

CANADA / JUDGMENT

A.H. v. Ho

2005 BCSC 175

COURT

Supreme Court of British Columbia

DECIDED

9 February 2005

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2005 BCSC 175internet A.H. v. Ho

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.H. v. Ho,

2005 BCSC 175

Date: 20050209

Docket: S023057

Registry: Vancouver

Between:

A. H.

Plaintiff

And

Dr. Peter S.C. Ho

Defendant

Before: The Honourable Madam Justice Holmes

Reasons for Judgment

Counsel for the Plaintiff:

G.J. Collette

Counsel for the Defendant:

B.J. Norell

S. Davies

Date and Place of Trial:

October 4-8, 12-15, & 18-20, 2004

Vancouver, B.C.

INTRODUCTION

- [1] A.H. claims that in the course of performing a routine hysterectomy, Dr. Peter Ho also did some cosmetic surgery (a mini tummy tuck) without her consent. She says that she was particularly susceptible to injury from that unauthorized bodily invasion because of childhood sexual abuse, and she claims damages for psychological consequences including a form of self-mutilation. A.H. claims that Dr. Ho's surgery was in any event negligent and disfigured her abdomen by creating "dog ear" bulges at each end of an unduly long incision and by pulling her umbilicus below its normal position. She seeks damages in relation to the psychological consequences of battery and the physical consequences of battery and negligence.
- [2] Dr. Ho responds that he performed only the agreed hysterectomy and conformed to the applicable standard of care. He says he excised an old scar as part of that surgery and with the old scar removed redundant skin and fat. He says that the surgery produced a good result, and that in any event any deficiency in the cosmetic result does not of itself indicate that he failed to meet the applicable standard of care in performing the surgery.

BACKGROUND

- [3] A.H. is 33 years of age. She is married with three children, aged 15, 12, and 4½. The first two children are of previous relationships. A.H. and her husband R.H. have been together for about twelve years, and live with the children in Squamish, B.C. Before that they lived in Delta, B.C.
- [4] After training and working in various fields, including as a medical assistant, babysitting, and as a gas station attendant, A.H. developed an interest and skill in computers. She ran a consulting business until its demands interfered with her family life with R.H. and the children.
- [5] Before the hysterectomy, she enjoyed an active and involved life with her family. She is an attractive woman, who evidently values her physical appearance.
- [6] All three of A.H.'s children were born by caesarean section. Dr. Ho was her obstetrician for the birth of her third child, and performed the caesarean section on that occasion.
- [7] It was common ground that during the third caesarean section, Dr. Ho excised two previous scars from A.H.'s previous caesarean section surgeries, leaving a single scar in their place. A.H. was pleased with the cosmetic result.

- [8] The hysterectomy surgery in issue took place on August 15, 2000 in the Surrey Memorial Hospital.
- [9] A.H. testified that after the hysterectomy operation, she was surprised to find a painful and lengthy incision running from one hip to the other. She testified that when she confronted Dr. Ho that day in the hospital, he explained that he had performed a "mini tummy tuck" in addition to the hysterectomy to excise redundant skin and her old scar. She testified that he told her not to worry, that everything would be all right when the swelling resolved, and to see him in six weeks' time.
- [10] Dr. Ho agreed that A.H. was very upset when he saw her the day after the hysterectomy, but he denied that A.H. confronted him about the nature of the incision. He also denied that he told her he had performed a mini tummy tuck.
- [11] A.H. testified that when she next saw Dr. Ho, which was in his office on September 29, 2000, she again confronted him about performing a mini tummy tuck without her consent, and he responded that he did this "for all of his women". She testified that she stormed out of Dr. Ho's office after this offensive remark.
- [12] She testified that earlier in the September 29 visit she told Dr. Ho that she expected him to pay for a full abdominoplasty to correct the cosmetic problems that his surgery had created. She was concerned in particular about two results: (1) that her umbilicus was drawn down about 1½" lower than its previous natural position, and (2) two dog ears or bulges at each end of the scar, measuring about 1" on one side and 1½" on the other side.
- [13] Dr. Ho described the September 29 visit as tense, and agreed that A.H. was angry. However, he denied many details of the visit as A.H. described them, including that he told or confirmed to her that he had performed a "mini tummy tuck" or any similar procedure.
- [14] He described A.H.'s abdomen as quite acceptable in appearance on examination during that visit. However, he referred her to Dr. David Ward, plastic surgeon, for correction of what he described in his testimony as a slight bulge at one end of the incision. He described the bulge as a normal complication of the incision. He also testified that A.H. told him during the September 29 visit that she had lost about twenty pounds since the surgery, and that he told her that was probably the reason for the slight bulge he observed.
- [15] When A.H. later contacted Dr. Ho's office, a member of his office staff advised her that Dr. Ho would no longer serve as her doctor. It was common ground that by this time A.H. had made known that she expected Dr. Ho to pay for a full abdominoplasty to correct the problems that she felt the surgery had created.

