NOTES AND CASE COMMENTS

LEGAL LIABILITY OF COSMETIC SURGEONS: *LaFLEUR* v. *CORNELIS*

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A critical analysis of a recent case, *LaFleur* v. *Cornelis*,[1] forms the basis of this paper, which deals with the liability of reconstructive or plastic surgeons. The case, and this comment, centre upon that part of a plastic surgeon's practice that deals with elective cosmetic surgery, i.e. surgery opted for by the patient to change the appearance of some feature or some part of his/her body, as opposed to corrective plastic surgery.

I. INTRODUCTION

LaFleur v. *Cornelis* was decided in 1979 at the Trial Division of the New Brunswick Court of Queen's Bench. To date, it has not been appealed. The judgment of Barry, J. is most interesting and brings up many controversial points of law.

The facts of the case are as follows: The plaintiff, Debra LaFleur, was an attractive young woman who consulted the defendant plastic surgeon because she wanted to have a surgical procedure known as a rhinoplasty — a "nose job" — which would reduce the size of her nose. She had the operation, but a scar and indentation was left on her nose. She had a second operation, called a revision, but the scar remained, as did other minor deformities in the nostril and bone. The result was not monstrous by any means; she remained attractive, but the deformity and the scar were noticeable. She sued the surgeon, Dr. Cornelis, alleging negligence in the technique he used and in failing to advise her of the risks involved. She also sued in breach of contract, alleging the existence of a contract between her and the defendant, a term of which was an express warranty of guaranteed results.

The defendant was found to be negligent in his failure to protect the nose from the sutures, which caused the scar. The defendant's technique was not the one used by most other specialists in the field, and expert medical testimony was used to determine this. As to the failure to advise the plaintiff of risks, it was held that his total non-disclosure of risks would normally constitute negligence but, in this case, it did not because the Judge decided that the plaintiff would have accepted the risks had they been explained to her.

The plaintiff succeeded in her action in contract and the defendant was found in breach. The defendant was held to have made an express agreement with the plaintiff, warranting that the plaintiff would be pleased with the outcome of the surgery.

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1. (1980) 28 N.B.R. (2d) 569.

In assessing damages, the Judge allowed recovery for emotional distress on the principle that such distress was a reasonably foreseeable result of the breach of contract. The plaintiff was awarded $6000 total in general damages for negligence and breach of contract.

This paper will centre around four issues:

1. The contractual relationship between doctor and patient which is derived from an express warranty;
2. Damages awarded for mental suffering in breach of contract actions;
3. Duty of care of a cosmetic surgeon; and
4. Disclosure of risks.

II. CONTRACTS BETWEEN DOCTOR AND PATIENT: BREACH OF EXPRESS WARRANTY

In a doctor-patient relationship, the law implies a contract in which the doctor promises to employ the learning, skill and experience ordinarily possessed by others of his profession.[2] Although it can be argued that in every such relationship a contract exists between the parties, the general rule is that medical actions find their basis in tort and, most particularly, in negligence. It is rare that a patient sues in contract and when he does, the claim is usually accompanied by a claim in negligence. *Lafleur* v. *Cornelis* exemplifies the combined negligence/contract action. It is rarer, still, that a patient will commence an action in contract alone. In the field of cosmetic surgery, however, a suit in contract might be, because of limitation periods, the only action available to the plaintiff in certain situations. The limitation period in tort is one year from the termination of professional services; in contract the limitation period is six years from the date of the breach.[3]

In an action in contract, the patient merely has to prove that there was a contract and that the doctor breached it.[4] In a tort action for negligence, however, expert witnesses must be called. This can be a very expensive proposition for the patient/plaintiff, compounded by the additional problem of finding such witnesses. The reluctance within the general medical community to testify to the detriment of one's peers is bound to be more prevalent within the specialties:[5]

> Malpractice actions against plastic surgeons almost invariably require testimony by experts to establish a *prima facie* case, and locating medical witnesses may be one of the more difficult tasks of the plaintiff's counsel. Plastic surgeons whose practice is limited to that specialty may be more disposed to testify, however, where an action involves a surgeon who is not a full-time specialist.

