

CANADA / JUDGMENT

De Sousa v. Rogers

2019 BCSC 128

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Supreme Court of British Columbia

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2019 BCSC 128 De Sousa v. Rogers

THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

De Sousa v. Rogers,

2019 BCSC 128

Date: 20190201

Docket: S152152

Registry: New Westminster

Between:

Maria De Sousa

Plaintiff

And

Dr. John Rogers, Dr. John R. Rogers Inc., and Dr. Michael Racich

Defendants

Before: The Honourable Mr. Justice Kelleher

Reasons for Judgment

Counsel for the Plaintiff:

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Place and Date of Trial/Hearing:

New Westminster, B.C.

June 26-29, 2018;

July 3-6 and 9-13, 2018; and

November 26-28, 2018

Place and Date of Judgment:

New Westminster, B.C.

February 1, 2019

Introduction

- [1] Maria De Sousa brings this action in negligence against two dentists, Dr. John Rogers and Dr. Michael Racich. Her notice of civil claim refers to breach of contract and breach of fiduciary duty. However, she has only pursued her claim in negligence. Dr. Rogers treated Ms. De Sousa in June 2011. Dr. Racich treated her between December 2011 and January 2013.

The Parties

The Plaintiff

- [2] Ms. De Sousa is 61 years old. She came to Canada from Portugal in 1973 when she was 15. She went to school to learn English and then worked for many years in a series of restaurants - dishwashing, helping in the kitchen, waiting tables, and tending bar. She is married to Henry De Sousa. They have two adult daughters, Lisa De Sousa and Elizabeth De Sousa.
- [3] In 2009, Ms. De Sousa worked at home, looking after her father-in-law. In 2010, he moved to a nursing home and she testified that she began working at a Greek restaurant in White Rock. Ms. De Sousa's father-in-law was unhappy at the nursing home and moved in with her and her husband. She looked after him until he passed away in August 2011.

The Defendants

- [4] Dr. John Rogers is a general dentist licensed in British Columbia. He earned his dentistry degree at the University of Toronto in 1983. He did a residency in dentistry at Vancouver General Hospital. He practised general dentistry in Burnaby until 1991, and worked in Papua New Guinea in 1991 - 1992. From 1993 to 2004, he practised family dentistry in Victoria. He has practised in White Rock from 2005 to the present. Between 2014 and 2015, he was president of the Vancouver and District Dental Society.
- [5] The defendant, Dr. John R. Rogers Inc., is Dr. Rogers' professional services corporation.
- [6] Dr. Michael Racich is a general dentist licensed in British Columbia. He graduated from the University of British Columbia in 1982. From 2002 until 2013, he was Consulting Staff in the Department of Dentistry at St. Paul's Chronic Pain Program. He also participated in the UBC Faculty of Dentistry Residency Program during the same period.
- [7] Dr. Racich practises general dentistry with an emphasis on comprehensive restorative dentistry, prosthodontics, orofacial pain, and TMD (temporomandibular disorder). He has publications in two peer reviewed publications.
- [8] Dr. Racich has served as a member of the Inquiry Committee of the College of Dental Surgeons of British Columbia from 2007 to the present.

Overview of the Claim

- [9] Ms. De Sousa asserts that she received negligent dental work from the defendants in 2011 - 2012. In the plaintiff's opening statement, she alleges that her life was "dramatically altered due to the negligence and her resulting injuries". She says she is "no longer able to work, and her quality of life has been greatly reduced".
- [10] The plaintiff's claim is that Dr. Rogers breached the standard of care in extracting her tooth number 46 on June 14, 2011, "during the Plaintiff's first appointment at his office despite not being able to find an issue with the tooth that would justify this most aggressive of treatment methods". She says she "dealt with significant levels of pain that began immediately after the extraction and continued to affect her day to day ability to function".
- [11] The plaintiff's claim is that Dr. Racich breached the standard of care when he "chose to place three implants in the Plaintiff's mouth on February 10, 2012" despite "knowledge of the possibility of neuropathic pain at the site of tooth 46". The plaintiff argues that "implants are not an appropriate treatment for patients dealing with pain, let alone neuropathic pain".

Treatment

- [12] The claims against both Dr. Rogers and Dr. Racich centre on their treatment of tooth number 46. Tooth number 46 describes the sixth tooth from the front in the lower right quadrant. Dr. Rogers extracted tooth 46 and Dr. Racich placed two implants in the area of tooth 46.
- [13] There is a history of treatment to tooth 46. Before seeing Dr. Rogers in 2011, Ms. De Sousa saw Dr. Patrick Gowdy (2004 - 2006), Dr. Timothy Barker (2008), a neurosurgeon, Dr. Richard Chan (2010), Dr. Melinda Ho (2010 - 2011), Dr. Elaine Lam (2010 - 2011), and Dr. John Fraser (June 8, 2011). She saw Dr. Victor Taddei (2011) after Dr. Rogers and before Dr. Racich. After Dr. Racich, Ms. De Sousa saw Dr. Brian Ross, Dr. Dean Foti, Dr. Ian Matthew, and Dr. Victor Mak. She was also referred to Dr. Sujay Mehta, whose evidence is discussed under expert opinions.

Dr. Patrick Gowdy

- [14] Dr. Gowdy is a general dentist. Ms. De Sousa first saw him as a new patient on July 13, 2004. Dr. Gowdy did not recall seeing her but identified that his chart showed she was in his care between July 13, 2004 and September 28, 2006.
- [15] On the first visit, he noted his concerns about her periodontal health. He noted that she had not been to a dentist for several years.
- [16] He recommended she come in every three months but she did not do so.
- [17] On September 28, 2006, Ms. De Sousa reported a fractured restoration on tooth 46. She reported that the tooth was trapping food.
- [18] Dr. Gowdy recommended placing a crown on tooth 46. Ms. De Sousa did not proceed with this. She did not return to Dr. Gowdy.

Dr. Timothy Barker

- [19] Ms. De Sousa testified that Dr. Barker performed the first root canal on tooth 46. This was after an incident in which she was eating squid and cracked her tooth. She told Dr. Barker she was experiencing pain in the area of tooth 46. She testified she stopped seeing Dr. Barker because she still had problems with tooth 46 after the root canal.
- [20] In cross-examination, Ms. De Sousa agreed that she had pain in and around tooth 46 in the years following.
- [21] Dr. Barker testified that he placed crowns on three teeth: 25, 31, and 46. Ms. De Sousa complained of swelling, constant pain, and numbness in the lower right quadrant. On May 21, 2008, he performed a root canal on tooth 46. He noted in his chart that a small piece of his file broke in the canal in the course of the proceeding.

- [22] Dr. Barker testified that in September 2008, Ms. De Sousa complained of pain to tooth 46. The tooth was sensitive to tapping and cold but not to heat. He assumed her symptoms were referred pain from tooth 45 or 47.
- [23] Dr. Barker redid the crown on tooth 46 on October 30, 2008. He inserted the new crown on November 12, 2008.