- [16] Dr. Ward coordinated a successful effort, supported by others of A.H.'s physicians, to gain Medical Services Plan funding for surgery to correct the dog ears. However, A.H. understood that Dr. Ward was seeking funding for a full abdominoplasty, and walked out of his office in anger when Dr. Ward told her that only a more limited procedure was approved by MSP. Dr. Ward later called her back in, and advised that he could no longer treat her. A.H. was unsurprised and agreed with Dr. Ward that the doctor-patient relationship was not good.
- [17] A.H. then saw Dr. Guichon for a second opinion about correcting the dog ears and the umbilical area. She learned, as is now common ground, that only a full abdominoplasty would correct both these problems to her satisfaction, although less extensive surgery could correct the dog ears. She testified that she has not to date felt ready to undertake a full abdominoplasty, in part because of the risks, especially while she is a smoker, and in part because she would not be psychologically ready to be satisfied with the result.
- [18] A.H.'s medical history since the hysterectomy has been most unfortunate. She now suffers from severe anxiety and panic, which prevent her from working, and depression, which seriously limits her motivation and ability to function in the other aspects of her life. Since the hysterectomy she has developed a practice of psychogenic excoriation, a form of self-abuse that involves picking at the face and torso, sometimes with sharp objects, until bleeding or even injury severe enough to require stitching occurs. Her excoriations are unsightly at the time and some of them leave permanent scars; she sees them as a significant disfigurement, perhaps more significant than that to her abdomen.
- [19] A.H. testified, and I accept, that since moving to Squamish in November 2003, she has done little of any interest or significance but lie on the couch with the curtains drawn. In her psychological condition at the time of trial, her life was difficult and bleak, and she clearly suffered enormous guilt and feelings of loss because of not participating in the family as she once did.

POSITIONS OF THE PARTIES

- [20] A.H. says that her reaction to the non-consensual surgery she alleges was aggravated by her psychological thin skull resulting from very serious childhood sexual abuse over an extended period by a family member, and included her psychogenic excoriations, her anxiety and panic, and her depression. The fact of the childhood sexual abuse is not in dispute.
- [21] A.H. explained that as a result of the sexual abuse she was very guarded with her body, and felt raped all over again when Dr. Ho violated her trust by performing surgery that she had not authorized. Her treating psychiatrist, Dr. Elizabeth Luke, diagnosed post traumatic stress disorder as a result of non-consensual surgery.
- [22] In respect of the alleged battery, A.H. therefore seeks an award of non-pecuniary damages as well as an award of damages for her past and future income loss.

- [23] A.H. says that Dr. Ho's negligence in any event disfigured her abdomen by creating dog ear bulges at each end of a lengthy incision and by pulling her umbilicus to a position about 1½" lower than its previous, normal position. She claims damages in relation to those physical consequences.
- [24] A.H. does not claim that her psychological injuries arose from the alleged negligence, and the evidence would not support such a position.
- [25] Dr. Ho says that he performed only the agreed hysterectomy, during which he excised old scar material including redundant skin and fat as necessary.
- [26] He says that any undesirable cosmetic outcome was the result of A.H.'s several previous surgeries in the area, and in any event does not of itself indicate negligence.
- [27] Dr. Ho submits that even if he is found to have breached his duty of care to A.H., he did not cause the injuries she now asserts, which were either pre-existing or a result of other factors.

THE ISSUES

[28] The parties' positions give rise to two main issues as to liability:

1. Did Dr. Ho perform a "mini tummy tuck" or similar cosmetic procedure in addition to the agreed hysterectomy, and thereby commit a battery?
2. Did Dr. Ho's hysterectomy fall below the standard of care of a competent obstetrician and gynaecologist in the same circumstances so as to constitute negligence?

Issues as to damages will follow from the findings as to liability.

1. Did Dr. Ho Perform the Alleged Cosmetic Procedure?

[29] There are three main proffered bases of support for A.H.'s position that Dr. Ho performed an unauthorized cosmetic procedure: (a) A.H.'s evidence that Dr. Ho told her that he had done a mini tummy tuck, (b) that he cannot have excised the old scar as part of the hysterectomy, as he claims, because part of the old scar remains, and (c) that Dr. Ho told her before the operation that he would incise her previous scar, so the scar revision or excision he now claims to have performed as part of the hysterectomy is itself outside the scope of the agreed procedure.

- (a) Did Dr. Ho Tell A.H. that He Performed a Mini Tummy Tuck?

[30] A.H. testified, and Dr. Ho denied, that he told her this in his visit the day after the surgery, and confirmed it in the September 29, 2000 visit in his office.

