IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brociner v. Ableman,*
2024 BCSC 2156

Date: 20241127
Docket: S227788
Registry: New Westminster

Between:

Flavia Brociner

Plaintiff

And:

Dr. Darryl Ableman

Defendant

Before: The Honourable Justice Warren

Reasons for Judgment

The Plaintiff, appearing in person:	F. Brociner
Counsel for the Defendant:	A. Turner A. Taggar
Place and Dates of Trial:	New Westminster, B.C. April 15-19, 22-24, 2024
Place and Date of Judgment:	New Westminster, B.C. November 27, 2024

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Introduction

[1] This is a medical malpractice case. The plaintiff, Flavia Brociner, who is self-represented, alleges that her former family doctor, Dr. Darryl Ableman, was negligent in his treatment of her chronic hypothyroidism, causing her to suffer from a constellation of symptoms including heart palpitations or tachycardia, arrhythmia, hot flashes and sweating, anxiety, loss of sleep, fatigue, irritability, confusion and depression.

[2] Specifically, Ms. Brociner alleges that Dr. Ableman prescribed too high a dose of medication, and failed to appropriately monitor her condition, which caused her to suffer from these debilitating symptoms over a period of many months, from as early as July or August 2016 to about the fall of 2018. She claims that her symptoms substantially interfered with her enjoyment of life and her ability to do her job, ultimately causing her to lose her job (although she is not advancing a claim for income loss or loss of income earning capacity). She seeks damages for pain and suffering and punitive damages.

[3] Dr. Ableman denies that his care of Ms. Brociner fell below the standard for an ordinary and prudent general practitioner. He also denies that any of Ms. Brociner's symptoms were caused by the medication he prescribed. Alternatively, he says Ms. Brociner was herself negligent, emphasizing that she was advised to get blood tests done every three months to monitor her condition, and she admitted that she failed to follow that advice.

Background

[4] There is little dispute about the nature of Ms. Brociner's medical condition and the actual care provided to her by Dr. Ableman. Except where indicated, the following chronology reflects the undisputed evidence.

[5] Ms. Brociner was born in 1966. She was between the ages of 49 and 51 during the material time.

[6] As mentioned, Ms. Brociner suffers from chronic hypothyroidism. This was diagnosed many years before she became Dr. Ableman's patient at the Foothills Medical Clinic (the "FMC"). She had been taking medication for this condition for years.

[7] The primary function of the thyroid is the production of two hormones that are referred to as T3 and T4. Thyroid stimulating hormone (TSH) is a hormone produced by the pituitary gland that stimulates the thyroid to produce T3 and T4. An underproduction of thyroid hormones leads to hypothyroidism, while an overproduction leads to hyperthyroidism.

[8] Hypothyroidism results in a decrease in metabolic rate which can cause a number of symptoms including weight gain, fatigue, cold intolerance, dry skin, constipation, swelling of the extremities, elevated cholesterol, slow heart rate, depression and paranoia. Hyperthyroidism results in an increase in metabolic rate, which can cause a number of symptoms including weight loss, fatigue, increased body temperature, increased heart rate, sweaty skin, anxiety, and tremor.

[9] Hypothyroidism is typically treated with a medication called Levothyroxine. Popular brand names for Levothyroxine include Synthroid and Eltroxin. The dosage is determined by periodic blood tests to monitor TSH levels.

[10] A TSH reading that falls within 0.30 and 5.50 is considered normal. In general terms, a high TSH level indicates an underactive thyroid (hypothyroidism) and the dosage should be increased, while a low TSH level indicates an overactive thyroid (hyperthyroidism) and the dosage should be decreased.

[11] Before Ms. Brociner started seeing Dr. Ableman, her family doctor was Dr. Shehata. Dr. Shehata treated Ms. Brociner's hypothyroidism with Eltroxin at a dose of 100 mcg per day. When Ms. Brociner was Dr. Shehata's patient she underwent blood tests to check her TSH level about every nine months, or annually. Ms. Brociner was aware that her TSH level could fluctuate and that periodic blood

tests were required to determine whether the dose of her medication should be adjusted.

[12] Ms. Brociner became Dr. Ableman's patient at the FMC on October 9, 2015, after Dr. Shehata retired. At that time, Dr. Ableman had been a general practitioner for at least 20 years. He offered a full-scope of care, treating patients of all ages, for a wide variety of medical issues.

[13] When Ms. Brociner became Dr. Ableman's patient, he had experience in diagnosing, treating and managing patients with thyroid conditions. In his testimony, he emphasized that when treating a patient with a thyroid condition, it is important to establish their TSH baseline and then fine-tune the medication dosage, which requires the patient to have their blood tested regularly. His practice is to advise the patient to have their blood tested every three months for the first year or so, until he knows their TSH level is stable, and then the patient can be tested less frequently.

[14] At the material time, four doctors worked at the FMC and, despite being Dr. Ableman's patient, Ms. Brociner saw other doctors there when that was more convenient. Patients of the FMC could make an appointment to see a particular doctor or they could walk in without an appointment, in which case they would be accommodated based on physician availability for that day. The FMC uses an electronic medical record (EMR) and each physician at the FMC can access the chart of any patient at the clinic through the EMR.

[15] During the material time, when a patient at the FMC was given a lab requisition to have blood tests performed, it was standard practice for the physicians to tell the patient to make a follow-up appointment within a few days of having the blood tests done to review the results, and not to assume that "no news is good news" in relation to their blood work.