Dr. Richard Chan

- [24] On June 21, 2010, Ms. De Sousa saw Dr. Chan, a neurosurgeon. She did not see him for pain in tooth 46 but pain arising from a car accident in 1993. She told Dr. Chan that she had numbness and weakening in her arms. She made no mention of the root canal.
- [25] Dr. Chan testified that he gathered that her symptoms were getting worse as time went on. He asked her to return in six weeks to report on her symptoms with a view to considering surgery. She did not return.

Dr. Melinda Ho

- [26] Ms. De Sousa testified that she thought the pain began in 2009 when she was eating squid. She went to see her dentist, Dr. Ho. She complained of pain in her right lower molar, tooth 46. Dr. Ho referred her to an endodontist, Dr. Elaine Lam, for a root canal on tooth 46.

Dr. Elaine Lam

- [27] Dr. Lam performed two root canals on the mesial and then the distal roots of tooth 46. The latter procedure took place on March 1, 2011. Although Ms. De Sousa complained of pain to tooth 46, Dr. Lam suggested that the pain could be coming from tooth 47. She also wondered whether tooth 46 had a fracture.
- [28] On May 26, 2011, Ms. De Sousa returned to Dr. Lam's office complaining of constant pain. Dr. Lam told her to expect pain for a few months. Dr. Lam decided to wait to see how Ms. De Sousa's symptoms played out. As noted, she thought the pain might be coming from tooth 47.
- [29] Dr. Lam left the practice a short time later. She arranged for Dr. Fraser to see Ms. De Sousa.

Dr. John Fraser

- [30] Dr. Fraser saw Ms. De Sousa on June 8, 2011. He testified that she complained of pain at tooth 46. He noted that both tooth 46 and tooth 47 were slightly sensitive to cold and throbbing but within normal limits. He noted that her temporal mandibular joint was tender on the right side. He did not conclude that tooth 46 was causing pain even though Ms. De Sousa was determined that tooth 46 was the source of her pain. He advised her that the pain may be myofascial, temporo-mandibular, or neurological. He recommended a soft diet, antibiotics, ice, and a night guard. He recommended that she return in three weeks for

reassessment of her condition.

- [31] Dr. Fraser testified that Ms. De Sousa left his office in a very agitated state. She came back a short time later and accused Dr. Fraser of lying to her. Ms. De Sousa asserted that Dr. Fraser did not perform the right test. She denied any suggestion that she was grinding her teeth. She walked out as Dr. Fraser was explaining that she could go elsewhere.
- [32] Ms. De Sousa testified that she is quite certain that Dr. Fraser did not touch tooth 46. She also denied telling Dr. Fraser that she did not grind her teeth and denied accusing Dr. Fraser of lying to her. She further denied that Dr. Fraser told her that her pain was from the muscles in her face, her jaw joint, or a neurological condition.

Dr. John Rogers

- [33] Ms. De Sousa testified that she went to see Dr. Rogers a few days later, on June 14, 2011. She had not seen him before. She reported to Dr. Rogers that she had a "toothache" and asked if he could do something about it. She testified that he examined her mouth, took x-rays, and extracted tooth 46. She said that the pain did not go away after the extraction. It was a very sharp, burning pain, something she had never felt before.
- [34] On cross-examination, Ms. De Sousa agreed that at the time she went to see Dr. Rogers, she was experiencing headaches and taking medication. She denied that she insisted on extracting the tooth after being shown a contemporaneous chart note to that effect. However, she agreed she had said in her examination for discovery that she "asked" Dr. Rogers to extract the tooth. She testified in cross-examination that Dr. Rogers did not tell her that the best treatment was to do nothing or that he would cut the gum and probably drill the bone to remove the tooth.
- [35] Dr. Rogers recalled that Ms. De Sousa came to see him specifically complaining about tooth 46. He testified that she referred to tooth 46 by number and insisted that it be extracted. Ms. De Sousa said the tooth was causing pain and had been sore for several weeks. She said she wanted it removed.
- [36] Ms. De Sousa did not tell Dr. Rogers about her treatment by Dr. Ho, Dr. Lam, and Dr. Fraser. Dr. Rogers also testified that she did not relay Dr. Fraser's advice from a few days earlier that tooth 46 was not the source of the pain. She insisted instead that tooth 46 was the source of the pain.
- [37] Dr. Rogers concluded that tooth 46 could have a cracked root or chronic periapical disease. He put that in his chart. He explained to the Court that one cannot tell if the tooth is fractured until it is removed.

- [38] Given what Ms. De Sousa told him, he concluded that there was no obvious reason why tooth 46 would be the source of the pain but nonetheless there could have been a legitimate reason for tooth 46 to be causing the pain. He told her that the best treatment was to do nothing and suggested that she seek a second opinion from an endodontist. He said that Ms. De Sousa said she was not going back to an endodontist and wanted the tooth extracted.
- [39] Dr. Rogers explained to her that the tooth had long roots and a surgical procedure would be involved, including cutting the gum, moving the gum away, likely drilling the bone to loosen the tooth, and then removing the tooth. He explained that postoperative risks included pain, swelling, bruising, bleeding, and the risk of infection.
- [40] Dr. Rogers testified that the extraction was uneventful. He gave Ms. De Sousa postoperative instructions including rest and said that the area would be numb for some time.
- [41] On cross-examination, Dr. Rogers said that he did not consider saving the tooth because Ms. De Sousa refused to see a specialist and did not want to save the tooth. He said that he would not have done the extraction had she not insisted. The following exchange occurred during his examination for discovery:

67 Q. And so this was -- you deemed the appropriate treatment at that time for Mrs. De Sousa's tooth number 46 was the extraction?

A Mrs. De Sousa insisted that I extract the tooth at that time.

68 Q. And you did not think that it was appropriate or she

A I explained to her I couldn't see an obvious reason for the tooth to be sore. She insisted that I remove it. So I complied with her request.

- [42] Dr. Rogers explained that he did not have his chart in front of him when he gave this answer at the examination for discovery. Having reviewed it, he recalled his conclusion that tooth 46 may have had a cracked root or chronic periapical disease.
- [43] Dr. Rogers testified that Ms. De Sousa came to his office on June 23, 2011. She complained of pain in the area of 46. She also said there was still tooth left in her mouth. He showed her the x-ray and said there was no tooth left. In cross-examination, he denied she described sharp shooting pain. He would have charted such a complaint.
- [44] Dr. Rogers testified that he had a telephone conversation with the plaintiff on June 27, 2011. He charted that she believed pieces of tooth were still coming out. These could have been pieces of bone. He explained to her that there was no tooth left.
- [45] Again, Dr. Rogers testified that he would have made an entry in his chart if she had complained of severe pain.

