COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Rybakov v. Khattak,*
2024 BCCA 96

Date: 20240305
Docket: CA48960

Between:

Dmitri Rybakov

Appellant
(Plaintiff)

And

Dr. Abid Saeed Khattak, Dr. Emad Halim Zaghloul, and Dr. Munir Muhammad Malik

Respondents
(Defendants)

Before: The Honourable Mr. Justice Fitch
The Honourable Mr. Justice Grauer
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated March 28, 2023 (*Rybakov v. Fraser Health Authority*, 2023 BCSC 680, Vancouver Docket S188759).

Oral Reasons for Judgment

Counsel for the Appellant:	D.O. Shane
Counsel for the Respondents:	J.D. Meadows B. Desparts
Place and Date of Hearing:	Vancouver, British Columbia March 5, 2024
Place and Date of Judgment:	Vancouver, British Columbia March 5, 2024

Summary:

The appellant appeals the dismissal of his medical negligence claim after the close of his case before a jury. The appellant, who received a course of electroconvulsive therapy, alleged that the respondent psychiatrists were negligent in failing to inform him that the force and duration of the electrical charges would be increased during treatment. His claim was dismissed on a no-evidence motion because he failed to provide expert evidence on the applicable standard of care. HELD: Appeal dismissed. The appellant conceded that there were no material risks arising from the undisclosed facts. The judge correctly concluded that clinical expertise was needed both to establish the standard of care and to demonstrate that the standard of care was negligent. This is not a case in which glaring risks materialized that could have been avoided with obvious precautions.

[1] **GRAUER J.A.**: The medical malpractice claim of the appellant proceeded to trial before Justice Giaschi and a jury on March 20, 2023. It arose in connection with a course of electroconvulsive therapy ("ECT") prescribed by the respondent Dr. Khattak and administered by the respondents Dr. Zaghloul and Dr. Malik (all three of whom are psychiatrists). ECT is a process designed to induce controlled seizures of a desired duration (above 15 seconds) in order to effect changes in brain chemistry.

[2] After the close of the appellant's case on March 27, 2023, the respondents applied under Rule 12-5(4) of the *Supreme Court Civil Rules* for an order dismissing the action on the ground that there was no evidence to support the appellant's claim. In reasons for judgment indexed as *Rybakov v Fraser Health Authority*, 2023 BCSC 680, Justice Giaschi granted the application and dismissed the action.

[3] By the time of the application, the appellant's case, which had initially pleaded multiple causes of action, was limited to a claim in negligence. The primary problem, as the judge noted, was that the appellant did not file any expert reports or otherwise present any expert evidence in his case. The essence of the issue on the respondents' application, then, was whether it could be said in the circumstances that there was any evidence that could support the allegation that the respondent psychiatrists had failed to meet the standard of care required of them in treating the appellant.

[4] The appellant says that, notwithstanding the absence of expert evidence, the judge erred in law in concluding that this was a case in which there was no evidence on which a jury could find a breach of duty. In fact, the appellant submits, there was some evidence that, in law, could have supported a finding by the jury that the applicable standard of care was itself negligent, and that accordingly, the judge should have left that question for the jury instead of deciding it for himself. This position focused on the allegedly negligent failure of the respondents to tell the appellant about their intention to increase the power and duration of charges administered in later sessions, and to advise him about the result.

[5] The relevant facts are fully set out in the judge's reasons. For present purposes, I note that the appellant discussed ECT with Dr. Khattak on July 8, 2016, and agreed to proceed with it at that time. Up to 12 treatments were planned. The appellant had previously read up about the procedure in the provincial manual for administering ECT. From this, he knew that gradual increases in the electrical charge would be delivered to obtain an adequate seizure. He also knew that any given treatment might fail to elicit an adequate seizure because of insufficient charge.

[6] Dr. Zaghloul administered the first two treatments on August 19 and 22, 2016, inducing seizures of 33 and 26 seconds, respectively. With the same electrical charge, he administered a third treatment on August 24, 2016. The controlled seizure was shorter, lasting 15 seconds. Dr. Zaghloul administered a fourth treatment on August 26, 2016, increasing the charge and duration, but inducing only a 5-second brain seizure. He therefore tried a second time with a higher charge and slightly longer duration, but no brain seizure occurred.

