

CANADA / JUDGMENT

Ciarlariello v. Schacter

[1993] 2 SCR 119

COURT

Supreme Court of Canada

DECIDED

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Ciarlariello v. Schacter

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Date

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Report

[1993] 2 SCR 119

Case number

22343

Judges

La Forest, Gérard V.; Sopinka, John; Cory, Peter deCarteret; McLachlin, Beverley; Iacobucci, Frank

On appeal from

Ontario

Subjects

Professional law

Torts

Notes

SCC Case Information: 22343

Decision Content

Ciarlariello v. Schacter, [1993] 2 S.C.R. 119

Vera Ciarlariello and Lena Ciarlariello,
Administrators of the Estate of
Giovanna Ciarlariello, Deceased Appellants

v.

Marilyn Anne Keller, M.D., and
Robert A. Greco, M.D. Respondents

Indexed as: Ciarlariello v. Schacter

File No.: 22343.

1992: November 30; 1993: April 22.

Present: La Forest, Sopinka, Cory, McLachlin and Iacobucci JJ.

on appeal from the court of appeal for ontario

Torts -- Battery -- Medical procedure -- Consent -- Patient undergoing procedure withdrawing consent during procedure -- Patient deciding to continue with procedure and suffering quadriplegia as a result of procedure -- Patient had undergone same procedure previously and had understood nature and risks of procedure -- Whether patient had to be informed anew of attendant risks when consenting to continue with procedure.

Physicians and surgeons -- Negligence -- Duty to disclose -- Patient undergoing procedure withdrawing consent during procedure -- Patient deciding to continue with procedure and suffering quadriplegia as a result of procedure -- Patient had undergone same procedure previously and had understood nature and risks of procedure -- Whether patient had to be informed anew of attendant risks when consenting to continue with procedure.

Mrs. Ciarlariello was diagnosed with a suspected aneurism. Her neurologist explained through an interpreter both the nature of the cerebral angiogram -- the x-raying of a dye injected through a catheter into the arteries leading to the brain -- required to locate the rupture and the risks involved. The first procedure was performed by Dr. Keller, an experienced radiologist. She again explained the procedure without an interpreter. The patient appeared to understand and gave her consent. However Dr. Keller had some misgivings about her complete comprehension. As a result, Dr. Keller destroyed the patient's original consent form and insisted that the patient be returned to her own hospital so she could talk to her family about the test. The patient later returned to Dr. Keller's hospital with a consent form signed by her daughter. The first cerebral angiogram failed to demonstrate a definite aneurism and it was decided that a second was needed to investigate the suspected area. Before it could be performed a "re-bleed" of the aneurism was diagnosed. This increased the already significant risk of morbidity. The patient consented to a second cerebral angiogram. Dr. Greco, also an experienced radiologist, explained the nature of this second test and its risks. The patient appeared to understand and consented to

the procedure. The patient experienced discomfort during the test, hyperventilated and, when calmed down, told the doctor to stop the test. The doctors determined that any symptoms the patient experienced were caused by tetany. The patient, when calm, instructed the doctors to finish the test after they informed her that the procedure required only another five minutes to complete. Dr. Keller, administered the final injection. The patient suffered an immediate reaction to the injection of the dye which rendered her a quadriplegic. Dr. Keller, testified that such a reaction was extremely rare and that never, before or since, had she seen such a reaction.

The patient brought an action against the respondent physicians. She died subsequent to the trial of the action and appellants carried on the action. Both the action, and an appeal, were dismissed. At issue here was the nature and extent of the duty of disclosure owed by a doctor to a patient who withdraws the consent given to a medical procedure during the course of that procedure.

Held: The appeal should be dismissed.

Appellants' action in battery could not succeed. There was a sound factual basis for the finding that the patient consented to the continuation of the angiogram and that she was capable of giving consent to continuing the procedure. There was neither fraud nor misrepresentation in obtaining the consent and the procedure was the one anticipated and was identical to one performed a week earlier.

An objective approach should be taken in deciding whether a risk is material and therefore one which should be explained to the patient. The crucial question in determining the issue is whether a reasonable person in the patient's position would want to know of the risk. The doctors involved conducted themselves in an exemplary manner. All the possible risks that could arise from the procedure were fully explained on several occasions to both the patient and her daughter.

Whether or not there has been a withdrawal of consent is a question of fact. The words used by a patient may be ambiguous. Even if they are apparently clear, the circumstances under which they were spoken may render them ambiguous. On some occasions, the doctors conducting the process may reasonably take the words spoken by the patient to be an expression of pain rather than a withdrawal of consent.

