Warren CJ, Buchanan and Ashley JJA)

63. There is, I think, a real question whether the principles concerning duty and breach which were framed in *Rogers* and expanded upon by Gummow J in *Rosenberg*,*[31]* and the principles concerning causation which were analysed in *Chappel* and *Rosenberg* (only for sake of convenience, acknowledging a want of accuracy, I shall refer to them as "the *Rosenberg* analys es") could apply by direct analogy to a case where a patient, having agreed with Dr A that he will conduct a procedure, it being important to the patient that the doctor do so, is not told by Dr A that Dr B will perform a substantial part of that procedure - Dr B being unknown to the patient, and it being plain that the patient would not have undergone the procedure had he or she known of Dr B's intended involvement.

Lanzer & Anor v Patterson [2007] VSCA 45 -
Lanzer & Anor v Patterson [2007] VSCA 45 -
Lanzer & Anor v Patterson [2007] VSCA 45 -
Lanzer & Anor v Patterson [2007] VSCA 45 -
Brock v Hillsdale Bowling and Recreation Club Ltd [2007] NSWCA 46 -
Brock v Hillsdale Bowling and Recreation Club Ltd [2007] NSWCA 46 -
Ohlstein v E & T Lloyd [2006] NSWCA 226 -
Ohlstein v E & T Lloyd [2006] NSWCA 226 -
Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd [2006] NSWCA 356 -
Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd [2006] NSWCA 356 -
Seltsam Pty Ltd v Mcneill [2006] NSWCA 158 -
Micallef v Minister for Health of the State of Western Australia [2006] WASCA 98 -
The Finance Brokers Supervisory Board v Van Stokkum [2006] WASCA 97 -
The Finance Brokers Supervisory Board v Van Stokkum [2006] WASCA 97 -
Elbourne v Gibbs [2006] NSWCA 127 -
Elbourne v Gibbs [2006] NSWCA 127 -
Elbourne v Gibbs [2006] NSWCA 127 -
Elbourne v Gibbs [2006] NSWCA 127 -
Elbourne v Gibbs [2006] NSWCA 127 -
Harriton v Stephens [2006] HCA 15 -
Harriton v Stephens [2006] HCA 15 -

Harriton v Stephens [2006] HCA 15 -
Ambulance Service of NSW v Worley [2006] NSWCA 102 (03 May 2006) (Tobias, McColl and Basten JJA)
Rogers v Whitaker (1992) 175 CLR 479
Willett v Futcher

Ambulance Service of NSW v Worley [2006] NSWCA 102 (03 May 2006) (Tobias, McColl and Basten JJA)

37 Indeed, as counsel for the Appellant pointed out in the course of argument, it would be wrong to read too much into the dictum with respect to diagnosis and treatment set out at [32] above. In a passage at p 489, dealing with breach of the requisite standard of care, the joint judgment in *Rogers* noted that there is "a fundamental difference between, on the one hand, diagnosis and treatment and, on the other hand, the provision of advice or information to a patient". Their Honours continued:

> " *Whether* a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play; *whether* the patient has been given all the relevant information to choose between undergoing or not undergoing the treatment is a question of a different order. Generally speaking, it is not a question the answer to which depends upon medical standards or practices." (Emphasis in original.)

Ambulance Service of NSW v Worley [2006] NSWCA 102 (03 May 2006) (Tobias, McColl and Basten JJA)

36 To say that the reasonableness of diagnosis and treatment in a particular case is not to be determined solely or even primarily by reference to accepted practice may tend to mislead, unless the phrase "accepted practice" is further analysed. The principle that accepted practice is not determinative of a standard may be accepted. The parties are entitled to call evidence as to the basis of accepted practice and as to developments in medical science which may call that practice into question. Thus, a distinction may need to be drawn between the medical science which underpins a practice and the practice itself. Medical science will, in many cases, be the primary point of reference in determining the appropriate standard: see *Rogers* , 175 CLR at 492-493 (Gaudron J). The role for "simple common sense", to which her Honour referred at p 493 , may be different in relation to questions of causation from its role in relation to the duty of care. Common sense may be coloured by specialist knowledge and experience. It is necessary for a person without medical training to guard against an opinionated judgment which flies in the face of expert opinion, even where the expert is unable to articulate with precision the basis for his or her conclusions.

Ambulance Service of NSW v Worley [2006] NSWCA 102 -
Ambulance Service of NSW v Worley [2006] NSWCA 102 -
Ambulance Service of NSW v Worley [2006] NSWCA 102 -
Ambulance Service of NSW v Worley [2006] NSWCA 102 -
Ambulance Service of NSW v Worley [2006] NSWCA 102 -
Ambulance Service of NSW v Worley [2006] NSWCA 102 -
Fallas v Mourlas [2006] NSWCA 32 -
Fallas v Mourlas [2006] NSWCA 32 -
Fallas v Mourlas [2006] NSWCA 32 -
Fallas v Mourlas [2006] NSWCA 32 -
Fallas v Mourlas [2006] NSWCA 32 -
Fallas v Mourlas [2006] NSWCA 32 -
Falvo v Australian Oztag Sports Association [2006] NSWCA 17 -
South Eastern Sydney Area Health Service v King [2006] NSWCA 2 -
South Eastern Sydney Area Health Service v King [2006] NSWCA 2 -
South Eastern Sydney Area Health Service v King [2006] NSWCA 2 -
South Eastern Sydney Area Health Service v King [2006] NSWCA 2 -

South Eastern Sydney Area Health Service v King [2006] NSWCA 2 -
Jeffrey v Witherow [2006] WASCA 4 -
Wilkins v Council of the City of Broken Hill [2005] NSWCA 468 -
Wilkins v Council of the City of Broken Hill [2005] NSWCA 468 -
Forder v Hutchinson [2005] VSCA 281 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Mulligan v Coffs Harbour City Council [2005] HCA 63 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Vairy v Wyong Shire Council [2005] HCA 62 -
Syd Matthews & Co Pty Ltd v Cavanagh [2005] WASCA 178 (19 September 2005) (Wheeler and Roberts-Smith JJA; Miller AJA)

50 Counsel for the appellant relies upon ***Chappel v Hart*** (1998) 195 CLR 232 per McHugh J at [34] , where it was said:

> "The foregoing observations lead me to the following conclusions concerning whether a causal connection exists between a defendant's failure to warn of a risk of injury and the subsequent suffering of injury by the plaintiff as a result of the risk eventuating:
>
> (1) a causal connection will exist between the failure and the injury if it is probable that the plaintiff would have acted on the warning and desisted from pursuing the type of activity or course of conduct involved; (*Rogers* (1992) 175 CLR 479 ; 109 ALR 625 ; *Nagle* (1993) 177 CLR 423; 112 ALR 393);
>
> (2) no causal connection will exist if the plaintiff would have persisted with the same course of action in comparable circumstances even if a warning had been given; (*Qant as Airways Ltd v Cameron* (1996) 66 FCR 246 at 293 - 4; 145 ALR 294; *Daniels v Anderson* (1995) 37 NSWLR 438 at 528);
>
> ...
>
> (6) the onus of proving that the failure to warn was causally connected with the plaintiff's harm lies on the plaintiff. However, once the plaintiff proves that the defendant breached a duty to warn of a risk and that the risk eventuated and caused harm to the plaintiff, the plaintiff has made out a prima facie case of causal connection. An evidentiary onus then rests on the defendant to point to other evidence suggesting that no causal connection exists. Examples of such evidence are: evidence which indicates that the plaintiff would not have acted on the warning because of lack of choice or personal inclination; evidence that no alternative course of action would have eliminated or reduced the risk of injury. Once the defendant points to such evidence, the onus lies on the plaintiff to prove that in all the circumstances a causal connection existed between the failure to warn and the injury suffered by the plaintiff."

(Page 23)

Syd Matthews & Co Pty Ltd v Cavanagh [2005] WASCA 178 (19 September 2005) (Wheeler and Roberts-Smith JJA; Miller AJA)
Rogers v Whitaker (1992) 175 CLR 479
Sutherland Shire Council v Heyman

Syd Matthews & Co Pty Ltd v Cavanagh [2005] WASCA 178 -
Stanilite Pacific Ltd (in Liq) v Seaton [2005] NSWCA 301 -

Strempel v Wood [2005] WASCA 163 -
Strempel v Wood [2005] WASCA 163 -
Strempel v Wood [2005] WASCA 163 -
Strempel v Wood [2005] WASCA 163 -
Atlantis Properties P/L v Cameron [2005] QCA 297 -
Atlantis Properties P/L v Cameron [2005] QCA 297 -
Povey v Qantas Airways Ltd [2005] HCA 33 (23 June 2005) (Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

177. The appellant challenged what he suggested was the undue deference exhibited by the United States cases towards the determinations by carriers themselves (or their regulatory agency) of the standard to constitute "the usual, normal, and expected operation of the aircraft" [183] . Thus, the appellant suggested that it was a mistake to deny the existence of an "accident" simply because airlines, in adopting the configuration of their seating arrangements, food and beverage services, public announcements and provision of written and oral warnings about DVT, had complied with industry practice at a given time (or even with any requirements of government agencies that then prevailed). The appellant suggested that inherent in this approach was a view that it could be left to the carriers themselves, or their regulatory bodies, to determine their *own* liability for "accidents". This, the appellant said, was incompatible with the imposition of the objective standard of the Warsaw Convention which judged whether an "accident" had occurred objectively and not whether it had occurred according to the views and practices of the relevant carriers, carriers generally or their regulatory agencies. This submission had resonances with the earlier rejection by this Court, in the context of liability for negligence at common law, of the earlier law that exempted medical practitioners from liability in negligence if they conformed to "a practice accepted at the time as proper by a responsible body of medical opinion even though other doctors adopt a different practice" [184] .

via

[184] *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871 at 881 per Lord Scarman, describing the so-called *Bolam* test: see *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582 at 586-587; [1957] 2 All ER 118 at 121, disapproved in *Rogers v Whitaker* (1992) 175 CLR 479 at 484.