- [31] As to the latter of those visits, A.H. testified, and Dr. Ho denied, that Dr. Ho told her he performs a mini tummy tuck procedure "for all of his women [patients]". The alleged remark is an unusual one, and is expressed in a fashion consistent with Dr. Ho's manner of speaking in his testimony and in areas of his examination for discovery. Many times he spoke of his patients in the aggregate, and of their response to his surgeries in generalities, as if the responses were uniform. A.H.'s evidence as to this conversation therefore had a ring of truth.
- [32] However, her evidence otherwise lacks support.
- [33] The hospital records following the surgery make no mention of A.H. complaining during Dr. Ho's visits or otherwise that Dr. Ho had performed, or told her that he had performed, a procedure which she had not authorized.
- [34] The hospital records do note A.H.'s distress and hostility. However, she was in pain, and had in any event reacted similarly during some of her previous hospital stays or medical treatments. Her reaction is therefore consistent with several sources of dissatisfaction or discomfort, not only that she had been told of surgery she had not authorized.
- [35] Also, A.H.'s distress, as noted in the hospital records, preceded Dr. Ho's visit to which she refers.
- [36] A.H. notes that Dr. Ho prescribed Ativan, which is primarily a tranquillizer, but also provides some pain relief. She submits that this supports her testimony about a confrontation, Dr. Ho's statement about a mini tummy tuck, and her distress at non-consensual surgery.
- [37] However, Dr. Ho prescribed Ativan before the visit in which she says the confrontation took place. The Ativan was administered at least twice before that visit. If Ativan was prescribed for distress, as well as or rather than for pain, the distress preceded the confrontation A.H. asserts and therefore does not provide evidence to support her testimony as to what was said.
- [38] Notes from A.H.'s first two visits to family doctors after the hysterectomy, on August 21 and 24, 2000, do not record any complaint that Dr. Ho had performed an unauthorized procedure. A.H. testified in the trial that she made that complaint during the August 21 visit; however, in her examination for discovery she testified that she did not.
- [39] There is no documented record of a complaint of unauthorized surgery until a visit to a medical clinic on August 31, 2000 more than two weeks after the surgery, despite A.H.'s testimony that the knowledge that Dr. Ho had performed non-consensual surgery had a profound impact upon her.
- [40] A.H. submits that Dr. Ho knew that she wanted, even prior to the hysterectomy, to have a full abdominoplasty, and when she decided not to have it done he determined to do her a favour by himself performing a modified tummy tuck along with the hysterectomy.

- [41] It was A.H.'s position that Dr. Ho knew that she had been consulting Dr. Ward before the hysterectomy about having a full abdominoplasty done in a joint procedure with the hysterectomy. A.H. testified that she discussed the possibility of a joint procedure with Dr. Ho in an office visit in June or July, that he advised against a full abdominoplasty so soon after the birth of her third child, and that she accepted his advice and decided to wait at least another year and a half. She therefore determined to proceed with the hysterectomy alone.
- [42] According to A.H.'s testimony, the decision not to undergo a joint procedure was based on Dr. Ho's advice, and not on issues related to financing a full abdominoplasty. I note this because it was suggested to Dr. Ho in the trial that he knew A.H. was unable to afford a full abdominoplasty and therefore determined to perform a mini tummy tuck; that suggestion is out of accord with A.H.'s own version of events.
- [43] Dr. Ho testified that there was no such discussion or office visit about a joint procedure during the weeks before the hysterectomy, that he was unaware that A.H. consulted Dr. Ward around that time, and that in any event a joint procedure would have been medically sound and he would not have advised against it.
- [44] Dr. Ho's office records do not show such a visit in June or July, before the hysterectomy. His staff at one point scheduled him for a joint procedure with Dr. Ward, but he testified, and I accept, that he does not take part in the scheduling process and was not aware of the scheduled joint procedure for A.H.
- [45] Dr. Ward did not testify.
- [46] The evidence therefore does not support A.H.'s submission that Dr. Ho must have known that A.H. wished to have a full abdominoplasty at that stage, and that he decided to do her a favour by instead performing a mini tummy tuck.
- [47] I conclude therefore that during the two visits in issue (August 16, 2000 and September 29, 2000) Dr. Ho responded to A.H.'s evident dissatisfaction with the results of the surgery, but did not tell her that he had performed a mini tummy tuck or other cosmetic procedure in addition to the hysterectomy. A.H. may have come to believe that he performed that surgery, and that he told her he had done so, but she is mistaken in that belief.
- (b) Does the Remaining Portion of Old Scar Indicate that Dr. Ho Did Not Perform a Scar Revision?
- [48] A.H. submits that Dr. Ho cannot have excised the old scar as part of the hysterectomy, as he claims, because part of the old scar remains.
- [49] This position is out of accord with the expert medical evidence.