Generally if there is any question as to whether the patient is attempting to withdraw consent, the doctor must ascertain whether the consent has in fact been withdrawn. Every patient's right to bodily integrity encompasses the right to determine what medical procedures will be accepted and the extent to which they will be accepted. The right to decide what is to be done to one's own body includes the right to be free from medical treatment to which the individual does not consent. The requirement that disclosure be made to the patient is based on this concept of individual autonomy. If, during the course of a medical procedure a patient withdraws the consent to that procedure, then the doctors must halt the process unless the medical evidence suggested that terminating the process would be either life threatening or pose immediate and serious problems to the health of the patient.

The question as to whether or not a consent has been withdrawn during the course of a procedure will depend on the circumstances of each case and may require the trial judge to make difficult findings of fact. Expert medical evidence, while relevant, will not necessarily be determinative of the issue. Indeed, in cases such as this where the patient must be conscious and cooperative in order for the procedure to be performed, it may well be beyond doubt that the patient was capable of withdrawing consent. The fact that the patient had withdrawn consent was not an issue here.

The appropriate approach is to focus in each case on what the patient would like to know concerning the continuation of the process once the consent has been withdrawn. Looking at it objectively, a patient would want to know whether there had been any significant change in the risks involved or in the need for the continuation of this process which had become apparent during the course of the procedure. In addition, the patient will want to know if there has been a material change in circumstances which could alter the patient's assessment of the costs or benefits of continuing the procedure. Changes may arise during the course of the procedure which are not at all relevant to the issue of consent. Yet, the critical question will always be whether the patient would want to have the information pertaining to those changes in order to decide whether to continue. The patient here was capable of giving her consent to the continuation of the procedure based on the earlier disclosures and did so.

The doctor must bear the burden of showing that the patient understood the explanation and instructions given. The conclusion that the patient here understood and had given valid consent to continue the procedure, notwithstanding the absence of an interpreter, could be drawn from her demonstrated ability to comprehend the language adequately. There was complete and proper disclosure made by the respondents of all the risks involved in the procedure.

It was not necessary to consider the issue of causation. The risks involved in the performance of an angiogram were far less than the risks which would flow from not locating and treating an aneurism. A patient in Mrs. Ciarlariello's position would not have declined the angiography. The evidence supported the conclusion the patient's quadriplegia was caused by contrast induced toxicity. The other possible causes were investigated and ruled out as causes of the paralysis.

The appellants' action in negligence must also fail. When a patient withdraws consent during a procedure to its continuation the procedure must be stopped unless to do so would seriously endanger the patient. However, the patient may still consent to the renewal or continuation of the process. That consent must also be informed. Although it may not be necessary that the doctors review with the patient all the risks involved in the procedure, the patient must be advised of any material change in the risks which has arisen and would be involved in continuing the process. In addition, the patient must be informed of any material change in the circumstances which could alter his or her assessment of the costs or benefits of continuing the procedure. Here, there had been no material change in the circumstances and a valid consent was given to the continuation of the process.

Cases Cited

Considered: *Reibl v. Hughes*, [1980] 2 S.C.R. 880; *Mitchell v. McDonald* (1987), 40 C.C.L.T. 266; *Nightingale v. Kaplovitch*, [1989] O.J. No. 585; referred to: *Fleming v. Reid* (1991), 4 O.R. (3d) 74; *Schanczl v. Singh*, [1988] 2 W.W.R. 465.

APPEAL from a judgment of the Ontario Court of Appeal (1991), 44 O.A.C. 385, 76 D.L.R. (4th) 449, 5 C.C.L.T. (2d) 221, dismissing an appeal from a judgment of Dupont J. (1987), 7 A.C.W.S. (3d) 51. Appeal dismissed.

E. A. Cherniak, Q.C., and Patricia D. Jackson, for the appellants.

F. Paul Morrison, Kevin C. McLoughlin and Tracey Pearce, for the respondents.

//Cory J.//

The judgment of the Court was delivered by

Cory J. -- At issue in this appeal is the nature and the extent of the duty of disclosure owed by a doctor to a patient who withdraws the consent given to a medical procedure during the course of that procedure.

I - Factual Background

Giovanna Ciarlariello was born in Italy in 1931. She moved to Toronto in 1955, was married there the following year, and bore two daughters, Vera and Lena. In 1965, her husband left her. In 1967, she began to work as a full-time employee on the cleaning staff of the Mount Sinai Hospital.

On December 20, 1980, Mrs. Ciarlariello came to work, at her usual time, 7:00 a.m. About 8:45 a.m. she experienced a sudden and severe headache. She went to the emergency department of the hospital. There she was diagnosed as having a grade one subarachnoid haemorrhage. This is a very serious condition which results from a ruptured aneurism. Between 40 to 50% of those who suffer a ruptured aneurism die within a few weeks of its occurrence. There is a significant risk of a further haemorrhage. If this occurs, 67% of those who suffer the further haemorrhage or "re-bleed" will die and that percentage applies to each succeeding re-bleed. It was decided that Mrs. Ciarlariello would have to undergo surgery to treat the aneurism.