[16] Between October 2015 and April 2018, Dr. Ableman saw Ms. Brociner on seven occasions: October 9, 2015, April 17, 2016, July 16, 2016, August 17, 2016, July 13, 2017, April 19, 2018 and April 22, 2018 (this was Ms. Brociner's last visit

with Dr. Ableman, although she returned to the FMC on April 24, 2018, and was seen by Dr. Dascalu).

[17] During the period from October 2015 to April 2018, Ms. Brociner also saw six other physicians, not all of whom worked at the FMC.

[18] Ms. Brociner's thyroid condition was the subject of discussion with the following physicians on the following dates:

- Dr. Ableman on October 9, 2015;
- Dr. Konovalova (at the FMC) on January 5, 2016;
- Dr. Ableman on April 17, 2016;
- Dr. Ableman on July 16, 2016;
- Dr. Al-Baaj (at the FMC) on October 29, 2016;
- Dr. Kim (at Viva Care Walk-in Clinic) on February 2, 2017;
- Dr. Dhillon (at Viva Care Walk-in Clinic) on April 26, 2017;
- Dr. Ableman on July 13, 2017;
- Dr. Ho (at Brentwood Walk-in Clinic) on November 7, 2017;
- Dr. Khangura (at Brentwood Walk-in Clinic) on February 7, 2018; and
- Dr. Ableman on April 19, 2018.

[19] Ms. Brociner's first encounter with Dr. Ableman on October 9, 2015 was essentially a "meet and greet" appointment, although Ms. Brociner also complained of a sore throat and itchy eyes. She told Dr. Ableman about her history of hypothyroidism. At the time, she was taking Eltroxin, 100 mcg per day, as prescribed by Dr. Shehata. Although not noted in Dr. Ableman's clinical records, Ms. Brociner admitted that Dr. Ableman gave her a requisition for blood work and told her to

undergo blood tests every three months to monitor her TSH level. Dr. Ableman did not prescribe any medication on this visit.

[20] Ms. Brociner returned to the FMC on January 5, 2016 for a renewal of her thyroid medication prescription. She was seen by Dr. Konovalova who gave Ms. Brociner a prescription for a three month supply of Synthroid at a dose of 100 mcg per day. Dr. Ableman was not involved in the decision to change the medication from Eltroxin to Synthroid and, given the evidentiary record, nothing turns on that change.

[21] At the January 5, 2016 visit, Ms. Brociner told Dr. Konovalova that her last blood tests had been done in September 2015 and her TSH level was within normal limits. In fact, the blood tests performed in September 2014 and September 2015 showed a TSH level of above normal (10.5 in September 2014 and 8.47 in September 2015). Dr. Konovalova asked Ms. Brociner to have blood tests done that day and return to the clinic to adjust the medication if needed. Ms. Brociner did not do that. Dr. Konovalova also provided Ms. Brociner with a standing lab requisition to have her TSH level checked every three months for two years. Ms. Brociner did not do that either. She did not go for a blood test until July 14, 2016, some six months later.

[22] Ms. Brociner next saw Dr. Ableman on April 17, 2016. Dr. Ableman's chart notes do not indicate that Ms. Brociner complained of any symptoms that might have been related to her thyroid. The clinical notes indicate that she reported being generally well, a description that Ms. Brociner did not challenge in her testimony. Dr. Ableman renewed her prescription of Synthroid 100 mcg for three months. Despite the requisition provided to her by Dr. Konovalova more than three months earlier, Ms. Brociner had not gone to the lab for blood tests. Dr. Ableman noted in his clinical record that the blood tests had not been done, and that Ms. Brociner needed blood work. Ms. Brociner admitted that at this visit Dr. Ableman asked her to get her blood test done. Again, she did not do that until July, about three months later.

[23] On July 12, 2016, Ms. Brociner went for bloodwork which revealed a TSH level of 18.37 (high). This was three months after her last visit with Dr. Ableman and seven months after Dr. Konovalova gave her the standing requisition for blood work every three months. Dr. Konovalova received the blood test results because her name was on the requisition. She testified that she asked an assistant at the FMC to call Ms. Brociner and ask her to come in to discuss the results. Again, the standard practice at the FMC is to ask patients to make an appointment within days of getting blood tests to review the results, but Dr. Konovalova testified that she departed from that practice because the TSH level of 18.37 was substantially higher than normal.

[24] Ms. Brociner denied that she was called in by FMC. The request was noted in the clinical records but she testified she believed this to be a lie. In any event, she did go into the FMC a couple days later.

[25] On July 16, 2016, Ms. Brociner saw Dr. Ableman, who increased her Synthroid dose from 100 mcg to 150 mcg because, as noted, the recent blood test revealed that her TSH level was very high. He provided her with a prescription for a three month supply. He testified that the reason he gave her a prescription for three months was to prompt her to get her blood tested in three months, prior to coming in for a renewal of the prescription. He testified that this would show whether the increase in the dose had been effective.

[26] It appears that at the July 16, 2016 appointment, Ms. Brociner complained of gastrointestinal issues, although this is not expressly documented in Dr. Ableman's clinical notes. Dr. Ableman gave her a lab requisition for blood tests (other than for TSH) and a requisition for an abdominal ultrasound. Ms. Brociner returned to the FMC on August 17, 2016, to review those results. She met with Dr. Ableman. The blood tests were positive for a bacterium called H. Pylori, while the ultrasound was normal. Dr. Ableman prescribed antibiotics.