- [50] Dr. Vera Frinton, obstetrician and gynaecologist, testified for A.H.. She examined A.H. shortly before the trial and testified that two scars are visible. She described the hysterectomy scar as extending 10" from iliac crest to iliac crest. Some magnification assistance is needed to see the shorter scar from the third caesarean section, which is about 3½" long and to one side of the midline.
- [51] The difficulty with A.H.'s position in this area is that Dr. Frinton based her evidence and her opinion in part on an acknowledgement that Dr. Ho performed a scar revision or excision of an old scar, as a small part of the hysterectomy. Although she saw and remarked on the residual portion of the old scar, she did not opine that its existence suggested that anything other than a scar revision or excision was performed. She did agree to the proposition that an old scar that remains cannot have been excised, but did so in the context of acknowledging the obvious, and, as I understood her evidence, did not intend to thereby comment on the nature of the surgery Dr. Ho undertook.
- [52] I will return later to Dr. Frinton's opinion that the scar excision achieved a poor result in failing to remove part of the old scar. However, nothing in her opinion or any of the other medical evidence contradicts or undermines Dr. Ho's assertion that he performed only the hysterectomy, with a scar excision as part of that procedure.
- (c) Was Consent Given Only for Incision, and not Excision, of the Previous Scar?
- [53] A.H. says that Dr. Ho told her before the operation that he would incise, or go in through, her previous scar; it appears to be her position that the scar revision or excision Dr. Ho now claims to have performed as part of the hysterectomy is therefore outside the scope of the agreed procedure.
- [54] A.H. testified that she always asks to speak to her surgeon before surgery so that she is sure she knows what will be done, and that she did so before the hysterectomy. She testified to a detailed and specific discussion with Dr. Ho before the hysterectomy surgery, in which she confirmed that Dr. Ho would remove her uterus, her cervix, and possibly her left ovary. She did not wish her right ovary to be removed, because she had never had trouble with it, and did not wish to have to take hormone supplements. It was unclear from A.H.'s evidence whether the conversation took place in the hospital or in Dr. Ho's office or in both places, but the fact of such a conversation was not in dispute.
- [55] A.H. testified that in this conversation she asked Dr. Ho if he would use the incision from the previous caesarean section, and he said that he would because there was no need to make a new incision. She testified that he also said there was no need to excise the old scar, because he had done that before during the third caesarean section.

- [56] Dr. Ho testified that he would not have told her that he would incise, or go in through, the old scar because his invariable practice is not to do that but rather to excise the old scar; his elliptical incision was part of that process of removing the old scar. He testified that he told her he would remove the scar and tidy up the area; if she he had had any concerns about the proposed incision that he could not satisfy, he would have cancelled the surgery.
- [57] I accept this explanation as inherently plausible and consistent with all the medical evidence, and conclude that A.H. either misunderstood at the time or is mistaken in her recollection of Dr. Ho's explanation of the precise mechanics of the proposed surgery.
- [58] If she misunderstood at the time, I find that she would in any event have agreed to the procedure as Dr. Ho explained it.
- [59] I therefore find that the agreed scope of the hysterectomy surgery was not limited to incising, rather than excising, the previous scar, and the fact that Dr. Ho performed a scar excision does not indicate that the surgery was without consent.

Other Observations

- [60] I noticed that A.H. needed to recite in an almost continuous account the details of her key dealings with Dr. Ho about the nature of the surgery. She appeared uncomfortable and unsure when asked in cross examination about specific aspects of those dealings in isolation. This characteristic of A.H.'s evidence gives rise to some concern that her memory of those dealings may not be direct or complete, and may rather have been reconstructed into a full narrative from some isolated details that she understood differently from Dr. Ho.
- [61] A.H. disputed the content of numerous areas of her treating physicians' notes as to what she reported to them over the years. I do not suggest that a physician's note is necessarily to be considered more reliable than A.H.'s memory of what she reported (or intended to report); various reasons may account for inaccuracy or a different focus in the physician's record. However, several of her denials related to events A.H. acknowledges to have occurred and which the physician would not have known of except from her. It is therefore very unlikely that the physicians' notes of those reports are inaccurate while A.H.'s recollection is not.
- [62] It is not surprising that A.H. does not have an accurate memory of all the details of every visit with every health professional. However, it follows that she may also be mistaken in her account of some of her dealings with Dr. Ho, despite what I find to be her sincere confidence that she is not.

Conclusion

- [63] I conclude that Dr. Ho did not perform unauthorized cosmetic surgery in conjunction with the hysterectomy, although A.H. has come to believe that he did.

2. Was Dr. Ho Negligent in Performing the Hysterectomy?

The Standard of Care

[64] A.H. bears the burden of proving that Dr. Ho failed to meet the standard of care of the ordinary competent obstetrician and gynaecologist in the same circumstances: *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 11 B.C.L.R. (3d) 201 at ¶33.