[7] Dr. Malik administered the fifth treatment on August 29, 2016, increasing both the charge and the duration, inducing a 20-second brain seizure. He administered the sixth treatment on August 31, 2016, increasing both the charge and duration again, and inducing a 15-second brain seizure. That was the last treatment.

[8] None of the respondents said anything to the appellant about the increases in the charges or duration either before or after the treatments, nor did they tell the appellant about the result of the two attempts on the fourth treatment (a 5-second brain seizure on the first attempt, with no brain seizure on the second attempt).

[9] The evidence read in by the appellant from the examinations for discovery of the respondents established that decreases in the duration of the seizures induced by the treatment can be expected due to the patient developing tolerance. As a result, it is a usual part of the course of treatment to increase the charges and/or time in order to obtain seizures of therapeutically appropriate duration. It was not the practice of the respondents to tell patients about these increases.

[10] As the appellant points out, the evidence was thus clear that, (1) none of the respondents disclosed to him that there would be or were increases in the electrical charges and their duration; and (2) none of the respondents disclosed to him that ECT #4 had failed to induce the required brain seizure.

[11] This, in the appellant's submission, was some evidence on which a jury could find negligence. His claim was based on the proposition that the respondents were obliged to tell him these things, and if they had, he would have stopped the treatment somewhere along the chain. Moreover, the appellant argued in his factum, the evidence as read in indicated that withholding the information was <u>within</u> the accepted standard of care, so no supportive expert evidence would have been available to the appellant. The issue, accordingly, was not whether the respondents had met the standard of care, but rather, whether that standard was itself negligent. The bottom line was this: were the respondents negligent in not disclosing the information in question?

[12] The appellant accepts that the judge reviewed the law correctly, but asserts that he erred in applying it. He did so, the appellant argues, by treating ECT as a complex procedure outside the realm of common sense, so that laypersons would lack the knowledge necessary to determine the standard of care. Instead, the appellant contends, this was simply a case of "communications management", not

medical science—citing *Rupert v Toth*, [2006] OJ No 882, 2006 CanLII 6696 (SCJ) for the proposition that this is an area in which physicians have no monopoly or particular expertise.

[13] As I read his reasons for judgment, the judge was very much alive to this question. He reviewed the law fully and carefully and I can find no flaw in his reasoning. As the judge observed at para 38, whether expert evidence is required to establish the applicable standard of care depends on the particular circumstances, and, more specifically, on the nature of the alleged negligent conduct. He went on to note:

> [39] The authorities have used different language to describe the circumstances where expert evidence is required to prove a standard of care and breach of a standard of care. However, the theme running through the cases is that expert evidence is required where the matter involves technical or specialized knowledge or experience that is beyond the knowledge or experience of laypersons. Where the matter does not involve specialized or technical knowledge or experience, expert evidence is not required.

[14] The appellant did not argue a lack of informed consent and conceded in oral argument that the evidence would not support such a claim because of the absence of any material risk. He agreed that the respondents had not failed to tell him about any risk that he then suffered from. He led no expert evidence that but for the treatment or its continuation, he would not have suffered any of the difficulties of which he complained. And while he read in discovery evidence that it was not the practice of either Dr. Zaghloul or Dr. Malik to advise patients of an intention to increase the power or duration of charges, there was no expert evidence of what the professionally accepted standard of care actually was. This meant that there was no evidence of the accepted standard against which the respondents' care should be measured, or of a standard that could be assessed for its reasonableness.

[15] Would it nevertheless have been open to a jury to find the respondents negligent for failing to advise the appellant of the increases in the power or duration of the charges?