But even though the burden of proof is lighter in contract than in tort, and it may well be cheaper for the plaintiff to sue in contract, these advantages to the plaintiff are usually only theoretical because, as has been

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2. T. Woodbury, "A Liberal View of the Contractual Liability of Physicians and Surgeons" (1976) 54 *N. Car.L. Rev.* 884 at 889.
3. E. Picard, *Legal Liability of Doctors and Hospitals in Canada* (1978) 54.
4. *Id.* at 55.
5. M. Carmichael, "Liability of Physician or Hospital in the Performance of Cosmetic Surgery upon the Face" 54 A.L.R. (3d) 1255 at 1261.

mentioned, the norm is that if the plaintiff proceeds in contract he will almost always plead negligence as well.

There are decided disadvantages to a claim in contract and these centre around the limitations on damage awards, as compared to heads of damages in tort.

American jurisprudence indicates that in general, actions in contract against surgeons are pursued less infrequently than in Canada. An American writer, Marc Carmichael, notes, however:[6]

> At first blush, it would appear that litigation in the field of cosmetic surgery would be a ripe area for actions in breach of contract or express warranty — the typical situation being that of a patient seeking to have his nose reshaped, the surgeon agreeing to do the job, and the results turning out to be other than those promised. Most of the actions arising out of cosmetic operations have been cast, however, in the conventional negligence mold, and of the actions brought in contract, only a few have succeeded in establishing liability on the part of the medical practitioner.

He adds that practical problems exist in a cosmetic surgery action brought in contract, because plastic surgeons have been educated not to make any promise of any sort, and thus proof of an express contract may be difficult.[7]

In *LaFleur* v. *Cornelis*, Barry, J., in finding that the surgeon and the plaintiff entered into a contract, a term of which was an express warranty of guaranteed results, states:[8]

> The plea in contract is a different matter. A cosmetic surgeon is in a different position than the ordinary physician. He is selling a special service and he is more akin to a businessman. Therefore, this is not the ordinary malpractice case. Normally a doctor contracts to use the best skill he possesses and he is expected to exercise at least the methods ordinarily employed by similarly trained professionals. If he does not do so, he may be guilty of negligence in carrying out his contract, as I have found the defendant was in this case.
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> In the instant case, that was not the kind of a contract which the defendant entered into with the plaintiff. The latter told the defendant what she wanted, namely, a smaller nose. The defendant drew a sketch on his notes to show the changes he would make if the plaintiff paid him a fee of $600.00. There was no misunderstanding whatever. Both parties were *ad idem* as to what each was to do. The plaintiff paid the fee and the defendant failed to carry out his part of the contract. Negligence is not a factor in a straight breach of contract action. There is no law preventing a doctor from contracting to do that which he is paid to do. I appreciate that usually there is no implied warranty of success, in the absence of special circumstances. In this case, the defendant stated to the plaintiff — "no problem. You will be very happy". He made an express agreement, which he was not required to, without explaining the risk.
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> I find that the parties made a contract, and the defendant breached it, leaving the plaintiff with a scarred nose with a minimal deformity.

The Judge's decision that there was an express warranty seems to turn on the statement ". . . no problem. You will be happy."[9] This writer, for one, has problems with construing Dr. Cornelis's statement as an express warranty. If Dr. Cornelis had said, referring to his sketch, "I promise this is exactly what your new nose will look like and I know you'll be happy with it," or "I guarantee your new nose will look just like the sketch," then the Judge's finding would be less vulnerable to criticism. It is sub-

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6. *Id.* at 1260.
7. *Id.* at 1260.
8. *Supra* n. 1 at 577.
9. *Id.* at 588.

mitted that, "You will be very happy," by itself, should not have been held to have constituted an express warranty. The phrase is general and vague and amounts to no more, it is suggested, than therapeutic reassurance or a "mere puff."[10]

Prosser, in *Handbook on the Law of Torts*, says:[11]

> A physician may, although he seldom does, contract to cure his patient, or to accomplish a particular result, in which case he may be liable for breach of contract when he does not succeed. In the absence of such an express agreement, he does not warrant or insure the outcome of his treatment, and he will not be liable for an honest mistake of judgement, where the proper course is open to reasonable doubt.