[65] A physician must possess and use that reasonable degree of learning and skill ordinarily possessed by practitioners in similar communities in similar cases, and will not be held negligent if he or she acted in accordance with a practice accepted by a responsible body of medical practitioners: *ter Neuzen* at ¶33-34.

[66] The simple fact of injury is not sufficient to establish negligence, including in the context of a surgery which produces a complication or problem:

... we would be doing a disservice to the community at large if we were to impose liability on hospitals and doctors for everything that happens to go wrong. Doctors would be led to think more of their own safety than of the good of their patients. Initiative would be stifled and confidence shaken. A proper sense of proportion requires us to have regard to the conditions in which hospitals and doctors have to work. We must insist on due care for the patient at every point, but we must not condemn as negligence that which is only a misadventure.

(*Roe v. Ministry of Health* [1954] 2 All E.R. 131 at 139 (C.A.))

The Alleged Failure to Conform to the Standard of Care

[67] A.H. alleges that Dr. Ho made a significantly larger incision than was necessary for the surgery and removal of the previous scar, and in any event failed to remove more than half of the previous 6" scar, with various cosmetic consequences: the umbilicus was pulled out of place, the dog ears formed, and the scar was much longer than necessary. The residual 3½" portion of the previous scar is barely visible to the naked eye, and is not suggested to be a cosmetic problem.

[68] As will be discussed in greater detail below, A.H.'s position, and the medical evidence supporting it, alleges negligence in the failure to achieve a better cosmetic result; to that extent it essentially reasons backwards from the unsatisfactory cosmetic features A.H. says the surgery caused.

[69] Dr. Ho maintains, among other defences, that the surgery did not cause these cosmetic features, that they resulted from other causes such as A.H.'s changes in weight.

[70] A threshold question in this area is therefore whether the surgery (negligent or otherwise) caused those cosmetic features, and to this I now turn.

Did the Surgery Cause the Cosmetic Features in Question?

- [71] Dr. Ho testified that a hysterectomy is much more difficult than a caesarean section and requires a longer incision. He testified that, as he noted in his operative report, he encountered a lot of scarring and needed to make a longer and elliptical incision, to help prevent dog ears. He agreed that he removed an unusual amount of tissue (including redundant skin), but said that it was an unusual surgery, given A.H.'s previous abdominal history. Dr. Ho testified that he saw no pulling of A.H.'s umbilicus at the September 29 visit, and that A.H. made no mention of it. He testified that he saw no dog ears after the surgery, and felt that the result was as good as one could expect.
- [72] Although Dr. Ho maintains that A.H. left the operating room without dog ears and that her weight fluctuation must have produced those that appear now, I prefer A.H.'s evidence that the dog ears appeared very shortly after the surgery, before any significant change in her weight.
- [73] Some poor quality photographs taken by R.H. 2½-3 months after the hysterectomy show two semi-circular bulges on each side of her lower abdomen. There was some suggestion by the defence that these photographs were taken later than A.H. indicated and after further weight fluctuation and lack of exercise, but I accept her evidence as to the approximate date of the photographs as consistent with other evidence, some of which is outlined below.
- [74] Dr. Sally Barrio, A.H.'s long-term family physician, testified that when she first saw A.H. after her own return from a maternity leave in the spring of 2001, she saw dog ears at each end of the scar. She testified that the dog ears were likely less pronounced than in the photographs taken in 2003 and 2004, which I will discuss below, but that could be because dog ears are less visible when the person is lying down, as A.H. was when Dr. Barrio examined her. I found all of Dr. Barrio's evidence to be fair and clear, and her recollection, as assisted by her notes, to be detailed and reliable.
- [75] Good quality photographs taken in May 2003 show larger bulges than are shown in the earlier, poor quality photographs mentioned above, and also show a general drooping of the abdomen. However, these photos also show A.H. to have gained weight.
- [76] Further good quality photographs taken in July 2004 show considerable abdominal drooping. Dog ear bulges are visible but are largely merged into the pannus or drooped lateral bulge above and supported by the scar. When that lateral bulge is lifted, the dog ears are visible to the same extent as in the earliest photographs available.
- [77] Dr. Ward was not called to testify, but his records were admitted (as were other medical records) as evidence of personal observations (but not opinions) and statements received. His records indicate that on October 6, 2000 he saw a "moderately elevated" dog ear on the left side that was about twice as prominent as a dog ear on the right, which Dr. Ward described as a "slightly elevated area of skin and fat".