[27] Dr. Ableman's clinical notes do not record any subjective complaints on August 17, 2016. However, Ms. Brociner testified that by August 2016 she was feeling very poor. She testified she told Dr. Ableman she had severe pain on her

"liver side", was nauseous, had shortness of breath, and was tired, and he responded that is what happens when you get old.

[28] On October 24, 2016, Ms. Brociner went for bloodwork which revealed a TSH level of 0.57 (normal). She was then seen by Dr. Al-Baaj at the FMC on October 29, 2016. His clinical notes indicate she reported being "stable on RX" and complained of itchy eyes. His objective note was "Well. In no distress". He renewed the prescription for Synthroid 150 mcg for six months.

[29] On November 21, 2016, Ms. Brociner was seen by Dr. Konovalova at the FMC for complaints of eye pain, watery discharge, and mild itchiness. Dr. Konovalova's clinical records show that she recorded Ms. Brociner as looking okay and not in distress. Dr. Konovalova testified that she does not specifically recall whether Ms. Brociner complained of any other symptoms at this visit, but that if Ms. Brociner did mention other concerns she would have noted them in the chart. No other concerns are noted.

[30] Ms. Brociner testified that by November 2016, the symptoms underlying her claim were severe, but that does not accord with Dr. Konovalova's notes referred to above.

[31] On February 2, 2017, Ms. Brociner attended a different clinic - Viva Care Walk-in Clinic – where she saw Dr. Rozaliya Kim. Ms. Brociner testified that sometimes she went to walk-in clinics that were closer to where she worked or lived to get her thyroid prescription renewed because this was more convenient than going to the FMC. Dr. Kim noted that Ms. Brociner raised concerns related to her eyes and said she wanted a renewal of her Synthroid prescription. It is not clear on the record why she needed a renewal as Dr. Al-Baaj had given her a prescription for six months at the end of October. Nevertheless, Dr. Kim provided her with a three month refill of Synthroid 150 mcg. Dr. Kim testified that, according to her notes, Ms. Brociner looked well. She testified that if Ms. Brociner had mentioned any other concerns she would have documented them in the chart. No other concerns are noted.

[32] On April 26, 2017, Ms. Brociner again attended at the Viva Care Clinic because of concerns related to her eyes and to get a renewal of her Synthroid prescription. She saw Dr. Sukhdip Dhillon, who provided her a three month refill of Synthroid 150 mcg. He also prescribed Paxil because Ms. Brociner complained to him of hot flashes. She testified she tried this for two weeks but it did not help.

[33] Ms. Brociner next saw Dr. Ableman on July 13, 2017. It had almost been a year since their last appointment (when he increased the Synthroid dose), almost nine months since she had been seen by anyone at the FMC, and almost nine months since her TSH level had been checked. At this visit, Ms. Brociner complained about hot flashes. Dr. Ableman says, presumably based on his review of his clinical records, this is the first time and only time Ms. Brociner complained of hot flashes to a physician at the FMC. Dr. Ableman testified that he assumed the hot flashes were related to menopause. He testified that he would have reviewed Ms. Brociner's chart and noted that Dr. Al-Baaj renewed the Synthroid 150 mcg prescription for six months in October, 2016, when her TSH was 0.57. He testified that this would have confirmed that the increased dose had been appropriate.

[34] During the July 13, 2017 visit, Dr. Ableman gave Ms. Brociner a lab requisition to have her TSH level checked and to have other hormones that indicate menopause also checked. He provided her with a six month refill for Synthroid 150 mcg. He also made some suggestions for the hot flashes and presumptive menopause. These included evening primrose oil, which she tried but said did not help; clonidine, which she said she had an allergic reaction to; and menopause patches, which she did not try.

[35] Ms. Brociner testified that by July 2017 she had complained to Dr. Ableman several times about her debilitating symptoms, including palpitations, hot flashes, severe night sweats, pain on liver side, etc. However, she saw him only once in the period between July 2016, when the medication dose was increased, and July 13, 2017. That was on August 17, 2016, when she attended to review the results of the abdominal-related testing which were positive for H. Pylori. As mentioned,

Dr. Ableman's clinical notes do not record any subjective complaints on August 17, 2016.

[36] On July 17, 2017, Ms. Brociner went for bloodwork which revealed a TSH level of 0.22 (low). The bloodwork also confirmed she was menopausal. Dr. Ableman testified that the TSH of 0.22 did not cause him concern. When I questioned whether he actually remembered reviewing these results, he acknowledged that he did not and that his testimony that a TSH level of 0.22 did not cause him concern was based on his usual practice. He testified that TSH levels can fluctuate, that 0.22 was only marginally out of range, and that Ms. Brociner's T4 was within normal range. With the T4 being within normal range and the TSH being only marginally low, he said he would have concluded that this was something to "keep an eye on" with another blood test in three months. He said in these circumstances the TSH of 0.22 would not warrant calling the patient in. Ms. Brociner was not called in to the FMC as a result of this blood test result.

[37] On November 7, 2017, Ms. Brociner attended another walk-in clinic - the Brentwood Clinic – where she saw Dr. Terrance Ho. He provided a three month refill of Synthroid 150mcg. He testified that he had no concerns about her presentation and made no note of complaints of hot flashes or palpitations. He testified that she reported that she "worked well" with the Synthroid 150 mcg.