Dr. Victor Taddei

- [46] Dr. Taddei is a retired general dentist. Ms. De Sousa testified that she went to see him on June 28, 2011 because of "sharp shooting burning pain".
- [47] Dr. Taddei had a vague recollection of Ms. De Sousa. She came in two weeks after the extraction, complaining of pain. He testified that he looked at the adjacent tooth 47 and thought that it could be a potential problem.
- [48] Ms. De Sousa agreed on cross-examination that she did not believe Dr. Taddei when he said there was no tooth left.
- [49] Dr. Taddei testified that he called the plaintiff on July 7, 2011 after reviewing the x-rays from Dr. Rogers. He told her that all of the root of tooth 46 was removed. Ms. De Sousa denied that such a call took place. Dr. Taddei said, and Ms. De Sousa denied, that he told her that any small fragments were likely fragments of bone and of no clinical significance.
- [50] Dr. Taddei saw Ms. De Sousa again on July 7 and December 6, 2011. He referred her to a Dr. Maguire for a cone beam CT scan because x-rays only provide two-dimensional imaging. She declined to follow-up on this referral.

Dr. Racich

- [51] Ms. De Sousa and Dr. Racich gave different evidence regarding her visits in his office and his treatment.

Ms. De Sousa's Testimony

- [52] Ms. De Sousa described her dealings with Dr. Racich as follows. She first saw him in December 2011. Her main concern was pain in the area of 46. Dr. Racich told her that it could be nerve pain. She told him she had a "strong shooting pain". He cleaned the area of 46 and put stitches in.
- [53] Ms. De Sousa testified that the only treatment Dr. Racich suggested was placing implants in the area of 46 and 15 (where there had been an earlier extraction).
- [54] Ms. De Sousa said she was instructed by Dr. Racich's office to come pick up some cream to prepare for the implants. All she received was a tube of Colgate toothpaste.
- [55] Ms. De Sousa then saw Dr. Racich and he put implants in the area of 46 and an implant in the area of 15. She testified that she told him she did not want an implant in 15 but he put one in any way.
- [56] Ms. De Sousa said that she had a lot of pain after these procedures. When she received a call from Dr. Racich enquiring about how she was feeling, she told him she was in pain and that he should not have put in the implants while she was still in pain.

- [57] The plaintiff described her pain as "worse and worse". It was sharp, shooting, and burning. She began having electric shocks in her face.
- [58] The plaintiff said Dr. Racich told her that she had neuropathic pain in the area of 46 and that she should go to a pain management clinic. She said she called the number of the pain management clinic but there was no answer.
- [59] Dr. Racich's chart shows that the first appointment was December 23, 2011. In cross-examination, the plaintiff agreed that Dr. Racich took a history from her. She did not recall whether she told Dr. Racich about the other dentists who had treated her, that she was under Dr. Taddei's care, or that he had recommended a specialist. She knew that Dr. Racich was not a specialist.
- [60] Dr. Racich's chart reflects that the next appointment was December 30, 2011. The chart notes that Ms. De Sousa "presented markedly better". In cross-examination, the plaintiff denied that this was so. She agreed that Dr. Racich told her that she required a root canal in the area of 47 and that 47 was the source of her problem. She denied agreeing to such a procedure. She also denied that she agreed to come back in for a root canal on her next visit.
- [61] According to the chart, Ms. De Sousa's next visit was January 6, 2012. She denied that she was there for a root canal. She wanted Dr. Racich to explore the area of 46 and he did so. According to the chart, the next visit was January 20, 2012. She denied in cross-examination that she had no pain in her mouth that day.
- [62] The chart shows visits on January 27, 2012 and February 3, 2012. She denied that she did not report any pain to Dr. Racich on those visits. They discussed implants in the area of 46. She denied that he told her there would be two implants at the sight of 46 and one at the site of 15.
- [63] Ms. De Sousa agreed that the implants were placed at the February 17 visit. She agreed in cross-examination that Dr. Racich gave her the opportunity to ask questions about the procedure. She denied that he told her the success or failure rate for implants.
- [64] According to the chart, her next visits were March 2 and 9, 2012. In cross-examination, she denied that she made no complaints to Dr. Racich on those days.
- [65] The chart reflects a telephone call from Dr. Racich's office on March 21, 2012. The chart notation says, "low grade ache began on Saturday; lower right region sensitive to 'push' from 'buccal'".
- [66] Ms. De Sousa said in cross-examination that she did not recall the first part and she denied the second part.

- [67] The chart shows a further telephone call on March 22, 2012. Ms. De Sousa did not recall this. She denied telling Dr. Racich's office that she was feeling better. She did not recall Dr. Racich telling her that tooth 47 required a root canal. She agreed that he recommended getting a second opinion. She denied telling Dr. Racich that she did not want to see anyone else.
- [68] The chart shows an appointment for April 27. She denied a notation in the chart that she had been probing the area of the implant and made symptoms worse. She denied that Dr. Racich told her to stop doing this. She denied telling him that she felt a little better when he applied some anaesthetic and denied that she had no pain when he injected her with anaesthetic. She agreed that Dr. Racich suggested a gel for diagnosis and treatment of her symptoms but denied that she declined to use the gel. According to Dr. Racich's chart, his office called Ms. De Sousa on June 1, 2012. She agreed that she received such a call telling her that he had obtained a prescription for neuropathic gel. She denied telling Dr. Racich's office that she was not interested in trying it.
- [69] Ms. De Sousa's last visit was January 18, 2013. In cross-examination, she did not recall whether Dr. Racich advised her to see an endodontist and oral surgeon or another specialist. She did not recall if he gave her a list of specialists, but if he did, she did not contact any.

Dr. Racich's Testimony

- [70] Dr. Racich testified that Ms. De Sousa came to see him on December 23, 2011. She described aching and continuous pain in the 46 region. She rated the pain as 7 out of 10. Ms. De Sousa told him that tooth 46 had a previous root canal and had been extracted six months earlier.
- [71] Dr. Racich testified that Ms. De Sousa did not mention any previous treatment with Dr. Ho, Dr. Lam, Dr. Fraser, or Dr. Taddei. She did not mention the previous recommendation for an endodontic procedure on tooth 47. She did not mention that she had been informed that her pain may be related to a temporo-mandibular joint issue, a myofascial issue, or a neurological issue.
- [72] Dr. Racich testified that he focussed on her pain concern. He conducted tests on tooth 47 that indicated the tooth may have been infected and might require a root canal. He denied in cross-examination that he diagnosed neuropathic pain in the area of 46. That was a differential diagnosis.
- [73] Dr. Racich said that Ms. De Sousa's next appointment was on December 30. He charted that her pain was reduced. She described it as 3 out of 10. He told her that tooth 47 was the likely cause of her pain because her pain level had decreased after antibiotics.
- [74] Ms. De Sousa made an appointment for a root canal on January 6, 2012. On that day, she came in with increased discomfort in the area of 46 and was unwilling to do the endodontic procedure on tooth 47. She felt there was still some foreign matter in the area of 46. Dr. Racich testified that he explored 46. He said that he did so because it would be helpful to Ms. De Sousa to rule out any pathology so they could proceed with the root canal of 47 at a later

date. He then proceeded with "surgical exploration", that is, a midline incision and gentle raising of the tissue to explore the top part of the bone. A slight piece of what appeared to be dentin was removed from the region and the bone began bleeding. The foreign matter was suctioned by his assistant as it was removed. Bone can also appear to be dentin. He did not have an opportunity to look at it to determine which it was. He then sutured the area. He prescribed ibuprofen.