And Williston, in *Contracts*, writes: "In the absence of an express agreement, there is no guarantee that a course of treatment for an operation will be successful."[12] In *LaFleur*, the trier of fact held that there was no absence of an express warranty because Dr. Cornelis assured Miss LaFleur she would be "very happy." Consider, though, if the operation had turned out successfully but, notwithstanding, the plaintiff was still *not happy* with the way she looked. Surely, she would have, in such circumstances, no action against Dr. Cornelis for breach of an express warranty of guaranteed happiness!

The courts decide whether or not an express promise was made. The dilemma of the courts is outlined by Woodbury when he says:[13]

> In determining what constitutes a contract, courts have been walking an evidentiary tightrope between words of agreement and expressions of opinion. In so doing, they have tried to balance the legitimate need to give patients "therapeutic reassurance" against the right of individuals to enter into contracts and have those contracts enforced. Needless to say, their performance has drawn less than unanimous applause from scholars, practitioners, and the bench.

Some examples of cases where an express warranty was found are as follows:

1. A court found the physician's assurance that an operation was a "fool-proof thing 100%" to be evidence of an express guarantee of the results of the operation.[14]

2. A court held that a psychiatrist's unqualified remarks that shock treatments were "perfectly safe" might be construed as a warranty.[15]

3. In a famous 1929 case, the defendant physician promised to perform plastic surgery on the plaintiff's burned hand and assured the plaintiff that the result would be a "100% perfect hand." The result was far from perfect, however, and the skin grafted onto the plaintiff's hand from his chest caused hair to grow on his palm. The defendant's doctor was found to be in breach of an express warranty.[16]

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10. S. M. Waddams, in *The Law of Contracts* (1977) at 250 writes: "Another limit to the scope of relief is the general commendatory statement. If too vague and general the court will regard it as a 'mere puff' and legally irrelevant. The assertion by the vendor of a house, for example that it is a 'most desirable residence,' is unlikely to have any legal consequences. On the other hand the statement by the seller of a used car that it was 'a good little bus' was held to amount to a warranty that it was at least roadworthy."
11. W. Prosser, *Handbook on the Law of Torts* (4th ed. 1971) 162.
12. S. Williston, *Contracts* (3rd ed. 1967) 946.
13. Woodbury, *supra* n. 2 at 893.
14. *Hackworth* v. *Hart* (1971) 474 S.W. (2d) 377.
15. *Johnston* v. *Rodis* (1958) 251 F. (2d) 917.
16. *Hawkins* v. *McGee* (1929) 84 N.H. 114.

4. In another early case, a plastic and cosmetic surgeon promised to make his patient "a model of harmonious perfection" and was found to have made an express warranty. He also promised that the operation would be performed without pain, inflammation, soreness or inconvenience and without leaving any scars.[17]

The above examples, it is submitted, contain much more conclusive evidence pointing toward an express warranty than can be found in *LaFleur*. But Judge Barry concludes that Dr. Cornelis made an express agreement, which he was not required to do, without explaining the risks. It is curiously noted that, as to the action in contract, Judge Barry's conclusion that there was an express agreement is reinforced by Dr. Cornelis's failure to discuss risk with his patient. Yet, when addressing himself to whether or not the defendant's failure to advise the plaintiff of the risks amounted to negligence, Judge Barry concludes it did not, because the plaintiff was an intelligent woman who knew about cosmetic surgery (her mother had had a successful rhinoplasty and her girlfriend was going to be undergoing one soon) and would therefore know of incidental risks and know that such an operation carries with it some chance of failure. In fact, Judge Barry concludes that the risk was possibly a ten per cent chance of a scar and in his opinion the plaintiff would have accepted that risk had it been explained to her.