[38] On February 7, 2018, Ms. Brociner again attended at the Brentwood Clinic where she saw Dr. Seema Khangura. Dr. Khangura testified that Ms. Brociner reported feeling well, and said she had her bloodwork done four months previously and it was normal. In fact, Ms. Brociner 's last blood work was performed in July 2017, about seven months previously. Dr. Khangura provided a three month refill of Synthroid 150 mcg.

[39] On April 17, 2018, Ms. Brociner had bloodwork which revealed a TSH level of <0.03 (very low). Dr. Konovalova (at the FMC) received and reviewed the results and asked an assistant to call Ms. Brociner to come in to review the results. Again, Ms. Brociner denied that she was called in. She says she made the next

appointment (for two days later) because she had a sinus infection. However, as in July 2016 when the blood tests revealed a very high TSH, Dr. Konovalova's request was documented in the clinical records.

[40] On April 19, 2018, Ms. Brociner saw Dr. Ableman at the FMC who reduced her Synthroid dose from 150mcg to 137mcg, and provided her a three month prescription for Synthroid 137 mcg. At this visit, Ms. Brociner complained about her sinuses, so Dr. Ableman ordered an x-ray to see if she had a sinus infection. Dr. Ableman's clinical record contains no note of any complaint about debilitating symptoms or any symptoms of thyrotoxicosis (that is, symptoms associated with hyperthyroidism). Dr. Ableman testified that he continued to expect that Ms. Brociner would get blood tests three months later and book a follow-up appointment.

[41] Dr. Ableman's last visit with Ms. Brociner took place a few days later, on April 22, 2018, for an unrelated reason.

[42] The sinus x-rays revealed a sinus infection. Ms. Brociner returned to the FMC on April 24, 2018 to discuss these results. She met with Dr. Dascalu who prescribed an antibiotic and referred her to an "ENT". His clinical notes indicate that she looked well and "NAD", which means no apparent distress.

[43] On May 13, 2018, Ms. Brociner attended Eagle Ridge Hospital (ERH) complaining of weight loss, hot flashes, sweating, and palpitations. About three weeks before that, Ms. Brociner began taking an over-the-counter weight loss supplement called Hydroxycut. The ERH clinical records indicate that Ms. Brociner was diagnosed by Dr. Miller as having an adverse reaction to Hydroxycut.

[44] The next day, May 14, 2018, Ms. Brociner attended the Royal Columbian Hospital (RCH), complaining of palpitations, dizziness, confusion, and shortness of breath. She reported taking four pills (a double dose) of Hydroxycut on May 10, 2018, and was drinking more coffee. She also reported having increased stress at work, but was unable to elaborate. She had not taken her thyroid medication since

May 10, 2018. An ECG was performed which showed a normal sinus (heart rate) rhythm.

[45] On May 15, 2018, Ms. Brociner saw Dr. Avanshi at Viva Care Medical. She reported having panic attacks and anxiety for the last week, experiencing work-related stress that was confidential, having palpitations, poor balance, and depression. She was prescribed Trazadone for stress/anxiety, which she did not try.

[46] On May 17, 2018, Ms. Brociner saw Dr. Khangura at the Brentwood Medical Clinic. She reported taking too much Hydroxycut to lose weight and that she was not feeling well with it. She was agitated, complained about Dr. Ableman, and advised that she had stopped taking her thyroid medication over the past weekend. She reported feeling dizzy, tired, occasionally having an abnormal heartbeat, and some nausea. Dr. Khangura conducted a physical exam which, according to her notes, revealed normal blood pressure, normal heart sounds, clear chest, and a regular but higher than normal heart beat. Dr. Khangura testified that she wondered if there was an issue with Ms. Brociner's thyroid and she was concerned about the Hydroxycut. She recommended Ms. Brociner attend the hospital for blood tests, because the tests could be performed there quickly.

[47] Ms. Brociner testified that at the May 17, 2018 visit with Dr. Khangura, she presented a printout of her pharmacy purchases. She said she did this because by this time she believed she had been taking too high a dose of Synthroid. However, Dr. Khangura testified that she did not recall Ms. Brociner showing her a history of her medications, and she would have noted it in the chart had she done so. There is no such note in the chart.

[48] Later that day, May 17, 2018, Ms. Brociner attended the Burnaby General Hospital (BGH). She reported anxiety, weight loss, hot flashes, sweating and palpitations. Blood tests revealed a TSH level of 0.18 (low). She was diagnosed with hypothyroidism and was prescribed Eltroxin 100 mcg by the doctor she saw there, Dr. Chou.

[49] On May 31, 2018, Ms. Brociner attended the BGH again. She had a sore throat and the records indicate she expressed concern that she may have lymphoma. The records indicate she denied any fever, chills, palpitations, or hot flashes at that time.

[50] In July 2018, Ms. Brociner started seeing a new family doctor, Dr. Rezvani. At their first appointment, Dr. Rezvani asked Ms. Brociner to get her blood tested for TSH and gave her a standing order for blood tests to be performed every three months. She did go for blood tests following this appointment.