In order to determine the site of the suspected aneurysm, Mrs. Ciarlariello's physicians ordered a cerebral angiogram. In this procedure a catheter is inserted in the patient's groin and is threaded up to the neck. A dye is then injected into the blood vessels leading to the head and X-ray pictures are taken. From them, the problem area can usually be located. Dr. Schacter, the neurologist in charge of Mrs. Ciarlariello's care, testified that he explained the procedure and its risks in some detail to Mrs. Ciarlariello, and in greater detail to her daughter, Vera, who acted as translator. Mrs. Ciarlariello gave her consent to having the tests performed. While awaiting the tests, Mrs. Ciarlariello was admitted to hospital and was kept sedated in a darkened room, in order to eliminate as much stress and stimuli as possible pending treatment of the suspected aneurysm.

Mrs. Ciarlariello was taken to the Toronto General Hospital on December 22, 1980, for the first of two angiograms. The respondent, Dr. Keller, a very experienced radiologist with the Toronto General, was to perform the first angiogram. When she met with Mrs. Ciarlariello, Dr. Keller followed her usual procedure of identifying herself and advised Mrs. Ciarlariello that she would carry out the scheduled test. She explained why the test was necessary, stating that an artery in her head had ruptured and that it was necessary to locate it to prevent further bleeding. She described how the test would proceed. Pointing to Mrs. Ciarlariello's groin, she explained that the anaesthetic would be injected at that site, followed by a tube which would go to an artery above her heart. Dye would be injected in the tube and x-rays taken. She reviewed the symptoms Mrs. Ciarlariello was likely to experience, particularly as the dye was injected. She told Mrs. Ciarlariello that she would explain what was happening during the procedure.

Dr. Keller then outlined the principal risks involved in the procedure. The first was blindness, which could result if a clot broke from the end of the catheter and blocked an artery supplying blood to an eye; the others were the risk of paralysis which could be transient or permanent, or a stroke. She explained that while there was a very low incidence of these events occurring the risks were real and she should be aware of them. Further, she advised Mrs. Ciarlariello that there was a risk of death, which although low, could occur as a result of a reaction to the dye.

Dr. Keller described Mrs. Ciarlariello as a bit drowsy, probably from sedation, but relatively calm and normally anxious. She appeared to understand all that she was told and did not seem to react adversely to the risks involved. The doctor then asked her to sign a consent to the proposed procedure, and this she did.

Despite her impression that Mrs. Ciarlariello understood all that had been explained to her, Dr. Keller was left with some misgivings pertaining to the consent. Therefore, Dr. Keller destroyed the consent form signed by Mrs. Ciarlariello. She then spoke on the phone to an intern in Dr. Schacter's service and Dr. Schacter at the Mount Sinai Hospital. She suggested that the family be consulted with regard to the consent to make sure Mrs. Ciarlariello understood it completely. She was advised that a family member was available for that purpose.

Dr. Keller then told Mrs. Ciarlariello about her decision to return her to Mount Sinai Hospital so that she could talk to her family about the test. Although, Mrs. Ciarlariello wished to proceed without consulting her family, Dr. Keller insisted that she do so.

Mrs. Ciarlariello returned to Toronto General Hospital at 2:00 p.m. on the same day with a consent signed by her daughter, Vera. The angiogram was then conducted. Two injections were made in each of the left and right carotid and left vertebral arteries. Although the procedure failed to demonstrate a definite aneurism, the test results did reveal a particular area which was suspected to contain the aneurism. It was decided that a second angiogram was needed to investigate this suspected area.

On December 26, 1980, Mrs. Ciarlariello suffered another sudden and severe headache. The following day, Dr. Schacter discussed the situation with Mrs. Ciarlariello and Vera. He told them that, in his opinion, Mrs. Ciarlariello had probably suffered a re-bleed and that another angiogram was needed. Mrs. Ciarlariello consented to the second angiogram.

On December 29, 1980, the second angiogram was performed by the respondent, Dr. Greco, another experienced radiologist who worked with Dr. Keller at Toronto General Hospital. Prior to the commencement of the test, Dr. Greco spoke with Mrs. Ciarlariello and explained why the test was required, and how it was to be performed. He outlined what sensations she might experience as the injections were made. These might involve a burning sensation, flashing lights, a warm taste at the back of the throat, and increased pressure in the head. He then explained the risks involved in the use of the dye, which included the possibility of a skin rash, and on rare occasions death, blindness, stroke and paralysis. Mrs. Ciarlariello appeared to understand all that was said to her and to consent to the procedure.

Dr. Greco then proceeded with the test. Some time after the procedure began, Mrs. Ciarlariello began moaning and yelling. Her breathing became very rapid and she flexed her legs. Dr. Greco immediately inquired as to the source of her discomfort but she could not respond because her breathing was developing into hyperventilation. The respondent, Dr. Keller, who heard the noise, stepped into the room. She noted that the patient was hyperventilating and that her limbs were rigid. This, according to the medical evidence, is characteristic of a condition called "tetany" or "carpo-pedal spasm" and results from unchecked hyperventilation. Mrs. Ciarlariello controlled her breathing, began to calm down and said, "Enough, no more, stop the test".