Allowing actions for breach of medical contracts has been criticized on the ground that physicians may be discouraged from giving the distraught and fearful patient needed reassurance.[18] It has been suggested that in emergency cases, where the bargaining atmosphere of the doctor — patient discussion is lacking, there may be a need to guarantee good results in order to prepare the patient psychologically for surgery, and therefore in those kinds of cases the guarantee should not be upheld.[19] It is submitted, further, that in a cosmetic surgery situation, where the treatment is elective and where, it is suggested, the typical patient is somewhat more informed and more sophisticated than the average patient, the courts should be most cautious in construing a doctor's casual comment as an express guarantee of results.

III. DAMAGES: AWARDING DAMAGES FOR MENTAL SUFFERING IN BREACH OF CONTRACT ACTIONS

It was once the law that no damages could be recovered in contract for injury to the feelings, i.e. mental distress.[20] It appears that the reason for this general rule is that contracts normally concern commercial matters and that mental suffering on breach is not in the contemplation of the

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17. *Bailey* v. *Harmon* (1924) 74 Colo. 390. The operation included a rhinoplasty, raising of the left eyebrow, removal and eradication or correction of all scars, blemishes, irregularities, defects, lines, circles, marks and wrinkles in the patient's neck, face and hands, and a "correction of all disfiguring distortions of all kinds."

18. Woodbury, *supra* n. 2 at 899.

19. *Id.* at 901.

20. J. Mayne, *McGregor on Damages* (14 ed. 1980) 70.

parties as part of the business risks of the transaction. However, Mayne in the fourteenth edition of *McGregor on Damages* says:[21]

> If, however, the contract is not primarily a commercial one, but rather one that affects not the plaintiff's business interests but his personal interest, the door should not be closed to awarding damages for mental suffering if the court thinks that in the particular circumstances the parties to the contract had such damage in their contemplation.

There are several recent cases which stand for this proposition. In *Heywood* v. *Wellars*,[22] a 1976 English case, the plaintiff instructed her solicitors to bring proceedings to restrain a man from molesting her, but her solicitors bungled the proceedings, and she was allowed damages in contract for her resulting mental distress. In this case, it was stressed that the mental distress was reasonably foreseeable. In *Newell et al.* v. *Canadian Pacific Airlines, Ltd.*,[23] a 1976 Ontario case, damages were awarded in contract for reasonably foreseeable emotional distress. The headnote from *Newell* reads:[24]

> One of the plaintiffs dogs died and the other suffered serious injury, while travelling in a cargo compartment of defendant's aircraft, as a result of the defendant's breach of contract to carry the dogs safely. In an action for breach of contract, in which the plaintiffs' claim included general damages for the "anguish, loss of enjoyment of life and sadness" which they alleged resulted from the breach of contract, *held*, judgment should be given for the plaintiffs for the damages claimed.
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> The defendant's employees saw the plaintiffs, spoke to them, were aware of their fragile state of health, and were aware of their attachment to and concern for their pets. Defendant's employees were at pains to reassure the plaintiffs that their pets would be safe in the cargo area of the aircraft and in fact came to advise them before they boarded the aircraft that the dogs had been placed in the cargo area. It was clear to the defendant from the obvious concern of the plaintiffs with respect to the welfare of their pets that should anything happen to them this would likely cause the plaintiffs vexation, frustration and distress. The special circumstances of this case were brought home to the defendant at the time it entered into the contract with the plaintiffs. Thus, damage to the plaintiffs' health, anguish, unhappiness and inconvenience were a reasonably foreseeable consequence of the defendant's breach of contract, for which the plaintiffs were entitled to recover damages.