[51] On July 25, 2018, Ms. Brociner returned to see Dr. Rezvani to review the blood test results. Her TSH was 7.20 (slightly high), which was consistent with her medication dose having been lowered to 100 mcg a couple of months before. However, she reported symptoms of heart racing and anxiety, which Dr. Rezvani considered were consistent with an over-performing thyroid. He thought she could be experiencing anxiety. He ordered a Holter test to determine if she had an arrhythmia, and he referred her to an endocrinologist, Dr. Shu.

[52] The Holter test was normal. Dr. Rezvani relayed this information to Ms. Brociner at an appointment on August 7, 2018.

[53] In October 2018, Ms. Brociner's TSH level was measured at 0.81, within normal range. She had an appointment with Dr. Rezvani on October 2, 2018, at which time he advised her that her TSH was within normal range. She complained of hot flashes and weakness. Dr. Rezvani told Ms. Brociner that he did not think these symptoms were related to her thyroid because her TSH level was in the normal range.

[54] Dr. Shu, the endocrinologist, saw Ms. Brociner on February 27, 2019. Ms. Brociner complained of palpitations, hot flashes, and sweats. Dr. Shu conducted a physical exam, which he noted as normal. He noted her TSH level was normal. It was his view that her symptoms were related to menopause. He recommended hormone replacement therapy, but Ms. Brociner decided against that treatment.

[55] On November 4, 2019, Dr. Rezvani adjusted Ms. Brociner's medication to Synthroid 88 mcg because her most recent blood tests revealed a TSH of 0.57, which was at the low end of the normal range. He gave her another requisition to have the blood tests repeated every three months.

[56] In November 2020, Ms. Brociner's TSH level was measured at 11.5, which was high. On November 4, 2020, Dr. Rezvani recommended increasing the Synthroid dose. Ms. Brociner told him she would think about it, and a couple of days later she agreed. The dose was adjusted to Synthroid, 88 mcg and 100 mcg on alternating days.

[57] At the time of the trial, Ms. Brociner was taking Synthroid, 88 mcg daily.

Expert Medical Evidence

[58] Ms. Brociner relied on the expert medical evidence of Dr. Bradley Eilerman. The defence relied on the expert medical evidence of Dr. Warren Murschell and Dr. Saul Isserow.

Dr. Bradley Eilerman

[59] Dr. Eilerman is an endocrinologist. He was educated and trained in the United States and he practices as a clinical endocrinologist in Kentucky. Dr. Eilerman wrote three expert reports: his original report, a corrected version of his original report, and a response report in which he comments on two expert reports written by Dr. Murschell, who is a family doctor.

[60] There was no dispute that Dr. Eilerman is an eminently qualified and experienced endocrinologist, whose practice includes the treatment of thyroid disorders, including the disorder from which Ms. Brociner suffers.

[61] Dr. Ableman objected to the admissibility of the standard of care portions of Dr. Eilerman's reports on the ground that he is not qualified to opine on the standard of care of a general practitioner practising in British Columbia. Dr. Ableman did not object to the opinions Dr. Eilerman expressed about the generally recommended

treatment for Ms. Brociner's condition, the goals of treatment, the primary method of monitoring the condition, the interpretation of blood tests that measure TSH, and adverse events that are associated with thyrotoxicosis.

[62] Dr. Eilerman testified in a *voir dire*, and his reports were entered into evidence on the *voir dire*. Subsequently, I ruled that the portions of Dr. Eilerman's evidence relevant to the standard of care of a general practitioner practising in British Columbia were inadmissible because Dr. Eilerman's education and experience, being exclusively acquired and developed in the United States and in a specialized field and specialized clinic, did not qualify him to opine on the standard of care applicable to the management of Ms. Brociner's condition by a general practitioner in British Columbia.

[63] In the result, the following of Dr. Eilerman's opinions were admitted into evidence:

- The recommended treatment for the majority of patients with hypothyroidism is Levothyroxine replacement.
- The goals of treatment are to "achieve a state of euthyroidism and normalization of the circulating levels of TSH and thyroid hormones".
- Measurement of TSH remains the primary method of monitoring replacement therapy.
- Certain blood test results indicate active hypothyroidism, typically due to under-replacement of thyroid hormone.
- Certain blood test results indicate mild iatrogenic thyrotoxicosis, typically due to the overreplacement of thyroid hormone, while others represent "overt biochemical thyrotoxicosis".
- A number of potential adverse events are possible with thyrotoxicosis, including heart rate increase, pulse pressure widened, psychosis, agitation,

and depression, among others, and these are consistent with Ms. Brociner's "urgent visits" in the spring and summer of 2018, and her description of anxiety and panic attacks experienced at that time.

- Ms. Brociner experienced subclinical thyrotoxicosis sometime between October 24, 2016 and July 13, 2017; while overt thyrotoxicosis developed sometime between July 13, 2017 and April 19, 2018.

- Ms. Brociner did not experience persistent harm beyond the period of biochemical thyrotoxicosis; that is beyond the medication dose correction (presumably on May 17, 2018 when Dr. Chou, at Burnaby Hospital, reduced the dose to 100 mcg).

[64] In cross-examination, Dr. Eilerman agreed with the following propositions:

- Common clinical manifestations of menopause include sweating, feeling warm, flushing, mood changes, sleep disturbances, and fatigue.

- Hydroxycut can cause a fast heart rate, increase in blood pressure and skipping beats, headaches, nervousness, shortness of breath, agitation, and insomnia.

- He would attribute the symptoms Ms. Brociner reported in May of 2018 as related to thyrotoxicosis only until July 2018, when it was determined by blood tests ordered in July by Dr. Rezvani that her TSH level had normalized.