[16] In oral argument, the appellant raised for the first time what he conceded was a novel proposition. It was this: it should have been open to the jury to determine whether the respondents breached their duty to the appellant by failing to advise him about facts that were subjectively material to him, notwithstanding the absence of any material risk arising from the alleged failure. This argument is based on evidence from the appellant that it would have been material to him to know that the doses were being increased and that an adequate seizure had not been induced during the fourth treatment. If he had known of these things, the appellant testified, he would not have continued with the treatment. There was no evidence that he communicated these concerns to any of the respondents.

[17] In the appellant's submission, this basis for finding liability had hitherto fallen through the jurisprudential crack between informed consent and breach of standard of practice.

[18] I see no merit to this argument. It was not included in the appellant's factum and counsel could find no authority to support it. It should not have been raised for the first time in oral argument, thereby taking the respondents by surprise.

[19] I also see no crack between informed consent and breach of standard of care. In the absence of a relevant material risk, there could be no duty to communicate facts to the appellant to avoid vitiating his consent. The appellant concedes as much. One must therefore look to whether, as a matter of standard practice, the facts in question ought nevertheless to have been communicated. The law requires more than evidence that the patient, subjectively, wanted to know.

[20] In the circumstances of this case, it is my view that it was not open to the jury to find the respondents negligent on any basis. Unlike the authorities the appellant did cite, where an accepted standard has been found negligent or where a breach of the standard of care has been found in the absence of expert evidence, this was clearly not a case where an obvious risk that materialized that, as a matter of common sense, ought to have been communicated to the patient in advance. Thus, for instance, in *Rupert*, the defendant physician had noted findings on a CT scan

that required a follow-up appointment, but failed to take the additional steps to ensure that the follow-up was done. The patient died. The judge described the problem as "not a matter of medical science but rather a matter of communications management" (at para 123). The mistake was not in determining whether the patient *should* be told—that was accepted—but in making sure he *was* told. That is not what happened here.

[21] Similarly, *Buckingham v Hobza*, 2023 BCSC 399, involved a claim where the patient had been administered a steroid, prednisone, after which he developed glaucoma. While the judge was unable to find that the plaintiff had established a claim for lack of informed consent, he concluded that the standard of care of administering the drug for the length of time it was administered, without a system of monitoring, was itself negligent in the circumstances. In doing so, the judge observed that:

> [217] … [T]o be negligent in itself, the existing standard must be one that is fraught with obvious risk and/or that fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact. …
> …
> [221] Similarly, I do not think that finding the standard of care negligent in this case requires any diagnostic or clinic expertise. This standard is fraught with risk in a particular situation and type of patient, and reasonable precautions to avoid that risk – in the form of a system of ongoing monitoring – are obviously available, even from the perspective of the non-medically trained trier of fact.

[22] Respectfully, the difficulty for the appellant in this case is that there was no evidence of any particular risk that materialized to which he was exposed and which could have been avoided by obvious and reasonable precautions, or that the respondents' practice of not disclosing the increases in dosage was fraught with foreseeable risk. This was a case where finding the standard of care negligent did require clinical expertise. This would include any finding that a fact ought to have been communicated notwithstanding the absence of any material risk associated with it. Such evidence might consist of an expert opinion that, given the vulnerability of a patient in the position of the appellant, it is generally accepted among psychiatrists administering ECT that all treatment-related facts need to be

communicated at each session, even where they are routine, give rise to no material risk, and are already generally known to the patient. There was, however, no evidence capable of supporting such a proposition. This, of course, is quite apart from the problem that, as counsel for the appellant acknowledged, there was no expert evidence that, but for the continuation of the treatment, the appellant would not have suffered the difficulties of which he complained.

[23] It follows, in my view, that the appellant has failed to establish any error of law in the judge's analysis. The judge correctly concluded that, in the circumstances of this case, expert evidence was needed both to establish a requisite standard of care and to demonstrate that the standard of care followed by the respondents was negligent. As there was no such evidence, the action was properly dismissed.

[24] For these reasons, and for the reasons expressed by the judge, I would dismiss this appeal.

[25] **FITCH J.A.**: I agree.

[26] **SKOLROOD J.A.**: I agree.

[27] **FITCH J.A.**: The appeal is dismissed.

"The Honourable Mr. Justice Grauer"