At this point, the test, which had been interrupted by this episode, was stopped, and the catheter was withdrawn from the abdominal artery although it remained in Mrs. Ciarlariello's body. Dr. Greco explained to Dr. Keller that he had completed both carotid arteries. Dr. Keller then talked to Mrs. Ciarlariello trying to reassure her and calm her. Mrs. Ciarlariello complained that her right hand was numb. On examination she was not able to move or grasp with it. The left hand was also weak, although to a lesser degree.

Dr. Keller concluded that Mrs. Ciarlariello's weakness resulted from the tetany which in turn had been caused by the hyperventilation. Dr. Keller tested Mrs. Ciarlariello's sensory functions with pinpricks to her arms and legs. She could feel the pin pricks everywhere, including her right hand. Dr. Keller then tested Mrs. Ciarlariello's motor functions in all four extremities. Her left hand grip had returned to normal. The strength in both legs was normal as was the strength in both arms; but the right hand remained weak. Her temperature perception on arms and legs with a hot towel was normal.

Dr. Keller decided that the sole remaining deficit, the weakness in the right hand, was purely a motor problem rather than a sensory one. She concluded that the cause of the weakness in the right hand was the tetany which in turn resulted from the hyperventilation. She felt strengthened in that conclusion by the improvement in all the extremities which, with the exception of the right hand, had returned to normal. She fully expected that the right hand would also improve.

By this time Mrs. Ciarlariello had ceased moving; she was quiet and co-operative. She had responded unhesitatingly to questions during the examination of her arms and legs. Dr. Keller then explained to Mrs. Ciarlariello that one more area needed investigation and this would require another five minutes of the test procedure. Dr. Keller asked her if she wished the test completed and she replied "Please go ahead".

Dr. Keller, administered the final injection. Mrs. Ciarlariello suffered an immediate reaction to the injection of the dye which rendered her a quadriplegic. Dr. Keller testified that such a reaction was extremely rare and that never, before or since, had she seen such a reaction.

Mrs. Ciarlariello brought an action in the Supreme Court of Ontario against the respondent physicians. Subsequent to the trial of the action, Mrs. Ciarlariello died, and the action was continued by the appellants.

II - The Courts Below

Supreme Court of Ontario (Dupont J.)

The trial judge conducted an extensive and thorough review of the evidence, which lead to very clear and detailed findings of facts. The issue of consent was relevant to both the claim of battery and negligence. It was this issue that was dealt with first.

Dupont J. observed that Mrs. Ciarlariello had not suggested that the angiogram was undertaken without her consent until some "considerable period of time after she was rendered quadriplegic". He found that the risk of paralysis had been explained to both Mrs. Ciarlariello and her daughter by all the doctors involved. He concluded that any failure to use the precise term "quadriplegic" should not vitiate the consent which had been given after the clear warning of the risk of paralysis. He determined that Mrs. Ciarlariello was well aware that her daughter had, with her knowledge and approval, signed a consent to the two angiograms and that Mrs. Ciarlariello had given her consent to both procedures.

On the question as to whether consent had been given to the final injection during the second angiogram, he held that "Mrs. Ciarlariello did agree to the final injection and the completion of the angiogram". He found that, although her consent had been "suspended" for a period of time, it was reactivated without the need to once again explain the risks, which remained the same as they had been at the beginning of the procedure. On this he wrote:

There is no doubt that when a patient is lying on a table and is in the very process of undergoing a surgical procedure, it is not the most desirable point at which to obtain their consent to the continuation of that procedure. Obviously, doctors should avoid obtaining consents under such circumstances. It is difficult, however, to determine beforehand what they should do when such a scenario arises. I have no doubt that whether or not to continue the test is really a matter of medical judgment. [The respondents] were forced to make a decision on the spot. Their evidence in this regard is that they weighed the risks of stopping the procedure against those of going ahead, and decided to do the latter. They did not want to take the risk of Mrs. Ciarlariello having a

second and perhaps fatal re-bleed; nor did they want to submit her to a third angiogram if it could be avoided by simply completing this, second one. Their decision was supported by the evidence of Dr. Wortzman, and two medical experts who specialize in neurosurgery: Dr. Morley and Dr. Kassel.

He concluded that in the circumstances, the action in battery failed.

He then turned to a consideration of the issue of informed consent as it relates to negligence. He referred to the decision of this Court in *Reibl v. Hughes*, [1980] 2 S.C.R. 880, at p. 892, where Laskin C.J. wrote that "a failure to disclose the attendant risks, however serious, should go to negligence rather than battery. Although such a failure relates to an informed choice of submitting to or refusing recommended and appropriate treatment, it arises as the breach of an anterior duty of care." The trial judge found that the respondents, in this case, had not breached the duty to disclose the material risks of the procedure to Mrs. Ciarlariello.