- It is possible the TSH levels normalized prior to July 2018 but that cannot be determined because Ms. Brociner's blood was not tested until July.

- He did not consider whether the Hydroxycut could have caused or contributed to the symptoms Ms. Brociner reported in the spring and summer of 2018 because he was asked to comment on the thyroid medication only.

Dr. Warren Murschell

[65] Dr. Murschell was a general practitioner, practicing in British Columbia between June 1997 to January 2021. Ms. Brociner did not cross-examine Dr. Murschell and his opinions were admitted unchallenged into evidence.

[66] Dr. Murschell expressed the opinion that Dr. Ableman met the standard of care of a general practitioner in his treatment of Ms. Brociner. He commented on each visit Ms. Brociner had with Dr. Ableman and expressed the view that Dr. Ableman's care was appropriate on each occasion. This included Dr. Ableman's decisions to increase Ms. Brociner's dose of Synthroid to 150 mcg daily in July 2016, in response to the high TSH blood test result, and reduce Ms. Brociner's dose of Synthroid to 137 mcg daily, in response to the very low TSH blood test result in April 2018.

[67] Dr. Murschell opined that Dr. Ableman's failure to make any change to Ms. Brociner's medication dose in response to the blood tests performed in July 2017, when the TSH level was revealed to be low at 0.22, reflected a judgment call and, particularly given the T4 level was within the normal range, it was his view that it was not inappropriate to continue Ms. Brociner on the then current dose (150 mcg) and follow up with regular testing. In this regard Dr. Murschell wrote:

> It was within acceptable range of standard of care for Dr. Ableman to make a judgment call to continue Ms. Brociner's current dose of thyroid hormone and continue to monitor her blood levels.

[68] Dr. Murschell expressed the view that any symptoms caused by too high or too low a dose of thyroid medication "rapidly clear" when hormone levels normalize following dose adjustment. He also opined that nothing done by Dr. Ableman caused Ms. Brociner any damage, there were no sequelae from his care of her, and the symptoms Ms. Brociner complained of on May 14, 2018 could have been caused by the Hydroxycut.

Dr. Saul Isserow

[69] Dr. Isserow is a specialist in internal medicine and cardiology. Since 1997, he has maintained a full-time clinical cardiology practice at the University of British Columbia Hospital and Vancouver General Hospital.

[70] In commenting on the effect of Hydroxycut, Dr. Isserow noted that the medical literature discloses a report of an individual developing a significant cardiac arrythmia called atrial fibrillation due to the use of Hydroxycut, and that the Hydroxycut formulation taken by Ms. Brociner included caffeine which "has the known effect of increasing heart rate and causing insomnia, as well as a sense of fear and agitation in some individuals …".

[71] In a response report, Dr. Isserow opined that the cardiac symptoms Ms. Brociner complained of in the spring/summer of 2018 were more likely due to Ms. Brociner taking Hydroxycut than taking too high a dose of Synthroid. Specifically, he wrote:

> In my opinion, it is far more likely that the symptoms complained of by Ms. Brociner in the spring/summer of 2018 & 2019 were due to the known phannacologic effects of the weight loss substance Hydroxycut that she was taking than due to the supra physiologic dose of thyroid replacement.
>
> Hydroxycut contains caffeine and given that she had not only recently started this agent but also that she had recently increased the dose, and that Hydroxycut is well-known to cause palpitations, it is far more likely that her symptoms complained of at that time were related to her Hydroxycut rather than to any sequelae of her previous pharmacologic overreplacement of thyroid medication.
>
> There is no evidence to suggest that she had a significantly widened pulse pressure (her recorded blood pressure on an Emergency Room visit on May 7, 2018 was 156/104 mmHg).
>
> This is a blood pressure which is not at all associated with a widened pulse pressure.
>
> What we mean by widened pulse pressure is that there is a very large gap between the top blood pressure recorded (systolic blood pressure) and the lower blood pressure recorded (diastolic blood pressure).
>
> One of the hallmarks of profound hyperthyroidism is that of vasodilation which is manifested clinically by a very low diastolic blood pressure (lower blood pressure). Her diastolic blood pressure of I04 mmHg (which is actually elevated) completely negates any vasodilation caused by hyperthyroidism

> and rather suggests that she has vasoconstriction (constriction of the blood vessels) caused by the weight loss stimulant that she was on.
>
> In my opinion, therefore, the symptoms complained of by Ms. Brociner at that time were more likely related to the weight loss medication than due to the supraphysiologic thyroid replacement therapy.

[72] In cross-examination, Dr. Isserow was not able to say how long it would take for the effects of Hydroxycut to resolve after an individual stops taking the supplement. He noted the duration of the effects depends on a number of factors including the dosage, and the individual taking the supplement.

Issues

[73] The requisite elements of a cause of action in medical malpractice are uncontroversial. The onus is on the plaintiff to establish on a balance of probabilities:

(a) the existence of a duty of care owed by the defendant to the plaintiff;

(b) a breach of the standard of care;

(c) injury to the plaintiff; and

(d) a causal connection in fact and law between the breach and the injury suffered and damages claimed.

[74] Dr. Ableman concedes that as Ms. Brociner's family doctor, he owed her a duty of care. The issues that arise are:

1. Did Dr. Ableman breach the standard of care expected of a general practitioner in managing and treating Ms. Brociner's thyroid condition?

