

# Surgeon found to have conveyed material risks even though interpretation issues meant patient claimed not to understand



## Key messages from the case

In the case of a patient with language difficulties, doctors are required to take reasonable care to ensure that the material risks of the procedure are conveyed, and to satisfy themselves that the substance of the information has been conveyed and understood. This case also highlights the importance of using accredited interpreters to explain risk to patients.

## Details of the decision

This case initially went before the District Court which found in favour of the patient with damages awarded in the amount of \$331,000. The case was appealed and the appeal court found in favour of the surgeon.

### Informed consent / duty to warn of risk

Mrs G suffered facial palsy when a facial nerve was severed during an operation to remove an acoustic neuroma.

This was a known risk of the surgery, and the surgeon was found not to have been negligent in the performance of the surgery. However, Mrs G claimed she had not been warned of the risk of nerve damage.

The case reiterated that to find a breach of duty for failure to warn, the court needed to find Mrs G would not have had the surgery if she had been properly advised of the risk.

### Use of interpreters

Mrs G had a poor grasp of English and her four consultations with multiple practitioners had been assisted by interpreters. A friend translated for her on the first two occasions at a regional clinic. The next two consultations were with accredited interpreters.

The court discussed the extent of the doctor's duty to satisfy themselves the patient has understood. The court of appeal rejected the trial judge's suggestion that doctors needed to check multiple times to ensure the patient has understood the information provided, ask repeated questions, recapitulate the information provided and ascertain the patient's understanding.

The court of appeal was unanimous in concluding this would be unduly onerous and extended far beyond a doctor's existing duty of care. It found that if a doctor consults with a patient using an interpreter accredited in their language, it would be unusual that 'interpreting issues' would form the basis for finding there had been a breach of the duty of care.

### Risks of using family or friends to interpret

In the initial consultations when a friend was interpreting, the doctor believed the consultation was being adequately interpreted. The doctor's medical records showed he had explained that the tumour was benign and was next to the brain but not in the brain, and conservative treatment and monitoring was appropriate. The doctor's oral evidence confirmed

and explained his notes, including that he would have specifically told the patient it was not cancer. However, the patient's evidence included that she believed she had a brain tumour, which was very bad, and could be removed by an operation. Both her parents had died of cancer so she believed the tumour would spread without surgery. She asked for a month to decide whether or not to proceed.

### Outcome

The court of appeal accepted that the doctor had all discussed material risks including the risk of facial palsy. The patient had not been able to prove that she had not been adequately warned of the risks of surgery.

The court of appeal also found that even if the patient had established she wasn't warned, she had not established that she wouldn't have had the surgery as a result. The court confirmed the patient must establish they would not have proceeded if properly warned.

The appeal was upheld.

### Key lessons

You are required to take reasonable care to ensure you convey the material risks of the procedure, and to satisfy yourself that the substance of the information has been conveyed and understood.

Use of plain language for all patients is ideal, ensuring that words such as tumour, lesion, growth are fully understood by all involved.

Avoid using family or friends to interpret unless there are no other options. If you use an accredited interpreter you are entitled to assume they are conveying your meaning. There would need to be unusual circumstances for the patient to show that interpreting issues meant you had breached your duty to inform.

Keep detailed notes of your consultation, including material risks that you discussed with the patient and include this in your correspondence with the patient's other practitioners.

### References and further reading

Avant factsheet – [Use of interpreters](#)

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