- [78] Dr. Claude Cronhelm, obstetrician and gynaecologist who testified for Dr. Ho, examined A.H. shortly before the trial. He concluded that the dog ears he saw were likely inevitable, given A.H.'s history, and that any drooping or pulling down of her umbilicus was completely normal in a patient of her age.
- [79] Dr. Cronhelm's opinion was based in large part on the facts as Dr. Ho observed and recorded them. Those included that any dog ears were only barely visible after the surgery, and that drooping of the umbilicus was not visible shortly after the hysterectomy and therefore could have occurred for any reason thereafter. Dr. Cronhelm's opinion in this area is therefore of limited assistance.
- [80] I conclude from all of this evidence that the dog ears were fully apparent at least by the time Dr. Ho and Dr. Ward each saw A.H. at the end of September and early October. I find some minimization in Dr. Ho's notation of a single area of concern in his record of the September 29 visit and his testimony as to a single "slight" bulge.
- [81] This conclusion gives some force to A.H.'s submission that Dr. Ho's surgical notes also minimize the size and consequences of the incision. Dr. Ho testified that it was not his normal practice to record the amount of skin and fat removed, but he did so here. I infer that he did so because the amount of skin and fat removed was extraordinary. In those circumstances, where Dr. Ho was aware of the need to record unusual details of a surgery, and did so in relation to one aspect relating to the amount of tissue removed during the incision, it is odd that his estimate of the length of the incision (as 7" instead of the 9.2-10.5" it actually was, as will be discussed below) was as imprecise as it was.
- [82] Dr. Cronhelm offered an explanation for that imprecision, but I am unable to accept it. In cross examination as to the length of the hysterectomy incision Dr. Cronhelm noted that A.H.'s previous scar was never formally measured, and suggested that Dr. Ho's estimate of the previous scar as 6" in length may have been just as flawed as his estimate of the hysterectomy scar at 7". That suggestion however fails to account for A.H.'s fundamental concern that the hysterectomy scar (running "from hip to hip") was much longer than the previous scar, with which she was entirely satisfied. It was not suggested to A.H. that her caesarean section scar was other than 6" in length, and I am satisfied that it was, as Dr. Ho recorded after that surgery, that length.
- [83] Dr. Cronhelm measured A.H.'s hysterectomy scar at 9.2". Dr. Frinton measured it at 10", and Dr. Lorne Brown, plastic surgeon, measured it at 10.5". The disparity among the measurements was unexplained. I accordingly consider the scar, and therefore the incision, to be between 9.2" and 10.5" in length, likely around 10".
- [84] For the reasons given above, I am satisfied that the surgery created a scar of approximately 10" in length, the two dog ears bulges, and a shift in the position of the umbilicus. The question then is whether those results were caused by negligence in the performance of the surgery.

Negligence in Performing the Surgery

[85] Ms. Norell for Dr. Ho submits that the evidence establishes that it is standard and accepted practice to excise old scars and redundant skin as part of a hysterectomy, and there is no evidence to indicate that Dr. Ho was negligent in conforming to that practice. She submits that A.H. has proven neither that Dr. Ho breached the applicable standard of care nor that the alleged breach caused the poor cosmetic result. She submits in particular that these matters cannot be proven without expert evidence, which is lacking, and refers to the following passage in *ter Neuzen* at ¶38:

... when a doctor acts in accordance with a recognized and respectable practice of the profession, he or she will not be found to be negligent ... because courts do not ordinarily have the expertise to tell professionals that they are not behaving appropriately in their field. In a sense, the medical profession as a whole is assumed to have adopted procedures which are in the best interests of patients and are not inherently negligent.

[86] Ms. Norell submits that the court in this passage and others in *ter Neuzen* indicates that courts cannot appropriately infer from a poor result that an accepted medical practice was negligently performed. She submits that no expert evidence in this case indicated what Dr. Ho did or did not do that was below the standard of care and caused the poor result.

[87] In *ter Neuzen*, the alleged negligence related not to the performance of an accepted medical practice but rather to the choice of medical procedures. Matters of diagnosis and choice of treatment (and assessment of the associated risks) are well outside the ordinary ken and require the assistance of experts in the field. The court summed up thus at ¶51:

... as a general rule, where a procedure involves difficult or uncertain questions of medical treatment or complex, scientific or highly technical matters that are beyond the ordinary experience and understanding of a judge or jury, it will not be open to find a standard medical practice negligent.

[88] The court followed the above-quoted passage with this:

On the other hand, as an exception to the general rule, if a standard practice fails to adopt obvious and reasonable precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice. (At ¶51)

[89] The court thus acknowledged that the ordinary finder of fact may make findings unassisted by expert evidence where the issue is not complex, scientific, highly technical, or otherwise beyond ordinary experience and understanding.

[90] Here, the alleged negligence relates not to the choice of medical procedures, but to competence in the execution of procedures acknowledged to have been appropriate. Some of the issues relating to that matter are indeed enlightened by expert evidence; others I view as within ordinary experience and understanding.