2. If so, did that breach cause the injuries or symptoms that are the foundation for Ms. Brociner's claim for damages?

3. If Dr. Ableman's breach caused the injuries or symptoms, was Ms. Brociner contributorily negligent?

4. If Ms. Brociner has established her claim, what monetary quantum of damages should be awarded?

5. If Ms. Brociner has established her claim, was Dr. Ableman's conduct such as to attract punitive damages?

Credibility

[75] I have significant concerns about the credibility and/or reliability of Ms. Brociner's testimony. There are several reasons for this, including:

- Ms. Brociner displayed intense animosity for Dr. Ableman that, in all the circumstances, was disproportionate. For example, she accused him of "torturing" her and "poisoning" her, suggesting he intentionally caused her harm. The objective evidence provides no support for that suggestion.

- Ms. Brociner displayed a tendency to provide excuses rather than directly answering questions. For example, when she was asked to confirm that she did not follow the repeated direction to have her blood tested every three months, rather than directly answering the question she said that the line at the lab was too long or she had work meetings (suggesting she was too busy to go to the lab).

- In material respects, Ms. Brociner's testimony was inconsistent with the clinical records of the various physicians she saw during the material period. Some examples include:

    - She testified that by July or August 2017 she had complained to Dr. Ableman several times about her debilitating symptoms, including palpitations, hot flashes, severe night sweats, pain on liver side, etc. However, she saw him only once in the period between July 2016, when he increased the Synthroid dose, and July 2017. That was on August 17, 2016, when she attended to review the results of the abdominal-related testing which were positive for H. Pylori. As

mentioned, Dr. Ableman's clinical notes do not record any subjective complaints on August 17, 2016.

- She testified that in October 2016, she told Dr. Ableman she had watery eyes which she claimed was related to being on Synthroid rather than Eltroxin. However, there is no record of her seeing Dr. Ableman in October 2016.

- She denied ever being called in by the FMC, in response to an abnormal blood test result. However, Dr. Konovalova testified that when she received the July 2016 result (a high TSH level of 18.37) and when she received the April 2018 result (a very low TSH level of <0.03), she directed an assistant to call Ms. Brociner in to the clinic. This was corroborated by Dr. Konovalova's written requests to FMC assistants, which were documented in the clinical records.

- In some respects, Ms. Brociner's testimony was unreasonable or irrational. For example:

  - As mentioned, she attributed her itchy eyes to being switched from Eltroxin to Synthroid, but she complained about itchy eyes the first time she saw Dr. Ableman in October 2015, when she was still on Eltroxin.

  - She did not make an appointment to see Dr. Ableman between July 2017 and April 2018, although she insists her symptoms were intolerable during this period. Then, when she did go to see Dr. Ableman in April 2018, she testified she initiated the appointment because she had a sinus infection.

[76] For the forgoing reasons, I concluded that it would not be safe to rely on Ms. Brociner's testimony unless it was corroborated by objective evidence I did accept.

[77] In contrast, I found Dr. Ableman's testimony, and that of his lay witnesses, to be credible and reliable. Although Dr. Ableman was somewhat sarcastic and at times evasive, for the most part his evidence was based on his contemporaneous clinical notes and his standard practices and, while the notes are rather brief, I have no reason to believe that the core aspects of his testimony were other than accurate. The testimony of Dr. Ableman's lay witnesses was also based, entirely or almost entirely, on their contemporaneous clinical notes and standard practices, and was not shown to have been inaccurate or misleading in any way.

Analysis

[78] As I have indicated in articulating the issues that arise in this case, it is not necessary to consider the question of contributory negligence, embark on the task of quantifying monetary damages, or address the claim for punitive damages, unless Ms. Brociner has established, on a balance of probabilities, that Dr. Ableman failed to meet the standard of care expected of a general practitioner in managing and treating her thyroid condition and that his breach caused the symptoms that underlie her claim.

[79] In determining whether Dr. Ableman failed to meet the standard of care, his conduct must be measured against the standard of an ordinary, prudent and diligent physician in the same field, and not against an ideal standard or standard of perfection: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 at para. 33; *Carlsen v. Southerland*, 2006 BCCA 214 at para. 13 – 15.

[80] It is generally accepted that a doctor who acts in accordance with a recognized and respectable practice of the profession will not be found negligent: *ter Neuzen* at para. 38. In other words, where a common and accepted course of conduct or practice is adopted by the profession, it is generally not for a trial judge to conclude that such a standard was itself negligent: *ter Neuzen* at para. 44.

[81] However, as an exception to that general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then conformance to the standard practice may constitute

negligence: *ter Neuzen* at paras. 40 – 51. Examples given in *ter Neuzen* include the failure to inform a patient of risks, the failure to remove a sponge, an explosion set off by an admixture of vapour and oxygen, and injury to a patient's body outside the area of treatment.

[82] Turning to causation, a finding that a defendant failed to meet the standard of care is not enough to impose liability. The plaintiff must also establish that the failure or breach caused the injury or damage for which the plaintiff seeks compensation.

[83] The test for establishing causation is not controversial. The plaintiff must show, on a balance of probabilities, that "but for" the defendant's negligence, the injury or damage would not have occurred: *Clements v. Clements*, 2012 SCC 32; *Ediger v. Johnston*, 2013 SCC 18 at para. 28.