Although, as a result of his conclusion that the patient had been advised of the risks it was not necessary to consider causation, the trial judge did so nonetheless. He noted that the appropriate standard was an objective one namely "would a reasonable person in Mrs. Ciarlariello's position, on a balance of probabilities, have refused the angiogram if there had been proper disclosure?" He held that in light of the evidence which clearly indicated that the risks involved in an angiogram were far outweighed by those which would arise from the failure to treat the aneurysm, a reasonable person in the position of Mrs. Ciarlariello would not have declined to undergo the angiogram procedure, even if all the risks including quadriplegia, had been disclosed to her.

He found that the respondent doctors had not fallen below the appropriate standard of medical practice in treating Mrs. Ciarlariello and dismissed the negligence claim brought against them.

Court of Appeal (1991), 76 D.L.R. (4th) 449

Finlayson J.A. observed at p. 454 that "[w]hile she withdrew her consent upon hyperventilating, the trial judge found as a fact that she agreed to the completion of the angiogram." He observed that he would not interfere with this finding of fact even if he possessed the power to do so. The issue which then confronted the Court of Appeal was, in his words at p. 455, whether "the termination of the patient's consent require[d] that her agreement to the continuation of the procedure be subject to the same legal standard that is required of pre-medical procedure consents, or was the decision to proceed following the episode of hyperventilation a matter of medical judgment to be exercised by the doctors performing the procedure?" It was found that it would be impractical to separate the issue of informed consent from the exercise of medical judgment. That is to say that once the second angiogram had been commenced with the appropriate consent, then (at p. 458) "the analysis of the risks inherent in proceeding with the procedure, as opposed to terminating it, becomes a matter of medical judgment."

Finlayson J.A. observed at p. 458 that although the procedure could not continue without her co-operation, in his opinion Mrs. Ciarlariello "was not in any condition to make an informed assessment of her condition". He expressed the opinion that in these circumstances, legal precision must give way to medical judgment. He thought that it would have been unfair to have "placed" the decision whether to proceed upon Mrs. Ciarlariello at a time when she was distraught and unable to appreciate the risk of proceeding.

Like the trial judge, he expressed the opinion that Dr. Keller had exercised proper medical judgment in deciding to proceed, and that the consent given by Mrs. Ciarlariello to continue was, under the circumstances, an informed consent. In his view, the elements of risk had not changed from the time of the commencement of the proceeding until it began again with the last injection.

III - Points in Issue

The parties take the position that the following issues are raised on this appeal:

- (a) did the courts below err in holding that the Final Injection, which followed the withdrawal of Mrs. Ciarlariello's consent, did not constitute a battery?
- (b) in the alternative, did the courts below err in failing to find that the defendant doctors breached their duty of disclosure in obtaining Mrs. Ciarlariello's consent to the Final Injection?
- (c) did the learned trial judge err in failing to find that a reasonable person in Mrs. Ciarlariello's position would not have consented to the Final Injection?

IV - Analysis

(1) Liability for Battery

Prior to *Reibl v. Hughes*, supra, there was some confusion as to whether the failure to inform a patient adequately of the risks that might flow from a medical procedure (a) vitiated consent and constituted a battery or (b) constituted negligence.

In this case the trial judge found that Mrs. Ciarlariello's consent was suspended when she asked that the test be stopped. It follows that the subsequent completion of the test which resulted in Mrs. Ciarlariello becoming a quadriplegic would have constituted battery if it had been established that Mrs. Ciarlariello did not give her consent to the completion of the test. This was not done. The trial judge found that the necessary consent was given. He was satisfied that Mrs. Ciarlariello was in every way capable of expressing her consent to the continuation of the procedure. There was certainly no evidence of fraud or misrepresentation. Nor did the doctors engage in or carry out, a different procedure than the one which the patient had anticipated. The second angiogram was identical to the one performed seven days earlier and was the very procedure that she was told it would be necessary to repeat. There was then a sound factual basis for the finding that Mrs. Ciarlariello consented to the continuation of the angiogram.

It is therefore clear that the appellants' action in battery cannot succeed. It remains to be considered whether the information provided to Mrs. Ciarlariello regarding the completion of the test was inadequate to such an extent that it constituted negligence.

