



## Naxakis v. Western General Hospital

(1999) 197 CLR 269; (1999) 162 ALR 540; (1999) 73 ALJR 782; (1999) 9 Leg Rep 2; [1999] HCA 22

**Country:** Australia

**Region:** Oceania

**Year:** 1999

**Court:** High Court

**Health Topics:** Child and adolescent health, Health care and health services, Hospitals, Medical malpractice, Violence

**Human Rights:** Right to due process/fair trial

### Facts

In July 1980 the appellant, who was 12 years old at the time, was struck on the head by the bag of a schoolmate and collapsed. The appellant was seen by a general practitioner who referred him to Western General Hospital, the first respondent, where he was placed under the care of Mr. Jensen, the senior neurosurgeon and second respondent. The appellant suffered symptoms including loss of consciousness, vomiting, and spasms of the neck, arm and leg muscles. Mr. Jensen gave a preliminary diagnosis of subarachnoid hemorrhage and ordered a CT scan and an X-ray. The CT scan showed abnormalities and the appellant displayed unusual symptoms. However, the appellant's headaches showed continued improvement and he was discharged from the Hospital nine days after being admitted. Two days after being discharged, the appellant collapsed at home. An angiogram was performed showing a major intracranial bleed from a burst aneurysm. The appellant suffered permanent physical and intellectual impairment as a result of the bleed.

The appellant sued for medical negligence. At the trial level the case was heard before a judge and a civil jury. After fourteen days it was submitted by the counsel for the respondents that, based on the evidence, there was no case for the jury to decide. The judge agreed with this submission and directed the jury to find in favor of the respondents. The appellants were unsuccessful at the appeal level. The Court of Appeal held that there was no evidence that would allow the jury to conclude in favor of the Appellant and upheld the decision of the trial judge.

This appeal was brought to the High Court of Australia on the grounds that the Court of Appeal erred in upholding the trial judge's decision to order the jury to return a verdict for the defendant.

### Decision and Reasoning

The Court held that it was an error for the Court of Appeal to uphold the trial judge's decision to withdraw the case from the jury. The lower courts should have considered whether evidence presented in favor of the appellant would, if true, allow the jury to reasonably find for the appellant. The Court emphasized that the decision to withdraw the trial from the jury should not have been made by weighing evidence for the appellant against contradictory evidence favoring the respondents. Counsel for the appellant provided admissible evidence to support the claim that it was negligent of Mr. Jensen not to consider differential diagnoses and not to order an angiogram while the appellant was under his care. It was up to the jury to decide if the evidence indicated that Mr Jensen was negligent and whether it could be inferred that his negligence caused the appellant's injury.

Gleeson, Gaudron, McHugh, and Kirby JJ held that the standard of care owed by Mr. Jensen should not have been determined by asking what other doctors would have done under the same circumstances. The justices of this court applied the rule established in *Rogers v. Whitaker* (1992) 175 CLR 479 at 493. The rule states that the standard of care owed by persons with special skills is not determined primarily by common practices or respected bodies of opinion of the relevant profession, but for the jury to decide whether it was negligent of Mr. Jensen not to order an angiogram.

Gaudron and Callinan JJ also commented on whether the appellant would be able to recover damages for the lost chance of successful surgery. Gaudron J. held that the appellant could not recover damages for loss of chance and Callinan J. held that the matter would be up to the jury to decide. Both judges acknowledged the impracticality and limited usefulness of applying the loss of chance approach to the success of medical

procedures.

### **Decision Excerpts**

“In this case, the first question to be determined is, in essence, whether it was unreasonable for the hospital and Mr Jensen not to have taken the precautionary measure of excluding other causes of the appellant's symptoms. And assuming there was some evidence that there were steps that could be taken to exclude other causes, it was for the jury to form their own conclusion whether it was reasonable for one or more of those steps to be taken. It was not for the expert medical witnesses to say whether those steps were or were not reasonable.” Para. 21.

“If proof on the balance of probabilities were also retained, damages for a loss of chance would be awarded only in those cases where the plaintiff cannot establish, on the balance of probabilities, that the risk would not have eventuate and the defendant cannot establish that it would.” Para. 34.

“If there is evidence upon which the jury could reasonably find negligence on the part of a doctor, the issue is for them to decide irrespective of how many doctors think that the defendant was not negligent or careless.” Para. 47.

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