[84] A trial judge is to take the robust and pragmatic approach to determining if the plaintiff has established causation; scientific proof is not required: *Clements* at para. 46.

[85] With one possible exception, Ms. Brociner has not established that Dr. Ableman failed to meet the standard of an ordinary, prudent and diligent general practitioner in his treatment of her thyroid condition. For the reasons I have already expressed, Ms. Brociner's own testimony about her interactions with Dr. Ableman is not credible or reliable. The only admissible expert medical evidence relevant to this question is that of Dr. Murschell, and he opined that Dr. Ableman's care of Ms. Brociner conformed to the recognized and respectable practice of general practitioners. I accept his evidence.

[86] The one possible exception concerns Dr. Ableman's failure to respond to the July 2017 blood test results, which revealed Ms. Brociner's TSH level to be low, at 0.22, by calling Ms. Brociner in immediately or at least three months later. He himself testified that the 0.22 result was something to keep an eye on with another blood test in three months. Dr. Murschell opined that Dr. Ableman's failure to make any change to Ms. Brociner's medication dose at this time was not inappropriate but

this assumed ongoing monitoring. Again, he opined that it was not inappropriate "to continue Ms. Brociner's [then] current dose of thyroid hormone and continue to monitor her blood levels". The problem is that by July 2017, Ms. Brociner had clearly demonstrated a tendency not to comply with the direction given to her at the FMC to have her blood tested every three months. Dr. Ableman noted her failure to get her blood tested in his chart notes in April 2016, and when he saw her on July 13, 2017 she had not had her blood tested for nine months.

[87] In these particular circumstances, I am troubled by Dr. Ableman's passive response to the results of the July 2017 blood test. However, I have determined that it is not necessary to make a definitive finding about whether this passivity amounted to a breach of the standard of care because I have concluded that even if it did, Ms. Brociner has failed to establish that it is more likely than not that the symptoms underlying her claim were caused by it.

[88] The expert medical witnesses agreed that too high a dose of thyroid medication can cause the kind of symptoms Ms. Brociner complained of in May 2018, but that Hydroxycut can also cause those symptoms.

[89] Ms. Brociner testified that from as early as the summer of 2016 she repeatedly complained to Dr. Ableman of the symptoms in question but, for the reasons I have already expressed, her testimony is not credible or reliable.

[90] Despite seeing seven physicians other than Dr. Ableman between August 2016 and April 2018 (Dr. Al-Baaj on October 29, 2016; Dr. Konovalova on November 21, 2016; Dr. Kim on February 2, 2017; Dr. Dhillon on April 26, 2017; Dr. Ho on November 7, 2017; Dr. Khangura on February 7, 2018; and Dr. Dascalu on April 24, 2018), the first documented complaint of the symptoms is on May 13, 2018 at Eagle Ridge Hospital. During the material time, the first abnormally low TSH result was in July 2017 (at 0.22) after which Ms. Brociner saw Dr. Ho in November 2017 and Dr. Khangura in February 2018, and the clinical records for each of those visits do not mention any such symptoms; to the contrary, she reported feeling well to each of Dr. Ho and Dr. Khangura. Similarly, after the extremely low TSH result in April 2018

(at <0.03) Ms. Brociner saw Dr. Dascalu on April 24, 2018 and his clinical notes for that visit do not mention any such symptoms, but rather indicate she was well.

[91] In the circumstances, I am not satisfied that Ms. Brociner suffered from the symptoms in question, other than some hot flashes as reported to Dr. Ableman in July 2017, until May of 2018. This was nearly two years after Dr. Ableman increased Ms. Brociner's dose of Synthroid to 150 mcg, nearly a month after he reduced it to 137 mcg, and about three weeks after Ms. Brociner started taking Hydroxycut.

[92] The expert medical witnesses essentially agreed that if the symptoms Ms. Brociner presented with in May 2018 were caused by too high a dose of thyroid medication, they would have resolved when her thyroid hormone levels stabilized following a reduction in the medication dose. Yet, she continued to complain of the symptoms in question (e.g., racing heart, anxiety, palpitations, sweats) after her TSH level had normalized; specifically, in July 2018 (to Dr. Rezvani) and February 2019 (to Dr. Shu).

[93] Dr. Isserow opined that the symptoms in question were more likely due to Ms. Brociner taking Hydroxycut than taking too high a dose of Synthroid. While Dr. Eilerman attributed the symptoms to biochemical thyrotoxicosis (that is, too high a medication dose), he admitted that he did not consider the possibility that the symptoms were caused by the Hydroxycut because he was not asked to do so. Further, he wrote a response report after being provided with Dr. Isserow's reports and he did not take issue with Dr. Isserow's causation opinion.

[94] Given the forgoing, I am not satisfied that it is more likely than not that but for the Synthroid doses established by Dr. Ableman, or more particularly his failure to adjust the dose in July 2017, Ms. Brociner would not have suffered from the symptoms underlying her claim. To the contrary, I find it is more likely than not that those symptoms were caused by the Hydroxycut. As a result, it is not necessary to address the other issues and Ms. Brociner's claim must be dismissed.

Conclusion

[95] Ms. Brociner's action is dismissed. If it is necessary to speak to costs, the parties may secure a hearing date by contacting Supreme Court Scheduling within 60 days of the release of these reasons. If neither party does that, then Dr. Ableman shall have his costs at Scale B.

"Warren J."