

CANADA / JUDGMENT

Gumbley v. Vasiliou

2025 ONCA 851

COURT

Court of Appeal for Ontario

DECIDED

9 December 2025

Source: norma.lexum.com · Research copy typeset by Esheria. Not court-issued or certified.

Gumbley v. Vasiliou

Collection

Decisions of the Court of Appeal

Date

2025-12-09

Neutral citation

2025 ONCA 851

Docket numbers

COA-24-CV-1032

Judges

Lauwers, Peter D.; Paciocco, David M.; Dawe, Jonathan

Subject

Civil

Decision Content

COURT OF APPEAL FOR ONTARIO

CITATION: Gumbley v. Vasiliou, 2025 ONCA 851

DATE: 20251209

DOCKET: COA-24-CV-1032

Lauwers, Paciocco and Dawe JJ.A.

BETWEEN

Ashley Gumbley by her Litigation Guardian Jessie Gumbley, Morgan McCaffery by her Litigation Guardian Jessie Gumbley, Savannah Edwards by her Litigation Guardian Jessie Gumbley, Jayden Gumbley by her Litigation Guardian Jessie Gumbley, Jessie Gumbley, and Reginald Gumbley

Plaintiffs (Respondents)

and

Denise Marie Vasiliou

Defendant (Appellant)

Peter W. Kryworuk, Stuart Zacharias and Stephen W. Ronan, for the appellant

Kristian Bonn, Paul Harte, Maria Damiano and Joshua Harte, for the respondents

Heard: October 3, 2025

On appeal from the judgment of Justice Graeme Mew of the Superior Court of Justice, dated September 3, 2024, with reasons reported at 2024 ONSC 4858.

Lauwers J.A.:

A. Overview [1] Ashley Gumbley, the respondent, experienced an acute asthmatic attack on October 9, 2014. She was taken by ambulance to Toronto East General Hospital, where her symptoms worsened. That evening she was intubated and ventilated. On October 16, 2014, Ms. Gumbley began exhibiting signs of a neurological injury. It was eventually determined that she had suffered brain damage that has rendered her an incomplete quadriplegic, unable to walk, and incontinent, with limited ability to see or to speak. She requires 24-hour-a-day care.

[2] Dr. Denise Vasiliou, the appellant, is an internal medicine specialist. She became the most responsible physician for Ms. Gumbley's treatment and care when she admitted her to the intensive care unit at about 7 p.m. on October 9, and she retained that responsibility until about 1:50 a.m. on October 10, when Dr. Michael Warner, who was the on-call intensive care specialist, took over responsibility for Ms. Gumbley's care.

[3] The trial judge's findings on the specifics of Dr. Vasiliou's negligence are not contested on this appeal, although they were hotly contested at trial. He summarized them in his reasons, *Gumbley v. Vasiliou*, 2024 ONSC 4858, at para. 216:

I have found that Dr. Vasiliou was negligent because of her failure to call Dr. Warner sooner—by 9:30 p.m. or 10:00 p.m. at the latest; her failure to make the decision to intubate Ms. Gumbley earlier (by 10:30 p.m. at the latest); having made the decision to intubate, her failure to execute it as soon as possible; and, her failure to ensure that the most experienced clinician available undertook the intubation and managed the subsequent ventilation of Ms. Gumbley.

See also para. 209 of Gumbley.

[4] Dr. Vasiliou appeals the trial judge's causation finding that her breaches of the standard of care more likely than not caused Ms. Gumbley's brain damage. The essential factual issue in the causation analysis was whether Ms. Gumbley's injury occurred on October 9, while she was under Dr. Vasiliou's care, or whether it occurred later. Dr. Vasiliou's expert identified October 15 or 16 as the most likely dates of the injury. The trial judge was "satisfied on a balance of probabilities that Ms. Gumbley's brain injury occurred between 10:30 p.m. and midnight on 9 October": Gumbley, at para. 265.

[5] Dr. Vasiliou argues that, in making that finding, the trial judge improperly relied on the hearsay content and opinions expressed in a critical care note dictated by Dr. Warner at 7:38 p.m. on October 10, which was addressed to Dr. Vasiliou. Neither party called Dr. Warner as a witness.

[6] Dr. Warner's note stated:

This patient came to the Emergency Department on October 9 at 1628. She complained of a 2-day history of shortness of breath and wheeziness. She felt that she had a cold. Her room air saturation was 84%. She was afebrile on presentation.

She was extremely tight, tachypneic and bronchospastic in the Emergency Department and received multiple nebulization of Ventolin and Atrovent. She was also given intramuscular epinephrine, methylprednisolone and magnesium sulfate. She was admitted to the ICU for ongoing observation. Around midnight, she required intubation because of severe respiratory acidosis and hypoxemia. Post-intubation, she remained hypercapnic with a pCO₂ greater than 100 and a pH less than 7. You called me at home to provide advice about what to do next. I recommended initiating treatment with the anaesthetic machine and speak[ing] to the Anaesthetist on call for help. [Emphasis added.]

[7] I agree with Dr. Vasiliou that the trial judge made use of Dr. Warner's note in his reasoning. In the absence of records of Ms. Gumbley's oxygenation levels in the relevant time frame, and based on the circumstantial evidence before him, he inferred that Dr. Vasiliou was the source of the information that Ms. Gumbley required intubation because of acidosis and hypoxemia: Gumbley, at para. 230. Based on Dr. Warner's note, the trial judge found Ms. Gumbley was suffering from hypoxemia at some point between 10:30 p.m. and midnight on October 9, 2014: Gumbley, at para. 261.

[8] The trial judge ultimately preferred the expert evidence of Dr. Robert Chen over Dr. Jason Lazarou (both specialists in neurology) on the cause of the brain injury. Dr. Chen opined that Ms. Gumbley's brain injury was most likely caused by a combination of hypoxia,[1] severe acidosis,[2] and hypercarbia,[3] and he made use of Dr. Warner's note in coming to this conclusion: Gumbley, at paras. 236-37. By contrast, Dr. Lazarou, who was called by the defence, did not refer to Dr. Warner's note and said the absence of reported hypoxia was important to his opinion that hypoxia was not a potential cause: Gumbley, at paras. 246-47.