Povey v Qantas Airways Ltd [2005] HCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 (21 April 2005) (Spigelman CJ, Sheller and Santow JJA)
Rogers v Whitaker (1992) 175 CLR 479
Romeo v Conservation Commission of the Northern Territory

Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
Hunter Area Health Service v Presland [2005] NSWCA 33 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
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D'Orta-Ekenaike v Victoria Legal Aid [2005] HCA 12 -
Rufo v Hosking [2004] NSWCA 391 (01 November 2004) (Hodgson and Santow JJA, Campbell AJA)

162 Mr Brereton SC who appeared with Dr K Sant of counsel for the appellant, after referring to the uncontroversial proposition that ultimately it is for the court and not the professional witnesses to be the arbiter of what reasonable care requires, *Rogers v Whitaker* (1992) 175 CLR 479 , referred to some observations of McHugh J in *Naxakis v Western General Hospital* (1999) 197 CLR 269.

Rufo v Hosking [2004] NSWCA 391 -
Rufo v Hosking [2004] NSWCA 391 -
Chester v Afshar [2004] UKHL 41 -
Chester v Afshar [2004] UKHL 41 -
Sheppard v Swan [2004] WASCA 215 (22 September 2004) (Malcolm CJ, McLure J, EM Heenan J)

111. In my view, the major issue in the appeal arises from the submission of the appellant that, in the circumstances which arose on the afternoon of 9 August 1998, the respondent came under a duty, from about 1630 hours, or possibly a little earlier, to inform the appellant of the availability of the alternative of caesarean section delivery and to offer her an opportunity to choose this despite the fact that it was not then clinically indicated or required in the interests of the baby. The law relating to a doctor's obligation to disclose to a patient, in advance of any voluntary procedure, risks which may be material to that particular patient in order for him or her to decide whether or not to proceed with the contemplated treatment is set out in ***Rogers v Whitaker*** (1992) 175 CLR 479 and in ***Rosenberg v Percival*** (*supra*) but neither of those decisions, nor any associated analysis of the professional obligation, goes on directly to address the situation which arose in this case. The question here is whether or not, in the midst of a procedure or in evolving process such as the second stage of labour, those principles apply, or apply to the same extent, as they do when no treatment has begun or when no process requiring professional judgment and intervention is already underway.

Sheppard v Swan [2004] WASCA 215 (22 September 2004) (Malcolm CJ, McLure J, EM Heenan J)

39. In support of the pleaded duty, the appellant relies by way of analogy on the duty to warn principle contained in a line of High Court decisions starting with ***Rogers v Whitaker*** (1992) 175 CLR 479. The ***Rogers v Whitaker*** principle is that a medical practitioner has a duty of care to warn a patient of a material risk inherent in a proposed treatment. A risk may be objectively material or subjectively material. A risk is objectively material because a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it. It is subjectively material if the doctor is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it (usually because of questions asked or reassurances sought). The Court criticised the phrase "informed consent" as apt to mislead.

Sheppard v Swan [2004] WASCA 215 (22 September 2004) (Malcolm CJ, McLure J, EM Heenan J)

112. No doubt the principles contained in ***Rogers v Whitaker*** (*supra*), ***Rosenberg v Percival*** (*supra*) and other cases dealing with the need for informed consent are capable of applying in part to situations where treatment is already underway, such as, perhaps, in the case of an ongoing regime of radio therapy or chemotherapy for the eradication of malign tumours; or in the progressive treatment for chronic conditions such as diabetes; various types of wasting neurological disease; or cardiopulmonary problems. When sufficient time and opportunity are available it is no doubt necessary for an attending physician or other doctor to explain the varieties of treatment or therapy which are open and considered suitable for the particular condition and to explain the advantages and disadvantages of the preferred regime which the doctor is recommending and, if they be considered at all material in the ***Rogers v Whitaker*** (*supra*) sense, to offer and explain other available options of treatment.

Sheppard v Swan [2004] WASCA 215 (22 September 2004) (Malcolm CJ, McLure J, EM Heenan J)

41. However, evidence of professional medical practice and opinion remains relevant to the issue of whether there has been a breach of duty (***Rosenberg v Percival*** (2001) 205 CLR 434 per Gleeson CJ at 439) but does not dictate the outcome. The modern duty to warn principles and the rejection of ***Bolam*** involve a departure from medical paternalism in favour of patient autonomy. As put by the High Court in ***Rogers v Whitaker*** (at 487):

> " ... while evidence of acceptable medical practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care after giving weight to 'the paramount consideration that a person is entitled to make his own decisions about his life'."

The duty to warn will not apply, or its content may vary, in the event of a medical emergency or because of socalled "therapeutic privilege" in which event, the onus is on the doctor to prove that performance of the duty would be damaging to the particular patient. Further, the duty to warn is a specific manifestation of the single comprehensive duty on medical practitioners to exercise reasonable care and skill in the provision of professional advice and treatment which extends to examination, diagnosis, treatment and the provision of information in an appropriate case (***Rogers v Whitaker*** at 483). It is proper to bear this in mind in light of the High Court's more recent warnings against formulating a duty of care in terms that are too specific: ***Graham Barclay Oysters Pty Ltd v Ryan*** (2002) 211 CLR 540.

Sheppard v Swan [2004] WASCA 215 -
Sheppard v Swan [2004] WASCA 215 -
Sheppard v Swan [2004] WASCA 215 -
Sheppard v Swan [2004] WASCA 215 -
Sheppard v Swan [2004] WASCA 215 -
Sheppard v Swan [2004] WASCA 215 -
Sheppard v Swan [2004] WASCA 215 -
McDonald v Girkaid Pty Ltd [2004] NSWCA 297 -
McDonald v Girkaid Pty Ltd [2004] NSWCA 297 -
McDonald v Girkaid Pty Ltd [2004] NSWCA 297 -
McDonald v Girkaid Pty Ltd [2004] NSWCA 297 -
Srna v The Medical Board of Western Australia [2004] WASCA 198 (27 August 2004) (Pullin J)

43. These views of Ipp J in ***Cranley's*** case, based as they were on ***Bolam's*** case, were expressed before the pronouncements of the High Court on the subject. ***Bolam's*** case does not now contain a correct statement of the law in Australia. In ***Rogers v Whitaker*** (1992) 175 CLR 479 (w hich was a case of a doctor giving advice) the High Court held that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. The High Court held that the standard is not determined solely or even primarily by reference to the practice followed or supported by a responsible body of opinion in the relevant profession or trade: see 487. It was said on the same page that "[e]ven in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the *Bolam* principle has not always been applied." For a time after ***Rogers v Whitaker*** there was a question about whether it should be confined to cases of doctors giving advice. However, ***Rogers v Whitaker*** was applied to a case of misdiagnosis in ***N axakis v Western General Hospital & Anor*** (1999) 197 CLR 269.

Srna v The Medical Board of Western Australia [2004] WASCA 198 (27 August 2004) (Pullin J)

43. These views of Ipp J in ***Cranley's*** case, based as they were on ***Bolam's*** case, were expressed before the pronouncements of the High Court on the subject. ***Bolam's*** case does not now contain a correct statement of the law in Australia. In ***Rogers v Whitaker*** (1992) 175 CLR 479 (which was a case of a doctor giving advice) the High Court held that the standard of care to be observed by a person with some special skill or competence is that of the ordinary skilled person exercising and professing to have that special skill. The High Court held that the standard is not determined solely or even primarily by reference to the practice followed or

supported by a responsible body of opinion in the relevant profession or trade: see 487. It was said on the same page that "[e]ven in the sphere of diagnosis and treatment, the heartland of the skilled medical practitioner, the *Bolam* principle has not always been applied." For a time after ***Rogers v Whitaker*** there was a question about whether it should be confined to cases of doctors giving advice. However, ***Rogers v Whitaker*** was applied to a case of misdiagnosis in ***N axakis v Western General Hospital & Anor*** (1999) 197 CLR 269.

Srna v The Medical Board of Western Australia [2004] WASCA 198 -
Srna v The Medical Board of Western Australia [2004] WASCA 198 -
Srna v The Medical Board of Western Australia [2004] WASCA 198 -
Mustac v Medical Board of Western Australia [2004] WASCA 156 (27 July 2004) (Simmonds J)

99 I should add in this connection that Senior Counsel for the Board conceded before me that the authorities since ***Cranley*** on the use of expert evidence in relation to the issue of medical negligence, at least of some sorts, ***Rogers v Whitaker*** (1992) 175 CLR 479 and ***Bolitho v City and Hackney Health Authority*** [1998] AC 232, to which the Board made reference in its Determination Decision, pars 181 and 182, did not detract from the authority of ***Cranley*** in this respect. This concession, which is to some extent at odds with the Board's view in its Determination Decision, was correctly made, in my view, as a distinction should be drawn for this purpose between the issue of negligence and that of conduct improper in a professional respect.