- [75] The next visit was on January 20, 2012. Dr. Racich testified that Ms. De Sousa did not have any pain at this appointment. This assertion was challenged on cross-examination but he was steadfast that if there was pain, he and the hygienist would both have noted it in their charts. If Ms. De Sousa reported pain that was more significant than the muscle tenderness identified at the visit, it would have been quantified and qualified in his chart notes.
- [76] Dr. Racich saw Ms. De Sousa again on January 27 and February 3, 2012, and developed a restorative treatment plan.
- [77] On February 10, 2012, Ms. De Sousa attended again. Dr. Racich was considering implants for the two previous extractions, 15 and 46. He obtained a CT scan that showed there was more than enough bone to place the implants. He discussed two implants at the site of the 46 and one at the site of the 15.
- [78] Dr. Racich testified that he has a standard discussion with patients before proceeding with implants: he explains the procedure, the timeline for healing (three or four months), and the prognosis of the implant, which is generally in the mid to high 90% success rate. He also discusses expected pain. This is generally rated at 0 out of 10 to 3 out of 10, but it can be higher with bone grafting. He would have discussed the nearby trigeminal nerve and the need to avoid traumatizing the nerve.
- [79] Dr. Racich testified that Ms. DeSousa agreed to have the implants placed in the 46 site and 15 site.
- [80] The implants were placed on February 17, 2012. He placed two implants in 46 and one in 15. He testified the implant procedure went well.
- [81] Dr. Racich denied that Ms. De Sousa was in pain when the implants were placed. He denied that she said that she did not think they were a good idea. He would not have proceeded if she had said that.
- [82] Ms. De Sousa attended again on March 2, 2012. Dr. Racich found the areas of the implants were healing well, the sutures in the upper site had dissolved, and the sutures on the lower side were removed. There was no qualitative mention of discomfort at this appointment.
- [83] Ms. De Sousa's next appointment was on March 9, 2012. Dr. Racich testified that he removed a further suture on that date and discussed restorative work.

- [84] Dr. Racich received a telephone call from Ms. De Sousa on March 21, 2012. She told him that she had a low-grade ache which began on Saturday and that the lower right of her mouth was sensitive to push from the cheek side. He prescribed antibiotics.
- [85] He called her the next day and learned she was feeling a bit better.
- [86] Ms. De Sousa's next visit was on March 23. She told Dr. Racich that she was feeling better than on March 21, but did have continuous, achy pain in the area of 47. She rated the pain as 6 out of 10. Dr. Racich examined her and suspected that the 47 tooth required a root canal. He testified that Ms. De Sousa told him she was undecided as to whether she wanted a root canal or an extraction of 47.
- [87] On April 13, 2012, Dr. Racich telephoned Ms. De Sousa. He testified that this was a follow-up call and that Ms. De Sousa said her tooth had settled down and was feeling fine.
- [88] The next appointment was on April 20, 2012. He found that the 46 region was no longer sensitive to palpation and that the tooth 47 was sensitive to palpation. On the front part of the gum of the 47 he saw a "herpetic-like lesion". He explained that it was herpetic-like and not herpes. He said a herpetic-like lesion can be caused by something traumatic such as poking the area or a toothbrush.
- [89] The next appointment was on April 27. Ms. De Sousa presented with localized pain on the 47 tooth. The pain was 5 out of 10, achy and continuous. She was "frustrated and emotional".
- [90] Dr. Racich suspected neuropathic pain, in part because there was trauma to the area which Ms. De Sousa had self-inflicted when she was self-examining. He explained that her pain might be from damage to the soft or hard tissues in the area.
- [91] He discussed potential treatment with her. Ms. De Sousa declined a referral to an oral surgeon, an oral medicine specialist, or an endodontist. He advised her not to self-examine the site as she would exacerbate her symptoms.
- [92] She next visited on May 18, 2012. She had continuous achy, burning, 7 out of 10 pain. He said this was the first occasion that Ms. De Sousa mentioned burning pain.
- [93] Dr. Racich called a pharmacist to order a neuropathic gel. He phoned in the prescription to give the pharmacist directions about what to put in the gel to maximize its benefits. He testified that Ms. De Sousa said she would try the neuropathic gel.
- [94] He received a telephone call from Ms. De Sousa on December 7, 2012. He said it was a long conversation. She had discomfort, a continuous ache, and 6 out of 10 pain in the 47/46 region. She had consulted other dental practitioners but had not followed their recommendations. She was not willing to tell Dr. Racich their names. She was unwilling to try the neuropathic gel. She expressed anger over the extraction of the 46 tooth and the implants.

- [95] The final visit was on January 18, 2013. Ms. De Sousa presented with continuous burning discomfort, a 9 out of 10. She said she had this pain since May or June 2012. She also complained of intermittent sharp, stabbing pain which did not have a stimulus or trigger. Dr. Racich testified that this was the first occasion that she mentioned sharp, stabbing pain.
- [96] Dr. Racich's examination showed slight palpation tenderness in the 46 and 47 area. He discussed neuropathic pain with Ms. De Sousa. He discussed the need for multi-disciplinary care, that is, neurologists as well as dental specialists. He referred her to a pain clinic and suggested she see an oral surgeon and an endodontist, and that she have an oral medicine evaluation. He gave her a list of specialists.

Dr. Brian Ross

- [97] Ms. De Sousa testified that Dr. Ross is her current dentist. She began seeing him in 2012. He was not called as a witness.
- [98] Ms. De Sousa agreed in cross-examination that he recommended a root canal of tooth 47. She refused to follow-up on this because in her view, tooth 47 was not the cause of the pain.
- [99] Dr. Ross referred her to Dr. Sujay Mehta in 2013.

Dr. Ian Matthew

- [100] Dr. Matthew is an oral surgeon. He was called as a witness by the defendants. He testified that Dr. Ross referred Ms. De Sousa to him for pain problems. He said he was anxious to help her but she did not accept his suggestions.
- [101] Ms. De Sousa wanted him to remove the implants that Dr. Racich had placed. Dr. Matthew completed an examination and did not find any concerns. He suspected the pain was caused by tooth 47.
- [102] Dr. Matthew observed that the implants had integrated satisfactorily. He did not think that removal was advisable. He said that implant removal can be traumatic, particularly to the jaw.
- [103] Dr. Matthew testified he did not have any concern about the placement of the two implants at site 46. He thought that, given the wide space at the site, it was acceptable practice to have placed two implants in order to spread the load.
- [104] Dr. Matthew also testified that Ms. De Sousa did not disclose a history of chronic pain nor her consultation with the neurosurgeon, Dr. Chan. Dr. Matthew said this information would be highly relevant and significant to him when looking for an explanation for the patient's problem. Ms. De Sousa also did not disclose her history of endodontic treatment on tooth 46.