(2) Negligence

(a) The Standard for Disclosure

Reibl v. Hughes, supra, indicates that the disclosure which must be made to a patient will often be more than that which the medical profession might consider appropriate to divulge. Although expert medical evidence on this issue is still relevant, it is no longer decisive in determining whether or not sufficient information was given to a patient to enable that patient to make an informed consent. The test now focuses on what the patient would want to know. Laskin C.J. put the position in these words at pp. 894-95:

To allow expert medical evidence to determine what risks are material and, hence, should be disclosed and, correlatively, what risks are not material is to hand over to the medical profession the entire question of the scope of the duty of disclosure, including the question whether there has been a breach of that duty. Expert medical evidence is, of course, relevant to findings as to the risks that reside in or are a result of recommended surgery or other treatment. It will also have a bearing on their materiality but this is not a question that is to be concluded on the basis of the expert medical evidence alone. The issue under consideration is a different issue from that involved where the question is whether the doctor carried out his professional activities by applicable professional standards. What is under consideration here is the patient's right to know what risks are involved in undergoing or foregoing certain surgery or other treatment.

In deciding whether a risk is material and therefore, one which should be explained to the patient, an objective approach should be taken. The crucial question in determining the issue is whether a reasonable person in the patient's position would want to know of the risk.

In the present case, there can be no doubt that the doctors involved conducted themselves in an exemplary manner. All the possible risks that could arise from the procedure were fully explained on several occasions to both Mrs. Ciarlariello and her daughter. The only outstanding question is whether Mrs. Ciarlariello's withdrawal of her consent during the second angiogram required the doctors to repeat their complete explanations concerning this procedure in order to obtain her consent to proceed. In general terms, the question can be put in this way: to what extent must disclosure be made to the patient who, during the course of a procedure, withdraws consent, in order to resume the procedure with the informed consent of the patient? In order to answer that question, it will be necessary to first consider the effect of the withdrawal of consent.

(b) Withdrawal of Consent

Whether or not there has been a withdrawal of consent will always be a question of fact. The words used by a patient may be ambiguous. Even if they are apparently clear, the circumstances under which they were spoken may render them ambiguous. On some occasions, the doctors conducting the process may reasonably take the words spoken by the patient to be an expression of pain rather than a withdrawal of consent. Obviously, these are questions of fact which will have to be resolved by the trial judge.

For example, in *Mitchell v. McDonald* (1987), 40 C.C.L.T. 266 (Alta. Q.B.), the plaintiff was suffering from acute muscular pain in her chest. She consented to receive a cortisone injection directly into the chest muscle. Unfortunately, the injection punctured a lung resulting in its partial collapse. At one point in the procedure, the plaintiff cried out "For God's sake, stop". She argued not unreasonably, that this constituted a withdrawal of consent. However, the trial judge, at p. 289, interpreted it as but a cry of pain:

With respect to the suggestion that the consent might have been withdrawn by her exclamation, "For God's sake, stop," it is beyond dispute that the damage had already been done before her cry. On the evidence, in any event, such a cry could well have been interpreted to mean, "My God, stop hurting me."

While the doctor's interpretation of the patient's cries in *Mitchell v. McDonald* may have been reasonable in that case, generally if there is any question as to whether the patient is attempting to withdraw consent, it will be incumbent upon the doctor to ascertain whether the consent has in fact been withdrawn. It should not be forgotten that every patient has a right to bodily integrity. This encompasses the right to determine what medical procedures will be accepted and the extent to which they will be accepted. Everyone has the right to decide what is to be done to one's own body. This includes the right to be free from medical treatment to which the individual does not consent. This concept of individual autonomy is fundamental to the common law and is the basis for the requirement that disclosure be made to a patient. If, during the course of a medical procedure a patient withdraws the consent to that procedure, then the doctors must halt the process. This duty to stop does no more than recognize every individual's basic right to make decisions concerning his or her own body.

This principle has been recognized before. It was very aptly described by Robins J.A. in *Fleming v. Reid* (1991), 4 O.R. (3d) 74 (C.A.), at p. 85, where he stated:

The right to determine what shall, or shall not, be done with one's own body, and to be free from non-consensual medical treatment, is a right deeply rooted in our common law. This right underlies the doctrine of informed consent. . . . The fact that serious risks or consequences may result from a refusal of medical treatment does not vitiate the right of medical self-determination. . . . It is the patient, not the doctor, who ultimately must decide if treatment -- any treatment -- is to be administered.

The same principle was recognized in *Nightingale v. Kaplovitch*, [1989] O.J. No. 585 (QL). In that case the patient was undergoing sigmoidoscopic examination. At one point the examination became extremely painful and the patient screamed "Stop, I can't take this any more". In spite of the patient's cries the doctor continued. The patient made a sudden movement caused by pain and suffered a punctured bowel. R.E. Holland J. of the Ontario High Court stated:

I conclude on a balance of probabilities that the perforation occurred after Dr. [Kaplovitch] had been asked to stop. . . .

I conclude that the perforation occurred after consent had been withdrawn. This amounted to a battery and liability would generally follow. . . . Quite apart from the question of battery, Dr. Kaplovitch was negligent in continuing the procedure when the plaintiff was obviously suffering extreme pain and when he had been asked to stop.