Mustac v Medical Board of Western Australia [2004] WASCA 156 (27 July 2004) (Simmonds J)
Rogers v Whitaker (1992) 175 CLR 479

(Page 3)

Wyong Shire Council v Vairy [2004] NSWCA 247 (27 July 2004) (Mason P, Beazley and Tobias JJA)
Rogers v Whitaker (1992) 175 CLR 479

Mustac v Medical Board of Western Australia [2004] WASCA 156 -
Mustac v Medical Board of Western Australia [2004] WASCA 156 -
Di Carlo v Dubois [2004] QCA 150 -
Di Carlo v Dubois [2004] QCA 150 -
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Di Carlo v Dubois [2004] QCA 150 -
Di Carlo v Dubois [2004] QCA 150 -
Olbourne v Wolf [2004] NSWCA 141 -
Olbourne v Wolf [2004] NSWCA 141 -
Huen v Hyland [2004] ACTCA 5 -
Huen v Hyland [2004] ACTCA 5 -
Harvey v PD [2004] NSWCA 97 -
Harvey v PD [2004] NSWCA 97 -
Harvey v PD [2004] NSWCA 97 -
State of New South Wales v Karen Therese Stevens [2003] NSWCA 298 -
State of New South Wales v Karen Therese Stevens [2003] NSWCA 298 -
State of New South Wales v Karen Therese Stevens [2003] NSWCA 298 -

Hoyts Pty Ltd v Burns [2003] HCA 61 -
Rogers v Nationwide News Pty Ltd [2003] HCA 52 (11 September 2003) (Gleeson CJ,Gummow, Hayne, Callinan and Heydon JJ)

89. The appellant appealed to the Court of Appeal of New South Wales. On 26 June 1991 the appellant's appeal was dismissed. That judgment was reported as *Rogers v Whitaker* [57] .

Rogers v Nationwide News Pty Ltd [2003] HCA 52 (11 September 2003) (Gleeson CJ,Gummow, Hayne, Callinan and Heydon JJ)

3. The first is a famous case in the law of professional negligence. It received wide publicity in the legal and medical professions, and was extensively reported in the general press, including publications of the respondent. The appellant was sued for damages by a patient, Mrs Whitaker. The case ultimately came to this Court under the name *Rogers v Whitaker* [2] . The importance of the case turned upon the aspect of the appellant's conduct which was held to involve a breach of his duty of care. Mrs Whitaker, who for many years had been almost totally blind in her right eye, consulted the appellant, who advised surgery on that eye. After the operation, she lost the sight of her left eye, without any improvement to the right eye. This was not the result of any lack of care or skill in the performance of the operation. The procedure that was undertaken involved an inherent risk, a risk said to occur only once in approximately 14,000 such procedures, of a development of sympathetic ophthalmia [3] . The appellant had failed to warn Mrs Whitaker of that possibility. He argued that, in so doing, he was acting in accordance with the standards of the medical profession generally; but the Court held that those standards were not determinative, that he should have warned the patient, and that he was liable to compensate her.

via

[3] (1992) 175 CLR 479 at 482.

Rogers v Nationwide News Pty Ltd [2003] HCA 52 (11 September 2003) (Gleeson CJ,Gummow, Hayne, Callinan and Heydon JJ)

108. The appellant appealed to this Court on grounds which reflected the issues that were joined on the pleadings as well as the issue upon which the majority in the Court of Appeal largely focussed:

> "2. The Court of Appeal erred in holding that the defence of fair protected report under s 24(3) of the Defamation Act 1974 (NSW) ('the Act') does not require those parts of the matter complained of giving rise to the defamatory imputation to be directly attributed to the proceedings in question.
>
> 3. The Court of Appeal erred in finding that it was clear on its face that the matter complained of was a report of the judgement of Hill J in *Whitaker v Commissioner of Taxation* [68] .
>
> 4. The Court of Appeal erred in finding that the matter complained of was a substantially accurate summary of the judgement of Hill J in *Whitaker v Commissioner of Taxation* [69] .
>
> 5. The Court of Appeal erred in finding that the judgment of Hill J conveyed the same imputation conveyed by the matter complained of.

6. The Court of Appeal erred in holding that the knowledge of the corporate publisher on the issues of absence of good faith under s 26 of the Act and malice is limited only to the knowledge of the publisher's servants or agents who were responsible for the content of the matter complained of.

7. The Court of Appeal erred in failing to find that the respondent knew of the falsity of the defamatory imputation conveyed by the matter complained of by reason of its earlier publications of the *Rogers v Whitaker* litigation.

8. The Court of Appeal erred in failing to find that the respondent was actuated by malice in publishing the matter complained of.

9. The Court of Appeal erred in failing to find that matter complained of was published in absence of 'good faith for public information' within s 26 of the Act .

10. The Court of Appeal erred in failing to find that the appellant was entitled to aggravated damages."

Dovuro Pty Ltd v Wilkins [2003] HCA 51 (11 September 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

120. In the past, in other areas of the law of negligence, this Court has insisted upon duties of notification to those affected of known risks to which they are exposed by the actions of others with superior knowledge [153] . The greater the risk, the higher the duty to notify. Involved in this principle is a respect for the autonomy of individuals to make informed decisions concerning their own interests when placed in a position of risk by the acts or omissions of others. Where there is potentially a high risk, as in the supply of imported seed into a vulnerable domestic farming area, the importer with technical and scientific expertise available to it, will be held to a high standard of care for, and of notification to, the growers who were necessarily reliant on being alerted to any unusual risks to which they are exposed.

via

[153] *Rogers v Whitaker* (1992) 175 CLR 479 ; *Chappel v Hart* (1998) 195 CLR 232; *Rosenberg v Percival* (2001) 205 CLR 434.

Rogers v Nationwide News Pty Ltd [2003] HCA 52 (11 September 2003) (Gleeson CJ,Gummow, Hayne, Callinan and Heydon JJ)

41. To identify how the issues about fair protected report arise it is necessary to refer to two other pieces of litigation – one, an action for damages brought by Mrs Whitaker against the appellant in the Supreme Court of New South Wales, and the other, proceedings in the Federal Court of Australia between Mrs Whitaker and the Commissioner of Taxation. In the first of those proceedings [19] , Mrs Whitaker sued the appellant for damages for negligence. On appeal to this Court [20] , it was held that the appellant was liable for failing to warn Mrs Whitaker of a material risk inherent in proposed operative treatment of her almost totally blind right eye. That risk, slight as it was, came to pass, through no fault of the appellant but, as a result, Mrs Whitaker became almost totally blind in both eyes. There was no question that the appellant conducted the operation with the required skill and care [21] .

via

[20] *Rogers v Whitaker* (1992) 175 CLR 479 .

Rogers v Nationwide News Pty Ltd [2003] HCA 52 -
Rogers v Nationwide News Pty Ltd [2003] HCA 52 -
Dovuro Pty Ltd v Wilkins [2003] HCA 51 -
Rogers v Nationwide News Pty Ltd [2003] HCA 52 -
Rogers v Nationwide News Pty Ltd [2003] HCA 52 -
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Rogers v Nationwide News Pty Ltd [2003] HCA 52 -
Rogers v Nationwide News Pty Ltd [2003] HCA 52 -
Rogers v Nationwide News Pty Ltd [2003] HCA 52 -
Capital Brake Service Pty Ltd v Meagher [2003] NSWCA 225 -
Cattanach v Melchior [2003] HCA 38 (16 July 2003) (Gleeson CJ,McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ)

> 190. The physical integrity of an individual's person and property has always been treated as of central importance in the law of negligence. Likewise the autonomy of the individual called on to make decisions affecting that physical integrity has been given great weight [310] . It is, then, not surprising that a doctor should owe his or her patient a duty to take reasonable care in carrying out procedures on the body of the patient, and a duty to take reasonable care in proffering advice about that treatment and its consequences. That a particular procedure is conducted at the patient's choice, rather than for an immediately identified therapeutic reason, leads to no different answer. The interest of the patient which is at stake in the events described is the patient's interest in physical integrity. The patient permits an invasion of that integrity only upon being sufficiently informed of what is to be done, why it is to be done and what are the consequences that will, or may, follow from it.

via

[310] *Rogers v Whitaker* (1992) 175 CLR 479 .

Voss v Suncorp-Metway Ltd [2003] QCA 252 -
Francis v Lewis [2003] NSWCA 152 -
Mouratidis v Brown [2002] FCAFC 330 -
Morel v Carroll [2002] WASCA 210 -
Morel v Carroll [2002] WASCA 210 -
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Morel v Carroll [2002] WASCA 210 -
Morel v Carroll [2002] WASCA 210 -
Morel v Carroll [2002] WASCA 210 -
Di Carlo v Dubois [2002] QCA 225 -
Di Carlo v Dubois [2002] QCA 225 -
State of Queensland (sued as the South Coast Regional Health Authority t/a Gold Coast Hospital) and ANOR. v Bloodworth [2002] NSWCA 134 -
State of Queensland (sued as the South Coast Regional Health Authority t/a Gold Coast Hospital) and ANOR. v Bloodworth [2002] NSWCA 134 -
State of Queensland (sued as the South Coast Regional Health Authority t/a Gold Coast Hospital) and ANOR. v Bloodworth [2002] NSWCA 134 -
State of Queensland (sued as the South Coast Regional Health Authority t/a Gold Coast Hospital) and ANOR. v Bloodworth [2002] NSWCA 134 -

Nationwide News Pty Ltd v Rogers [2002] NSWCA 71 (15 March 2002) (Mason P, Stein JA and Grove J)

56 The judgment of Hill J also recounted some aspects of the earlier litigation between Mrs Whitaker and Mr Rogers. That it was initially heard by Campbell J in the NSW Supreme Court (and where that decision was reported in the law reports). His Honour also referred to the result, a judgment for Mrs Whitaker in the sum of $808,564.38 including $65,814.38 interest. The judgment further noted that Mr Rogers appealed to the NSW Court of Appeal but that his appeal was unsuccessful. Also that Mr Rogers further appealed to the High Court, which dismissed his appeal. Hill J mentioned that the High Court decision was reported as *Rogers v Whitaker* (1992) 175 CLR 479 .

