

CANADA / JUDGMENT

Igboji v. Garbuz

2022 BCSC 2008

COURT

Supreme Court of British Columbia

DECIDED

17 November 2022

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2022 BCSC 2008 Igboji v. Garbuz IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Igboji v. Garbuz, 2022 BCSC 2008 Date: 20221117 Docket: S-188572 Registry: Vancouver Between: Martin Okechukwu Igboji Plaintiff And Dr. Donald Garbuz, Dr. Husam Alrumaih, Dr. Ian Wilson, and Vancouver Coastal Health Authority operating public hospitals under the names of Vancouver General Hospital and University of British Columbia Hospital Defendants Before: The Honourable Justice Edelmann Reasons for Judgment The Plaintiff, appearing in person: M. Igboji Counsel for Defendants: D. Liu Place and Date of Trial: Vancouver, B.C. November 7, 2022 Place and Date of Judgment: Vancouver, B.C. November 17, 2022 Overview

[1] This is a summary trial application pursuant to R. 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, by the defendant physicians for dismissal of an action by Mr. Igboji, relating to injuries he allegedly sustained during knee surgery. In particular, Mr. Igboji alleges negligence in the medical care provided and a lack of informed consent.

Issues

[2] There are three issues to be decided in this case:

- a) Is the matter suitable for summary trial or would it be otherwise unfair to proceed with a summary trial?
- b) Did the defendant physicians breach the standard of care and were therefore negligent in providing medical services to Mr. Igboji?
- c) Would a reasonable person in Mr. Igboji's circumstances have consented to the treatment had they been properly informed of the relevant risks?

[3] For the reasons below, the application by the defendant physicians is allowed and Mr. Igboji's claim is dismissed. Summary Trial

[4] This is a medical malpractice action relating to the care provided by the defendant physicians to the plaintiff in relation to knee replacement surgery performed on August 15, 2016 and a manipulation under anesthesia ("MUA") of the knee on October 24, 2016.

- [5] Mr. Igboji filed a Notice of Civil Claim on August 3, 2018. Responses, amendments and lists of documents have been exchanged. Examinations for discovery of Dr. Garbuz and the plaintiff occurred in February, 2021. The parties have reserved dates for a 20-day trial in July 2023.
- [6] In December, 2021, the defendant physicians served an expert report by Dr. Gregory Abelseth, orthopedic surgeon, and expressed their intention to schedule a summary trial. At the time, Mr. Igboji had counsel who eventually provided his availability for a summary trial and requested examinations for discovery of Drs. Wilson and Alrumaih which proceeded in June, 2022. The summary trial was originally scheduled to proceed in September, 2022. A week or so before the summary trial was to proceed, Mr. Igboji's counsel provided notice that he was withdrawing. The September hearing did not proceed as there was not a judge available.
- [7] Mr. Igboji is now self-represented. He made it clear that he does not intend to retain new counsel, and he will be unable to obtain any expert reports for trial. He has not filed any materials in response to the summary trial application. I was, however, taken through his examination for discovery at some length and he was given the opportunity to set out the additional evidence he would produce if given the opportunity.
- [8] Although I have a great deal of sympathy for Mr. Igboji, I do not find there to be any unfairness to him in deciding this matter on the materials before me. I find that the matter can be decided even taking Mr. Igboji's case at its highest and assuming that he would be able to adduce the evidence described in his submissions. As I will set out below, the most fundamental problem for Mr. Igboji is that the only expert evidence in this matter is unequivocally supportive of the defendants, and he does not seek to adduce evidence from another expert. Without such evidence, this Court is simply not in a position to make a finding of professional negligence on the facts set out in Mr. Igboji's claim. I find I am also able to decide the issue of informed consent even if I were to accept Mr. Igboji's version of the communications with the treating physicians. Standard of Care
- [9] Physicians have a duty to conduct their practice in accordance with the conduct of a prudent and diligent doctor in the same circumstances. Specialists must exercise the degree of skill of an average specialist in their field (*ter Neuzen v. Korn*, 1995 CanLII 72 (SCC), [1995] 3 S.C.R. 674, at 693-94). However, the standard of care expected of physicians is not a standard of perfection (*Carlsen v. Southerland*, 2006 BCCA 214 at para. 13).
- [10] As noted, Mr. Igboji does not intend to obtain an opinion from an expert witness. He suggests that certain decisions by the treating physicians, in particular a decision to place a pillow under his knee during recovery, breached the standard of care. The only evidence he points to is the current state of his knee and a pamphlet on post-operative care. The fact that a known complication occurred during a procedure is not evidence in and of itself from which the Court can infer a breach of the standard of care (*Daniels v. Strangway*, 2001 BCSC 304 at para. 45; *Chen v. Ross*, 2014 BCSC 374 at paras. 273-288, *aff'd* 2015 BCCA 250).