The trial judge preferred Dr. Chen's opinion in part because it benefitted from the information contained in Dr. Warner's note: Gumbley, at para. 263. As a result of Dr. Warner's note, Dr. Chen's opinion, and the totality of the evidence that he reviewed at some length in his reasons, the trial judge found Ms. Gumbley's brain injury occurred between 10:30 p.m. and midnight on October 9: Gumbley, at para. 265.

- [9] The trial judge's determinations of credibility, reliability and the weight to place on expert evidence attract appellate deference in the absence of palpable and overriding error. One of the main contested issues on this appeal is whether the trial judge erred by relying on the contents of Dr. Warner's note.

B. Issues [10] Dr. Vasiliou argues that Dr. Warner's note was not admissible in evidence against her, first, because it was hearsay, and second, because it was opinion evidence that should have been excluded by a limit in the Agreed Statement of Facts. Dr. Warner's note was included among documents admitted pursuant to that limited agreement, which provided in material part:

The parties agree that the documents in the Joint Brief of Documents are authentic copies of the originals. To the extent that the records are business records as defined by the Evidence Act, RSO 1990, c. E. 23, they are agreed to be evidence of such acts, transactions, occurrences or events as set out in the records, without prejudice to the right of any party to lead contrary evidence.

Where the records contain a diagnosis or statement of opinion those entries are admitted to establish the fact that the author(s) reached those diagnoses or opinions at the time, and not for the truth or accuracy of those opinions.

- [11] Dr. Vasiliou further argues that, because there was no evidence connecting any of her breaches of the standard of care to Ms. Gumbley's brain injury, the trial judge's causation analysis was wrong in law: he did not make the required causation findings and he erred in law by looking at the breaches "cumulatively" rather than separately to find the necessary causal link between Dr. Vasiliou's negligent omissions and Ms. Gumbley's brain injury.
- [12] As I will explain, the trial judge did not impermissibly rely on the truth value of Dr. Warner's note or rely upon it as inadmissible opinion evidence. Dr. Warner's note was properly before the trial judge, on consent. The document was a "business record" as defined by the Evidence Act, R.S.O. 1990, c. E.23, s. 35 and therefore admissible as evidence of the fact that this was information Dr. Warner received when he assumed the role of most responsible physician. The trial judge found, as he was entitled to, that Dr. Vasiliou was the source of the information received by Dr. Warner that "[a]round midnight, [Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia." This assertion was admissible for its truth through the combined effect of s. 35 of the Evidence Act and the party admissions exception to the rule against hearsay. It is not contested that Dr. Vasiliou had the expertise to provide this medical assessment. The trial judge was therefore entitled to rely on the opinion he found she had provided to Dr. Warner. Along with the expert opinions the trial judge relied upon, this information provides the necessary evidentiary and causal link between Dr. Vasiliou's breaches of the standard of care and Ms. Gumbley's injury.

[13] The trial judge made the required findings, which were open to him on the evidence, and he did not err in his analysis of causation. For the reasons below, I would dismiss Dr. Vasiliou's appeal.

C. Analysis [14] I will first address the law of causation to set the context, and then I will consider Dr. Vasiliou's challenges to the evidence.

1. The Need for a Causal Link [15] There is no doubt that Dr. Vasiliou owed Ms. Gumbley a duty of care as her most responsible physician; she no longer contests that she breached the applicable standard of care. Did Dr. Vasiliou's breaches cause Ms. Gumbley's injuries?
- a. The Governing Principles [16] Chief Justice McLachlin's statement in *Clements v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, at para. 8, sets the causation test in negligence cases:

The plaintiff must show on a balance of probabilities that "but for" the defendant's negligent act, the injury would not have occurred. Inherent in the phrase "but for" is the requirement that the defendant's negligence was necessary to bring about the injury – in other words that the injury would not have occurred without the defendant's negligence. This is a factual inquiry. If the plaintiff does not establish this on a balance of probabilities, having regard to all the evidence, her action against the defendant fails. [Emphasis in original.]

[17] Chief Justice McLachlin noted, at para. 46: "A trial judge is to take a robust and pragmatic approach to determining if a plaintiff has established that the defendant's negligence caused her loss." She added: "Scientific proof of causation is not required." At paras. 9, 20, 23, and 28, she reiterated the view that the court should take "a robust and common sense" approach to the application of the test.

[18] Instances of medical malpractice fall into two categories in causation analysis, or a combination of the two. The first are instances in which the doctor does something that should not have been done – acts of commission: see e.g., *Armstrong v. Royal Victoria Hospital*, 2019 ONCA 963, 452 D.L.R. (4th) 555, rev'd *Armstrong v. Ward*, 2021 SCC 1, [2021] 1 S.C.R. 3 (surgeon used a tool that caused adhesions and scarring, blocking patient's ureter); *Dallner v. Gladwell*, 2024 ONSC 6557 (surgeon applied excessive degree or duration of force or stretch to patient's arm during surgery); and *Kotorashvili v. Lee*, 2024 ONSC 1495 (surgeon prematurely removed a clavicle implant plate from the patient's body). The second category comprises instances in which the doctor fails to do something that should have been done – acts of omission: see e.g., *Aristorenas v. Comcare Health Services* (2006), 83 O.R. (3d) 282 (C.A.), leave to appeal refused, [2006] S.C.C.A. No. 487 (treating physician and nurses failed to adequately and promptly treat post-surgery infection); *Sacks v. Ross*, 2017 ONCA 773, 417 D.L.R. (4th) 387, leave to appeal refused, [2017] S.C.C.A. No. 491 (diagnosis and treatment of anastomotic leak in patient was delayed); *Beldycki Estate v. Jaipargas*, 2012 ONCA 537, 295 O.A.C. 100 (radiologist failed to see visible lesion in patient's liver on CT scan); and *Hasan v. Trillium Health Centre (Mississauga)*, 2024 ONCA 586, 499 D.L.R. (4th) 178, leave to appeal refused, *Campbell v. Hasan*, [2024] S.C.C.A. No. 402 (treating physician failed to consult with neurologist and order brain imaging for patient in timely manner).