The judgment in the District Court

Nationwide News Pty Ltd v Rogers [2002] NSWCA 71 (15 March 2002) (Mason P, Stein JA and Grove J)

91 When considering a defence of a fair protected report a preliminary observation may be made which is particularly apposite in this case. What the court has to consider is what a fair minded reasonable member of the public, unversed in and unimbued with the legal niceties of the *Rogers v Whitaker* litigation, would ordinarily and reasonably have understood when reading Hill J's judgment.

Nationwide News Pty Ltd v Rogers [2002] NSWCA 71 -
Nationwide News Pty Ltd v Rogers [2002] NSWCA 71 -
Nationwide News Pty Ltd v Rogers [2002] NSWCA 71 -
Nationwide News Pty Ltd v Rogers [2002] NSWCA 71 -
Nationwide News Pty Ltd v Rogers [2002] NSWCA 71 -
Woods v Multi-sport Holdings Pty Ltd [2002] HCA 9 -
McCarthy v Kidd [2001] NSWCA 304 -
McCarthy v Kidd [2001] NSWCA 304 -
Melchior v Cattanach [2001] QCA 246 (26 June 2001) (McMurdo P, Davies and Thomas JJA,)

3. Although there was a body of medical evidence to the contrary, [2] the primary judge's finding of liability was supported by Dr Pfanner's evidence. Mrs Melchior recounted to Dr Cattanach what she was told of an appendectomy performed upon her 25 years earlier when she was 15. She later became an enrolled nurse and acquired some limited medical knowledge but she did not have that knowledge when she was 15. Because of Mrs Melchior's age at the time of the appendectomy and the passage of time since, I am satisfied the learned primary judge was entitled to prefer Dr Pfanner's evidence and to conclude that Dr Cattanach was negligent. Mrs Melchior was entitled to be warned of the additional material risk of pregnancy and of the availability of the hysterosalpingogram to detect a patent fallopian tube because the 25 year old history of a patient recalling what she was told about a procedure, when she was 15 years old, had not been positively confirmed by Dr Cattanach during the sterilisation procedure: see *Rogers v Whitaker* . [3]

via

[2] See *Rogers v Whitaker* (1992) 175 CLR 479, 491.

Curnuck v Nitschke [2001] NSWCA 176 (26 June 2001) (Meagher JA at 1; Davies AJA at 2; Fitzgerald AJA at 15)

13 It is not in dispute that, if the solicitors had held an active retainer from the appellants, they would have been obliged to institute proceedings on behalf of the appellants within the limitation period or to warn the appellants of the consequences of allowing the limitation period to pass. It is not in dispute that, in considering duties of care arising under tort and contract, courts have

imposed upon professional practitioners a duty to give an appropriate warning in respect of matters of which the client should be informed (see ***Rogers v Whitaker*** (1992) 175 CLR 479 ; and ***Chappel v Hart*** (1998) 72 ALJR 1344).

Melchior v Cattanach [2001] QCA 246 -
Melchior v Cattanach [2001] QCA 246 -
Melchior v Cattanach [2001] QCA 246 -
Curnuck v Nitschke [2001] NSWCA 176 -
Melchior v Cattanach [2001] QCA 246 -
Melchior v Cattanach [2001] QCA 246 -
Minister for Immigration and Multicultural Affairs v Yusuf [2001] HCA 30 -
Brodie v Singleton Shire Council [2001] HCA 29 -
Pilmer v Duke Group Ltd (In Liq) [2001] HCA 31 -
City of Botany Bay Council v Jazabas Pty Ltd [2001] NSWCA 94 (12 April 2001)

43. Mr Haigh's question to Mrs Cuthbert arguably entered a new dimension because it went beyond the scope of the invitation in the letter and it did not relate to the contents of the proposed development control plan. The antecedent relationship between the two people did not commit Mrs Cuthbert to answer whatever Mr Haigh asked, or to make the range of disclosures expected of a specialist medical practitioner pursuant to the duty of care expounded in ***Rogers v Whitaker*** (1992) 175 CLR 479 .

Rosenberg v Percival [2001] HCA 18 (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

157. Notwithstanding the foregoing criticisms of the subjective test, which the appellant reflected in his submissions to this Court, I am not persuaded that this Court should now adopt a variant of the objective standard. To do so would be incompatible with general doctrine. It would be difficult to reconcile with the test which the Court has laid down in *Rogers* that expressly mentioned the need for attention to the considerations to which a particular patient may be likely to attach significance [146] . And it would be unnecessary to stem any flood of meritless claims, so long as the courts observe the need for "great care", as suggested by Samuels JA in *Ellis* [147] , in evaluating the patient's own assertions.

Rosenberg v Percival [2001] HCA 18 (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

149. It is not the case that the risks of which a patient must be warned are confined to those that are commonplace (such as anaesthesia). The risks of quadriplegia in *Ellis v Wallsend District Hospital* [123] , of mediastinitis in *Chappel* , of impotence and bladder malfunction considered in *Smith v Tunbridge Wells Health Authority* [124] or of sympathetic ophthalmia examined in *Rogers* itself [125] , were all rare outcomes. As found, the relevant risks existed and were undisclosed to the respective patients. In *Rogers* , according to the evidence, the risk involved was "once in approximately 14,000 such procedures, although there was also evidence that the chance of occurrence was slightly greater when, [as in that case], there had been an earlier penetrating injury to the eye operated upon" [126] . The importance of all of these cases is that they emphasise that it is the patient who ultimately carries the burden of the risks. Therefore, unless such risks may be classified as "immaterial", in the sense of being unimportant or so rare that they can be safely ignored, they should be drawn to the notice of the patient. Only then can an informed choice be made by the person who alone, in law, may make that choice, namely the patient.

via

[126] *Rogers* (1992) 175 CLR 479 at 482.

Rosenberg v Percival [2001] HCA 18 (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

79. The second, or subjective, limb of the test in *Rogers* for material risk requires further discussion. The second limb recognises that the particular patient may not be a "reasonable" one; he or she may have a number of "unreasonable" fears or concerns. These will be given full weight under the second limb if the medical practitioner was or should have been aware of them. One way of satisfying that condition is if the patient asked questions revealing the fear or concern. However, that is not the only means of satisfying the second limb. There are a multitude of potential circumstances in which a court might find that the medical practitioner should have known of a particular fear or concern held by the patient. Courts should not be too quick to discard the second limb merely because it emerges that the patient did not ask certain kinds of questions.

Rosenberg v Percival [2001] HCA 18 (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

77. Clearly, in cases of a medical practitioner's failure to warn, the extent or severity of the potential injury is of great importance in applying the test in *Rogers* of "likely to attach significance to", as is the likelihood of the injury actually occurring. These two matters, the extent or severity of the potential injury and the likelihood of it coming to pass, are to be considered together. A slight risk of a serious harm might satisfy the test, while a greater risk of a small harm might not. It is also important to note that, in considering the severity of the potential injury, that severity is judged with reference to the plaintiff's position. Thus, the risk of blindness in one eye would ordinarily be considered serious; if however, as in *Rogers* , the patient is already blind in one eye and stands to lose sight entirely, that risk becomes one of an altogether greater magnitude.

Rosenberg v Percival [2001] HCA 18 (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

9. Although this Court came to the same conclusion about the duty of care as had been reached in North American cases, the Court warned against uncritical use of certain concepts, which ought to be valuable currency, but which are susceptible to rhetorical inflation. Mason CJ, Brennan, Dawson, Toohey and McHugh JJ said [8] :

> "In this context, nothing is to be gained by reiterating the expressions used in American authorities, such as 'the patient's right of self-determination' or even the oft-used and somewhat amorphous phrase 'informed consent'. The right of self-determination is an expression which is, perhaps, suitable to cases where the issue is whether a person has agreed to the general surgical procedure or treatment, but is of little assistance in the balancing process that is involved in the determination of whether there has been a breach of the duty of disclosure. Likewise, the phrase 'informed consent' is apt to mislead as it suggests a test of the validity of a patient's consent. Moreover, consent is relevant to actions framed in trespass, not in negligence. Anglo-Australian law has rightly taken the view that an allegation that the risks inherent in a medical procedure have not been disclosed to the patient can only found an action in negligence and not in trespass; the consent necessary to negative the offence of battery is satisfied by the patient being advised in broad terms of the nature of the procedure to be performed. In *Reibl v Hughes* the Supreme Court of Canada was cautious in its use of the term 'informed consent'."

via

[8] (1992) 175 CLR 479 at 490.

Rosenberg v Percival [2001] HCA 18 (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

11. The joint judgment continued [9]:

> "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."

via

[9] (1992) 175 CLR 479 at 490.