- [11] The expert report of Dr. Abelseth is clear, detailed and directly addresses the specific facts of Mr. Igboji's case. Given his background, I find that Dr. Abelseth is qualified to provide an expert opinion. None of the material facts on which Dr. Abelseth relies are contested by Mr. Igboji. In the opinion of Dr. Abelseth, there is nothing the treatment team could have or should have done differently that would have predictably changed the outcome in Mr. Igboji's case. In his opinion, Mr. Igboji had the appropriate pre-operative assessment, surgical treatment, post-operative management, and treatment of the post-operative complication to his knee.
- [12] Ultimately, the onus to prove a breach of the standard of care is on Mr. Igboji. This Court has repeatedly found that a plaintiff's claim will fail where a defendant has adduced evidence that the standard of care has been met and the plaintiff has not adduced evidence to the contrary (*American Pyramid Resources Inc. v. Royal Bank of Canada* (1986), 1986 CanLII 1028 (BC SC), 2 B.C.L.R. (2d) 99 (S.C.) at 105; *Steeves v. Air Canada*, [1996] B.C.J. No. 2879 (S.C.) at paras. 17-21; *Pushee v. Roland*, 2002 BCSC 1771 at paras. 16-21; *Ince v. Sanders*, 2010 BCSC 872 at para. 27).
- [13] I find that the defendant has adduced reliable evidence that the standard of care was met in Mr. Igboji's case. Mr. Igboji has pointed to no additional evidence he will be able to adduce even if given additional time. I find he has not met the burden of proving a breach in the standard of care. His claim on this issue is dismissed. Informed Consent
- [14] The evidence of Mr. Igboji and Dr. Garbuz differs as to the risks discussed prior to the surgery. In particular, they differ as to whether Mr. Igboji was informed of the risk that the knee could be worse after surgery and that there could be a painful recovery period of up to a year. Their evidence also differs about whether Mr. Igboji was informed of the risk of bleeding and blood clotting as a result of the MUA.
- [15] The legal framework for assessing informed consent is well established, and requires the plaintiff to establish that:
- (a) he was not fully informed of the nature of any material risk of a procedure and any special or unusual risks related to the procedure;
 - (b) a reasonable person in his position, properly informed, would not have proceeded with the procedure;
 - (c) an undisclosed material or special or unusual risk actually materialized and caused the plaintiff damage. (*Liu v. Chuo*, 2019 BCSC 109 at para. 81; *Kooijman v. Bradshaw*, 2016 BCSC 2316 at para. 68)
- [16] The defendants accept that for the purposes of the summary trial, I should proceed on the basis of Mr. Igboji's assertion that he was not informed of the risks described above. In my view, the main issue is therefore the second prong, whether a reasonable person in Mr. Igboji's position would not have proceeded with the surgery.

- [17] Mr. Igboji had a 15-year history of knee pain. When he was seen at the defendants' clinic in September 2015, he said he was having difficulties getting out of an armchair with no armrests, was experiencing range of motion issues, and found it difficult to manage longer shifts at work. He rated the severity of his right knee pain at this point in time at 8/10. By the time he saw Dr. Garbuz on February 19, 2016, he reported his right knee pain to be at times up to 9/10 in severity.
- [18] Mr. Igboji was aware that there would be some recovery period required post-operatively and had prepared for it by purchasing groceries ahead of time so that he would not need to leave home. In his examination for discovery, Mr. Igboji agreed that he would have proceeded with the knee replacement knowing there was an 85 to 90% chance of success, despite the possibility of the pain remaining the same or being slightly different.
- [19] Mr. Igboji says he would not have proceeded if he had known how it would turn out. Both Mr. Igboji's submissions and his evidence in examination for discovery were clearly framed with the benefit of hindsight. There is little question that if someone knew in advance there would be an adverse outcome they would likely not proceed. The question is not what a reasonable person would do with the benefit of knowing the outcome, but what a reasonable person in Mr. Igboji's circumstances would have done at the time of deciding to proceed with the surgery if they had been properly informed of the risks.
- [20] In my view, even assuming Mr. Igboji was not informed by Dr. Garbuz of the material risk that the knee could worsen post-surgery or that the recovery could be painful for months and up to a year, I find that a reasonable patient in his circumstances would have opted to undergo the surgery. There is little question that Mr. Igboji's knee was a source of ongoing pain and that he had mobility issues as a result. The evidence from Dr. Abelseth is that around 5% of patients feel their knee is worse after such surgery than before. I find that a reasonable person in Mr. Igboji's circumstances would have been willing to assume such a risk given the much higher chances of a life-changing positive outcome.
- [21] This accords with Dr. Abelseth's experience in his own practice. He estimates that less than one percent of people decide not to proceed with knee replacement after being properly apprised of the risks. Evidence from medical experts on the likelihood a patient would proceed knowing the risks have been viewed by our courts as helpful on the objective test: (Allen v. Janjua, 2017 BCSC 2198 at para. 79)
- [22] As noted, following the surgery Mr. Igboji underwent an MUA which resulted in bleeding in his knee. Prior to the MUA, Mr. Igboji was experiencing pain described at a level of 13/10 and his knee was stuck in a 70-degree bent position. In examination for discovery, Mr. Igboji agreed that he was generally aware of the risk of bleeding and blood clots from surgery and given the pain and limited range of motion he was experiencing, he would have proceeded with the MUA despite those risks. It is unclear to me if Mr. Igboji is now asserting that he was not informed of the risks of the MUA and would not have proceeded with it had he been informed.

- [23] In any event, I am satisfied that a reasonable person in Mr. Igboji's circumstances would have proceeded with the MUA. Dr. Abelseth's evidence is that the MUA was the best option given the limited range of motion, moderate joint effusion, ongoing joint pain, and the passage of two months post-operatively. In his experience, only a small proportion of patients are recommended to proceed with an MUA and only 10-20% of those patients decline to proceed. I find that a reasonable person experiencing pain at 13/10 and whose knee was stuck at a 70-degree angle would have opted for the procedure despite the risks.
- [24] I therefore find that, even taking Mr. Igboji's evidence at its highest, he has not established the procedures were undertaken with a lack of informed consent.

Conclusion

- [25] Mr. Igboji's claims are dismissed, with the normal order for costs to the defendants as the successful parties. "Edelmann, J"

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Prepared on 29 October 2026 · Esheria