[19] Dr. Vasiliou's breaches of the standard of care are acts of omission. The required chain of reasoning was set out in *Sacks*, at paras. 46-48, and in *Hasan*, at para. 16, citing *Sacks*. The trier of fact's thought process in determining factual causation has two steps. The first is to determine what likely happened in actuality. The second, explained at para. 48 of *Sacks*, is to consider what likely would have happened had the defendant not breached the standard of care:

There are two possible outcomes to the trier of fact's imaginative reconstruction of reality at the second step. On the one hand, if the trier of fact draws the inference from the evidence that the plaintiff would likely have been injured in any event, regardless of what the defendant did or failed to do in breach of the standard of care, then the defendant did not cause the injury. On the other hand, if the trier of fact infers from the evidence that the plaintiff would not likely have been injured without the defendant's act or failure to act, then the "but for" test for causation is satisfied: but for the defendant's act or omission, the plaintiff would not have been injured. The defendant's fault, which justifies liability, has been established.

[20] The trial judge cited the test in *Sacks* at para. 217 of his reasons.

[21] I agree with Dr. Vasiliou that, as Laskin J.A. noted in *Chaszewski v. 528089 Ontario Inc. (Whitby Ambulance Service)*, 2012 ONCA 97, 287 O.A.C. 266, at para. 15, the test for causation stipulates that "it is the defendant's particular substandard act or omission that must be shown to have caused the harm; therefore, it is necessary to identify that act or omission to determine what, if any, connection it has to the harm at issue."

[22] In other words, as Rouleau J.A. observed in *Aristorenas*, at para. 54:

The "robust and pragmatic" approach is not a distinct test for causation but rather an approach to the analysis of the evidence said to demonstrate the necessary causal connection between the conduct and the injury. Importantly, a robust and pragmatic approach must be applied to evidence; it is not a substitute for evidence to show that the defendant's negligent conduct caused the injury.

[23] Confounding the causation analysis in this case is the presence of several related omissions, the absence of certain evidence, and the argument that an adverse inference was drawn by the trial judge. Dr. Warner's note provides an important causal link, but Dr. Vasiliou disputes its admissibility on the basis that it was both hearsay evidence and opinion evidence. I will return to the causation analysis after addressing the challenges to the evidence on which the trial judge relied.

2. Dr. Vasiliou's Challenges to the Evidence [24] As noted, the trial judge found that Ms. Gumbley's brain injury occurred between 10:30 p.m. and midnight on October 9 while Dr. Vasiliou was the most responsible physician.

[25] Dr. Vasiliou asserts that this finding was fatally flawed because it was "anchored to" inadmissible evidence, which is Dr. Warner's note that "[a]round midnight, [Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia." Dr. Vasiliou

argues that this note was inadmissible as hearsay, and also that it was inadmissible because it was opinion evidence. Dr. Vasiliou submits that there was no admissible evidence that Ms. Gumbley was hypoxemic before or during intubation. Dr. Vasiliou also submits that it was wrong for the trial judge to draw an adverse inference against her arising from the absence of documentation as to Ms. Gumbley's blood oxygen saturation levels in that time period.

[26] I address each of these challenges in turn.

- a. Was Dr. Warner's Note Inadmissible Hearsay? [27] Hearsay is an out of court statement that is being tendered for the truth of its contents. The canonical expression of the rule against hearsay comes from the Judicial Committee of the Privy Council in *Subramaniam v. Public Prosecutor*, [1956] 1 W.L.R. 965, at p. 970:

Evidence of a statement made to a witness by a person who is not himself called as a witness may or may not be hearsay. It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement, but the fact that it was made.

This statement has been accepted as reflecting the law in Ontario: see *R. v. Rosik*, [1971] 2 O.R. 47, [1970] O.J. No. 1738 (C.A.), at para. 47, per Schroeder J.A. (concurring), *aff'd* [1971] S.C.R. vi; *R. v. Wildman* (1981), 60 C.C.C. (2d) 289, 1981 CanLII 86 (Ont. C.A.), at para. 35, *rev'd* on other grounds, [1984] 2 S.C.R. 311; and Ontario Law Reform Commission, *Report on the Law of Evidence* (Toronto: Ministry of the Attorney General, 1976), at p. 1.

[28] In this case, Dr. Vasiliou argues the assertions in Dr. Warner's note were taken by the trial judge as true: "Around midnight, [Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia."

[29] Since Dr. Warner's note is a statement made out of court and not during trial testimony, his note would be hearsay if relied upon to establish what it asserts. Indeed, it is clear that the assertions contained in the note include a second layer of hearsay. Dr. Warner did not arrive at the hospital until approximately 1:50 a.m.; he had no first-hand knowledge of whether Ms. Gumbley was experiencing "severe respiratory acidosis and hypoxemia" before or around midnight. His note about this observation must have been based not on his own personal knowledge, but on information he got from some other source about Ms. Gumbley's condition. Even if Dr. Warner had been a witness at trial, the hearsay rule would have barred him from giving evidence about things he was told by other people or learned from reading documents if the purpose of adducing this testimony was to establish the truth of what Dr. Warner was told or what he read, and if no exception to the hearsay rule applied. The note was therefore double hearsay if relied upon to prove that "[a]round midnight, [Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia."