In *LaFleur* v. *Cornelis*, Judge Barry relies on *Heywood* and *Newell*, among others. He says:[25]

> The ordinary principles of damage assessment in contract are inapplicable in the circumstances. Borins, County Court Judge in *Newell* v. *Canadian Pacific Airlines Limited* (1979) 74 D.L.R. (3d) 574, analyzed the new authorities in which damages for emotional stress and upset were allowed. Previously such were not considered. One cannot replace a nose or the turmoil caused to a person by a breach of contract. These items of damage were obviously foreseeable to any person in the instant case.

He continues:[26]

> I also realize that I am adopting a relatively new method of assessing damages for some items not allowed even ten years ago, but I have never been able to find any logical reason why an injured party should not be compensated for foreseeable results of a breach of contract, just as in negligence.

It is noteworthy that although Judge Barry finds that the defendant is liable in negligence as well as in breach of contract, he chooses to make

21. *Id.* at 70.
22. [1976] 1 All E.R. 300.
23. (1976) 74 D.L.R. (3d) 574 (Ont. Cty. Ct.).
24. *Id.* at 575. Newell reviews several other cases where damages for mental distress were awarded in breach of contract actions.
25. *Supra* n. 1 at 579.
26 *Id.*.

the damage award for mental distress under the action in contract. He also implies that he is applying the "thin skull" rule in a contract action, by saying, "I believe that she would have been emotionally upset in any event, but nothing like she suffered, being the type of person she is and was."[27]

In summing up, Judge Barry says, "I cannot allow her compensation for *all* that she has suffered, emotionally and otherwise."[28] (Emphasis added.) Why he can't allow compensation for *all* that she has suffered, he doesn't say.

American cases seem to follow the recent trend of awarding damages for mental suffering in contract actions. In *Sullivan* v. *O'Connor*,[29] a 1973 Massachusetts case — the fact situation was similar to that in *LaFleur* — the parties had entered into an agreement whereby the defendant cosmetic surgeon promised to correct the plaintiff's long and prominent nose. In fact, three operations were necessary and the plaintiff's nose, instead of being enhanced, became concave at midpoint, and flattened, concave and bulbous at the tip. The jury was permitted to take into account the mental effects on the plaintiff as the court considered that such damages awarded for mental suffering flow directly, naturally, proximately and foreseeably from the breach.[30] Woodbury notes that this award in *Sullivan* introduced an element of loss traditionally restricted to tort liability.[31]

In *LaFleur*, the plaintiff was awarded $6000 total damages for negligence and for breach of contract. Judge Barry's judgment seems to stress the breach of contract by the defendant. It would be interesting to know how much of the $6000 was awarded to cover the breach and how much was awarded for negligence, or if the Judge had even considered such a split. It should be mentioned that damages in contract are not expressly covered by a Canadian doctor's standard insurance coverage and, theoretically, the surgeon could have to pay such awards out of his own pocket.[32] Picard notes, however:[33]

> To date the Canadian Medical Protective Association has not denied the request of a member to be assisted simply because he has been sued in contract. This may change if the number of contract actions increases sharply.

It is suggested that in the area of cosmetic surgery, if a breach of contract is found, the typical situation is ripe for a claim of damages for mental distress. The fact that patients who seek surgery may be more sensitive about looks and appearances in the first place would indicate that, in the event of unsatisfactory results, mental distress and upset would be not only foreseeable, but virtually certain.

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27. *Id.* at 578.
28. *Id.* at 579.
29. (1973) 363 Mass. 579.
30. *Id.* at 586.
31. Woodbury, *supra* n. 2 at 885.
32. Picard, *supra* n. 3 at 56. The same situation exists in the United States. i.e., contract actions are not expressly covered by the usual malpractice insurance.
33. *Id.* at 56.

IV. STANDARD OF CARE: "... A VERY HIGH DUTY INDEED."

In addressing himself to the issue of duty of care, Judge Barry says:[34]

> The allegation of negligence must, of course, be based on a duty. The duty of the ordinary physician is that he or she will use the best efforts and skill of which they are capable as related to the skill and knowledge and efforts of comparably trained people in the profession. A specialist is expected to possess more knowledge and skill than a general practitioner. The duty on a specialist is higher.