- [105] On cross-examination, Dr. Matthews said that implants can cause neuralgia. However, he stated that pain can have many causes including viruses, trauma, and ischemic injuries. He said a referral to an oral medicine specialist would be appropriate as well as an eventual referral to a neurologist.
- [106] On December 6, 2012, Ms. De Sousa again telephoned Dr. Matthew, wanting him to remove the implants. He suggested that she see an oral medicine specialist or that she return to Dr. Racich. He did not think the implants were the source of her problem. This upset the plaintiff.
- [107] Dr. Matthews eventually referred Ms. De Sousa to Dr. Mehta who has an interest in orofacial pain.

Dr. Dean Foti

- [108] Dr. Foti is a neurologist. He testified that Ms. De Sousa was referred to him from the Emergency Department of Vancouver General Hospital.
- [109] He testified that Ms. De Sousa did not disclose a history of chronic pain or pain issues to him. That would have been significant to Dr. Foti. She also did not disclose her prior neurosurgical consultation or that she had been treated for dental pain in the lower right side of her mouth since 2005.
- [110] Dr. Foti concluded that Ms. De Sousa had chronic pain involving her face, head, neck, and ear with an unknown cause. Her pattern of symptoms made it unlikely that she had trigeminal neuralgia or neuropathy pain. He was of the opinion that stress and anxiety might be playing a role in her symptoms.

Dr. Victor Mak

- [111] Dr. Mak is a periodontist who was called by the defendants. He saw Ms. De Sousa between April 4 and April 30, 2013. She came to him complaining of pain in her jaw.
- [112] In the second visit, Dr. Mak told her that he had reviewed a CT scan and concluded that neither of the implants was touching the nerve bundle. He did not think the implants were causing her pain. He told her that she had a type of facial pain relating to her jaw joints, such as temporomandibular dysfunction or temporomandibular joint syndrome (TMJ).
- [113] He said that Ms. De Sousa disagreed with his assessment.
- [114] Dr. Mak recommended she see a neurologist and oral medicine specialist. Ms. De Sousa said that she did not want to go and wanted the implants removed. He could not ascertain that the implants were the source of her pain.
- [115] Ms. De Sousa's final visit was on April 30, 2013. Dr. Mak explained that, in his view, the pain was related to her jaw joint and jaw muscles. He wished to refer her to an oral medicine specialist but she refused a referral.

The Plaintiff's Condition

- [116] Ms. De Sousa suffers from chronic pain. I accept her evidence that the pain has been debilitating and of long duration. Her evidence in that regard is corroborated by her husband, her sister, her daughters, and her friend, Lucia Batista.
- [117] Her husband, Henry De Sousa, testified that the plaintiff was always hard-working. Although she was away from the workforce looking after family members, she always wanted to return to work. He said that after the extraction, she described "burning pain" on the right side of her mouth. She was in too much pain. It worsened after the treatment by Dr. Racich.
- [118] Mr. De Sousa testified that before the treatment by the defendant dentists, she enjoyed going out dancing. She enjoyed taking care of their home. Since then, she has stopped driving, he said, because the pain affects her concentration. He now does most of the cooking. She has lost interest in gardening. They used to travel overseas but no longer do so. He described the party they put on for their daughter, Elizabeth's engagement. Ms. De Sousa was in too much pain to participate. She had to lie down.
- [119] Elizabeth De Sousa is one of the plaintiff's daughters. She testified that her mother is in a lot of pain. She is always touching her jaw. She used to enjoy life: travelling, socializing, and camping. Now she is very limited. She has stopped driving. She seems to have lost her sense of direction and her facility in English.
- [120] Lisa De Sousa is the plaintiff's other daughter. She testified that the plaintiff was "full of life" before the dental treatment. She enjoyed travelling, camping, dancing, and cruises. Today she is not the same person. She cannot return to work because of the pain. She is confused; she cries a lot and often retires at 6:00 p.m.
- [121] Fernanda Santos is the plaintiff's sister. She said Maria worked hard all her life. She had a full-time job and looked after her parents and then her husband's parents.
- [122] Ms. Santos said that because of the pain, the plaintiff can no longer do what she used to do. Ms. Santos was at the engagement party for Elizabeth at the plaintiff's home. She confirmed that the plaintiff left the party because of the pain.
- [123] The plaintiff's friend, Lucia Batista, gave evidence to the same effect. She said that when she phones the plaintiff, she complains of pain. She no longer attends family functions.

Reliability and Credibility

- [124] A summary of the principles governing credibility was provided by Mr. Justice Abrioux in *Absolute Industries Ltd. v. Harris*, 2014 BCSC 287:

[65] In *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 186-187, aff'd 2012 BCCA 296, Madam Justice Dillon provided a useful summary of the principles governing the court's approach to assessing the evidence where there are significantly different versions of events advanced by the parties:

- credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides;
- the art of assessment involves an examination of various factors such as the ability and opportunity to observe events, the firmness of memory, the ability to resist the influence of interest to modify recollection and whether the witness' evidence harmonizes with independent evidence that has been accepted;
- whether the witness changes his testimony during direct and cross-examination;
- whether the testimony seems unreasonable, impossible or unlikely;
- whether a witness has a motive to lie; and
- the demeanor of a witness generally.

[66] Dillon J. also referred to the well-known statement of O'Halloran J.A. in *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (BCCA), which is to the effect that ultimately, the validity of the evidence depends on whether it "is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time".

[67] She concluded at paragraph 187:

[187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.

[Emphasis added.]

[125] Ms. De Sousa disputed the records, testimony, diagnoses and treatment recommendations of several of the treatment providers. The treatment providers, other than the defendants, have no interest in the outcome of these proceedings.

[126] The plaintiff's recollection of the circumstances of her treatment and her interaction with the dentists who saw her, including the defendants, was, to put it kindly, imperfect. The following are five significant examples:

1. The plaintiff denies that she asked Dr. Rogers to extract tooth 46. That is inconsistent with Dr. Rogers' evidence and with his contemporaneous chart. It is also inconsistent with what she said in her examination for discovery:

778 Q So I want to go back to -- I want to now go to when you first saw Dr. Rogers, and that was on June 14, 2011?

A Yes.

779 Q Before the break you weretelling me about how confident that you were that your issues were emanating from tooth 46, and you were confident about that; right?

A Yes.

780 Q You were so confident that when you went to see Dr. Rogers you insisted that he take the tooth out?

A I did not insist. I think I asked him -- you know, because I was told that, you know, if it was broken, there was nothing we could do. So I think I asked him to extract the tooth, and he said okay. And he said, well, it's going to -- I have to do a little surgery. And then my husband was waiting. And I don't know if it was him or his assistant that went to tell my husband. And then it didn't take long. He just cut the bone and that was it.