- [30] The historical case law yields several grounds for the presumptive inadmissibility of hearsay statements. Of these, the inability to cross-examine the declarant has the most force. The trier of fact is hobbled in the pursuit of the truth by being unable to assess the declarant's credibility and reliability in the crucible of cross-examination. Dr. Warner was not a witness, so he was not cross-examined.
- [31] However, a statement used for a hearsay purpose may be admissible if the parties agree to its admission as hearsay or if it falls within an exception to the hearsay rule. It is helpful to consider the admission of each level of hearsay in turn.
- [32] The parties agreed that the documents in the Joint Brief of Documents filed at trial, including Dr. Warner's note, could be relied upon as "evidence of such acts, transactions, occurrences or events as set out" in the documents, "[t]o the extent that the records are business records as defined by the Evidence Act". A hospital record qualifies as a business record pursuant to s. 35 of the Evidence Act: see *Barker v. Montfort Hospital*, 2007 ONCA 282, 278 D.L.R. (4th) 215, at para. 27, leave to appeal refused, *Barker v. Dervish*, [2007] S.C.C.A. No. 299; *Robitaille v. Anspor Construction Ltd.* (2002), 161 O.A.C. 96 (C.A.), at para. 5, leave to appeal refused, [2002] S.C.C.A. No. 356; *K.K. v. M.M.*, 2021 ONSC 3975, at para. 38, *aff'd* 2022 ONCA 72, 466 D.L.R. (4th) 559. In the role he assumed as most responsible physician, Dr. Warner gathered medical information that he would rely on in treating Ms. Gumbley. The critical care note dictated by Dr. Warner at 7:38 p.m. on October 10 was part of his transaction in doing so. Put simply, the note was admissible pursuant to s. 35 of the Evidence Act and the agreement of the parties as evidence that Dr. Warner had gathered information on which he would rely. The first layer of hearsay was admissible, and the trial judge was entitled to rely upon it.
- [33] What, then, of the second layer of hearsay – the assertion that at "[a]round midnight, [Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia"? There are two bases for its admissibility, each contingent on the trial judge's factual finding that Dr. Vasiliou was the source of the assertion that, at "[a]round midnight, [Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia." I will return to this finding below.
- [34] First, provided Dr. Vasiliou is the source of this information, s. 35 of the Evidence Act would permit the admission of the second layer of hearsay, at least in cases such as this. There is authority holding that double hearsay in a business record is admissible pursuant to s. 35(4) of the Evidence Act, which provides that "lack of personal knowledge by the maker" of the business record "may be shown to affect its weight, but such circumstances do not affect its admissibility": see *Parliament et al v. Conley and Park*, 2019 ONSC 2951, at paras. 33-36; and *L. (B.) v. Saskatchewan (Ministry of Social Services)*, 2012 SKCA 38, 393 Sask. R. 57, at paras. 26-29, respecting s. 50(2) of The Evidence Act, S.S. 2006, c. E-11.2, which is identical to s. 35(4) of the Ontario Evidence Act in its treatment of lack of personal knowledge by the maker of a business record. Alternatively, *Setak Computer Services Corporation Ltd. v. Burroughs Business Machines Ltd. et. al.* (1977), 15 O.R. (2d) 750, [1977] O.J. No. 2226 (H.C.),

expresses a more limited approach. It holds, at para. 63, that double hearsay in a business record is admissible only when both the person making the record and the source of the double hearsay “are each acting in the usual and ordinary course of business in entering and communicating an account of an act, transaction, occurrence or event.” See also *Bruno v. Dacosta*, 2020 ONCA 602, 69 C.C.L.T. (4th) 171, at para. 61. Without question, Dr. Vasiliou was acting in the usual and ordinary course of business when instructing Dr. Warner. Apart from the opinion included in the business record, which I will address below, on either view of the law, the double hearsay contained in Dr. Warner’s note would therefore have been admissible under s. 35 of the Evidence Act, if Dr. Vasiliou is the source.

[35] The second exception to the hearsay rule that would apply if Dr. Vasiliou is the source of this information is that of a party admission, that is, acts or words of a party offered as evidence against that party: *R. v. Lo*, 2020 ONCA 622, 152 O.R. (3d) 609, at para. 64. The law does not mandate exclusion of such evidence because the party found to have made the admission cannot complain about the inability to cross-examine themselves to probe its credibility or reliability: *R. v. Evans*, [1993] 3 S.C.R. 653, [1993] S.C.J. No. 115, at para. 24. If Dr. Vasiliou is the source of the information in Dr. Warner’s note, this double hearsay would be admissible on this basis as well.

b. Did Dr. Warner’s Note Record a Statement Made by Dr. Vasiliou? [36] I turn to the trial judge’s findings relating to the source of the material information.

[37] To constitute a party admission by Dr. Vasiliou as to Ms. Gumbley’s condition while in her care, it must be shown on the balance of probabilities that Dr. Vasiliou was the source of the information in Dr. Warner’s note. The same evidentiary standard applies in establishing the elements of the business record exception under s. 35 as a basis for admitting double hearsay. The trial judge was satisfied that Dr. Vasiliou was the source. Unless that finding is found to be in error, the double hearsay is admissible.

[38] Dr. Vasiliou argues that there is no evidence to support this finding. In her submission, the trial judge’s finding that she was the source of the information was an adverse inference for which there was no legal or factual basis. I do not agree that the trial judge based this finding on an adverse inference. It was an inference from the circumstantial evidence that was open to him. Moreover, even if he had arrived at this finding through an adverse inference, there would be no basis to interfere.

[39] The trial judge set out the chain of reasoning that led him to conclude that Dr. Vasiliou was the source of the information. He said, at paras. 227, 228, and 230 of Gumbley:

In a critical care note dictated by Dr. Warner, he recorded that: “Around midnight, [Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia”. Dr. Warner was not called as a witness. His note was dictated at 5:08 p.m. [sic] on the same day that he had taken over as [most responsible physician] for Ms. Gumbley.

Dr. Vasiliou could not say where Dr. Warner would have got that information from. She had a conversation with him, but cannot recall word for word what was said. However, she felt comfortable saying that she did not tell Dr. Warner that Ms. Gumbley had been hypoxemic, noting that in her own note, she had used the term desaturation.

...

In the absence of records of Ms. Gumbley's oxygenation levels, the most reasonable inference is that Dr. Vasiliou was, in fact, the source of Dr. Warner's note that, at around midnight, Ms. Gumbley had required intubation because of, *inter alia*, hypoxemia. [Italics in original; underlining added.]

[40] Indeed, when the reference to hypoxemia is read in the fuller context of Dr. Warner's note, the conclusion that he was summarizing information provided to him by Dr. Vasiliou seems virtually inescapable:

Around midnight, she required intubation because of severe respiratory acidosis and hypoxemia. Post-intubation, she remained hypercapnic with a pCO₂ greater than 100 and a pH less than 7. You called me at home to provide advice about what to do next. [Emphasis added.]

[41] It seems natural and logical that Dr. Warner's note, addressed to Dr. Vasiliou, recounted information she gave to him, because he says "[y]ou called me at home to provide advice about what to do next", plainly in view of the facts just recited. There is no real alternative explanation, none offered by Dr. Vasiliou, and no evidence of another source.