Up to this point, he adequately summarizes the law. In continuing, however, he proceeds to make a most interesting and somewhat disturbing statement:[35]

> Dr. Cornelis is a highly trained specialist, who performs cosmetic surgery on an otherwise healthy body. It is my opinion that a medical doctor, who undertakes to operate on the nose of a *healthy person* for cosmetic purposes, has a *very high duty indeed.* Poor results cannot be concealed by clothing nor from the mirror, and the doctor knows it. Medically, such procedures are unnecessary unless on psychiatric grounds and the defendant is not a psychiatrist nor did a psychiatrist recommend the procedure. (Emphasis added).

Judge Barry seems to imply that because the patient is healthy and the purpose of the procedure is cosmetic that the standard of care is somehow elevated beyond even that of the reasonable medical specialist. Should the reader of his judgment make the inference that the performance of a rhinoplasty on Tuesday, for strictly cosmetic purposes, carries with it a higher standard of care than on Wednesday, when the specialist undertakes the identical procedure but for the purpose of correcting a patient's physical dysfunction?

A similar anomaly is evident in an analysis of the distinction he makes between "unnecessary" cosmetic surgery and procedures necessary on psychiatric grounds. It is submitted that there should be no variance of the duty of care that is owed in the two situations. The duty and standard of care should be a function of the surgeon's special training and ability and not of the patient's personal reasons for submitting to the procedure.[36]

V. DISCLOSURE OF RISKS

In *LaFleur* v. *Cornelis* the plaintiff alleged that Dr. Cornelis failed to advise her of the risks inherent in the procedure. The defendant pleaded that the plaintiff consented to the risk by signing the authorization to operate on one occasion and by signing the hospital form which stated that she understood and consented to the risks. However, Judge Barry concluded:[37]

> The other allegation of negligence is based on the failure to advise of the risks involved. It is true that the plaintiff signed the fine print hospital documents and another consent to surgery, but those documents do not relieve the defendant of his duty to inform the plaintiff of the risks inherent. I find as a fact that he did not do so.

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34. *Supra* n. 1 at 573.

35. *Id.*.

36. Barry's comments as to the higher duty that may be owed to patients undergoing cosmetic surgery, as opposed to "non-elective" surgery are interesting too, in light of the fact that he gives the impression that he views the whole idea of cosmetic surgery as somewhat frivolous. *See* n. 52.

37. *Supra* n. 1 at 575.

Judge Barry also states, "When a treatment is elective, a very high degree of disclosure of the risks is required,"[38] and he cites *Halushka* v. *University of Saskatchewan* as an authority for this proposition. In *Halushka*, a university student volunteered to be a subject of an experimental test involving the administration of an anaesthetic. It was held that the duty of disclosure of risks in a medical research situation where people offer themselves as subjects for experimentation is at least as great as, if not greater than, the duty required in an ordinary doctor-patient situation, and that the question of risks being properly hidden from a patient (i.e. when it is important that the patient should not worry) can have no application in the field of research. It is submitted that the full disclosure standard advocated by Hall, J.A. in *Halushka* was to be confined to experimental and research oriented treatment, and as such is not applicable to the facts of *LaFleur*, and that Barry's equating of "experimental" with "elective" is not justified.

LaFleur v. *Cornelis* was decided prior to the Supreme Court of Canada decision in *Reibl* v. *Hughes*.[40] In that case, Chief Justice Laskin advocated a full disclosure standard in all medical procedures, rejecting the professional disclosure standard which, to that time, had been the normal standard in Canada.

In *LaFleur*, the plaintiff and the defendant did not discuss risks *at all*. Obviously, this cannot amount to a full disclosure but, under the circumstances of the case, it is submitted that it could be argued that no disclosure whatsoever could satisfy the requirements of a professional disclosure standard. It is quite conceivable that it would be accepted practice for a cosmetic surgeon not to mention risks, especially when the doctor knows that his patient is familiar with the procedure he will be undergoing.