- [91] The key witnesses as to the issue of negligence were Dr. Vera Frinton, who testified for A.H., and Dr. Claude Cronhelm, who testified for Dr. Ho. Both of these witnesses are general obstetricians and gynaecologists who perform hysterectomy surgeries as part of their ordinary practices. Dr. Frinton opined that Dr. Ho's scar revision and hysterectomy fell below the applicable standard of care; Dr. Cronhelm disagreed.
- [92] Dr. Nancy Van Laeken, a plastic surgeon, also testified for A.H., and gave very clear and credible evidence. Her evidence assisted an understanding of the mechanics of abdominal surgery and of the corrective options available to A.H., but acknowledged that the standard of care applicable to plastic surgery, and the cosmetic results to be expected, are different from those relating to surgery performed by an obstetrician and gynaecologist.
- [93] Dr. Frinton testified that the hysterectomy scar is longer than one would expect for an uncomplicated hysterectomy such as A.H.'s. Complication in this context refers to the hysterectomy procedure itself, and not to the previous abdominal scarring that might affect access to the relevant area.
- [94] Dr. Frinton testified that the result of Dr. Ho's scar revision was poor, because it left significant dog ears and failed to completely remove the previous caesarean section scar. She opined that the cosmetic result of the surgery was below that to be expected of a reasonably competent gynaecologist, because of the lateral dog ears and the suprapubical indentation. I do not understand A.H. to pursue a claim in respect of the suprapubical indentation itself.
- [95] It was common ground that, as Drs. Frinton and Van Laeken noted, the striae and laxity of the abdomen and the pannus or bulge of redundant skin and fat were unrelated to the surgery. The pannus likely resulted from A.H.'s weight fluctuations, and may have been more noticeable because of the scar, which, as is usual, created an indentation (because of below-surface scarring) over which the pannus hung.
- [96] Dr. Frinton agreed that a good cosmetic result is more difficult to achieve in circumstances, such as here, where the patient has had previous abdominal surgeries and has striae and laxity of the abdomen. However, those features of A.H.'s medical history were available to Dr. Frinton when she formed her opinion that the cosmetic result of the surgery fell below that to be expected of a reasonably competent gynaecologist. Her acknowledgement of propositions applicable to surgeries generally did not, in my view, undermine the strength of her opinion.
- [97] I view similarly Dr. Frinton's acknowledgement that dog ears can occur without negligence.
- [98] It is also to be noted that Dr. Frinton described A.H.'s abdominal history as fairly involved, but not abnormal or uncommon, being characteristic of perhaps 10-15% of Dr. Frinton's own patients.

- [99] Dr. Frinton was cross examined extensively about possible reasons for a scar the length of A.H.'s, which Dr. Frinton measured at 10". She testified that nothing in the medical records she reviewed indicated a need for a scar of that length. In particular, she testified that scarring in the fascial area, to which Dr. Ho referred in his surgical notes, is scarring in the superficial layers and would not warrant a larger incision.
- [100] Dr. Cronhelm testified that Dr. Ho's hysterectomy, including the amount of skin and fat he removed, met the applicable standard of care. He opined that the amount of old scar tissue (skin and fat) required to be removed is something that only the surgeon can judge, and a 1½" width of tissue, although more than usual, could be reasonable to remove.
- [101] Dr. Cronhelm resisted the suggestion in cross examination that A.H.'s previous scar could have been removed and the hysterectomy performed by way of an incision considerably shorter than the approximately 10" incision in question. He explained first that an incision must be longer with each successive surgery, to remove the previous scar while keeping the elliptical shape of the incision, and that in a situation of scarring from multiple surgeries, it is impossible to know how much scar tissue remains to be removed. As I have noted above, he also suggested that A.H.'s previous scar may have been longer than the 6" Dr. Ho recorded after that caesarean section surgery, and the difference between the two scars therefore less than is now asserted.
- [102] As to the latter suggestion, I found earlier that the previous scar was significantly shorter than the hysterectomy scar. That aspect of Dr. Cronhelm's opinion therefore has no foundation in the evidence.
- [103] Dr. Cronhelm's other explanations assume that circumstances may have existed that would warrant the lengthy scar, including that there was extensive scarring from successive surgeries or that a lengthy scar was judged necessary for proper healing. However, Dr. Ho's previous caesarean section had excised the scars from the first two caesarean sections. Also, his surgical notes for the hysterectomy refer only to scarring as the reason for what he described as his 7" incision.
- [104] Finally, Dr. Cronhelm disagreed with Dr. Frinton's opinion in part because it was given three years after the event and was based on cosmetic results inconsistent with those Dr. Ho noted at the time of the surgery. Dr. Cronhelm noted in this regard that according to Dr. Ho the surgical scar following the operation was completely acceptable. I have found otherwise.
- [105] Dr. Cronhelm's opinion therefore rests on facts or supposition as to facts different from those that I have found.
- [106] Ms. Norell submits that Dr. Frinton's opinion speaks inappropriately to the ultimate issue, expressly a simple conclusion of failure to meet the applicable standard of care. This submission in effect supplements the submission I discussed earlier that a court must rely on expert medical evidence to explain how such a failure took place.