[42] Dr. Vasiliou was cross-examined on this point. She did not offer an outright denial, and her evidence was somewhat evasive:

Q. It's okay. So to the extent [Dr. Warner] recorded, "Around midnight she required intubation because of severe respiratory acidosis and hypoxemia," you would likely be the source of that information?

A: I was a source of a conversation. I do not recall telling him she had severe respiratory acidosis and severe hypoxemia. I don't recall saying....

Q. Okay. I think we're quite clear. You don't have any specific recollection of, you know, almost all these events. Right? You've told us the ones, the handful of events.

A. Yeah. I remember having that conversation with Mike Warner. I, I had mentioned that.

Q. Right.

A. Yeah.

Q. So you had a conversation with Dr. Warner.

A. Yes.

Q. Right? And, and I'm suggesting to you that you are the source of this information.

A. I don't know where he got this information. Based on what I remember from the conversation I had with him, this severe respiratory acidosis and severe hypoxemia was not part of that conversation to the best of my recollection.

...

Q. And, just to be clear, you don't recall saying this but you're not saying you didn't say it.

A. I don't recall saying this. I don't recall this happening. I do not recall her being hypoxemic.

...

Q. Doctor, I take it as possible you did say these words.

A. Highly unlikely.

Q. It's possible.

A. Highly unlikely.

Q. So it was possible. Correct?

A. Again, based on my note, based on everything else that I can see, from that recollection I have of that conversation, I'm quite comfortable to say that I did not say hypoxemic to him.

[43] This evidence followed an earlier exchange in cross-examination:

A. I have a recollection of the RT showing me a paper. I don't have the — I don't recall the numbers.

Q. So at this point that was important clinical information that you did not include in your note. Correct?

A. Yes.

Q. You also wrote, "She's continuing to desaturate." Correct?

A. I wrote that, yes.

Q. Okay. The meaning [of] that word is "make less saturated." Correct?

A. I meant increasing oxygen requirements.

Q. No, I understand. But let's talk with language and medical terminology. Desaturated means makes less saturated.

A. Yes.

Q. And what that's referring to is saturation of the hemoglobin molecule which has four attachment points for oxygen. Right?

A. Yes.

Q. So someone reading this note would understand that the oxygen saturations were low.

A. Were dropping.

Q. Right. You don't indicate what the O2 sats were. Right?

A. Not in my note.

[44] Dr. Vasiliou noted her use of the term “desaturate”, not “hypoxemic”, in her own note dictated at 12:31 a.m. on October 10:

Ms. Gumbley was admitted to the ICU with severe asthma exacerbation. We repeated her blood gas and it is worsening. The lactate is increasing, presumably from all the Ventolin she has received. She has developed a metabolic respiratory acidosis. She is also continuing to desaturate. She was given some Ativan for anxiety and Gravol for nausea. This did not settle her and she continued to desaturate and got into more respiratory distress, so the decision was made to intubate. [Emphasis added].

[45] Despite initially suggesting that her use of the word “desaturate” referred to “increasing oxygen requirements”, Dr. Vasiliou agreed, after probing, that desaturation means decreasing levels of blood oxygen: that is, Ms. Gumbley’s oxygen saturations “[w]ere dropping”. Hypoxemia means low levels of blood oxygen, as confirmed by the expert evidence: Gumbley, at para. 230. In other words, in her answer Dr. Vasiliou appears to have inverted the definition of desaturation, perhaps to stave off the obvious commonality between desaturation and hypoxemia. She was fencing with the cross-examiner.

[46] The trial judge did not accept Dr. Vasiliou’s evidence that she was not the source of the information in Dr. Warner’s note. This is not surprising given the trial judge’s evaluation of Dr. Vasiliou as a witness, at para. 142 of Gumbley:

Dr. Vasiliou was both polite and considerate, but at times also a difficult, and even argumentative, witness. The vagueness of many of her answers did little to allay concerns about her record keeping or the degree of her involvement with [Ms. Gumbley].

[47] Dr. Vasiliou characterizes the finding that she was the source of the information in Dr. Warner’s note as an adverse inference based on the lack of evidence of Ms. Gumbley’s oxygen saturation status in the 90 minutes before intubation. She argues there was no basis on which the trial judge could draw an adverse inference against her with respect to this lack of evidence.

[48] The trial judge did note the lack of evidence, at para. 219 of Gumbley:

Part of the challenge in this case is the absence of evidence as to Ms. Gumbley’s precise oxygen saturation status in the 90 minutes prior to intubation, which I find to be a result of either Dr. Vasiliou’s failure to document, or have documented, the results for the two [arterial blood gas] orders that she says she gave, or because of her failure to order the [arterial blood gases] at all.

[49] He also summarized the governing principles on drawing an adverse inference of causation, perhaps as a self-caution, at paras. 220-21 of Gumbley:

It has been held that in some circumstances, where a defendant's negligence is the cause of an absence of evidence, an adverse inference of causation may be drawn against the defendant. As this court found in *Fleury (Estate) v. Kassim*, 2022 ONSC 2464, 82 C.C.L.T. (4th) 211, at para. 112:

Whether an inference of causation is warranted, and how it is to be weighed against the evidence, are matters for the trier of fact. However, a court must be cautious in this approach in order to avoid creating a consequential reversal of the burden of proof. *Benhaim v. St. German* [sic], 2016 SCC 48 at para 42 and 66-67.

To similar effect, in *Hanson-Tasker v. Ewart*, 2023 BCCA 463, the court stated, at para. 80:

...in cases of negligently-created causal uncertainty where a plaintiff adduces some evidence of causation, it is open to a trial judge to draw a causal inference unfavourable to the defendant that serves to discharge the plaintiff's burden of proof: *Benhaim* at para. 42. The inference operates as something of a counterweight, offsetting the imbalance and consequent unfairness that may arise, particularly when a defendant seeks shelter in the evidentiary vacuum created by their own negligence and relies on the burden of proof shouldered by the plaintiff to defeat the claim. The underlying policy goal seeks to balance two considerations: (1) ensuring that defendants are held liable for injuries only where there is a substantial connection between the injuries and their fault; and (2) preventing defendants from benefiting from the uncertainty created by their own negligence: *Benhaim* at para. 66.