An individual's right to determine what medical procedures will be accepted must include the right to stop a procedure. It is not beyond the realm of possibility that the patient is better able to gauge the level of pain or discomfort that can be accepted or that the patient's premonitions of tragedy or mortality may have a basis in reality. In any event, the patient's right to bodily integrity provides the basis for the withdrawal of a consent to a medical procedure even while it is underway. Thus, if it is found that the consent is effectively withdrawn during the course of the proceeding then it must be terminated. This must be the result except in those circumstances where the medical evidence suggests that to terminate the process would be either life threatening or pose immediate and serious problems to the health of the patient.

The issue as to whether or not a consent has been withdrawn during the course of a procedure may require the trial judge to make difficult findings of fact. If sedatives or other medication were administered to the patient then it must be determined if the patient was so sedated or so affected by the medication that consent to the procedure could not effectively have been withdrawn. The question whether a patient is capable of withdrawing consent will depend on the circumstances of each case. Expert medical evidence will undoubtedly be relevant, but it will not necessarily be determinative of the issue. Indeed, in cases such as this where the patient must be conscious and cooperative in order for the procedure to be performed, it may well be beyond doubt that the patient was capable of withdrawing consent.

In the case at bar, the issue of withdrawal of consent is not an issue. Both the trial judge and the Court of Appeal found that the patient had withdrawn her consent and the respondents have not taken issue with those findings.

(c) Once Consent to the Process has been Withdrawn, Under what Circumstances May Consent Be Given to have it Continued?

Once a patient withdraws consent to the procedure the question then becomes under what circumstances a valid consent to the continuation of the process can be given. The appellants contend that before a valid consent to the continuation of the process can be given the patient must be advised, once again of all the risks involved in the process. The respondents argue that in the absence of any changes in the circumstances which would result in a greater risk for the patient, no further disclosure need be made.

The argument that the entire disclosure need not be repeated rests on two bases. First, the consent is not referrable to a precise moment in time but rather it is a relationship that exists between patient and doctor. That is to say consent is a process, not an instant in time. As a result, once consent to the procedure has been obtained, then the doctor need not explain and disclose all the risks over again. Rather, all that is necessary is an explanation of any new circumstances which may have arisen which require an explanation.

In this case, the respondents point to six occasions prior to the final injection, when the risks of the procedure were discussed with the patient and an informed consent was given to the process. They note that in *Mitchell v. McDonald*, supra, it was held that the patient's past experience with, and informed consent given to cortisone shots meant that the doctor did not need to go over in detail the risks of those shots each time one was administered. However, the presumption that patients have reasonably good memories and have consistently consented to the repetition of a treatment does not necessarily lead to the conclusion that they will also consent when those same patients are in a highly anxious or confused state.

The second argument of the respondents as to why full disclosure need not be repeated addresses the anxiety issue in this way: since the patient is in an emotional state, it would be both pointless and dangerous to increase the patient's fear by outlining all the risks once again. The trial judge gave effect to this submission in these words:

There is no doubt that when a patient is lying on a table and is in the very process of undergoing a surgical procedure, it is not the most desirable point at which to obtain their consent to the continuation of that procedure. Obviously, doctors should avoid obtaining consents under such circumstances. It is difficult, however, to determine beforehand what they should do when such a scenario arises. I have no doubt that whether or not to continue the test is really a matter of medical judgment.

Similarly, the Court of Appeal indicated that once the doctors commenced the angiogram procedure, the issue of informed consent did not arise. In that court's view, the doctors were entitled to exercise their medical judgment and proceed accordingly.

On this issue, I cannot accept the reasoning of the trial judge or the Court of Appeal. Their position constitutes a return to the medical judgment standard which was specifically disapproved in *Reibl v. Hughes*, supra. To give effect to it would permit the doctors to interfere with the bodily integrity of the patients if in their opinion, from a medical point of view, it would be preferable to override the patient's objections and specific refusal to continue the process. Although from the point of view of the medical profession this would undoubtedly be done in the

best interest of the patient, nonetheless, it cannot be accepted.

The appropriate approach is, once again, to focus on what the patient would like to know concerning the continuation of the process once the consent has been withdrawn. Looking at it objectively, a patient would want to know whether there had been any significant change in the risks involved or in the need for the continuation of this process which had become apparent during the course of the procedure. In addition, the patient will want to know if there has been a material change in circumstances which could alter the patient's assessment of the costs or benefits of continuing the procedure. For example, have the circumstances changed in such a way that the procedure is no longer as important to making a diagnosis as it was earlier? Each case, of course, will have to be determined on its own facts. Changes may arise during the course of the procedure which are not at all relevant to the issue of consent. Yet, the critical question will always be whether the patient would want to have the information pertaining to those changes in order to decide whether to continue.