2. She testified that the incident with the squid occurred in 2009 or 2010. She said that after that, Dr. Barker performed a root canal on tooth 46 and her issues with the tooth persisted. However, she denied that the squid incident occurred before the first root canal until her examination for discovery was put to her.
3. The plaintiff agreed she stopped seeing Dr. Barker in 2008 because she was still having problems with tooth 46 after the root canal. She said that she went to see Dr. Ho in April 2010 because she was having problems with tooth 46 after Dr. Barker's root canal. She did not remember telling Dr. Lam that she had pain and swelling ever since the root canal, despite Dr. Lam's chart note.
4. Ms. De Sousa denied that she felt around the socket to try to feel bone or touched the area at all after seeing Dr. Racich. She was then asked about her evidence in the examination for discovery that she put her finger into the area of the extraction a couple of times. She did not recall being asked those questions or answering them, but she agreed the answers were true.

5. The plaintiff asserted that Dr. Fraser did not touch tooth 46 even though she told him that she was having pain there. That is contrary to his evidence and to his chart. Dr. Fraser has no interest in the outcome of these proceedings. She also denied that he told her the pain may be coming from the muscles of her face or a joint or neurological condition. Contrary to his chart note, she denied accusing him of lying to her.
- [127] Ms. De Sousa's evidence must be considered in light of her relatively poor memory. Moreover, much of what she told the Court is inconsistent with the "probabilities of the case as a whole": *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.).
- [128] Treatment providers have chart notations that provide a clear record of what occurred.
- [129] Ms. De Sousa's evidence conflicts with that of Dr. Fraser. I prefer Dr. Fraser's recollection.
- [130] I reach the same conclusion with respect to Dr. Taddei. He has no interest in the outcome of these proceedings and his evidence was unshaken in cross-examination.
- [131] Finally, I accept the evidence of the defendants, Dr. Rogers and Dr. Racich. Their evidence was unshaken in cross-examination. They relied on contemporaneous chart notes.

Expert Evidence

1. Dr. Sujay Mehta

- [132] Dr. Sujay Mehta is a British Columbia dentist. He graduated in medicine from Tufts University in Boston and did a two-year Hospital Dentistry Residency at the Veterans Administration/UCLA Medical Centre as Chief Resident. He completed an Orofacial Pain Residency through the Department of Oral Medicine and Orofacial Pain at UCLA Medical Center.
- [133] He is a clinical instructor in the Faculty of Dentistry at the University of British Columbia. He has managed chronic pain patients at the Orofacial Pain Clinic and currently does so full-time at his private office.
- [134] Dr. Mehta has lectured both in Canada and internationally on subjects including, chronic pain, facial pains, temporomandibular joint disorders, neuralgias, and neuropathic pain.
- [135] Dr. Mehta treated Ms. De Sousa and also provided opinion evidence about her treatment by Dr. Rogers and Dr. Racich.
- [136] Dr. Mehta first saw the plaintiff on July 22, 2013. He reports that Dr. Ross referred Ms. De Sousa to him "for evaluation to [sic] pain in the lower right dental quadrant following endodontics, extraction and dental implant basements".
- [137] He saw her on four occasions in 2013 and 2014. His first report notes that counsel for the plaintiff asked him to consider the following:

Maria De Sousa's present symptoms arising from her surgeries.

My medical opinion regarding the likely cause of [Ms.] De Sousa's injuries and, in particular, whether the described negligence, extraction and implant placement is the cause of the injury.

My medical opinion on whether [Ms.] De Sousa had a pre-condition that made her more susceptible to the resulting injury or whether there are any post-incident medical records, trauma, or other factors that impact on her injuries.

My opinion regarding Maria De Sousa's general disability arising from her medical malpractice injuries and the extent to which this interferes with her activities of daily living, recreational, social and household activities and whether this impairment is likely to be permanent.

My opinion regarding any future treatment for [Ms.] De Sousa including use of ongoing medication or treatment for symptom relief with my estimate as to frequency and duration of such medication or treatment.

My final prognosis, including whether and when complete recovery is likely to occur or alternatively, whether Mrs. De Sousa has a permanent or partial disability.

[Emphasis added.]

[138] These instructions are deeply flawed. The third paragraph assumes "negligence" on the part of the defendants. The fifth paragraph refers to the plaintiff's "medical malpractice injuries". The instructions suggest that Dr. Mehta was instructed to assume that there has been negligence and medical malpractice. As such, any conclusion reached by an expert based on these instructions is, as the defendants argue, a self-fulfilling prophecy.

[139] A second, and also fundamental, flaw is the incomplete records upon which Dr. Mehta relied.

[140] Dr. Mehta did not have the medical records of other persons who treated Ms. De Sousa: Dr. Gowdy, Dr. Barker, Dr. Ho, Dr. Lam, Dr. Fraser, or Dr. Taddei. He did not have complete records from the plaintiff's physician, Dr. Mary Weckworth. He did not have the x-rays and other images taken by Dr. Racich. He did not receive Dr. Mak's treatment records. He requested Dr. Mak's records from plaintiff's counsel but did not receive them. He did not follow up.

[141] Moreover, Dr. Mehta relied upon records of Dr. Weckworth, Dr. Brian Ross, Morgan Creek Clinic, and Ms. De Sousa's income tax and benefit return. None of this is part of the evidence.

[142] In these circumstances, the Court is unable to determine whether Dr. Mehta was misinformed about the facts, took irrelevant facts into consideration, or omitted to consider relevant facts.

- [143] The Court must know the facts on which the opinion is based. If an expert has been misinformed, has taken irrelevant facts into consideration, or not considered relevant facts, the value of the opinion will be diminished: *R. v. Turner*, [1975] Q.B. 834 (C.A.); see also *R. v. Howard*, [1989] 1 S.C.R. 1337 at 1347, 1348.
- [144] Before any weight can be given to the expert's opinion, the facts upon which the opinion is based must be found to exist: *R. v. J.-L.J.*, 2000 SCC 51 at para. 59.
- [145] On November 14, 2017, Dr. Mehta provided a second report and addendum where he sets out that he has reviewed some further records, those of Dr. Mary Weckworth, records of the Jim Pattison Outpatient Care and Surgery Centre of July 11, 2016, certain income tax information, and clinical records from Dr. Racich and Dr. Rogers.
- [146] In both reports, Dr. Mehta is critical of Dr. Rogers and Dr. Racich. However, given the flaws I have noted, the opinions cannot be given any weight.

2. Dr. Douglas Nielsen

- [147] Dr. Nielsen is a general dentist. He has practised in British Columbia since 1972. He is the past President of the Vancouver and District Dental Society and has been active in the dental community in various study clubs with other dentists.
- [148] Dr. Nielsen prepared a report for counsel for the defendants, dated November 29, 2017. The report exhaustively reviews the history of Ms. De Sousa's treatment. He said with respect to Dr. Rogers:

In my opinion, Dr. Rogers provided a thorough examination and assessment of Ms. De Sousa's dental issue. His differential diagnosis of the dental cause for her tooth #46 having pain, in my opinion met the standard of care of a competent general dentist in British Columbia.