[50] However, despite his discussion of the law, the trial judge did not state he was drawing an adverse inference of causation when he found Dr. Vasiliou was the source of Dr. Warner's information. The point was more subtle. It was open to the trial judge to find Dr. Vasiliou was the source of Dr. Warner's notation that Ms. Gumbley was intubated because she was hypoxemic. This finding was not an adverse inference of causation; rather, it was an interpretation of a piece of evidence before the court. The trial judge recognized that the inference was not contradicted by evidence of Ms. Gumbley's oxygen saturation levels in the relevant time frame, because such evidence did not exist as a result of Dr. Vasiliou's breaches of the standard of care. This evidentiary gap did not prevent the trial judge from reaching the interpretation of Dr. Warner's note that he did.

[51] Even if this case had come down to an adverse inference, it would have been open to the trial judge to infer causation where a gap in the evidence attributable to the defendant's negligence prevented the plaintiff from demonstrating the link between the injury and the negligent act. Permitting Dr. Vasiliou to rely on a gap in the evidence that resulted from her breaches of the standard of care would effectively immunize her from liability: see *Ghiassi v. Singh*, 2018 ONCA 764, at para. 29; *Goodwin v. Olupona*, 2013 ONCA 259, 305 O.A.C. 245, at paras. 72-74; and *Hasan*, at paras. 24-25.

- [52] The trial judge also cautioned himself, at para. 212 of Gumbley, that the onus of proof of causation stayed on Ms. Gumbley throughout.
- [53] The trial judge committed no errors in finding Dr. Vasiliou to be the source of the double hearsay in Dr. Warner's note.
- c. Was Dr. Warner's Hypoxemia Notation Inadmissible Opinion Evidence? [54] Dr. Vasiliou argues that the content of Dr. Warner's note was inadmissible opinion evidence. In her view, because Dr. Warner was not present for the intubation and had no first-hand knowledge of it, his note that "[Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia" was the expression of an opinion he formed. She argues that the opinion was not admissible under s. 35 of the Evidence Act, which does not allow for opinion evidence to be proved through business records, and that its admission violated the terms by which the Joint Brief of Documents was admitted into evidence, which did not allow opinion evidence to be provided through the admitted documents.
- [55] Although I agree that the diagnosis ("severe respiratory acidosis and hypoxemia") and recommended treatment ("intubation") recorded in Dr. Warner's note were medical opinions, I do not agree that this opinion evidence was inadmissible.
- [56] I will begin with s. 35. I agree that where a hospital record contains medical opinions or diagnoses, those opinions are not admissible for the truth of their contents under the statutory business records exception: *Girao v. Cunningham*, 2020 ONCA 260, 2 C.C.L.I. (6th) 15, at paras. 46-48. Professional opinions or diagnoses are not "an act, transaction, occurrence or event" within the meaning of s. 35(2): *Blake v. Dominion of Canada General Insurance Company*, 2015 ONCA 165, 331 O.A.C. 48, at para. 59, citing *Adderly v. Bremner*, [1968] 1 O.R. 621 (H.C.); *McGregor v. Crossland*, 1994 CanLII 388, [1994] O.J. No. 310 (C.A.), at para. 3.
- [57] However, as I have already explained, the first layer of hearsay was not admitted as opinion evidence to prove the truth of the diagnosis and recommended treatment, but to show that this was information Dr. Warner received. The admission of the first level of hearsay does not raise opinion evidence issues and is not affected by this line of authority. In contrast, the second layer of hearsay is subject to this limit. I accept that the accuracy of the diagnosis and recommended treatment could not be proved through s. 35 of the Evidence Act.
- [58] However, this second layer of hearsay, including the opinion, were properly received as a party admission made by Dr. Vasiliou, whose expertise was not in issue. Based on the trial judge's finding that Dr. Vasiliou was the source of the medical observation that "[Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia," those opinions were hers. Since she expressed these opinions, the trial judge was entitled to conclude that she held those opinions, and he was entitled to rely upon them for their truth, as expert opinions.

- [59] It is not necessary for this appeal to go over the law as set out in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, [2015] 2 S.C.R. 182. It was determined in *R. v. Marquard*, [1993] 4 S.C.R. 223, [1993] S.C.J. No. 119, at paras. 37-39, that no reversible error occurs if an expert offers an opinion going beyond the expertise established in the voir dire where they clearly have the expertise to offer such an opinion. The same would hold true here. I have no trouble identifying Dr. Vasiliou as a person qualified to give that opinion. She is an internist and offered medical observations in her testimony as a participant expert: *Westerhof v. Gee Estate*, 2015 ONCA 206, 124 O.R. (3d) 721, at paras. 60-61. She does not suggest that she was not competent to do so, and her qualifications to offer this diagnosis and treatment recommendation are obvious.
- [60] As indicated, Dr. Vasiliou argues, in the alternative, that permitting the trial judge to rely on the content of Dr. Warner's note violates the terms by which the Joint Brief of Documents was admitted into evidence, as to which the Agreed Statement of Facts provided:

Where the records contain a diagnosis or statement of opinion those entries are admitted to establish the fact that the author(s) reached those diagnoses or opinions at the time, and not for the truth or accuracy of those opinions.

- [61] The limited use agreement was not violated. Dr. Warner's note was admitted for the purpose of establishing the information that Dr. Warner had received. The trial judge inferred from the nature of that note and the circumstances in which it was prepared that the recorded information was provided by Dr. Vasiliou. Therefore, the record was not used as opinion evidence from Dr. Warner that "[Ms. Gumbley] required intubation because of severe respiratory acidosis and hypoxemia." Dr. Vasiliou's admission to that effect was not rendered inadmissible by the terms under which the Joint Brief of Documents had been submitted.
- [62] This objection accordingly has no merit.
- [63] As a result, there was admissible evidence before the trial judge that Ms. Gumbley was hypoxemic leading up to her intubation. His finding that her brain injury occurred in this timeframe was supported by the expert evidence before him, which I now review.
3. Expert Evidence on the Timing of the Brain Injury [64] The trial judge referred to the evidence as indicated in the references. He preferred the evidence of Dr. Chen, who derived assistance from Dr. Vasiliou's reference to desaturation and Dr. Warner's note in concluding that hypoxia was part of a combination of metabolic disturbances that likely caused Ms. Gumbley's brain injury on October 9: *Gumbley*, at paras. 237-38. Dr. Chen noted brain cells need oxygen, and without it, they will die: *Gumbley*, at para. 238. Dr. Vasiliou argues there is significant evidence that Ms. Gumbley was not hypoxemic on October 9 and points to Dr. Chen's acceptance in cross-examination that the recorded values of oxygen saturation on October 9 and 10 do not indicate hypoxemia. The problem is the paucity of readings and data that is the result of Dr. Vasiliou's breaches of the standard of care. The trial judge found hypoxemia occurred during the 90 minutes for which there are no recorded values of oxygen saturation, not before or after this period.