(d) Application to the Case

Here the trial judge found that after Mrs. Ciarlariello had calmed down, Dr. Keller explained to her that one more area needed investigation which would take five minutes. Dr. Keller then asked her if she wished the test completed and Mrs. Ciarlariello told her to go ahead. This evidence was corroborated by Dr. Greco and provided a sound basis for the findings of the trial judge on this issue.

There was no evidence that sedatives, medication, or a deterioration in her condition had made it impossible for Mrs. Ciarlariello to give her consent to the continuation of the process. Significantly, there was no evidence that the hyperventilation or tetany suffered by Mrs. Ciarlariello had increased the risk associated with any further angiogram injections. The trial judge was therefore correct in his conclusion that there was no need to repeat the details of the procedure or its attendant risks before carrying out the last injection. There had been no significant change in circumstances since the procedure had been stopped. The hyperventilation, although extreme in this case, was not unusual. The patient's recovery from it was normal. There were no additional factors which had arisen which needed to be brought to the attention of the patient. Mrs. Ciarlariello was, therefore, capable of giving her consent to the continuation of the procedure based on the earlier disclosures. This she did.

(e) The Patient's Understanding of the Information

Prior to *Reibl v. Hughes*, there was some doubt as to whether the doctor had the duty to ensure that he was understood. However, *Laskin C.J.* made it quite clear in that case that it was incumbent on the doctor to make sure that he was understood, particularly where it appears that the patient had some difficulty with the language spoken by the doctor.

Indeed, it is appropriate that the burden should be placed on the doctor to show that the patient comprehended the explanation and instructions given. See as an example, *Schanczl v. Singh*, [1988] 2 W.W.R. 465 (Alta. Q.B.). In the case at bar, the trial judge very carefully considered the

ability of Mrs. Ciarlariello to comprehend the medical information given to her by the doctor. He took into account Mrs. Ciarlariello's difficulties with the English language, and the stress that she was undergoing. With those factors in mind he came to the conclusion that she understood the nature of the procedure that she was to undergo. He found that she had a basic understanding of English which was manifested by her ability to converse with and respond appropriately to questions and instructions given to her by the doctors. Thus, although a translator was not present during the angiogram, in light of her demonstrated ability to adequately comprehend the language, it was appropriate to conclude that Mrs. Ciarlariello had given a valid consent to the continuation of the procedure.

There was then ample evidence upon which the trial judge could properly base his findings that Mrs. Ciarlariello was aware of all the risks and was able to give a valid consent to the continuation of the process.

(f) Causation

There was complete and proper disclosure made by the respondents of all the risks involved in the procedure. Mrs. Ciarlariello gave an informed consent to the angiogram and the continuation of the second angiogram.

It is, therefore, not necessary to consider the issue of causation. Yet, for the sake of the peace of mind of the daughters of Mrs. Ciarlariello, I think it is worth emphasizing that since the risks involved in the performance of an angiogram were far, far less than the risks which would flow from not locating and treating an aneurism, a patient in Mrs. Ciarlariello's position would not have declined the angiography. As the trial judge pointed out, the statistical risk of quadriplegia from angiography is far less than the risk of death from the non-treatment of a subarachnoid haemorrhage. The trial judge further noted that all the defendant doctors, and the two medical experts testified that they had never had a subarachnoid patient refuse to undergo angiography. Taken together, this represented a patient population of over 1,000. This strengthens and supports the trial judge's conclusion that it was highly unlikely that Mrs. Ciarlariello would have refused to reactivate her consent to the continuation of the procedure had she been re-informed of all the risks, including quadriplegia.

Further, there was ample evidence to support the trial judge's finding that it was highly probable that Mrs. Ciarlariello's condition of quadriplegia was caused by contrast induced toxicity. The evidence reveals that Dr. Keller carefully investigated all the likely causes of the quadriplegia and concluded that the contrast material used in the angiogram had leaked through capillary walls and destroyed the neural tissue of the spinal cord. The other possible causes of the quadriplegia -- a stroke or a blood clot -- were investigated and ruled out as causes of the paralysis.

(3) Conclusion

The appellants' action against the respondents in battery must fail. The patient consented to both the angiograms and to the continuation of the second one. There was no fraud or misrepresentation inducing her to do so and the procedure in its continuation was no different from that to which she had previously given her consent.

The appellants' action in negligence must also fail. When a patient withdraws consent during a procedure to its continuation the procedure must be stopped unless to do so would seriously endanger the patient. However, the patient may still consent to the renewal or continuation of the process. That consent must also be informed. Although it may not be necessary that the doctors review with the patient all the risks involved in the procedure, the patient must be advised of any material change in the risks which has arisen and would be involved in continuing the process. In addition, the patient must be informed of any material change in the circumstances which could alter his or her assessment of the costs or benefits of continuing the procedure. Here, there had been no material change in the circumstances and a valid consent was given to the continuation of the process.

V - Disposition

Accordingly, the appeal must be dismissed. There will be no order as to costs.

Appeal dismissed.

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