Rosenberg v Percival [2001] HCA 18 (05 April 2001) (Gleeson CJ,McHugh, Gummow, Kirby and Callinan JJ)

134. Clearly enough, the judges constituting the Full Court were of the opinion that the standard required by *Rogers* obliged the appellant to give warnings beyond those actually provided [84]. Wallwork J put it this way [85]:

> "On the overwhelming evidence [the risk of postoperative TMJ disorder] was a risk which existed because of the likelihood of some patients having complications after the operative procedure. Once there is a risk which is generally known to the profession, there is a duty to warn. It was not necessary to establish that the [appellant] should have been alerted to any disorder which existed in the [respondent's] jaw joint.
>
> > It was put for the [appellant] that although the [respondent] had been given the pamphlet and had received a letter from the [appellant], she had not raised any matters which had resulted in the [appellant] warning her of possible complications. That has been held in *Rogers v Whitaker* not to be determinative of the relevant question.
>
> [T]he learned trial Judge erred in finding that the [appellant] was not required to warn the [respondent] of the risks of TM joint problems and symptoms arising after the procedures which the [respondent] underwent."

Rosenberg v Percival [2001] HCA 18 -
Rosenberg v Percival [2001] HCA 18 -
Rosenberg v Percival [2001] HCA 18 -
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Rosenberg v Percival [2001] HCA 18 -
McCann & ANOR v BUCK [2001] WASCA 78 (15 March 2001) (Kennedy, Ipp and Owen JJ)

Rogers v Whitaker (1992) 175 CLR 479
Romeo v Conservation Commission (NT)

McCann & ANOR v BUCK [2001] WASCA 78 -
Bridges v Pelly [2001] NSWCA 31 (02 March 2001) (Sheller and Giles JJA, Brownie AJA)

(c) That there was negligence in performing the surgery without assistance. It was not established that Mr Pelly was without an assistant. At one point Professor Norman described Sister Gaymore as acting as assistant. There was no expert evidence that performing the surgery without an assistant was departure from normal or proper practice of the time. Mr Anstee said that he performed surgery routinely without a surgical assistant, usually having the assistance of a nursing sister, and that operating without a surgically trained assistant was in 1981 "consistent with the practice of a responsible body of plastic and reconstructive surgeons". The evidence of lack of an assistant adding to the risk of the surgery was weak - Professor Norman said that lack of an assistant plus other matters were "additive factors", but no evidence specifically linked lack of an assistant with causation of injury. Although perhaps he could have (see *Rogers v Whitaker* at 487), I see no reason why the trial judge should have held on this state of the evidence that there was a failure to exercise due care and skill, see *Lowns v Woods* (1996) Aust Torts Rep 81-376 at 63,160-1 .

Bridges v Pelly [2001] NSWCA 31 -
Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd [2000] NSWCA 374 (21 December 2000) (Malcolm AJA at 1; McPherson AJA at 360; Ormiston AJA at 455)

McPHERSON AJA: These are appeals from a judgment given in the Commercial Division of the Supreme Court (Giles J) on 13 May 1999 for an amount of $21,193,828 together with interest in action 50257 of 1995 claiming damages for professional negligence. The respondents to the appeal, who are the plaintiffs in the action, are NRMA Limited, NRMA Insurance Limited, and NRMA Holdings Limited. The appellants are the defendants Mr J D Heydon QC, who was then a practising barrister, and two solicitors and their partners, Mr J K Morgan and the firm of Allen Allen & Hemsley (AAH); and Mr G A T Bateman and the firm of Abbot Tout (AT). There are cross-appeals by the three NRMA companies against the dismissal of some of their other claims for damages based either on common law negligence or on statutory causes of action under the *Trade Practices Act* 1974 (Cth) , the Fair Trading Act 1987 (NSW) and the Corporations Law . On the hearing of the appeal, Mr Bathurst QC appeared, with Mr Meagher SC and Mr Gleeson of counsel for Mr Heydon; Mr Ellicott QC and Mr Barton for Abbot Tout (AT); and Mr Oslingon QC and Mr Speakman for Allen Allen & Hemsley (AAH). Mr Sher QC, with Mr McDougall SC, Mr N J O'Bryan and Mr Nugent, appeared for the three plaintiff companies. They are collectively designated NRMA, although their rights of action, losses, and claims are not necessarily identical. 361 The

reasons for judgment of the learned judge at first instance are over 700 pages in length, resulting from an action that occupied some six months of court sitting time, and generated over 5000 pages of transcript of evidence together with many volumes of documentary evidence. Because, whatever the result, an appeal was always predictable, his Honour's reasons are comprehensive. This has the advantage of relieving this Court of much of the burden of restating in detail all of the facts, evidence, issues and submissions that took up much of the trial, enabling attention to be focussed on the principal questions of liability now calling for decision. There are three. They have been called: (1) the *Gambotto* question; (2) the Free Shares question; and (3) the statutory claims.

362 Before considering them, it will avoid repetition later in these reasons if some general observations are made now about the duties and standards of care imposed by law on practising barristers and solicitors, and the kind of conduct that may constitute a breach of them. Both branches of the profession owe a duty of care to their clients, in this instance to NRMA, that may be summed up by saying that they are bound to have and to exercise a degree of skill and care that is to be expected of persons professing and practicing in their area of expertise. See *Rogers v Whitaker* (1992) 175 CLR 479, 483. In terms of reputation and prominence, the defendants were and are among the leaders of the profession in the field of company law, and especially, in Mr Heydon's case, trade practices law. This, it was submitted by Mr Sher QC, had the consequence that they were to be judged by more exacting standards than others of lesser ability in the same field of expertise; but that is plainly neither good law nor sound policy. It would penalise those who were better at doing the same work, and reward increasing proficiency with progressively heavier liabilities. There is only one standard, which is the standard appropriate to a member of the profession with the relevant specialist skills: *Duchess of Argyll v Beuselinck* [1972] 2 LL R 179, 183; *Rogers v Whitaker* (1992) 175 CLR 479, 483. 363 There is occasion here to bear in mind that the liability in question is limited to negligent acts or omissions, and that is so whether it arises out of contract, as it does for a solicitor, or is based in tort, as it is for a barrister in New South Wales. In a contract for legal services, the implied undertaking is no more nor less than to have and to use the requisite degree of skill and care. The same duty is imposed by the law of tort. In giving advice, a lawyer does not warrant or guarantee the soundness of his or her opinion but only that the requisite degree of skill and care has been used in arriving at it: *Boland v Yates Property Corporation Pty Ltd* (1999) 74 ALJR 209, 272, col 1 E-G. In the present proceedings, where the professional negligence is alleged to consist, at least in part, in failing to warn of a risk that legal advice given to a client might turn out to be mistaken, a lawyer is not normally required to warn experienced business clients of the possibility that his opinion, though firmly held, may not in fact prevail. See *Ormidale Holdings Pty Ltd v Ray* (1982) 36 BCLR 378, 387, quoted with approval by McClelland CJ in Eq in *Trust Co. of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237, 247. 364 Finally, reference must be made to the limits of the duty to advise. At one time a solicitor's duty was considered to be limited by the terms of the retainer from the client, there being no affirmative legal obligation to give advice going "beyond the specifically agreed task or function". Then, in *Hawkins v Clayton* (1988) 164 CLR 539, 585, it was held that there was no justification for imposing a contractual duty of care that was co-extensive with the parallel duty independently imposed in the law of negligence. It followed that an obligation might arise requiring a solicitor to take positive steps, beyond the specifically agreed professional task or function, to avoid a real and foreseeable risk of economic loss being sustained by the client, or even by others who were not the clients who had retained the solicitor. The result was that in *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642, 652, a majority of this Court held that an affirmative duty to advise might exist in relation to matters that were not directly within the ambit of the retainer from the client. The decision on this point in *Waimond Pty Ltd v Byrne* has since been followed on several occasions. More recently, however, in *Henderson v Merrett Syndicates Limited* [1995] 2 AC 145, 193-194, the House of Lords rejected the reasoning of Deane J in *Hawkins v Clayton* , holding instead that there was "no sound basis for a rule which automatically restricts a claimant to either a tortious or a contractual remedy", and that it was "the contract that defines the relationship of the parties", so that ordinarily "the parties must be taken to have agreed that the tortious remedy is to be limited or excluded". In *Astley v Austrust Ltd* (1999) 51 ALJR 403, the High Court decided to follow the reasoning in *Henderson v Merrett Syndicates Limited* , in preference to that of Deane J in *Hawkins v Clayton* . The result, in my respectful opinion, is that what was said by Deane J in *Hawkins v Clayton* has ceased to be good law in Australia. Because it formed the or a pivotal point in the reasoning in *Waimond Pty Ltd v Byrne* , it is no longer possible to say that there is a "penumbral" duty in tort requiring a solicitor to advise on matters going beyond the limits of his

or her retainer. On that aspect, the decision in *Waimond Pty Ltd v Bryne* is inconsistent with the reasoning in *Astley v Austrust Ltd* , and should, in my opinion, no longer be followed. It had the effect of enlarging or extending the range of matters on which a solicitor, and possibly also a barrister, might be required by the law of tort to advise a client or other persons. 365 Not being in a contractual relationship with the client, the liability of a barrister for giving negligent advice has always been a product of the law of tort, and in that form it survives the decision in *Astley v Austrust Ltd* . However, the task of a barrister in giving opinions, was, before *Hawkins v Clayton* and *Waimond Pty Ltd v Byrne* , widely regarded as being to answer the specific questions on which he or she was briefed for advice. Counsel was not expected to go beyond matters on which the opinion was sought, although he or she might, and generally would, do so on noticing something material that might have been overlooked by those instructing. If, the principle referred to in *Waimond Pty Ltd v Byrne* is no longer good law, then, as I see it, it now no longer applies to barristers any more than to solicitors so as to impose a legal duty of advising on matters on which advice has not been sought. The decision in *Astley v Austrust Ltd* was delivered after the trial of this action had ended. In the reasons for judgment, the learned judge relied to some extent on the decision in *Waimond Pty Ltd v Byrne* in making some findings against the defendants of negligently failing to warn the NRMA plaintiffs of risks with respect to questions on which they were not retained or instructed to advise. Not for the first time, therefore, the liabilities of parties to this action have been affected by a decision that altered the law.

Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd [2000] NSWCA 374 -
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Heydon v NRMA Ltd; Bateman v NRMA Ltd; Morgan v NRMA Ltd [2000] NSWCA 374 -
Shead v Hooley [2000] NSWCA 362 (14 December 2000) (Mason P, Beazley JA and Davies AJA)

Rogers v Whitaker (1992) 175 CLR 479
Ainsworth v Levi (NSW Court of Appeal, 30/8/95, unrep)

Shead v Hooley [2000] NSWCA 362 (14 December 2000) (Mason P, Beazley JA and Davies AJA)

42 Mason CJ, Brennan, Dawson, Toohey and McHugh JJ said, in *Rogers v Whitaker* (1992) 175 CLR 479 at 487 , that the content of the duty of care is not to be determined either solely or even primarily by reference to the practice followed by or supported by a responsible body of opinion in the profession. It is a matter for the courts. Their Honours went on to say, however, at p 489:-

Shead v Hooley [2000] NSWCA 362 -
Johnson v Biggs [2000] NSWCA 338 (24 November 2000) (Giles and Fitzgerald JJA, Santow AJA)

93 It must be remembered that material risk in this context has both a subjective and objective aspect. Consider the first aspect with this particular patient. She, as the trial judge held, demonstrated her desire to be fully informed about the operation. So too in *Rogers v Whitaker* (at 491), the High Court placed emphasis on the fact that the patient was keenly interested in the outcome of the suggested eye procedure. It is significant in terms of the complications she ended up suffering was that amongst the Appellant's questions in the written note which she took to her pre-operation consultation with Dr Biggs were these: “Any further complications after op?” and “Very concerned that after op the pain still be there?” and “Can op cause any problems elsewhere?” (Blue Book, 197) Even if as a layman she could not be expected to ask the precise question as to the risk that eventuated, that of new, different and worse pain, her questions were clearly directed at that *kind* of risk. So too said the High Court with the patient in *Rogers v Whitaker* who wanted to know if there was a danger of unintended or accidental interference with her good eye.

Studer v Boettcher [2000] NSWCA 263 (24 November 2000) (Handley, Sheller and Fitzgerald JJA)

2. cf Rogers v Whittaker (1992) 175 CLR 479 , 483.

Johnson v Biggs [2000] NSWCA 338 (24 November 2000) (Giles and Fitzgerald JJA, Santow AJA)
Rogers v Whittaker (1992) 175 CLR 479 .

Johnson v Biggs [2000] NSWCA 338 -
Studer v Boettcher [2000] NSWCA 263 -
Johnson v Biggs [2000] NSWCA 338 -
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Johnson v Biggs [2000] NSWCA 338 -
Tan v Benkovic [2000] NSWCA 295 (26 October 2000) (Mason P, Stein and Heydon JJA)
25 The appellant challenges some of the findings of fact said to underpin the awards of aggravated and exemplary damages. 26 The primary judge held that the appellant first raised with the respondent the possibility of a facelift operation when he was treating her son for his nose injury in 1991 (RB 14). The respondent accepts that this was an error and that cosmetic surgery was first discussed between the parties in 1995, after the respondent's general practitioner had referred her to the appellant for that purpose. The error is of some materiality, because it seems to be part of the material relied upon in the trial judge's conclusion that the appellant took advantage of a vulnerable woman by persuading her to undergo surgery. 27 Furthermore, while it is fairly clear that the appellant encouraged his patient to proceed with the facelift that she was anxious to obtain, I cannot see that this is improper in itself. Cosmetic surgery is not unlawful and the respondent was a consenting adult. Her rights to information and disclosure of risks stemming from the *Rogers v Whitaker* duty of care are significant, but that case does not equate the law of negligence in medicine with the Contracts Review Act . Nor is it proper to treat a patient as lacking autonomy, save so far as the patient is protected by the law of battery and the principles stated in *Rogers* itself. 28 His Honour accepted the evidence of the respondent's own general practitioner that " *patients contemplating cosmetic surgery ... generally ... have unrealistic expectations - largely inculcated by the hubris of Hollywood"* (RB 38). He found perceptive and accurate the evidence of Dr Skinner, a psychiatrist, that the respondent *"is preoccupied with concerns about her appearance ... an obsessive preoccupation .... There is evidence that this preoccupation was already present ... because of the reasons given requesting surgery"* (RB 39). The appellant was found to have paid *"inadequate attention ... to the threshold matter of whether she was a psychologically appropriate candidate for a cosmetic plastic surgery procedure"* (RB 43). 29 In part, these findings reflect the way the case was fought. They build upon the case advanced by the respondent through her evidence, the evidence of her witnesses and the submissions of her counsel at trial. Nevertheless, I feel bound to record a sense of unease with these aspects of the background findings. After all, the duty of care in *Rogers* is premised on the notion of the patient's autonomy, albeit that there are patients and patients and that different proposed medical procedures call forth different matters that ought to be disclosed by the competent medical practitioner. 30 The appellant challenges other findings in the judgment, but none of them strike me as having any materiality to the matters presently in issue. Nothing turns upon whether or not medical advice was accompanied by puffery or exaggerated bedside manner such as statements about making the respondent feel a different person or looking 20 years younger. Blandishments of this nature may have been relevant to the now resolved issue whether the respondent would have undergone surgery had the full risks been disclosed, but their presence could not conceivably establish a case for aggravated or exemplary damages if otherwise unavailable in this particular case. 31 The medical profession is best positioned to set its own standards as to appropriate professional practices in regard to what some would regard as "elective" procedures paid for by patients' own moneys. Obviously there will be situations where over-servicing, overcharging or failure to disclose risks and benefits will incur legal sanctions. But courts should not rush into areas in which subjective professional judgments predominate.
32 These considerations of restraint have particular force in the area of cosmetic surgery. The line between therapeutic and elective - to the extent that it exists at all - is necessarily dependant in part

upon the eye of the beholder. Here there remains uncertainty as to which of the respondent's photos were taken before her surgery. Even if that issue could be resolved, I would have real difficulty with accepting that it lay within any area of medical expertise to determine whether pre-operative disfigurement justified intervention (cf Dr Mann's opinion: Bl 44). Additional considerations intervene when public moneys are involved (as they were here), but they appear to lie in the realm of professional practice and conduct and the realm of morality, not in the realm of the tort of negligence. Whether surgery is "necessary" or "unnecessary" has no direct bearing upon whether it is performed competently or whether pre-surgical warnings satisfied the *Rogers v Whitaker* duty.

Tan v Benkovic [2000] NSWCA 295 (26 October 2000) (Mason P, Stein and Heydon JJA)

39 The appellant accepts that there may be cases where negligence attending a medical procedure is so gross as to merit an award of exemplary damages. This is in accord with the authorities. 40 *Lamb v Cotogno* (1987) 164 CLR 1 was an action in trespass. Sometimes a medical professional's non-disclosure is so inadequate as to vitiate the patient's consent, with the result that the ensuing procedure is a battery (see *Appleton v Garrett* [1996] PIQR 1, discussed in "Battery: Exemplary and Aggravated Damages" [1996] Med Law Review 311). 41 Exemplary damages have however been awarded in cases of pure negligence (see, as to the general proposition, *Coloca v BP Australia Limited* [1992] 2 VR 441; and as to exemplary damages in cases of medical negligence, *Backwell v AAA* [1997] 1 VR 182, *B v Marinovich* [1999] NTSC 127, noted (2000) 7(3) JLM 250). 42 I do not think that this case calls for an extensive discussion of the principles relating to exemplary damages. The function and broad parameters of such an award are expounded in *Lamb* and *Coloca* . Speaking generally, what needs to be shown is contumelious disregard of the plaintiff's rights by the defendant. 43 In my view the award of exemplary damages in this case must be set aside. Neither the facts as found nor the evidence in the case support his Honour's conclusion that there was *"an egregious error on the part of the defendant in talking the patient into assenting to a facelift operation"*. Nor was this a case exposing a *"need to stamp the defendant's conduct with a mark of opprobrium"*. Nor was there a *"contumelious disregard for the doctor-patient relationship obligations"* as adverted to in his Honour's reasons for the award of aggravated damages. 44 I have already covered much of this ground. I refer to what I have said about the lack of material in this particular case to sustain any conclusion that the appellant acted improperly in encouraging his eager patient to undergo surgery. 45 There is certainly an entrepreneurial flair about some of the appellant's practices that some would find inappropriate or even offensive. But there was no evidence of excessive charging and it cannot *per se* be wrong for a doctor or any other professional to have the desire of monetary gain as a motivating force. The appellant performed the surgery without negligence. He disclosed a number of the potential risks and, as to those he did not, explained that this was due to oversight. The judge was not bound to accept that explanation, but he did not make findings rejecting it. 46 The appellant's *"blandishments"* and *"promises"*, to the extent that they have any bearing upon the *Rogers v Whitaker* tort, did not convert what remains a negligent failure to alert an eager patient to some fairly unlikely risks which unfortunately came home into a *"conscious and contumelious disregard for the plaintiff's rights"* (cf *Lamb* at 9) meriting a punitive and deterrent award of $60,000. 47 I have not overlooked the findings concerning the way in which the appellant treated and delayed treating the respondent post-operation. It is however unclear to me whether they figured in the reasoning supporting the award of exemplary damages. I do not wish to belittle those findings, but they do not strike me as justifying or sustaining the award when one considers the extent to which the appellant did in fact respond to his patient's litany of complaints. I have no difficulty with the idea that contumelious disregard of a doctor's duty to provide adequate after-care might attract such an award in a proper case (cf *Lamb* at 12-13). 48 The award of exemplary damages should therefore be set aside. 49 This Court was not asked to order a new trial as to damages. Senior counsel for the respondent did however invoke *Robinson v Riley* [1971] 1 NSWLR 403, submitting that the Court should consider whether a sufficient amount was awarded for compensatory damages before taking away the entirety of the aggravated and exemplary damages. Our attention was drawn to the evidence as to the psychological sequelae suffered by this particular respondent (see esp the report of Dr Skinner at Bl 77-8). With some hesitation, I would reject this invitation. After all, the trial judge segregated the three heads of damages. The reasons explaining the *"compensation damage"* address both physical and psychological distress in contrast to the reasons supporting the awards of aggravated and exemplary damages which make no