In my opinion, Dr. Rogers' extraction of tooth #46 met the treatment standard of care of a competent general dentist in British Columbia.

In my opinion, Dr. Rogers has met the standard of care throughout the course of his treatment for Ms. De Sousa. Based on the surgical procedure performed on Ms. De Sousa, it's not uncommon for small pieces of bone to work their way out of the surgical site.

- [149] Dr. Nielsen expressed this opinion with respect to Dr. Racich:

In my opinion, Dr. Racich provided a thorough examination and assessment of Ms. De Sousa's dental issue. His chart notes show a detailed timeline of examination, treatment and follow-up for Ms. De Sousa, including referrals for second opinions. His differential diagnosis of the dental cause for her pain in the area of #46, in my opinion, met the standard of care of a competent general dentist in British Columbia.

3. Dr. Meera Gupta

- [150] Dr. Gupta is a neurologist licensed to practise in British Columbia. She examined Ms. De Sousa on the instructions of the defendants. She received certification in neurology in 2012 from the University of Ottawa. She has five years of clinical practice experience and is the medical director at B.C. Centre for Ability.
- [151] Dr. Gupta reviewed Ms. De Sousa's history and conducted a physical examination on October 22, 2017.
- [152] Dr. Gupta noted that Ms. De Sousa has a history of non-specific oral pain that initially appeared to her to be of dental origin.
- [153] Dr. Gupta concluded that Ms. De Sousa has persistent idiopathic facial pain ("PIFP"). She said this is a disorder of unknown cause which can be exacerbated by dental procedures. Procedures are commonly performed on these patients in an attempt to address the initial complaint. She explained that this is often futile as the pain disorder is typically not of primary dental origin. She concluded that the current facial pain syndrome would be present regardless of dental procedures. The dental procedure may have worsened the pre-existing pain condition. However, this would not have altered the ongoing or anticipated need for treatment, including pain medication and participation in a pain clinic.
4. Rebuttal Report of Dr. Mehta
- [154] On January 12, 2018, Dr. Mehta purported to provide a rebuttal report reviewing Dr. Nielsen and Dr. Gupta's reports.
- [155] In cross-examination, Dr. Mehta was shown handwritten notes he took while discussing his rebuttal report with counsel for the plaintiff. His notes say "attack everything in Nielsen rep[ort]". He said this was his interpretation of the instructions he received.
- [156] This is an entirely inappropriate instruction to an expert witness. It is an instruction to act contrary to the duty of an expert. The Supreme Court Civil Rules, R. 11-2(1) provides:
- (1) In giving an opinion to the court, an expert appointed under this Part by one or more parties or by the court has a duty to assist the court and is not to be an advocate for any party.
- [157] Counsel for the plaintiff has effectively instructed Dr. Mehta to act as an advocate. That is improper.
- [158] There is no suggestion that Dr. Mehta refused these instructions. I therefore conclude that Dr. Mehta's rebuttal report in respect of Dr. Nielsen's report is not admissible.
- [159] Dr. Mehta disagreed with Dr. Gupta's diagnoses. However, Dr. Gupta gave evidence as an expert in neurology. Dr. Mehta is a general dentist, not a neurologist.

[160] In his original letter of instruction, he was asked for a "medicolegal neurological assessment". He is simply not qualified to provide a neurological assessment. Dr. Mehta did not go back to plaintiff's counsel to explain that he was not a neurologist or to seek clarification. His evidence is that he assumed "neurological" meant "medical legal" or "dental legal". This makes no sense to me.

Analysis

[161] To succeed in a claim of negligence, the plaintiff must prove as against each of the defendants all of the following:

- a) that the defendant owed Ms. De Sousa a duty of care;
- b) that the defendant's conduct breached the standard of care;
- c) that Ms. De Sousa sustained damage; and
- d) that the damage was caused, in fact and in law, by the defendant's breach.

See *Mustapha v. Culligan of Canada Ltd.*, 2008 SCC 27 at para. 3.

[162] There is no dispute that the defendants owed Ms. De Sousa a duty of care. There is also no doubt that Ms. De Sousa has suffered pain over the last several years.

[163] The questions before me are first, whether the defendant's conduct breached the standard of care and second, if it did, whether the defendant's breach caused damage to the plaintiff.

Standard of Care

[164] The principles governing the standard of care in a medical negligence case were summarized by Madam Justice Ballance in *Chen v. Ross*, 2014 BCSC 374, aff'd 2015 BCCA 250 [Chen]. There is no suggestion or argument that the dentists in this case are held to any different standard of care. Justice Ballance stated at paragraphs 273-274 and 277:

[273] A physician's error in clinical judgment or an adverse outcome from medical treatment does not necessarily correspond to medical negligence: *Belknap v. Meakes* (1989), 64 D.L.R. (4th) 452 (B.C.C.A.) [Belknap]; *Fairley (Guardian ad litem of) v. Waterman*, 2002 BCSC 10 [Fairley].

[274] There is no uniform standard of care governing all doctors. The applicable standard is related to the physician's education, experience, qualifications and the surrounding circumstances. Specialists are expected to exhibit a higher degree of skill in their field than are general practitioners with respect to treatment as well as diagnosis. The physician's conduct is evaluated objectively against a reasonable medical person who possesses and exercises the skill, knowledge, and judgment of the normal prudent practitioner of his or her special group, in the particular circumstances, at the material time: *Wilson v. Swanson*, [1956] S.C.R. 804 [Wilson]; *ter Neuzer v. Korn*, [1995] 3 S.C.R. 674 [Korn].

[1277] Neither the generalist nor specialist is expected to meet a standard of perfection; only reasonable care is required, not infallibility.

[165] An error in clinical judgment is distinguishable from professional fault. When the practitioner appropriately exercises clinical judgment, an error in judgment does not amount to negligence: *Dickie v. Minett*, 2012 ONSC 4474 at paras. 296-300, *aff'd* 2014 ONCA 265.

[166] The plaintiff advanced three main arguments against Dr. Rogers:

- a) Dr. Rogers failed to meet the standard of care in proceeding with the extraction "during the plaintiff's first appointment at his office Despite not being able to find an issue with the tooth that would justify this most aggressive of treatment methods";
- b) Dr. Rogers failed to obtain Ms. De Sousa's informed consent prior to the extraction; and
- c) This failure to meet the standard of care caused the plaintiff's loss.

[167] The plaintiff advanced three main arguments against Dr. Racich:

- a) Dr. Racich failed to meet the standard of care in proceeding with the placement of two implants at tooth number 46 on February 17, 2012 when he had diagnosed neuropathic pain at the site of that tooth;
- b) Dr. Racich failed to obtain Ms. De Sousa's informed consent prior to the placement of implants at tooth number 46; and
- c) This failure to meet the standard of care caused the plaintiff's loss.

[168] The plaintiff has not established that either Dr. Rogers or Dr. Racich breached the standard of care in performing the extraction or proceeding with the implants, respectively. In any event, the plaintiff has failed to establish that the treatment by Dr. Rogers and Dr. Racich is the cause of her pain.