- [65] Dr. Vasiliou argues that desaturation cannot be equated with hypoxemia, based on Dr. Chen's testimony that Ms. Gumbley was not hypoxemic on the later date of October 15, despite recorded oxygen saturation levels of 88%, 87%, 84% and a brief drop to 67%. This is not the proper basis on which to make such an assertion. Dr. Chen's discussion of the readings on October 15 does not translate quite so easily.
- [66] Dr. Dev Jayaraman, a specialist in internal medicine and critical care, testified Ms. Gumbley likely experienced significant hypoxia during intubation, and that this was the most likely explanation for her brain injury in the circumstances: Gumbley, at para. 249.
- [67] Dr. Gordon Cheung, a neuroradiologist, testified that the brain imaging was consistent with a combination of hypoxic, metabolic, and toxic injuries: Gumbley, at para. 240. Taking into account the clinical data, including documented references to hypoxia and oxygen desaturation, Dr. Cheung concluded the injury likely occurred on October 9 or 10: Gumbley, at para. 241. Dr. Vasiliou points out that Dr. Cheung acknowledged that the brain imaging was also consistent with the injury occurring on October 15 or 16, not just October 9 or 10: Gumbley, at para. 241. However, Dr. Cheung did not resile from his opinion that the injury likely occurred on October 9 or 10, which is the evidence the trial judge accepted.
- [68] Expert witnesses called by Dr. Vasiliou offered different opinions from the experts called by Ms. Gumbley. Dr. Lazarou testified the brain injury likely occurred on October 15 or 16, although he conceded this was based on very limited clinical evidence: Gumbley, at para. 242. His opinion was that the pattern of brain injury was not consistent with hypoxia or hypercarbia: Gumbley, at para. 243. In his view, there was no evidence to suggest hypoxia had occurred, although he acknowledged he did not refer to Dr. Warner's note, and the absence of reported hypoxia was important to his conclusion: Gumbley, at paras. 243, 246-47. As noted, the trial judge did not accept Dr. Lazarou's evidence.
- [69] Dr. Niall Ferguson, a specialist in internal medicine, critical care and respirology, testified it was unlikely Ms. Gumbley was hypoxemic, because there were oxygenation recordings to the contrary and high oxygenation levels after intubation. He added the typical problem with asthma would be ventilation – getting enough air in and out of the chest – not oxygenation, and he would have expected to see clinical signs recorded that would indicate hypoxemia: Gumbley, at para. 254. As I have explained, the trial judge chose not to infer from the absence of recorded oxygenation values that Ms. Gumbley was not hypoxemic. Instead, he relied on Dr. Vasiliou's admission, recorded in Dr. Warner's note, that Ms. Gumbley was hypoxemic. It was open to him to reject Dr. Ferguson's opinion on this point.
- [70] I see no basis for interfering with the trial judge's assessment of the expert evidence on appeal. As the trial judge recognized, at para. 226 of Gumbley, there was significant disagreement among the expert witnesses on the cause of Ms. Gumbley's brain injury. A trial judge's findings of fact and assessment of conflicting expert evidence are entitled to deference, absent palpable and overriding error: *Hacopian-Armen Estate v. Mahmoud*, 2021 ONCA 545, 77 C.C.L.T. (4th) 206, at paras. 27, 66-67; *Benhaim v. St-Germain*, 2016 SCC 48,

[2016] 2 S.C.R. 352, at para. 37. There was no palpable and overriding error in the trial judge's finding that Ms. Gumbley was hypoxemic leading up to her intubation, as recorded in Dr. Warner's note. Similarly, there was no palpable and overriding error in his preference for expert evidence that took account of this recorded medical information and in his conclusion that this period of hypoxemia and other disturbances likely caused her brain damage. Dr. Vasiliou's arguments do not identify a reversible error; they invite this court to re-weigh the evidence differently from the trial judge. I would decline that invitation.

4. Causation Redux [71] I return to the causation argument. As noted, Dr. Vasiliou argues that the trial judge did not make the necessary factual findings to meet the standard explained by this court in Chaszewski and in Aristorenas. Despite her conceded breaches of the standard of care, Dr. Vasiliou submits that none of them actually links or touches down with causative force. She asserts that, as a consequence, the trial judge's causation analysis was wrong in law: he did not find that "but for" any specific breach of the standard of care, Ms. Gumbley would not have been injured; and he erred in law by looking at the breaches "cumulatively" rather than separately to find the necessary causal link between Dr. Vasiliou's negligent omissions and Ms. Gumbley's brain injury.

[72] There is no merit to this argument. The finding that Ms. Gumbley's brain injury occurred when she was hypoxemic leading up to her intubation provides one necessary evidentiary and causal link between Dr. Vasiliou's breaches of the standard of care and Ms. Gumbley's injury. The other necessary link is provided by the trial judge's finding that if Dr. Vasiliou had not delayed calling for help or intubating Ms. Gumbley, then Ms. Gumbley would not have suffered a brain injury, at paras. 273-76 of Gumbley:

The plaintiffs put forward in argument what they call the counter factual. They submit that had Dr. Vasiliou called upon Dr. Warner, he would have responded and come to the hospital within 30 minutes. There is no reason to believe that he would not have followed the standard Canadian asthma guidelines and provided aggressive treatment. He would have watched Ms. Gumbley "like a hawk" and if aggressive treatment was not successful in improving Ms. Gumbley's condition, he would have moved quickly to intubate and ventilate Ms. Gumbley. Ms. Gumbley would not have experienced nearly two hours of sub-optimal ventilation. She may not have required anaesthetic gases.