- [107] In my view, those submissions have little application in the present context where the negligence is said to consist in the failure to achieve a satisfactory result. It is within ordinary understanding that surgery comprehends its cosmetic result, and that surgeons and patients contemplate that the incision and scar will be as small and as smooth or tidy as reasonably possible. The incision here was clearly unsatisfactory: it was excessively long and left a clumsy-looking result, with dog ears at each end of the hip-to-hip scar. Dr. Frinton, as a medical expert, reinforced the conclusion that the result is unsatisfactory and also advised that, having reviewed the medical records, she found no basis for a competent obstetrician and gynaecologist to produce such a result.
- [108] I therefore find that Dr. Ho was negligent in causing the excessively long scar and the dog ear bulges at each end of the scar.
- [109] I do not, however, make the same finding in relation to the shift in position of the umbilicus.
- [110] As indicated earlier, I accept A.H.'s evidence that the position of the umbilicus was slightly moved by the surgery. However, the evidence does not establish that any negligence on Dr. Ho's part caused that result.
- [111] Dr. Frinton did not address the position of the umbilicus in her opinion. Nothing in the evidence suggested that the surgery moved the umbilicus in a way or to an extent that would not have occurred with a reasonably sized and placed surgical incision.
- [112] The burden is on A.H. not only to show negligence, but also to show that the negligence caused the very result being complained of. While A.H. met that burden in respect of the length of the incision and the dog ears, I am unable to find that she did so in respect of the moved umbilicus.

DAMAGES

- [113] A.H. is entitled to damages reflecting the undesirable cosmetic results, and associated pain and suffering, flowing from Dr. Ho's negligence. Those results are the larger and therefore more painful incision than was necessary and the dog ear bulges at each end of the resulting scar.
- [114] A.H. testified, and I accept, that before the hysterectomy she was slim (except when pregnant) and comfortable in her body. She liked to wear clothing that exposed her abdomen. Swimming was a major part of her life, especially with her children.
- [115] I also accept that since the hysterectomy she has had to wear girdle-like undergarments to suppress the bulges. When she goes swimming she feels that people stare because the bulges are visible no matter the type of swimsuit she wears. She can no longer wear low-cut pants. She feels ugly and disfigured, and this feeling affects all aspects of her life, including her sexual relationship with her husband.

- [116] Dr. Ho submits that A.H. should have mitigated some of her damages by undergoing cosmetic surgery to remove the dog ear bulges when that option was made available, and supported by her physicians, at no cost to her, approximately four months after the hysterectomy surgery.
- [117] However, I consider reasonable some hesitation on her part in undergoing further surgery. A.H. was understandably distressed after the unsatisfactory hysterectomy surgery. This reaction was aggravated by Dr. Ho's abrupt termination of his relationship with her. Also, I consider reasonable in the circumstances A.H.'s reluctance to quickly place her trust in the plastic surgeon to whom Dr. Ho referred her.
- [118] A.H.'s damages will therefore reflect the effects upon her of an unsatisfactory cosmetic result over a period of 18 months from the time of Dr. Ho's surgery, as well as the pain and suffering associated with corrective cosmetic surgery to remove the dog ear bulges. I conclude that she should reasonably have undergone scar revision surgery within 18 months of Dr. Ho's surgery, which would have corrected the undesirable cosmetic results caused by Dr. Ho's negligence.
- [119] Ms. Norell submitted, and Mr. Collette did not dispute, that the applicable case authorities indicate a range of damages of between \$25,000 and \$40,000 for the abdominal cosmetic results and associated emotional distress and upset.
- [120] One of the cosmetic results, namely the pulled or shifted umbilicus, I found was not proven to have been caused by Dr. Ho's negligence. That feature is in my view of less cosmetic significance than the dog ear bulges and the lengthy scar.
- [121] Taking all of these considerations into account, I conclude that A.H. is entitled to general damages in the amount of \$20,000.
- [122] I make no award of aggravated damages, and do not understand that any other heads of damages are claimed in respect of Dr. Ho's negligence and the cosmetic results to the abdomen I have found that it caused.

"H.J. Holmes, J."

The Honourable Madam Justice H.J. Holmes

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/05/01/2005bcsc0175internet.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/a-h-v-ho-2005>

Prepared on 25 October 2026 · Esheria