[169] Ms. De Sousa has a history of self-diagnosis. She has refused treatment when she disagrees with the professional. That is her right. But it does not constitute tortious conduct on the part of the defendants.

[170] Ms. De Sousa also distrusts what dentists tell her if it is not what she wishes to hear or is not what, in her opinion, is the source of the problem.

Informed Consent

[171] The plaintiff alleges a lack of informed consent on the part of both defendant dentists. She submits that:

1. Dr. Rogers failed to obtain Ms. De Sousa's informed consent for the extraction of tooth number 46 and thereby failed to meet the standard of care; and

2. Dr. Racich failed to obtain Ms. De Sousa's informed consent for the placement of implants at number 46 and thereby failed to meet the standard of care.

[172] The issue of informed consent can engage both the tort of negligence and the tort of battery. The plaintiff only alleges negligence in this case; she does not make any claim in battery. For clarity, however, I find it useful to review the distinction between the issue of informed consent in the negligence context versus the battery context. Chief Justice Laskin set out the relevant legal framework in *Reibl v. Hughes*, [1980] 2 S.C.R.880 at 891-892:

In my opinion, actions of battery in respect of surgical or other medical treatment should be confined to cases where surgery or treatment has been performed or given to which there has been no consent at all or where, emergency situations aside, surgery or treatment has been performed or given beyond that to which there was consent.

This standard would comprehend cases where there was misrepresentation of the surgery or treatment for which consent was elicited and a different surgical procedure or treatment was carried out.

In situations where the allegation is that attendant risks which should have been disclosed were not communicated to the patient and yet the surgery or other medical treatment carried out was that to which the plaintiff consented (there being no negligence basis of liability for the recommended surgery or treatment to deal with the patient's condition), I do not understand how it can be said that the consent was vitiated by the failure of disclosure so as to make the surgery or other treatment an unprivileged, unconsented to and intentional invasion of the patient's bodily integrity. I can appreciate the temptation to say that the genuineness of consent to medical treatment depends on proper disclosure of the risks which it entails, but in my view, unless there has been misrepresentation or fraud to secure consent to the treatment, a failure to disclose the attendant risks, however serious, should go to negligence rather than to 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 due care, comparable in legal obligation to the duty of due care in carrying out the particular treatment to which the patient has consented. It is not a test of the validity of the consent.

[173] Thus, a physician's conduct may constitute a battery if the patient's consent was never obtained or (absent an emergency) the procedure exceeded the consent given. As noted, there is no allegation of battery in this case.

[174] In the negligence context, the issue of informed consent is essentially a duty of disclosure: *Hopp v. Lepp*, [1980] 2 S.C.R. 192 at 196. A physician who carries out a procedure in compliance with the standard of care can still be found negligent if he or she did not properly disclose the risks of the treatment before obtaining consent.

[175] Justice Ballance set out the relevant principles for assessing the issue of informed consent in the negligence context in *Chen*:

- [302] Since the landmark decisions of the Supreme Court of Canada in *Hopp v. Lepp*, [1980] 2 S.C.R. 192 and *Reibl v. Hughes*, [1980] 2 S.C.R. 880, it has been firmly entrenched in the jurisprudence that a physician may be found negligent even where the medical treatment complies with the expected standard of care, if he or she has failed to obtain the patient's informed consent to the treatment that has caused the injury.
- [303] Before obtaining a patient's consent and implementing a course of treatment, the doctor must disclose to the patient the nature of the proposed treatment, its gravity, and any associated material, special and unusual risks that a reasonable person in the patient's shoes would want to know: *Reibl*. In addition to informing the patient about the frequency or statistical chance of a material or special risk arising, the physician must also explain the nature and severity of the injury that could ensue: *Brock v. Anderson*, 2003 BCSC 1359 [Brock].
- [304] In the aftermath of *Reibl*, the courts have taken an expansive approach in characterizing risks that carry serious consequences as constituting material risks. In the result, the duty to disclose necessitates informing a patient of even a statistically remote risk where the potential consequences of it are sufficiently serious that a reasonable patient would likely consider it to be significant: *Brito (Guardian ad litem of) v. Woolley*, 2003 BCCA 397, leave to appeal to S.C.C. refused, [2003] S.C.C.A. No. 418, 2004 CarswellBC 880 (S.C.C.).
- [176] If the evidence proves the plaintiff was not properly informed of the risks of the procedure, she must also prove that a reasonable person in her position would not have undergone the procedure if advised of the risks: *Hopp v. Lepp*; *Parotta v. Yeung et al*, 2003 BCSC 1305 at para. 53.
- [177] Dr. Racich testified that he had an extensive discussion with Ms. De Sousa about the risks and benefits of dental implants and the alternatives to them. On January 27, 2012 he discussed several treatment options including implants, with a view to giving her as much information as possible. On February 3, 2012, he further discussed implants to be placed at site 46. On February 10, 2012, he testified, he had his standard "informed consent discussion". This included the risks and benefits of implants, the percentage rates of success, and the risk to the nearby trigeminal nerve.
- [178] Ms. De Sousa denied such discussions. I am satisfied that these discussions took place. Dr. Racich's testimony was entirely unshaken in cross-examination. As explained above, I have found that the plaintiff is not a reliable historian.
- [179] Ms. De Sousa denied that Dr. Rogers explained to her that the tooth was not loose and had long roots. She denied that he explained the risks, benefits, and alternatives to treatment when he conducted the surgery. She further denied that he recommended doing nothing. She denied that he told her he planned to cut the gum, move it out of the way, and likely drill the bone to remove the tooth. She denied that she was told there would be stitches.

- [180] Dr. Rogers' evidence is in stark contrast to this. According to him, he told her the best treatment was to do nothing. He suggested returning to an endodontist but Ms. De Sousa insisted on immediate extraction.
- [181] He explained the tooth was not loose and had long roots. He explained that the surgical procedures would include making a cut in the gum, moving the gum to one side, drilling the bone to loosen the tooth and then removing the tooth. He told Ms. De Sousa that post-operative risks included pain, swelling, bruising, bleeding, and the risk of infection. He based this evidence on his standard practice. He testified that he would have told her that she should call the office or come in if there were problems.
- [182] I have no difficulty preferring Dr. Roger's recollection. Evidence of the standard practice of a professional is cogent evidence of what occurred.
- [183] The evidence does not establish that Dr. Rogers or Dr. Racich breached their duty to inform the plaintiff of the nature of the procedure and its associated risks prior to obtaining her consent.

Conclusion

- [184] The evidence does not establish that either Dr. Rogers or Dr. Racich breached the standard of care. The evidence does not establish that damages suffered by Ms. De Sousa, that is, her pain, was caused by the actions of Dr. Rogers or Dr. Racich.
- [185] In light of my conclusion regarding the liability of the defendants, I will not consider the evidence of damages.
- [186] The plaintiff's case against the defendants is dismissed.

"Kelleher J."

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