The non-disclosure of risks complained of by the plaintiff in *LaFleur* can be narrowed to the risk that the operation would not yield the desired cosmetic results. Barry J. says:[41]

> I must address myself to the question of whether or not the failure to advise the plaintiff of the risks was negligence. Normally, in this type of case, I would think it was.

But he qualifies this and says:[42]

> However, the plaintiff was an intelligent person, who would know of incidental risks. She knew of her mother's successful operation and the fact that her girlfriend was submitting to the same procedure. The risk was possibly a 10% chance of a scar, more or less, and in my opinion, the plaintiff would have accepted that risk had it been explained. She states she would not.
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> The Defendant cannot be expected to dissuade his patients, if I may call them such, from undergoing the surgery which is his specialty for 80% of his work and income. There was a high duty to explain the risk, but had he done so, the plaintiff would not have changed her mind, in my opinion. Hindsight is not the proper measure.

Judge Barry is applying a subjective test. Normally the doctor would have been negligent in not making at least a partial disclosure of risks, but here, since the plaintiff had personal knowledge of cosmetic surgery procedures and was an intelligent and informed young woman, she is

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38. *Id.* at 576.
39. (1965) 52 W.W.R. (N.S.) 608 (Sask. C.A.).
40. (1980) 14 C.C.L.T. 1.
41. *Supra* n. 1 at 576.
42. *Id.* at 576.

deemed to know of the risks. This finding is difficult to reconcile with the fact that Judge Barry held, regarding the action in contract, that the defendant had guaranteed the results of the operation. If Miss LaFleur is imputed with the knowledge of a 10% risk of failure, how can it be said that she is justified in construing Dr. Cornelis's comment, "No problem. You will be very happy," as a 100% guarantee of success?

In *Petty* v. *MacKay*[43], Anderson, J. purports to apply an objective test in the issue of causation. Picard says, "Thus in an action by a patient alleging negligence for failing to disclose a risk, the patient must prove that the failure by the doctor was a cause-in-fact and a proximate cause of the patient's injuries."[44] In *Petty* v. *Mackay*, the plaintiff did not discharge this onus of proof. The headnote summarizes the case:[45]

> The plaintiff instituted an action in negligence against the defendant, alleging that the defendant, who was a plastic surgeon, failed to advise the plaintiff of the possible risks, including disfigurement, prior to the performing of a "modified abdominoplasty".
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> The plaintiff's occupation was that of an exotic dancer. She requested the plastic surgery in order to improve the cosmetic appearance of her abdomen. The operation did not achieve this result. The defendant did not warn the plaintiff of the risks involved. The plaintiff testified that if she had known of the risks, she would not have had the operation.
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> Held — The action should be dismissed. A reasonable and prudent person in the plaintiff's circumstances would have proceeded with the surgery even if the risks involved had been fully discussed prior to the operation. The plaintiff's testimony that she would not have, was "hindsight" testimony made in the light of the actual results of the operation. This is only of assistance where the objective test creates a situation of uncertainty. Otherwise the objective test should be applied. Applying the objective test, if the plaintiff had been informed of the risks she would have gone ahead with the operation.

In *Petty* v. *Mackay*, the objective test for causation is said to embody that of the reasonable or prudent patient in that particular patient's circumstances. It is submitted that the test applied in *Petty* v. *Mackay* is, in actuality, a combined objective/subjective test as advocated by Mr. Justice Brooke in the Ontario Court of Appeal decision of *Reibl* v. *Hughes*.[46] *Reibl* v. *Hughes* was appealed to the Supreme Court of Canada and Chief Justice Laskin expressed disapproval of the combined objective/subjective test, stating that he rejected the test partly because of the "hindsight" problem.[47] It should be noted that in *LaFleur*, a subjective test was applied and the "hindsight" problem was in issue, but the problem was resolved in favour of the defendant. It appears, too, that Laskin's objective test is, in fact, merely a variation of the combined objective/subjective test that he purports to reject.[48] The patient's particular circumstances are stressed by Laskin more than once in his judgment, and when such circumstances are so considered, a subjective element is necessarily implemented.