mention of them. There is the further difficulty that we have not seen the respondent. Nor is the confused photographic evidence sufficient to lead this Court to conclude that the award of $30,000 compensatory damages was appealably inadequate. Not all of the respondent's distress as recorded by Dr Skinner could properly be seen as stemming from the appellant's negligence as distinct from the respondent's disappointment about failing in her goal of retarding the visible signs of the aging process. 50 The parties were agreed that there had been a slip in the calculations of interest agreed at trial. This can be attended to in the necessary recalculations of interest that flow from the order which I propose. These are that the appeal be allowed with costs, the respondent having a certificate under the Suitors' Fund Act (if qualified); and that the amount of the judgment in the respondent's favour be varied by excluding aggravated and exemplary damages and any interest component relating thereto. The parties should file appropriate Short Minutes within 7 days. 51 STEIN JA: I agree with Mason P. 52 HEYDON JA: I agree with Mason P.

Tan v Benkovic [2000] NSWCA 295 (26 October 2000) (Mason P, Stein and Heydon JJA)

25 The appellant challenges some of the findings of fact said to underpin the awards of aggravated and exemplary damages. 26 The primary judge held that the appellant first raised with the respondent the possibility of a facelift operation when he was treating her son for his nose injury in 1991 (RB 14). The respondent accepts that this was an error and that cosmetic surgery was first discussed between the parties in 1995, after the respondent's general practitioner had referred her to the appellant for that purpose. The error is of some materiality, because it seems to be part of the material relied upon in the trial judge's conclusion that the appellant took advantage of a vulnerable woman by persuading her to undergo surgery. 27 Furthermore, while it is fairly clear that the appellant encouraged his patient to proceed with the facelift that she was anxious to obtain, I cannot see that this is improper in itself. Cosmetic surgery is not unlawful and the respondent was a consenting adult. Her rights to information and disclosure of risks stemming from the *Rogers v Whitaker* duty of care are significant, but that case does not equate the law of negligence in medicine with the Contracts Review Act . Nor is it proper to treat a patient as lacking autonomy, save so far as the patient is protected by the law of battery and the principles stated in *Rogers* itself. 28 His Honour accepted the evidence of the respondent's own general practitioner that " *patients contemplating cosmetic surgery ... generally ... have unrealistic expectations - largely inculcated by the hubris of Hollywood"* (RB 38). He found perceptive and accurate the evidence of Dr Skinner, a psychiatrist, that the respondent *"is preoccupied with concerns about her appearance ... an obsessive preoccupation .... There is evidence that this preoccupation was already present ... because of the reasons given requesting surgery"* (RB 39). The appellant was found to have paid *"inadequate attention ... to the threshold matter of whether she was a psychologically appropriate candidate for a cosmetic plastic surgery procedure"* (RB 43). 29 In part, these findings reflect the way the case was fought. They build upon the case advanced by the respondent through her evidence, the evidence of her witnesses and the submissions of her counsel at trial. Nevertheless, I feel bound to record a sense of unease with these aspects of the background findings. After all, the duty of care in *Rogers* is premised on the notion of the patient's autonomy, albeit that there are patients and patients and that different proposed medical procedures call forth different matters that ought to be disclosed by the competent medical practitioner. 30 The appellant challenges other findings in the judgment, but none of them strike me as having any materiality to the matters presently in issue. Nothing turns upon whether or not medical advice was accompanied by puffery or exaggerated bedside manner such as statements about making the respondent feel a different person or looking 20 years younger. Blandishments of this nature may have been relevant to the now resolved issue whether the respondent would have undergone surgery had the full risks been disclosed, but their presence could not conceivably establish a case for aggravated or exemplary damages if otherwise unavailable in this particular case. 31 The medical profession is best positioned to set its own standards as to appropriate professional practices in regard to what some would regard as "elective" procedures paid for by patients' own moneys. Obviously there will be situations where over-servicing, overcharging or failure to disclose risks and benefits will incur legal sanctions. But courts should not rush into areas in which subjective professional judgments predominate. 32 These considerations of restraint have particular force in the area of cosmetic surgery. The line between therapeutic and elective - to the extent that it exists at all - is necessarily dependant in part upon the eye of the beholder. Here there remains uncertainty as to which of the respondent's photos were taken before her surgery. Even if that issue could be resolved, I would have real

difficulty with accepting that it lay within any area of medical expertise to determine whether pre-operative disfigurement justified intervention (cf Dr Mann's opinion: Bl 44). Additional considerations intervene when public moneys are involved (as they were here), but they appear to lie in the realm of professional practice and conduct and the realm of morality, not in the realm of the tort of negligence. Whether surgery is "necessary" or "unnecessary" has no direct bearing upon whether it is performed competently or whether pre-surgical warnings satisfied the *Rogers v Whitaker* duty.

Tan v Benkovic [2000] NSWCA 295 -
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Tan v Benkovic [2000] NSWCA 295 -
Tamworth Base Hospital v Durant [2000] NSWCA 209 -
Tamworth Base Hospital v Durant [2000] NSWCA 209 -
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Tamworth Base Hospital v Durant [2000] NSWCA 209 -
Tamworth Base Hospital v Durant [2000] NSWCA 209 -
Baker v Hardcastle [2000] WASCA 166 (16 June 2000) (Pidgeon J, Wallwork J, Parker J)

Rogers v Whitaker (1992) 175 CLR 479
Abalos v Australian Postal Commission

Baker v Hardcastle [2000] WASCA 166 -
Baker v Hardcastle [2000] WASCA 166 -
Baker v Hardcastle [2000] WASCA 166 -
Baker v Hardcastle [2000] WASCA 166 -
Baker v Hardcastle [2000] WASCA 166 -
Baker v Hardcastle [2000] WASCA 166 -
Baker v Hardcastle [2000] WASCA 166 -
Bourke v MacNeil [2000] NSWCA 144 -
Sauer v Pashley [2000] QCA 32 (22 February 2000) (de Jersey CJ, McPherson JA, Byrne J,)

16. While the views of doctors are not necessarily definitive of the requisite standard of care, they will often be influential, as noted in *Rogers v Whitaker* (page 489):

> "Whether a medical practitioner carries out a particular form of treatment in accordance with the appropriate standard of care is a question in the resolution of which responsible professional opinion will have an influential, often a decisive, role to play ..."

This is, in my opinion, such a case.

Sauer v Pashley [2000] QCA 32 -
Sauer v Pashley [2000] QCA 32 -
Hoffman v Legal Practitioners Complaints Committee [1999] WASCA 309 (22 December 1999) (Wallwork, Owen and White JJ)

Rogers v Whittaker (1992) 175 CLR 479

Elliott v Bickerstaff [1999] NSWCA 453 -

Elliott v Bickerstaff [1999] NSWCA 453 -
Boland v Yates Property Corporation Pty Ltd [1999] HCA 64 -
Marinko v Masri [1999] NSWCA 364 -
Marinko v Masri [1999] NSWCA 364 -
Tai v Hatzistavrou [1999] NSWCA 306 (25 August 1999) (Priestley, Handley and Powell JJA)

100 Given the particular problem with which the Court is now concerned to deal, there is some advantage to be gained by setting out, in full, the particular passage in the speech of Lord Diplock to which reference was made in ***Rogers v. Whitaker*** supra. It was as follows:

Tai v Hatzistavrou [1999] NSWCA 306 -
Tai v Hatzistavrou [1999] NSWCA 306 -
Tai v Hatzistavrou [1999] NSWCA 306 -
Tai v Hatzistavrou [1999] NSWCA 306 -
Tai v Hatzistavrou [1999] NSWCA 306 -
Tai v Hatzistavrou [1999] NSWCA 306 -
Tai v Hatzistavrou [1999] NSWCA 306 -
Tai v Hatzistavrou [1999] NSWCA 306 -
Ta Ho Ma Pty Ltd v Allen [1999] NSWCA 202 -
Ta Ho Ma Pty Ltd v Allen [1999] NSWCA 202 -
Eagle & ANOR. v Prosser [1999] NSWCA 166 -
Dr Ibrahim v Arkell [1999] NSWCA 95 -
Dr Ibrahim v Arkell [1999] NSWCA 95 -
Dr Ibrahim v Arkell [1999] NSWCA 95 -
Percival v Rosenberg [1999] WASCA 31 -
Percival v Rosenberg [1999] WASCA 31 -
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Percival v Rosenberg [1999] WASCA 31 -
Percival v Rosenberg [1999] WASCA 31 -
Percival v Rosenberg [1999] WASCA 31 -
Gray v Robbins [1999] VSCA 30 -
Astley v AusTrust Ltd [1999] HCA 6 (04 March 1999) (Gleeson CJ; McHugh, Gummow, Hayne and Callinan JJ)

135. The obligations of professionals in modern times are not light ones. *Rogers v Whitaker* [138] is a case in point. In it the plaintiff's claim was brought in tort. There were no express terms, and it is certainly not readily apparent that a term would necessarily be implied in the contract between the doctor and the plaintiff to the effect, that in the circumstances of that case, the doctor would be obliged to warn the patient of a risk of sympathetic ophthalmia as remote as one in fourteen thousand. No suggestion was made there of any contributory negligence on the part of the plaintiff. But had there been, and had such a term been implied, it would hardly seem fair that the plaintiff might recover her damages in full, notwithstanding, had it occurred, significant causative negligence on her part, simply because she might be able to frame her claim exclusively, or alternatively in contract. Similarly, logically there is no reason why a patient of sound mind of a doctor who has failed to abide by, for example, a post-operative regime recommended by the doctor, should be able to escape all liability if he or she has been disadvantaged by both that failure and negligence on the part of the doctor. *Rogers* ' case also shows that the relationship and the duties owed are in a real and practical sense in a process of extension [139] as the tort of negligence has been since *Donoghue v Stevenson* [140] . The duties and the relationship between professionals and other providers of services and advice may in practice extend far beyond matters to which the parties would normally turn their minds, and, even if they did, would mutually wish, or be prepared to include in their contracts. Whilst it might be right to

say that the obligation in *Rogers* ' case was no more than an aspect of the all-embracing duty to take reasonable care, the content of which will vary from case to case, it is also right to say that the breadth and nature of the content would be unlikely to be, in some cases, such as the parties would contemplate and include in their contracts at the time of their formation. *Chappel v Hart* [141] is another example of a situation in which it is rather unlikely that the parties at the inception of a notional bargaining process for, and in the formation of, their contract would have contemplated the imposition of an obligation as broad and as onerous on the doctor as that which the Court found to exist there. In this respect the obligations may more aptly be regarded as obligations in tort than in contract, one of the tests of the former being the objective test of reasonable foreseeability rather than what the parties subjectively may have had in mind when the contract was made. I do not think that in cases such as *Rogers v Whitaker* [142] and *Chappel v Hart* [143] it can confidently be said that the duty found by the Court to exist is attributable to the will of the parties and therefore contractual, as Lord Goff of Chieveley held it to be in these terms in *Henderson v Merrett Syndicates Ltd* [144] :

> "It is however my understanding that by the law in this country contracts for services do contain an implied promise to exercise reasonable care (and skill) in the performance of the relevant services; indeed, as Mr Tony Weir has pointed out[145] in the 19th century the field of concurrent liabilities was expanded 'since it was impossible for the judges to deny that contracts contained an implied promise to take reasonable care, at the least, not to injure the other party.' My own belief is that, in the present context, the common law is not antipathetic to concurrent liability, and that there is no sound basis for a rule which automatically restricts the claimant to either a tortious or a contractual remedy. The result may be untidy; but, given that the tortious duty is imposed by the general law, and the contractual duty is attributable to the will of the parties, I do not find it objectionable that the claimant may be entitled to take advantage of the remedy which is most advantageous to him, subject only to ascertaining whether the tortious duty is so inconsistent with the applicable contract that, in accordance with ordinary principle, the parties must be taken to have agreed that the tortious remedy is to be limited or excluded."

Astley v AusTrust Ltd [1999] HCA 6 (04 March 1999) (Gleeson CJ; McHugh, Gummow, Hayne and Callinan JJ)

135. The obligations of professionals in modern times are not light ones. *Rogers v Whitaker* [138] is a case in point. In it the plaintiff's claim was brought in tort. There were no express terms, and it is certainly not readily apparent that a term would necessarily be implied in the contract between the doctor and the plaintiff to the effect, that in the circumstances of that case, the doctor would be obliged to warn the patient of a risk of sympathetic ophthalmia as remote as one in fourteen thousand. No suggestion was made there of any contributory negligence on the part of the plaintiff. But had there been, and had such a term been implied, it would hardly seem fair that the plaintiff might recover her damages in full, notwithstanding, had it occurred, significant causative negligence on her part, simply because she might be able to frame her claim exclusively, or alternatively in contract. Similarly, logically there is no reason why a patient of sound mind of a doctor who has failed to abide by, for example, a post-operative regime recommended by the doctor, should be able to escape all liability if he or she has been disadvantaged by both that failure and negligence on the part of the doctor. *Rogers* ' case also shows that the relationship and the duties owed are in a real and practical sense in a process of extension [139] as the tort of negligence has been since *Donoghue v Stevenson* [140] . The duties and the relationship between professionals and other providers of services and advice may in practice extend far beyond matters to which the parties would normally turn their minds, and, even if they did, would mutually wish, or be prepared to include in their contracts. Whilst it might be right to say that the obligation in *Rogers* ' case was no more than an aspect of the all-embracing duty to take reasonable care, the content of which will vary from case to case, it is also right to say that the breadth and nature of the content would be unlikely to be, in some cases, such as the

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via

[138] (1992) 175 CLR 479 .

Astley v AusTrust Ltd [1999] HCA 6 -
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Sweeney v Coffey Pty Ltd [1999] NSWCA 38 -
Scrase v Jarvis [1998] QCA 441 (22 December 1998)

see Rogers v. Whitaker (1992) 175 C.L.R. 479 at 483 , another warning case. The proper

Chappel v Hart [1998] HCA 55 (02 September 1998) (Gaudron, McHugh, Gummow, Kirby and Hayne JJ)

96. In *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [165] , Lord Hoffmann emphasised that commonsense answers to questions of causation will differ according to the purpose for which the question is asked. The answer depends upon the purpose and scope of the rule by which responsibility is being attributed. In *Rogers v Whitaker* , this Court decided that "a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment" and that:

> "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." [166]

> These standards have fairly been described as onerous. They are. But they are the law. They are established for good reason. When not complied with (as was held to be so in this case) it should occasion no surprise that legal consequences follow. This was an unusual case where the patient was found to have made very clear her concerns. The practicalities are that, had those concerns been met as the law required, the overwhelming likelihood is that the patient would not, in fact, have been injured. So much was eventually conceded. In such circumstances, commonsense reinforces the attribution of legal liability. It is true to say that the inherent risks of injury from rare and random causes arise in every surgical procedure. A patient, duly warned about such risks, must accept them and their consequences. Mrs Hart was ready to accept any general risks of the operation of which she was warned. However, she declined to bear the risks about which she questioned the surgeon and received no adequate response. When those risks so quickly eventuated, commonsense suggests that something more than a mere coincidence or irrelevant cause has intervened. This impression is reinforced once it is accepted that Mrs Hart, if warned, would not have undergone the operation when she did.

Chappel v Hart [1998] HCA 55 -
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Chappel v Hart [1998] HCA 55 -
Pekkala v Lubke [1996] QCA 470 (22 November 1996) (Macrossan CJ. McPherson JA. Moynihan J.)

> The first question is whether the respondent, by his incorrect diagnosis, or lack of it, and the treatment recommended on 21 December, breached the duty of care that he owed as doctor to his patient. The nature of this duty is helpfully summarised in *Rogers v. Whitaker* (1992) 175 CLR 479 . The trial Judge answered this

Pekkala v Lubke [1996] QCA 470 -
Pekkala v Lubke [1996] QCA 470 -
Breen v Williams [1996] HCA 57 (06 September 1996) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

> 24 (1992) 175 CLR 479 .

Breen v Williams [1996] HCA 57 (06 September 1996) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

> 164 (1992) 175 CLR 479 at 490 , 492.
> 165 See, generally, as to the interrelation of, and distinctions between, the economic, ethical and

social interests served by tort, contract and fiduciary law, Cooter and Freedman, "The Fiduciary Relationship: Its Economic Character and Legal Consequences", (1991) 66 New York University Law Review 1045 at 1053-1056, 1064-1074; De Mott, "Fiduciary Obligation Under Intellectual Siege: Contemporary Challenges to the Duty to be Loyal", (1992) 30 Osgoode Hall Law Journal 470 at 482-497. Further, in a given case, consideration also may be required of statutory provisions requiring a particular norm of conduct, such as

Breen v Williams [1996] HCA 57 (06 September 1996) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

71 Sidaway (1985) AC 871 at 903. See also Rogers v Whitaker (1992) 175 CLR 479 at 483.

72 Liverpool City Council v Irwin

Breen v Williams [1996] HCA 57 (06 September 1996) (Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ)

163 (1992) 175 CLR 479 .

Breen v Williams [1996] HCA 57 -
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Breen v Williams [1996] HCA 57 -
Turner v Locher and Locher [1995] QCA 106 -
Turner v Locher and Locher [1995] QCA 106 -
Tully v Council of the City of Townsville [1992] QCA 117 -