I accept that submission. It is supported by both the evidence and logic.

Even if Dr. Warner had not been called when he should have been, if Dr. Vasiliou had made the decision to intubate Ms. Gumbley sooner, and in accordance with the standard of care, the catastrophic outcome that occurred would likely have been avoided.

That likelihood would have been even greater if intubation had been undertaken by the available anaesthetist.

- [73] Dr. Vasiliou argues that the evidence did not support the finding that intubating Ms. Gumbley earlier likely would have resulted in her not suffering a brain injury. This is not so much an argument that the trial judge erred in applying the test for causation as it is an argument that he made the wrong factual finding on the evidence.
- [74] To the contrary, his causation findings were supported by the expert evidence on which he chose to rely. Dr. Andrew McIvor, a specialist in internal medicine and respirology, testified that if Ms. Gumbley had been intubated earlier, she likely would have recovered. He pointed to her successful recovery following a previous intubation at Scarborough General Hospital as the likely result if Dr. Vasiliou had met the standard of care: Gumbley, at paras. 248, 251. Despite being challenged on this comparison, he maintained that the difference in outcome was a reflection of the difference in treatment: Gumbley, at paras. 252-53. Dr. Jayaraman concurred with Dr. McIvor's opinion that an earlier intubation likely would have led to a full recovery, and Dr. Chen's opinion was that an earlier intubation likely would have avoided the brain injury Ms. Gumbley sustained: Gumbley, at paras. 249-50.
- [75] Dr. Vasiliou argues that Dr. McIvor did not explain how earlier intubation would have avoided the brain injury in this case. She contrasts this with Dr. Ferguson's opinion that earlier intubation would not have made a difference because the difficulty ventilating Ms. Gumbley was driven by her underlying asthma, which would not have improved with the timing of the intubation.
- [76] Dr. McIvor's evidence was that Ms. Gumbley's prior hospitalization showed she had severe asthma that required aggressive treatment. She required intubation on her previous hospitalization because she was unresponsive to other treatment. That prior experience showed she could have made a full recovery if she was treated proactively, and it also showed she would likely require intubation as part of that treatment. Dr. McIvor's opinion suggests that oxygenating Ms. Gumbley through timely ventilation would have made a difference because it worked in the past. As Dr. McIvor noted, mortality and severe morbidity rates associated with severe asthma exacerbation are exceedingly rare with appropriate treatment. Her asthma presentation did not make her brain injury inevitable. The trial judge was entitled to accept Dr. McIvor's view that earlier ventilation likely would have made a difference to Ms. Gumbley's clinical course over the explanation offered by Dr. Ferguson that ventilation made no difference.
- [77] Dr. Vasiliou points to the expert evidence she called, which differed from the conclusion reached by Drs. McIvor, Chen and Jayaraman. Dr. Ferguson attributed the difference in outcome from the Scarborough intubation to the worse exacerbation of Ms. Gumbley's asthma when she was Dr. Vasiliou's patient: Gumbley, at para. 254. Additionally, Dr. Brian Katchan, an internal medicine and critical care specialist, maintained that earlier intubation would not have changed the outcome: Gumbley, at para. 255. However, the trial judge found the Scarborough intubation showed there was at least a possibility that Ms. Gumbley could have been intubated without catastrophic consequences: Gumbley, at para. 269. He recognized that asthma attacks differ, but ultimately accepted the other expert opinions that

the outcome for Ms. Gumbley at Toronto East General Hospital was attributable to the substandard treatment she received from Dr. Vasiliou. The treatment received made a difference to the outcome.

- [78] It was open to the trial judge to reject Dr. Ferguson’s opinion and attribute greater weight to the other expert opinions on this issue. As before, the trial judge’s weighing of the expert evidence and findings of fact are entitled to appellate deference, especially when they involve the assessment of a large amount of complex evidence: Benhaim, at para. 37; Hacopian-Armen Estate, at paras. 27, 66-67; and Calin v. Calin, 2021 ONCA 558, at para. 35.
- [79] Finally, the trial judge did not add up the breaches “cumulatively” to justify his liability finding, as Dr. Vasiliou argues. He identified a causal link between the specific breaches of the standard of care – Dr. Vasiliou’s failure to respond with sufficient haste – and Ms. Gumbley’s brain injury. To repeat, the trial judge found, at para. 216 of Gumbley, that “Dr. Vasiliou was negligent because of her failure to call Dr. Warner sooner—by 9:30 p.m. or 10:00 p.m. at the latest; her failure to make the decision to intubate Ms. Gumbley earlier (by 10:30 p.m. at the latest); having made the decision to intubate, her failure to execute it as soon as possible”. It was open to him to conclude that the evidence supported his finding that these breaches led Ms. Gumbley to experience the “sub-optimal ventilation” and complications that ultimately caused her brain injury on October 9 or 10: Gumbley, at para. 273.

D. Disposition [80] This appeal turns finally not on the law of causation but on the trial judge’s factual findings, and on his findings as to credibility, reliability, and the weight to be accorded to expert evidence. Dr. Vasiliou has identified no palpable and overriding errors in the trial judge’s meticulous, detailed, and lengthy reasons.

- [81] I would dismiss the appeal with costs payable by the appellant to the respondents, fixed at \$60,000 all-inclusive, as agreed by the parties.

Released: December 9, 2025 “P.D.L”

“P. Lauwers J.A.”

“I agree. David M. Paciocco J.A.”

“I agree. J. Dawe J.A.”

- [1] “Hypoxia”, which is a more generic term for low levels of oxygen in tissues, was used synonymously with “hypoxemia” in the trial. “Hypoxemia” means low levels of oxygen in the blood.
- [2] Respiratory acidosis arises from elevated carbon dioxide in the blood, which makes the blood abnormally acidic.
- [3] Abnormally high levels of carbon dioxide in the blood.

Source & reproduction note

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

ORIGINAL SOURCE <https://norma.lexum.com/coa/coa/en/item/23781/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gumbley-v-vasiliou-2025>

Prepared on 29 October 2026 · Esheria