In a cosmetic surgery situation, would an application of the subjective/objective test be: Would the reasonable patient, who seeks cosmetic surgery because he or she is sensitive about appearance, have consented to the risk? In *LaFleur*, one of the medical experts suggested that the

43. (1979) 10 C.C.L.T. 85.

44. E. Picard, "Consent to Medical Treatment in Canada" (1981) 19 *Osgoode Hall L.J.* 147.

45. *Supra* n. 43 at 85.

46. (1977) 6 C.C.L.T. (Ont. C.A.).

47. Picard, *supra* n. 3 at 148.

48. *Id.*.

plaintiff was "hyper" and that he would not have accepted her as a patient.[49] Should the test for "hyper" patients be that of the "reasonable unreasonable patient"? It is suggested that the plaintiff in a negligence action in cosmetic surgery cases is not going to be the average, typical, reasonable person. Any test, to be fair to the plaintiff, would have to be largely subjective. As to Laskin's conclusion, in *Reibl* v. *Hughes*, that the subjective test is inadequate, Picard says:[50]

> It is submitted that the Chief Justice's conclusions are based on an unwarranted pessimism about the ability of the legal process to deal with evidence. The patient's attitudes, demeanour and his story are tested by examination-for-discovery and, at trial, by the adversary process. The trial judge can assess the credibility of the patient and his testimony. Surely, the doctor deserves no more and no less protection than a defendant in, for example, a negligent misstatement action.

The test applied in *LaFleur* was subjective and, it is submitted, adequate. There, the judge reviewed the evidence and found in favour of the defendant.

VI. CONCLUSION

Portions of Judge Barry's judgment indicate that he is somewhat awed by the whole concept of cosmetic surgery. His attitudes are traditional and conservative and he freely admits that he does not really understand why people would submit to surgery merely to modify their appearance, or why doctors would choose such a specialty.[51]

> It is a little difficult for me to think of a medical doctor as a person who changes the shape of a person's nose because he or she does not like it, but it is a fact that doctors do such work.

He remarks, "Why she [the plaintiff] was unhappy with her nose, I will never know . . .".[52] Yet, Judge Barry's biases are not reflected in the outcome of the case, although one might query the adequacy of the quantum of damages awarded. In Canada, malpractice cases are almost always heard before a judge alone, but in the United States it is usually a jury who decides the case and sets the quantum. Carmichael notes:[53]

> Another aspect of a cosmetic surgery case which counsel should consider is the attitude of prospective jurors toward elective surgery as a concept, and toward cosmetic surgery in particular. Thus, on voir dire, counsel should ascertain whether an individual has any moral or ethical prejudices against such medical procedures, the patient who would undergo such an operation, or the physician who would perform such surgery.

It is submitted, in conclusion, that a cosmetic surgeon, if he wishes to avoid being a potential defendant in a breach of contract action, must take care to refrain from making statements that the court could construe as express warranties of successful results. Such caution may prevent him from giving his patient the therapeutic reassurance that the patient desires to hear. Cosmetic surgeons should be aware of the current trend of the courts to not rule out damage awards for mental suffering in breach of contract actions. To avoid being held negligent in the issue of risk disclosure, cosmetic surgeons should, especially in the light of the Supreme Court of Canada decision in *Reibl* v. *Hughes* disclose all material risks and adopt a full, as opposed to a professional, disclosure standard.

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49. *Supra* n. 1 at 573.
50. Picard, *supra* n. 3 at 148.
51. *Supra* n. 1 at 573.
52. *Id.* at 571.
53. Carmichael, *supra* n. 5 at 1261.